

Behind Closed Doors: An Investigation of Ethically Ambiguous Negotiation Tactics  
and Its Implications for Australian Lawyers' Professional Conduct

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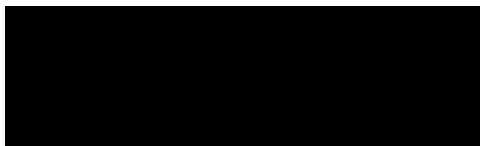
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# ABSTRACT

This PhD research project investigates Australian lawyers' relationship with ethically ambiguous negotiation tactics (EANTs). Contrary to the assumption that lawyers operate within a well-known and understood framework of professional conduct, this project reveals significant gaps, complexity and uncertainty about how lawyers should conduct themselves in specific negotiation scenarios involving EANTs.

Chapter 1 fills the gaps in the understanding of which EANTs might be relevant to lawyers by developing the concept of EANTs as applicable to lawyers, and then using systematic searches of the literature and thematic analysis to identify and develop a catalogue of EANTs. This Chapter discovers EANTs in every dimension of negotiations, including tactics leveraging information, time, location, external factors and individuals involved in the negotiators. Chapter 2 examines this catalogue by reference to the Australian Solicitors' Conduct Rules in its capacity as the most recent and complete written expression of the Australian legal profession's judgment on the conduct expected of its members. This examination reveals confusion and lack of clarity in relation to what the profession expects of its members in negotiations.

Chapters 3 and 4 focus on how these findings relate to lawyers in practice by reference to the extant case law (Chapter 3) and studies of lawyers (Chapter 4). These two Chapters bring to light a lack of consensus among lawyers about what is permissible, combined with the widespread use of EANTs. However, as these sources tend to be outdated and most of the studies have an international focus, Chapter 5 develops a tailored survey methodology to investigate EANTs in the Australian legal professional context. Survey results presented in Chapter 6 reinforce the findings of previous Chapters that EANTs are both ambiguous and widespread among Australian lawyers.

Chapter 7 discusses whether the lack of consensus is a problem, including whether any issues could be attributed to a 'few bad apples' among the profession. However, it concludes that EANTs are a symptom of the profession's difficulty in adapting to a larger paradigm shift from being a profession of litigators, to being a profession of negotiators. This leads to a recommendation of using education and building consensus to make EANTs less ambiguous and to facilitate ethical conduct among Australian lawyers.

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*Figure 1 Photo to Illustrate Ambiguity Lawyers May Face in Using Negotiation Tactics*

## INTRODUCTION

### A *Introduction*

This research project investigates how far Australian lawyers can go in negotiations by reference to ethically ambiguous negotiation tactics ('EANTs'). I started this project to solve a problem. As a junior lawyer, I struggled to work out the answer to what seems like a simple question: 'how far can lawyers go in negotiations?' Despite extensive research, consulting with peers and seeking ethics advice from my law society, this was a recurrent problem. It caused stress and anxiety. I was anxious that other lawyers might be taking advantage of me and, ultimately, my clients. I also wanted to deliver every advantage to my clients, but I was worried that I might go too far. My hypothesis was that if I approached the task methodically and systematically, I could find answers for every situation, determining which tactics could be used by lawyers and what was off-limits. As this thesis will demonstrate, I was naïve.

This Introduction Chapter will start by defining key terms and scope and setting out the overarching topic and aims of the thesis. It will then outline the current state of literature and identify the gap in the knowledge it seeks to address, as well as the value in doing so. It will then explain the methodology, hypothesis and finally the layout of the thesis.

## B *Key Terms and Scope*

The focus of this thesis is on the attitudes to and usage of EANTs by practising lawyers in Australia. From a scholarly point of view, tactics have been shown to provide a discrete and convenient unit of analysis for studying negotiation conduct.<sup>1</sup> The definitions adopted for EANTs directly informs the scope of the project. The concept of EANTs and each of its elements (ethically ambiguous negotiation tactics) as applicable to lawyers are discussed and developed in Chapter 1. Essentially, it refers to acts or omissions deliberately used by lawyers to gain an advantage in negotiations and which are open to various interpretations according to the moral principles (ethics) of lawyers.<sup>2</sup> The term ethics in this context is used in its general sense as a system of moral principles by which lawyers' actions may be judged as good or bad, or right or wrong. This meaning of ethics goes beyond the written law and rules of professional conduct and incorporates customs and general usages of the profession. The rules are, however, given special attention in this thesis in Chapter 2. This is because of their role as a written expression of the profession's ethical judgment on the conduct expected of its members. An examination of general laws is outside the scope of the thesis, except to provide context for the rules of professional conduct in Section B of Chapter 2.

The ethical ambiguity of EANTs focuses the inquiry on the grey area between what is permissible and what is not, the area that I seek to clarify through this research project. This leaves the impact of EANTs on the stakeholders and outcomes of negotiation outside its scope. This is an important issue that is highlighted in Section E of this Introduction, explaining the value of this project. Pragmatic consequences of behaviour could be a powerful determinant of lawyers' conduct in practice.<sup>3</sup> So, for example, lawyers might be less inclined to use tactics such as threats if it could be established that threats generally backfire

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<sup>1</sup> Liisa M Kyl-Heku and David M Buss, 'Tactics as Units of Analysis in Personality Psychology: An Illustration Using Tactics of Hierarchy Negotiation' (1996) 21(4) *Personality and Individual Differences* 497.

<sup>2</sup> See Chapter 1, Part B, Section 3 of this thesis.

<sup>3</sup> John Wade, 'Persuasion in Negotiation and Mediation' (2007) 8(2) *ADR Bulletin* 253 <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1414&context=adr>>6, where Wade argued that prudence and practicality are the dominant approach to ethics among lawyers.

and result in worse outcomes for clients, or that the use of EANTs causes long term damage to their reputations and their one off successful use could lead to being made pariahs of the profession in the long term. However, it is outside the scope of this project because it would have been speculative to investigate the impact of EANTs if they are not shown to be a problem in practice. This is not to detract from the value of understanding the impacts, which could be a promising avenue for further research.

The terms ‘lawyer’ and ‘negotiation’ are intended to be inclusive in the sense of encompassing all branches of the law and all types of negotiations, reflecting the diversity of contemporary legal practice. The distinction between barristers and solicitors or other types of lawyers, such as in-house counsel or government lawyers, is not material for the purposes of this research project (this is discussed further in the introduction to Chapter 2). The key limiting criterion that affects the scope of this research project is that it is focused exclusively on practising lawyers. This excludes law students, law academics and judges who could all be considered lawyers in the broader sense of the word because they are not subject to the same pressures and context as practising lawyers. This means that cases and studies relating to their conduct (or conduct of lawyers’ clients) but not practicing lawyers are outside the scope of Chapter 3 and Chapter 4.

As discussed in more detail in Chapter 1, this thesis is not confined to examining a particular type of negotiation. A stereotype of lawyers and negotiation is of a set-piece negotiation to resolve a dispute on the eve of the trial. However, this is one of many types of negotiations lawyers can engage in. Lawyers negotiate not only in civil or criminal trials but when there is no litigation at all, such as in commercial transactions. This breadth is reflected in the cases examined in Chapter 3, which for example include interactions with tax authorities (*Chamberlain*),<sup>4</sup> long campaigns to delay and grind opponents down (*Flower & Hart*)<sup>5</sup> and studies in Chapter 4, which included pre-court negotiations and prosecutors as well as defence in criminal law.

This thesis has a geographic focus on Australia. However, it draws heavily on overseas literature. This focus is strongest in Chapter 2 and Chapter 3, which examine the Australian Solicitors Conduct Rules and Australian case law, respectively. These are already some of the

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<sup>4</sup> *Chamberlain v the Law Society of the Australian Capital Territory* (1993) 43 FCR 148 (*‘Chamberlain’*).

<sup>5</sup> *Caboolture Park Shopping Centre Pty Ltd (In Liquidation) and White Industries (Qld) Pty Ltd v Flower and Hart (A Firm)* [1993] FCA 471; (1993) 117 ALR 253 (22 September 1993) (*‘Flower and Hart’*).

longest chapters in the thesis, and my preliminary research suggested that examining a wide variety of professional conduct rules or a few more cases would not materially contribute to the discussion, so other jurisdictions were excluded. However, due to the paucity of Australian literature, Chapters 1 and Chapter 4, which, respectively, identify EANTs and examine studies of lawyers, draw heavily on rich overseas literature.

## C *Overarching Topic and Aim of the Thesis*

While the overarching idea of trying to clarify how lawyers should negotiate was motivated by my personal experience, this research project, including the focus on EANTs, was largely precipitated by the 2014 paper by Wade entitled ‘Ethically Ambiguous Negotiation Tactics (EANTS): What Are the Rules behind the Rules?’<sup>6</sup> The paper appears to have been the first to introduce the acronym of ‘EANTs’ to legal scholarship, and written by Wade from the perspective of a scholar as well as a practising mediator. He contended that the use of EANTs by lawyers was pervasive and of epidemic proportions.<sup>7</sup>

Wade’s claims were echoed in professional publications in Queensland and Western Australia. The Queensland commentary argued that the precise duties of lawyers in negotiations remain ‘a vexed question’.<sup>8</sup> The Western Australian article recounted a panel discussion on the topic of ‘how far can lawyers go’ in negotiations.<sup>9</sup> The discussion attracted a great deal of interest but revealed that lawyers had many misconceptions about what is permissible in negotiations.<sup>10</sup> The commentary expressed astonishment that doubts on the issue remained even after the seminal decisions of *LPCC v Fleming* [2006] WASAT 352 and *LSC v Mullins* [2006] LPT 012.<sup>11</sup>

This research project seeks to investigate how far lawyers can go in negotiations by reference to EANTs, both in the sense of how far they are permitted to go and in the sense of how far

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<sup>6</sup> John Wade, ‘Ethically Ambiguous Negotiation Tactics (EANTS): What Are the Rules behind the Rules?’ in *12 and 14 May Law Society of Saskatchewan CPD Conferences* (2014) 4.

<sup>7</sup> *Ibid.*

<sup>8</sup> Mike Emerson, ‘Legal Ethics and Mediation: Is the ASCR Enough?’ [2014] (October) *The Proctor* 36 focusing specifically on negotiations, but the article’s findings apply to lawyer negotiations in general.

<sup>9</sup> Julian Sher, “My Final Offer!”: The Ethics of Negotiation’ [2015] (August) *Brief* 4.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

they actually go. This investigation is intended to answer or at least contribute to the understanding of the vexed question of the precise duties of lawyers in negotiations.

## D *Current State of Knowledge and Gaps*

There is a lack of consensus about the vexed question, including its very existence, in Australia. As I will detail in the Introduction of Chapter 2, usually, Australian lawyers' peak representative bodies, such as state law societies, have taken the position that the standards of conduct are well known and understood by the members of the legal profession and the public at large.<sup>12</sup> This contradicts the implied premise of the vexed question that such standards are either not known or subject to misunderstanding or misconception, at least in the context of negotiations. This was also a key underlying assumption of this research project: that if lawyers look hard enough, answers can be found.

In contrast to this, a significant volume of literature points to the uncertainty that surrounds lawyers' ethics in general and in negotiations in particular, as well as the associated prevalence of undesirable conduct. The law and work of lawyers have long been recognised as becoming more complex.<sup>13</sup> Further, there has been a shift in the paradigm of how lawyers operate, whereby alternative dispute resolution ceased to be 'alternative' and negotiation became the main paradigm of lawyers' work.<sup>14</sup> However, despite these changes, much of the ethical infrastructure is based on the previous paradigm of adversarial litigation.<sup>15</sup> For example, the rules of professional conduct have been criticised for being focused on litigation and for not explicitly referring to or providing guidance on the standards of conduct expected in negotiations, giving rise to confusion about the applicability of adversarial standards of conduct in negotiations.<sup>16</sup> These issues also seem to be reflected in the case law (examined in

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<sup>12</sup> New South Wales Law Reform Commission, *Second Report on the Legal Profession: Complaints, Discipline and Professional Standards*, vol Report 32 (1982) <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-32.pdf>>; Australian Law Reform Commission Report 89, 'Managing Justice: A Review of the Federal Civil Justice System' (Report 89) discussed in more detail in Part B, Chapter 2.

<sup>13</sup> New South Wales Law Reform Commission (n 12) [23].

<sup>14</sup> Wayne Martin, 'Alternative Dispute Resolution - A Misnomer?' in *Australian Disputes Centre ADR Address* (2018); these issues are discussed in greater detail in Part B, Chapter 2.

<sup>15</sup> Samantha Hardy and Olivia Rundle, *Mediation for Lawyers* (2010) 208, [7.2].

<sup>16</sup> Jim Parke, 'Lawyers as Negotiators: Time for a Code of Ethics?' [1993] *Australian Dispute Resolution Journal* 216, 223; Nadja M Spiegel, Bernadette Rogers and Ross P Buckley, *Negotiation – Theory and Techniques* (1998) [5.6]; Hardy and Rundle (n 15) [7.2]; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (2nd ed, 2013) 210; Mark J Rankin, 'Legal Ethics in the Negotiation Environment: A Synopsis' (2016) 18 *Flinders Law Journal* 77; Gino Dal Pont, *Lawyers' Professional*

detail in Chapter 3), particularly the cases of *Mullins*<sup>17</sup> and *Fleming*,<sup>18</sup> which suggest that a different set of standards might apply to negotiation. Some have suggested that such standards are yet to be articulated,<sup>19</sup> and the profession needs a strong indication as to the baseline of expected conduct.<sup>20</sup>

A key gap in the literature is the lack of an understanding of the specific types of conduct that need to be considered. The literature so far has considered EANTs in a piecemeal fashion without identifying the full range and scope of what are the EANTs and where the ambiguity lies. For example, there has been a lot of discussion about deception-based tactics, less of threats and abuse of process, but very little about other types of conduct that could be classified as EANTs.<sup>21</sup> As I discuss in Chapter 1, whilst literature contains several typologies of tactics, those suffer from limitations, chiefly failing to identify the full range of EANTs that might be used by lawyers. This is a necessary precursor to being able to identify how far lawyers can go in negotiations, as this may vary from tactic to tactic. I will explain the methodology and set out how I address this gap in the Methodology section of this Introduction and in Chapter 1.

The literature relating to this topic also raises concerns about how lawyers act in the context of this uncertainty. This is a relatively understudied topic with only two dated studies in Australia, which I discuss in more detail in Chapter 4, complemented by a much larger body of overseas, primarily US, studies shedding light on lawyers' attitudes and use of EANTs. Unsurprisingly, lawyers' representative bodies usually claim that lawyers usually act ethically and professionally. Yet, scholarly literature contains claims that there is an epidemic of EANTs and that legal negotiation is widely regarded as inherently deceptive, strewn with falsehoods, and even requiring talent for deceit.<sup>22</sup> Further, it has been claimed that the use of

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*Responsibility* (5th ed, 2013) [21.155]; David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (3rd ed, 2014) [15.320].

<sup>17</sup> [2006] LPT 012.

<sup>18</sup> [2006] WASAT 352.

<sup>19</sup> Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008) p 192.)

<sup>20</sup> Paula Baron and Lillian Corbin, 'The Unprofessional Professional: Do Lawyers Need Rules?' (2017) 20(2) *Legal Ethics* 155, 172.

<sup>21</sup> Avnita Lakhani, 'Deception as a Legal Negotiation Strategy: A Cross-Jurisdictional, Multidisciplinary Analysis Towards an Integrated Policy Reforms Agenda' (PhD Thesis, Bond University, 2010) 401; Cheryl Rivers, 'Ethical Decision Making in Negotiation: A Sino-Australian Study of the Influence of Culture' (PhD Thesis, Queensland University of Technology, 2003) 142.

<sup>22</sup> Justine Rogers, 'Chapter 14 The Lying Lawyer and the Ethics of Negotiation' in Michael Legg (editor), *Resolving Civil Disputes* (2016).

‘irrational,’ ‘aggressive’ and ‘posturing’ tactics is ‘already well entrenched in negotiation practice in Australia’.<sup>23</sup> The use of EANTs seems to be part of the convention.<sup>24</sup> A notable feature of these claims is that they appear to be based primarily on their authors’ experience or cite US literature.<sup>25</sup> While this may suggest the universality of the problem and similarities between the Australian legal system and its overseas counterparts, it is subject to a major limitation: it is not clear whether such claims reflect the actual experience of Australian lawyers. This point touches on a wider issue and a gap in the literature.

The Australian Law Reform Commission (‘ALRC’) noted that when it came to issues affecting lawyers in Australia, much of the research, particularly empirical research, was ‘thin and spotty’.<sup>26</sup> Empirical research is research based on experiments or experience rather than ideas or theories.<sup>27</sup> The Commission described the state of knowledge as being based on ‘anecdote and impression’ rather than a platform of empirical reality.<sup>28</sup> This thesis seeks to address this gap as well, using comprehensive and systematic searches and synthesis of what is known about lawyers’ experience when it comes to EANTs (Chapters 3-4) as well as an exploratory study (Chapters 5-6), all synthesised in Chapter 7.

## E     *Significance of EANTs and the Value of Addressing the Gaps*

The lack of understanding of whether lawyers have a problem with EANTs poses many challenges. EANTs could be a significant problem, or they could be no problem at all. If the problem exists either in the form of lawyers not knowing which lines they cannot cross or in using EANTs, it could have significant impacts on them as well as other stakeholders in

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<sup>23</sup> Ibid [14.8].

<sup>24</sup> Wade (n 6); Lakhani (n 21).

<sup>25</sup> See eg, G E Dal Pont, ‘Lawyers’ Professional Responsibility’, (5<sup>th</sup> ed 2013) citing Craver, “Negotiation Ethics: How to be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive” (1997) 38 S Texas Law Review 713 at 719. Wade referring to his own experience and Hinshaw’s study.

<sup>26</sup> Ibid [1.39-1.40].

<sup>27</sup> Oxford Dictionaries online at <https://www.oxfordlearnersdictionaries.com/definition/english/empirical>

<sup>28</sup> Australian Law Reform Commission Report 89 (n 12); Wayne Martin, ‘Alternative Dispute Resolution - A Misnomer?’ (Australian Disputes Centre ADR Address 2018) for a more recent expression in the same vein.

negotiations, ranging from the negotiators on the receiving end to clients, the legal profession as a whole and the public at large.

Failure to recognise EANTs and adhere to ethical lines can have manifold consequences. Lawyers may unwittingly lose their livelihood and cause damage to others. *Clyne's* case is an example where a lawyer's use of EANTs amounted to a savage attack on another lawyer, required the court to step in to protect the public, and ultimately resulted in the loss of the livelihood of the lawyer who used the tactic because he was disbarred, thus losing his right to earn a livelihood by practicing law.<sup>29</sup> *Mullins* provides another illustration of the significance of the gaps in knowledge.<sup>30</sup> That case has been described as a 'crucifixion' of an eminent lawyer.<sup>31</sup> Contemporary news publications suggest that it took place in the context of 'a crackdown against lawyers who allegedly withhold facts that could damage their clients' cases'—that is, an EANT.<sup>32</sup> This raises the question of whether the problem associated with such tactics warranted the crackdown and whether other lawyers, if they use EANTs, might be at risk of being crucified.

Unaddressed use of EANTs, if there is truly an epidemic,<sup>33</sup> could also have multiple practical consequences. Studies of negotiators not specific to the legal context have shown that EANTs can have significant and often unpredictable impacts on the stakeholders. For example, adding decoy options as a tactic was shown to lead to a 46% increase in the amount received by the party using this tactic.<sup>34</sup> The use of pressure tactics and threats, however, produced negative outcomes.<sup>35</sup> In other words, lawyers' use of such tactics may actually be detrimental to their clients' interests. Having multiple negotiators, home advantage, time pressure and emotional reactions have all been shown to result in better negotiation outcomes, although at times at the expense of the relationship between the parties, which was damaged.<sup>36</sup> Thus, the

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<sup>29</sup> *Clyne v New South Wales Bar Association* [1960] HCA 40 [26].

<sup>30</sup> [2006] LPT 012.

<sup>31</sup> Wade (n 6) 17.

<sup>32</sup> Annabelle McDonald, 'Patel Case Lawyer Fined for Deception' [2006] (24/11/2006) *The Australian* 10.

<sup>33</sup> Wade (n 6).

<sup>34</sup> Alexander; Rhode, Avo; Schönbohm and Jacobus van Vliet, *The Tactical Utilization of Cognitive Biases in Negotiations* (No 80, 2014) 17.

<sup>35</sup> Soojin Lee et al, 'How Do I Get My Way? A Meta-Analytic Review of Research on Influence Tactics' (2017) 28(1) *The Leadership Quarterly* 210, 225 <<http://dx.doi.org/10.1016/j.leafqua.2016.11.001>>.

<sup>36</sup> Henrik Agndal, Lars-Johan Åge and Jens Eklinder Frick, 'Two Decades of Business Negotiation Research: An Overview and Suggestions for Future Studies' (2017) 32(4) *Journal of Business &*

use of some EANTs can improve the outcomes for clients, while other EANTs could be unwittingly against clients' interests.

The use of the EANTs can also have surprising impacts on the individuals involved in negotiations. Contrary to a common understanding that negotiators might feel bad about engaging in conduct that might be unethical, Ruedy et al. found that negotiators using exaggeration, for example, experience positive affect, 'a cheater's high'.<sup>37</sup> Thus, the use of EANTs could lead not only to financial but also psychological rewards. Studies have also shown that those who use EANTs might not appreciate how they are perceived by others. For example, while those who used half-truths (i.e., withheld information) considered it to be ethical and different from lying, those on the receiving end equated it to lying.<sup>38</sup> Not only can this lead to a perception that the user of the tactic is unethical, but it can also create a vicious circle of EANTs. This is because targets of use of the EANTs tend to reciprocate, that is, themselves use EANTs.<sup>39</sup> In the context of legal negotiations, this all tends to suggest that EANTs can have many and varied impacts, ranging from the outcomes of the negotiations to the parties' reputations and even affect. While this can be positive in some cases, in the context of the profession as a whole, it could suggest a vicious circle of reciprocated use of EANTs which affect outcomes, and reputations, while leaving lawyers with a 'cheater's high'.

However, the gaps in the knowledge make it difficult to assess what responses, if any, are needed. We do not know whether Australian lawyers, as a profession, actually have a problem with EANTs. As outlined in the previous section, there are competing claims. Some suggest that lawyers know and understand what standards apply and act ethically. Others claim lawyers do not know what they are doing and there is an epidemic of EANTs, carrying all the potential consequences outlined above. Given their significance, this thesis aims to address these gaps.

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*Industrial Marketing* JBIM-11-2015-0233, 7, 15–18  
<<http://www.emeraldinsight.com/doi/10.1108/JBIM-11-2015-0233>>.

<sup>37</sup> Nicole E Ruedy et al, 'The Cheater's High: The Unexpected Affective Benefits of Unethical Behavior' (2013) 105(4) *Journal of Personality and Social Psychology* 531, 531, 545.

<sup>38</sup> Todd Rogers et al, *Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others* (No RWP14-045, 2014) 3.

<sup>39</sup> Denise Fleck et al, 'Neutralizing Unethical Negotiating Tactics: An Empirical Investigation of Approach Selection and Effectiveness' (2014) 30(1) *Negotiation Journal* 23, 33.

## F *Methodology for a Systematic Inquiry*

This section sets out this research project's ontological and epistemological position and a multi-faceted methodology that draws on a mix of doctrinal and empirical research methods tailored to investigating EANTs.

Simply put, epistemology is about 'how we know things'<sup>40</sup> and ontology is about 'what exists,' addressing the question of the nature of 'reality' that is being investigated.<sup>41</sup> There are several ways to learn about EANTs and several perspectives on what is the reality of EANTs among Australian lawyers. For example, a positivist approach to epistemology predicates that a phenomenon (e.g., EANTs) can be studied objectively.<sup>42</sup> In the case of EANTs, this could be done by observing actual negotiations and perusing lawyers' files and correspondence. Another approach to study is a constructivist approach, which is based on the concept that knowledge is shaped by experience, context and perspective.<sup>43</sup> It takes into account into the experiences, opinions and perspectives of the people involved, in this context—lawyers. The method of learning about a phenomenon would feed directly into the reality that is being discovered. A realist ontological perspective would assume that there is a single observable reality that applies to all lawyers.<sup>44</sup> This can be contrasted with a relativist approach, which suggests that there are multiple realities regarding EANTs among lawyers and these can change over time.<sup>45</sup> An understanding of these concepts is critical to the understanding of what and how this research project can contribute to the knowledge of EANTs.

This project adopts a constructivist epistemological perspective that lawyers' perception of EANTs is socially constructed, shaped and informed by lawyers' individual experiences. EANTs are contextually dependent and occur in what is traditionally a highly confidential environment. This perspective is chosen over positivism, which postulates a single reality that can be observed and measured objectively because EANTs do not lend themselves to

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<sup>40</sup> Cambridge Dictionary Online 'epistemology'  
<https://dictionary.cambridge.org/dictionary/english/epistemology> accessed 12 May 2023.

<sup>41</sup> Oxford Reference 'ontology'  
<https://www.oxfordreference.com/display/10.1093/acref/9780199212064.001.0001/acref-9780199212064-e-709;jsessionid=105DoEBDFoF62A133447B39C7B6DFoD4>

<sup>42</sup> Alan Bryman and Emma Bell, *Business Research Methods* (2011) 15.

<sup>43</sup> *Ibid* 22.

<sup>44</sup> Toritseju Rita Pessu, 'Understanding Research Paradigms: An Ontological Perspective to Business Research' (2019) 9(4) *IOSR Journal of Research & Method in Education* 38, 39 <[www.iosrjournals.org](http://www.iosrjournals.org)>.

<sup>45</sup> *Ibid*.

easy measurement. Lawyers may disagree on what is an EANT and what is not. Further, attempts to measure directly, such as by direct observation or study of files, could influence the subjects' conduct. Constructivist philosophy of morality as postulated by Piaget, is also conceptually similar to how lawyers conceptualise their own professional ethics.<sup>46</sup> They follow the same pattern in the sense that Piaget postulated that morality is acted and socialised, then labelled, and then adjusted to new circumstances. Similarly, lawyers' ethics have been described as being about what a lawyer does, and much of it not being in writing. In the context of this study, a constructivist approach also aligns with a legal principle that, in the legal context, perceptions are just as important as the objective reality. This is reflected in the maxim that justice must not only be done but seen to be done, because the rule of law depends on public confidence in the administration of justice.<sup>47</sup> Thus, if lawyers perceive EANTs to be a problem that might involve abuses or other issues, then *it is a problem* even if, objectively, EANTs might be a rare event. A constructivist approach lends itself to methodologies that take into account the perspectives of individual lawyers, such as case studies (Chapter 3) and surveys of lawyers about their experiences and perceptions (Chapters 4-6).

In line with this epistemological position, this thesis adopts a relativist ontological approach. In other words, it acknowledges that there may be multiple truths or realities about EANTs, which may also change over time. Individual perception and context may influence each lawyer's understanding of EANTs. A realist approach, that is, one that assumes a single observable reality, would not be appropriate for the phenomenon of EANTs, which applies to a complex profession in a rapidly evolving social and legal context. A singular fixed reality would be too simplistic, given the subjective and evolving nature of ethical boundaries. This project proceeds from the perspective that this understanding is likely to be changed by lawyers' experience and various factors. Indeed, many of the cases considered in Chapter 3 (*Mullins*<sup>48</sup> is a prime example) were pursued by the regulators in order to 'shift' lawyers' perception and understanding of EANTs.

Adopting a constructivist and relativist approach enables this research project to take into account the diversity and complexity of individual perspectives and contextual factors relating to EANTs. It lends itself to using a combination of qualitative methods ranging from

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<sup>46</sup> Jean Piaget, *The Moral Judgment of the Child* (2014).

<sup>47</sup> *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ cited with approval in *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ who said that this principle is fundamental and could be traced back to Magna Carta at [3] and that it has been applied in many contexts at [4].

<sup>48</sup> [2006] LPT 012.

doctrinal research, thematic analysis, and case analysis to surveys, facilitating a rich and nuanced exploration of the topic. These are precisely the methods used in this research project.

Doctrinal research, often described as ‘library-based’ or ‘black-letter,’ is one of the principal methods of legal research.<sup>49</sup> It involves literature searches, analysis of rules and judgments to locate the sources of the law and then interpreting and analysing the text (hence ‘black-letter’, referring to the colour of the text on paper).<sup>50</sup> In this study, it is used primarily to develop a theoretical framework of EANTs and how it applies to case law and prior studies of lawyers. This provides a foundation for the empirical part of the research.

The empirical side of this project involves several components. As noted in section D, empirical research in this context refers to research based on lived experience rather than ideas or theories. The inclusion of such research addresses the dynamic and practical nature of legal practice and legal negotiation, which is shaped by many factors. This approach allows an exploration of these issues and how these influence the realities of EANTs in daily practice. Cases are not analysed solely to understand legal principles, but also as detailed examples of how specific lawyers navigated EANTs, thus illustrating how doctrinal research relates to the actual practice of law and providing contextual depth to this project. This is followed by a review of prior surveys of lawyers that provide breadth to this project, as some of those studies are based on responses of thousands of lawyers. The exploratory survey conducted as part of this project serves as a lynchpin that ties other parts of this project together and grounds it in contemporary Australian legal practice. The combination of doctrinal and empirical research in this project offers a rigorous yet nuanced approach to the phenomenon of EANTs as well as its practical implications for Australian lawyers.

## G *Research Questions and Hypothesis*

The research questions and hypothesis evolved during the course of this research project. As noted in part A of this Chapter, this thesis was initially premised on a hypothesis that if I try hard enough, I will find the answers and be able to ‘draw’ the ethical lines in relation to all EANTs. Thus, the initial aims for this research project were to 1) identify all EANTs that could be used by lawyers and 2) determine how EANTs are regulated, with a view to resolving whether specific EANTs are permissible for use by lawyers. However, as the project

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<sup>49</sup> Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2013) 21(3) *Legal Education Digest* 83.

<sup>50</sup> *Ibid* 85.

progressed, it became apparent that the complexity of the questions and the state of knowledge would make it impossible to answer these questions.

I used systematic searches of the literature in order to identify what is known about lawyers' use and perception of EANTs, as well as the relevant legal issues. However, the literature I identified, as discussed earlier in section D, had several gaps. My analysis of the literature was akin to a grounded theory approach, seeking to derive insights and patterns from the information that was available. Additionally, when it came to identifying applicable principles, I realised that the second aim was not feasible in the context of a diverse profession that operates across many different areas of law, many of which are regulated on a State and Territory basis, adding further complication. The rules of professional conduct, which have been adopted across most of Australia and apply to most Australian lawyers in a relatively uniform manner, have therefore been chosen as the focus of doctrinal analysis to the exclusion of other sources of legal obligations, which are used only for contextualised and comparative purposes.

As the research project progressed it became apparent that the aims had to be revised. My research revealed that there was such lack of agreement about EANTs among lawyers that it was often not possible to pursue the original aim of trying to identify the ethical lines. It became apparent that there might not be a consensus about such ethical lines. This led to evolution in the hypothesis and research questions and a shift towards investigating the ambiguity of EANTs in negotiations and its implications more broadly, including the extent to which it may be a problem for Australian lawyers. Further my research revealed a perception among lawyers of a very high rate of usage of EANTs that led to hypothesising whether EANTs pose a significant problem for the profession, perhaps of a different scope and nature to that initially conceptualised. This was investigated by asking:

- to what extent do the lawyers assess different types of EANTs as permissible;
- what is the frequency of use of EANTs among lawyers; and
- what factors are associated with the lawyers' assessment and prevalence of the use of different types of EANTs.

Despite having adopted a relativist approach which recognises that there may be many realities of EANTs among the profession, my investigation of the topic, including the exploratory survey, also suggested a hypothesis that the state of uncertainty coupled with high prevalence applies across the board, that is, it is a problem for all Australian lawyers.

## H *The Layout of the Thesis*

The thesis is structured so as to provide a comprehensive and systematic study of the questions set out above. Chapter 1 lays the groundwork by exploring the concept of EANTs in greater detail and uses systematic searches of the literature and thematic analysis to develop a catalogue of EANTs that is used as an analytics framework in subsequent chapters. Each of subsequent chapters examines a different source of information in relation to the research questions. Chapter 2 examines Australian Solicitors Conduct Rules by reference to the framework to identify what the rules have to say about EANTs and understand what lawyers as a profession say is permissible. Chapters 3 and 4 examine the case law and studies of lawyers, respectively, to understand how lawyers navigate EANTs in practice, particularly how they assess what is permissible, what EANTs are used, and what factors might be associated with this. To address the limitations of prior research, including the paucity of contemporary Australian studies, Chapter 5 develops a methodology, and Chapter 6 reports on the result of a survey of 275 Australian lawyers. Finally, Chapter 7 discusses the implications of the investigation, the nature of the problem posed by EANTs, and proposes recommendations for addressing the problem.

# CHAPTER 1: WHAT ARE ETHICALLY AMBIGUOUS NEGOTIATION TACTICS?

## A *Introduction*

This Chapter defines what is an EANT and then uses systematic searches of the literature to identify and catalogue EANTs relevant to lawyers. This catalogue is then used as a reference point in subsequent chapters to highlight what is known about which EANTs, as well as areas where knowledge might be limited or absent.

This Chapter is structured in three parts. Part B develops a definition of EANTs that takes into account key nuances of lawyer negotiations and learnings from prior research. Part C describes the systematic search and analysis methodologies used to identify and categorise EANTs. The results, consisting of a catalogue, are set out in Part D.

## B *The Meaning of 'EANT'*

This part examines the definition of EANTs proposed by prior researchers and develops a more comprehensive definition of EANTs that takes into account the legal professional context of this project. The definition developed in this Part provides a foundation for literature searches and thematic analysis of EANTs in Parts C and D of this Chapter.

### 1 *What is an EANT?*

While many studies refer to EANTS, there is a paucity of theoretical research about the meaning and the nature of the concept of EANTs. The most recent and the most comprehensive examination of EANTs in Australia was conducted as part of a PhD project by Cheryl Rivers. Rivers studied differences in ethical decision making between Chinese and Australian business negotiators. As part of that project, Rivers not only tested existing methodologies, but also sought to address their limitations by developing her own. Rivers used the following definition of EANTS:

‘a manoeuvre used in the course of a negotiation that may be regarded as wrong by at least some individuals who participate in or observe the negotiation’.<sup>51</sup>

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<sup>51</sup> Rivers (n 21) 15.

This definition is concise and easy to comprehend. However, its brevity hides important aspects of the concept that need to be explained further, including the reference to ‘manoeuvre’ and ‘wrong’. The reference to a manoeuvre in the definition implies the need for movement or positive action. In developing the definition of a ‘tactic,’ Rivers noted that this word originates from the military context and refers to a ‘manoeuvre in the course of battle’.<sup>52</sup> Rivers suggested that in negotiations, this refers to ‘an action or statement used by a negotiator, usually with a view to achieving an aim’.<sup>53</sup> However, in adopting this definition, Rivers has fallen into the same trap for which she criticised previous researchers: failing to recognise that tactics can involve omissions.<sup>54</sup> Tactics can involve omissions—for example, withholding a piece of information, causing delay, or procedural difficulties. The use of the word ‘manoeuvre’ in the definition developed by Rivers implies the need for positive action, which, as Rivers argued herself, is not a necessary ingredient for something to qualify as a tactic.<sup>55</sup>

There are other definitions of tactics that provide further insight into what is meant by a ‘tactic’.<sup>56</sup> In psychological research, for example, tactics have been described as ‘micro-behaviours’ or ‘psychological and behavioural means through which personal goals, personal projects, and personal strivings are accomplished’. Macquarie Dictionary defines tactics as ‘mode of procedure for gaining advantage or success’.<sup>57</sup> The common element appears to be that tactics involve a behaviour (doing or not doing something) for a particular purpose. The Macquarie Dictionary definition reference to ‘gaining advantage’ seems to capture the purpose in a clear and simple way. Drawing on elements of all these definitions, a tactic in negotiations can be understood as an act or omission used by a negotiator to achieve an advantage in negotiations.

Rivers sought to capture the ‘ethical ambiguity’ part of the acronym EANT by saying that a tactic ‘may be regarded as wrong by at least some individuals’. The use of the word ‘may’ alludes to ambiguity. The reference to ‘wrong’ invokes the ethical dimension of this behaviour. However, the definition does not specify by what measure something is ‘wrong’.

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid, 139.

<sup>55</sup> Ibid.

<sup>56</sup> See eg Kyl-Heku and Buss (n 1); Thomas M Besch, ‘Identification of Negotiation Tactics and Strategies of Army Negotiators’ (Naval Postgraduate School, 1992); Rivers (n 21) 14.

<sup>57</sup> *Macquarie Dictionary* (5th ed, 2009) ‘tactic’.

Nor does it address why the opinion of ‘some individuals’ should be determinative of whether something is deemed ethically ambiguous. The definition fails to reflect important aspects of ‘ethics’ and ‘ambiguity’ that are essential to the understanding of the concept of EANTs. It is, therefore, important to consider these two terms further.

## 2 *What is Meant by Ethics: Morals when it Comes to EANTs, Rules when it Comes to Lawyers?*

When Lewicki and Stark were piloting the first survey of EANTs, they noted that students asked to rate EANTs by how ‘ethical’ struggled in interpreting what is meant by ethics.<sup>58</sup> Rather than provide a definition of what is meant by ethical, Lewicki and Stark resolved this problem by replacing the word ‘ethical’ with the word ‘appropriate’.<sup>59</sup> Subsequent studies revealed that this change resolved the problem—there were no further queries from the participants. These studies also showed that there was no observable difference between the results, irrespective of which word was used.<sup>60</sup> The solution of replacing the word ‘ethics’ with ‘appropriate,’ however, is not appropriate for this project. Clarity around what is meant by ‘ethics’ in the definition of EANTs is integral to this research project.

The approach used by Rivers is instructive. Rivers noted that ‘ethics’ is often used interchangeably with ‘morality’.<sup>61</sup> Rivers argued that this is correct because both terms have as their basis the Greek roots *ethos* and *ta ethika* which was then rendered into Latin by Cicero as *mores*.<sup>62</sup> Rivers referred to the Oxford Dictionary definition of ethics, which, in turn, refers to the writings of Aristotle and ‘ideal excellence’.<sup>63</sup> Rivers ultimately adopted the following definition of ethics from Lewis:

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<sup>58</sup> Roy J Lewicki and Neil Stark, ‘What Is Ethically Appropriate in Negotiations: An Empirical Examination of Bargaining Tactics’ (1996) 9(1) *Social Justice Research* 69, 80 <<http://link.springer.com/10.1007/BF02197657>>.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid 14.

<sup>62</sup> Ibid, citing Oxford English Dictionary, 1989.

<sup>63</sup> Rivers (n 21) 14.

‘the rules, standards, codes or principles which provided guidelines for the morally right behaviour and truthfulness in specific situations’.<sup>64</sup>

The concepts of ‘morality,’ ‘wrong’ as well as references to ‘rules, standards, codes or principles’ can also be found in the Macquarie Dictionary definition of ethics. An important feature of the Macquarie definition, which is missing from the discussion of this concept by Rivers, is that Macquarie Dictionary refers to three different meanings of ethics:

1. a system of moral principles by which human actions and proposals may be judged good or bad or right or wrong;
2. the rules of conduct recognised in respect of a particular class of human actions: *medical ethics*; and
3. moral principles, as of an individual.<sup>65</sup>

Lewis’ definition of ethics, adopted by Rivers, seems to incorporate elements of all three of these definitions without making a distinction between them. However, in the context of this research project, the distinction is important. This is because the legal profession, whose conduct is the focus of this research project, has developed its own understanding of what is meant by ‘ethics’.

References to Aristotle, morals and ‘wrong’ combined with an absence of references to rules or laws in the combined definition of EANTs (as opposed to ethics, adopted from Lewis) suggest that Rivers drew primarily on notions of morality or philosophical notions of ethics in conceptualising the meaning of ‘ethics’ in the acronym EANT. However, Dal Pont argues that among lawyers, ‘ethics’ is not expressly associated with morality or philosophical notions of ethics.<sup>66</sup> Lawyers tend to use the word ‘ethics’ to connote the rules that are binding on them as professionals as distinct from legal rules that are binding in general.<sup>67</sup> The scope of these obligations consists of a mixture of customs, common law obligations and professional conduct rules.<sup>68</sup> Another feature of lawyers’ ethics is that they are binding, that

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<sup>64</sup> Ibid, 15 citing PV Lewis ‘Defining business ethics: Like nailing jello to a wall’ (1985) 4(5) *Journal of Business Ethics*, 377.

<sup>65</sup> *Macquarie Dictionary* (5th ed, 2009) ‘ethics’.

<sup>66</sup> Dal Pont (n 16) [1.10].

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

is, non-discretionary.<sup>69</sup> To mark this distinction, Dal Pont adopted the practice of referring to the obligations applying to lawyers' conduct as 'professional obligations' rather than 'ethics'.<sup>70</sup>

There is a case for using the word 'ethics' in all three Macquarie dictionary senses (as a system of moral principles, the rules of conduct, and the moral principles of an individual) as one. There is an overlap and inter-relationship between the different conceptions of ethics. In the context of lawyer negotiations, Wade, for example, recognised that different conceptions, or as he described it, 'sources' of ethics, such as good ends, rules, organisational norms, personal conscience and 'prudence and practicality, reinforce each other.<sup>71</sup> Wade argued the last of these—'prudence and practicality,' essentially based on pragmatism, self-interest, and practical wisdom passed from lawyers to lawyers is the dominant one in practice.<sup>72</sup> More broadly, Honoré argued that ethics and morality are linked and that they influence and reinforce each other.<sup>73</sup> To make this case, Honoré used the example of the moral requirement to protect the vulnerable as manifesting itself in the law of trusts or child protection laws.<sup>74</sup> There is thus a mutually reinforcing relationship, where rules and laws help draw the lines when it comes to ethics, and ethics are embodied in laws.

Despite the inter-relationship between the three different definitions of ethics, they are distinct. As the concept of EANTs emerged out of business negotiation literature, where ethics is understood in its general, non-legal sense, this is also the sense that should be given to it when it comes to what is meant by 'EANTs'. This, broader definition, would therefore also take into account the unwritten practices influenced by prudence and practicality that might not be found in writing.

The broader definition of ethics that incorporates not just formal rules but also norms and customs is also consistent with how the term 'ethics' is understood at the highest levels of Australian judiciary. For example, Sir Owen Dixon, one of Australia's most prominent jurists and a former Chief Justice of the High Court, noted the origins of the word ethics and stated

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Wade (n 6) 10.

<sup>72</sup> Ibid.

<sup>73</sup> Tony Honoré, 'The Dependence of Morality on Law' (1993) 13(1) *Oxford Journal of Legal Studies* 1; Charles Rickett, 'Legal Ethics in General Practice' in *Legal Ethics: Papers Presented at a Seminar Held by the Legal Research Foundation at the Centra Hotel, Auckland* (1994).

<sup>74</sup> Honoré (n 73) 11.

in an address on professional conduct to law students that ‘for when you speak of professional ethics you have in mind rather the habits and customs of the profession’.<sup>75</sup> More recently, the Hon Justice Susan Kiefel, who was at the time a puisne Justice of the High Court, made a similar observation, stating that acting ethically involves conforming to ‘the customs and character’ of the legal community, but that values of the wider society inform those of the profession.<sup>76</sup> The influence of norms and customs on professional ethics in addition to formal rules is also accepted in theoretical literature.<sup>77</sup>

The meaning of ethics in the acronym EANTs is closely linked to the meaning of the term ‘ambiguous,’ which is used as an adjective of ethics. Rivers adopted the Oxford Dictionary definition of ambiguity as ‘doubtful, questionable and open to several possible interpretations’.<sup>78</sup> Macquarie Dictionary offers a similar definition of ambiguity, which provides more examples of when something can be considered ambiguous, that is:

1. open to various interpretations; having a double meaning; equivocal: an ambiguous answer;
2. of doubtful or uncertain nature; difficult to comprehend, distinguish, or classify: a rock of ambiguous character; or
3. lacking clearness or definiteness; obscure; indistinct.<sup>79</sup>

As in this case ambiguity refers to ethics, a tactic can be considered ethically ambiguous if it can be characterised in terms of any of these definitions when it comes to how it should be characterised by reference to ethics. The Macquarie Dictionary definition expands and provides further examples of what can be considered ambiguous.

Rivers adopted the following definition of negotiation:

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<sup>75</sup> Owen Dixon, ‘Professional Conduct’ in *Inaugural Lecture to the Law Students of the University of Melbourne upon the Occasion When Professional Conduct First Became a Subject in the Curriculum of the Law School* (1953) 129.

<sup>76</sup> The Hon Justice Susan Kiefel, ‘Ethics and the Profession of the Lawyer’, (Speech, Queensland Law Society, Vincents’ 48th Annual Symposium 2010).

<sup>77</sup> Robert J Condlin, ‘The “Nature” of Legal Dispute Bargaining’ (2016) 17 *Cardozo Journal of Conflict Resolution* 393, 20, also citing at 12 Jonathan Haidt, *The Righteous Mind* (2012) at 270 who claimed that morality consists of “interlocking sets of values, virtues, norms, practices, identities, institutions, technologies, and evolved psychological mechanisms that work together to suppress or regulate self-interest and make cooperative societies possible.”.

<sup>78</sup> Rivers (n 21) 14.

<sup>79</sup> *Macquarie Dictionary* (7<sup>th</sup> ed, 2017) ‘ambiguous’.

‘a deliberate interaction, involving face-to-face discussions between two or more entities who are attempting to define or redefine the terms of their interdependence in a matter’.<sup>80</sup>

This definition highlights that negotiations involve interactions between the parties and attempts to define or redefine their relationship. However, it fails to reflect many aspects of negotiations for many lawyers. Negotiations do not have to involve ‘face-to-face discussions’ and ‘deliberate interactions’. Whilst lawyers commonly engage in face-to-face negotiations, there are also many types of negotiations that occur through other media, such as by correspondence and over the phone.

Furthermore, the definition of negotiation is unnecessarily limited to ‘deliberate interactions’. Lack of interaction and avoidance of interaction can be a part of a negotiation. The definition adopted by Rivers invokes what Lande described as the ‘romantic’ view of negotiations involving one climactic settlement.<sup>81</sup> By contrast, in legal matters, every step in the matter can be negotiated as parties jockey for position and set themselves up for trial, which in most cases, will never come.<sup>82</sup> Galanter coined the term ‘litigotiation,’<sup>83</sup> a mix between litigation and negotiation consisting of a ‘single process of disputing in the vicinity of the official tribunals’ to describe this process.<sup>84</sup> While the definition adopted by Rivers is closer to the ‘romantic view’ of negotiations, in the context of this project, negotiation should be understood in its broader context as a ‘process’ which may involve an interaction or lack of interaction rather than just deliberate interaction.

Where the meaning of negotiation for the purposes of this project differs from Galanter’s ‘litigotiation’ is that it may, but does not necessarily have to, involve ‘vicinity of official tribunals’. Legal negotiations can be classified in many different ways, including based on whether they involve a mediator or not, the area of law, type, such as civil or criminal,<sup>85</sup> or, as

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<sup>80</sup> Rivers (n 21) 15.

<sup>81</sup> John Lande, ‘Teaching Students to Negotiate Like a Lawyer’ (2012) 39 *Washington University Journal of Law and Policy* 109, 110 <<http://ssrn.com/paper=2086871>>.

<sup>82</sup> Ibid.

<sup>83</sup> Marc Galanter, ‘The Quality of Settlements’ [1988] *Journal of Dispute Resolution* 55; Lande (n 81).

<sup>84</sup> Ibid

<sup>85</sup> See eg Asher Flynn and Arie Freiberg, ‘Plea Negotiations: An Empirical Analysis’ (2018) 544 *Trends & issues in crime and criminal justice* 14, which highlights how common the negotiations are in criminal law.

suggested by Menkel-Meadow whether it is about disputes (what has already happened) and negotiations about transactions (what will happen).<sup>86</sup> This project is not restricted to a particular type of lawyer negotiations. Lawyer negotiations are not restricted to civil litigation. They apply in the context of criminal law as well as where there is no litigation at all. A recent study in Victoria found that between 87 and 100 percent of guilty pleas entered at all levels of Victorian courts were the result of a negotiated agreement between the prosecutor and the defence.<sup>87</sup> Dispute resolution is not the only arena where lawyers negotiate.<sup>88</sup> Negotiations also take place in non-contested settings including commercial and property transactions.<sup>89</sup> Taking account of these considerations, this thesis uses the following definition of negotiation: a process where two or more entities are attempting to define or redefine the terms of their relationship in a matter, which may but does not have to occur in the vicinity of courts or tribunals.

### 3 *Summary of the Definition of EANTs*

In this section I examined the meaning of terms comprising the acronym EANTs and clarified various aspects of it to take into account contextual issues associated with lawyer negotiations. To summarise, I arrived at the following definition of the constituent part of EANTs for the purposes of this project:

- Ethically: refers to a system of moral principles by which human actions and proposals may be judged good or bad or right or wrong, and in this research project, understood in its general sense as opposed to the professional obligations of lawyers.
- Ambiguous:
  - open to various interpretations; having a double meaning; equivocal: an ambiguous answer;
  - of doubtful or uncertain nature; difficult to comprehend, distinguish, or classify: a rock of ambiguous character; or
  - lacking clearness or definiteness; obscure; indistinct

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<sup>86</sup> Carrie Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (1983) 8(4) *American Bar Foundation Research Journal* 905, 908.

<sup>87</sup> See summary of findings in Asher Flynn and Arie Freiberg 'Plea negotiations: An empirical analysis' (2018) 544 *Trends and Issues in Crime and Criminal Justice* 1, 4.

<sup>88</sup> Carrie Menkel-Meadow, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (1983) 8 (4) *American Bar Foundation Research Journal* 905, 908.

<sup>89</sup> G Richard Shell, 'Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action' (1991) 44(2) *Vanderbilt Law Review* 221 <[http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr44&section=19](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr44&section=19)>.

by reference to the 'ethics' as defined above;

- Negotiation: a process where two or more entities are attempting to define or redefine the terms of their interdependence in a matter, which may, but does not have to occur in the vicinity of courts or tribunals.
- Tactic: an act or omission used by a negotiator to achieve an advantage in negotiations.

Put together, these can be further summarised and simplified into the following definition, which I will use throughout this project:

an EANT is an act or omission, used deliberately to gain an advantage in out of court negotiations which is:

- open to various interpretations;
- is of doubtful or uncertain nature; or
- lacks clarity or definiteness

according to the general moral principles by which such acts or omissions may be judged good or bad, right or wrong.

## C *Methodology of Searches and Thematic Analysis*

Having established what is meant by EANTs, I now turn to identifying them in the literature. This section describes the methodology that was used to systematically search the literature, identify tactics, and summarise them into a meaningful catalogue. The methodology builds on the work of Rivers<sup>90</sup> and Lakhani<sup>91</sup> on negotiation tactics and takes into account the more recent work of Nowell et al on thematic analysis to develop a taxonomy of EANTs.

### 1 *Search Methodology*

I used multiple techniques in order to identify EANTs, starting by searching for lists and catalogues and then moving on to trying to identify individual tactics.

My initial searches revealed no prior comprehensive catalogues of EANTs, necessitating the development of a catalogue in this Chapter. This finding was reinforced by the fact that both

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<sup>90</sup> Rivers (n 21).

<sup>91</sup> Lakhani (n 21).

Rivers and Lakhani called for the development of more comprehensive catalogues of EANTs. Thus, there is a gap in the knowledge that requires a comprehensive review of all possible tactics. This Chapter seeks to address it through a comprehensive review of all accessible literature on negotiation tactics.

I used an iterative snowball search strategy to identify the relevant literature and tactics within it. 'Snowballing searches' means searching for the papers that are cited in, or that are cited by, the literature that had been earlier identified in the first round of searches.<sup>92</sup> Thus, each paper can help identify multiple other papers, leading to a snowballing effect. This technique was also extended to searches using author names where more than one work had been identified on the topic or in relation to the works of the leading authors.

The first round of searches was conducted using three sets of terms derived from Wade's conference paper on EANTs: 'negotiation AND tactic,' 'negotiation AND ethics' and the acronym 'EANTs'.<sup>93</sup> The searches then expanded using forward and reverse snowballing techniques. The searches were conducted in a range of search engines in order to capture as much relevant literature as possible. The primary search tool was Google which, according to Gusenbauer, is the most comprehensive of all academic search engines.<sup>94</sup> This approach has limitations. Google Scholar uses a confidential proprietary algorithm, which could introduce biases into results.<sup>95</sup> Studies have shown that Google Scholar favours articles with a high number of previous citations.<sup>96</sup> This means the searches are more likely to return standard and mainstream literature, whilst 'gems' or novel interpretations are less likely to appear in the results.<sup>97</sup> Google algorithm can also return thousands of results, some of which do not

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<sup>92</sup> Claes Wohlin, 'Guidelines for snowballing in systematic literature studies and a replication in software engineering' (May 2014) DOI:10.1145/2601248.2601268 available at SSRN [https://www.researchgate.net/publication/266658918\\_Guidelines\\_for\\_snowballing\\_in\\_systematic\\_literature\\_studies\\_and\\_a\\_replication\\_in\\_software\\_engineering](https://www.researchgate.net/publication/266658918_Guidelines_for_snowballing_in_systematic_literature_studies_and_a_replication_in_software_engineering).

<sup>93</sup> Wade (n 6).

<sup>94</sup> Michael Gusenbauer, *Google Scholar to Overshadow Them All? Comparing the Sizes of 12 Academic Search Engines and Bibliographic Databases*, vol 118 (Springer International Publishing, 2019) <<https://doi.org/10.1007/s11192-018-2958-5>>.

<sup>95</sup> Joeran Beel and Bela Gipp 'Google Scholar's Ranking Algorithm: The Impact of Citation Counts (An Empirical Study)' in André Flory and Martine Collard (eds), *Proceedings of the 3rd IEEE International Conference on Research Challenges in Information Science (RCIS'09)*, 439, Fez (Morocco), April 2009.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

even contain the search terms. In order to mitigate against these limitations, additional searches were performed using specialised legal databases, including Austlii, LexisNexis and Westlaw databases.

A common limitation of scholarly searches is that they primarily capture peer-reviewed articles published in peer-reviewed journals. Such literature is likely to already contain a good-quality overview of the research in the field. However, it may exclude commentary, books, conference papers and theses which may not be indexed or searchable through these platforms. As such, additional searches were conducted using the University of Western Australia Electronic Library Catalogue and the standard (non-scholar) version of the Google search engine.

Once the initial literature had been identified, it was reviewed for relevance and a further round of searches was conducted. The earliest literature considered in this thesis was as available through the catalogues specified above, with the vast majority of works dated 1960 or later – see bibliography. The latest literature is as of April 2023 when the write up and research was substantially completed. The search results were then analysed and classified using a thematic analysis method, which is set out in the next section.

## 2 *Thematic Analysis*

The comprehensive nature of the searches produced a voluminous and rich source of data consisting of over 200 papers and over 500 tactics, which required a systematic approach to analysing it. The method of data analysis adopted in this research is inspired by the research of Rivers, who also sought to develop a comprehensive classification of EANTs and used what she described as ‘coding exercises’.<sup>98</sup> The approach used by Rivers was essentially thematic analysis. Nowell most recently reviewed various approaches to thematic analysis, so my methodology draws on lessons from Nowell as well to ensure the analysis is conducted in a rigorous and methodical manner.<sup>99</sup>

The similarity in this research project with the approach used by Rivers is that it involves generating a pool of tactics and then iteratively going through it, classifying the tactics into a limited number of categories until all tactics can be assigned to a unique category.<sup>100</sup>

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<sup>98</sup> Rivers (n 21) 148.

<sup>99</sup> Lorelli S Nowell et al, ‘Thematic Analysis: Striving to Meet the Trustworthiness Criteria’ (2017) 16(1) *International Journal of Qualitative Methods* 1.

<sup>100</sup> Rivers (n 21) 148.

However, Rivers used three sets of independent coders to develop a classification of tactics,<sup>101</sup> whereas, in this research project, one person (myself) categorised all the tactics.

There are two reasons for this. First, I used a much larger pool of tactics—over 500 compared to the 75 used by Rivers.<sup>102</sup> It would not be practical to code and re-code three times such a large pool of tactics using multiple coders within the framework of this project. The second reason for not using multiple coders is that it is not necessary in the context of this project. My research is exploratory. I seek to explore the data from various perspectives, not develop a rigorous scale to be used in future studies similar to Rivers.

The thematic analysis methodology recommended by Nowell aims to generate a rich and detailed yet complex account of data.<sup>103</sup> It relies on using ‘themes’ to categorise and understand the data.<sup>104</sup> Nowell et al used the following definition of themes:

‘a theme is an abstract entity that brings meaning and identity to a recurrent experience and its variant manifestations. As such, a theme captures and unifies the nature or basis of the experience into a meaningful whole.’<sup>105</sup>

The methodology involves an iterative and reflective process.<sup>106</sup> First, codes or classes are generated deductively based on prior study, research or conceptual framework.<sup>107</sup> The data is then repeatedly analysed and categorised using the codes. Where data does not neatly fit the codes, such departures are highlighted and analysed again.<sup>108</sup> In the process of analysing the data, some themes may merge or ‘collapse’ into each other, whilst others need to be broken down or out into separate themes.<sup>109</sup> The overall process can then be used to theorise the significance of the patterns and their meanings and implications to broader literature.<sup>110</sup> The

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<sup>101</sup> Ibid 147.

<sup>102</sup> Ibid 149.

<sup>103</sup> Nowell et al (n 99) 2.

<sup>104</sup> Ibid 8.

<sup>105</sup> Ibid (citations omitted).

<sup>106</sup> Ibid 4.

<sup>107</sup> Ibid 4.

<sup>108</sup> Ibid 6.

<sup>109</sup> Ibid 9.

<sup>110</sup> Ibid 11.

codes and the data are read and re-read together, involving a process of searching for meanings and patterns.<sup>111</sup>

It is most suitable for diverse sets of data.<sup>112</sup> The data generated in the searches conducted as part of this project meets this criterion as it is derived from various cross-disciplinary searches.

## D *Results of the Searches and the Analysis*

The initial searches using Google Scholar identified a total of 277 works, including books, peer-reviewed articles and 'grey' literature, such as non-peer reviewed articles and professional publications. A further 151 works were identified using snowballing searches and additional search engines, bringing the total to 428 works.

A review of this literature revealed that out of the combined total of 428 works, only 55 referred to one or more specific negotiation tactics. There were 34 publications relating to lawyers. The remaining 21 papers came from a range of disciplines, including business negotiations and psychology, contributing cross-disciplinary knowledge to this thesis. The tactics from these papers were compiled into a list comprised of 598 tactics.

### 1 *Thematic Analysis*

During thematic analysis, I experimented with using several different classifications of tactics developed by legal scholars and scholars from other disciplines identified during the literature review. As I will discuss in this section I ultimately selected and applied 5w and H framework (alternatively, it can be referred to as Aristotle's Septem Circumstantiae - discussed later in this section)<sup>113</sup> as the primary analytical framework. That framework involves asking questions 'who, what, where, when, why, and how' to explore various ethical aspects of each situation. It is adopted because it would be more likely to capture the entire domain of EANTs than other classifications.

This research project required a framework that was practical in application, suitable for generating useful insights into the data and addressed the key limitation of previous studies identified by Rivers: 'poor content adequacy,' that is, not covering the field and failing to

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<sup>111</sup> Ibid 5.

<sup>112</sup> Ibid 2.

<sup>113</sup> Michael C Sloan, 'Aristotle's Nicomachean Ethics as the Original Locus for the Septem Circumstantiae' (2010) 3 *Classical Philology* 236.

adequately address all types of tactics one might encounter in negotiations.<sup>114</sup> Four classifications identified in the negotiation literature considered but rejected for use in this project were those of Hartje and Wilson (1984),<sup>115</sup> Besch (1992),<sup>116</sup> Lewicki (with other scholars from 1983 to 2000)<sup>117</sup> and finally Rivers (2003).<sup>118</sup>

Hartje and Wilson produced a list consisting of four types of tactics specifically relevant to lawyers:

1. Timing;
2. Authority;
3. Communication; and
4. Pressure.<sup>119</sup>

In this classification, timing tactics included the use of deadlines and using timing to make offers.<sup>120</sup> Authority tactics included presenting a client as uncompromising, having no authority to bind the client, or coercing a government or another powerful authority into the negotiation.<sup>121</sup> Communication tactics involved misdirection and multiple messages.<sup>122</sup> Pressure included threats, causing physical discomfort and outnumbering.<sup>123</sup>

Besch considered negotiation tactics used by military negotiators in the USA and used the following six categories previously developed by Karass:

1. Authority;
2. Demand and concession;

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<sup>114</sup> Rivers (n 21) 141.

<sup>115</sup> Jeffrey H Hartje, 'Lawyer's Skills in Negotiations: Justice in Unseen Hands' (1984) 1984 *Journal of Dispute Resolution* 119.

<sup>116</sup> Besch (n 56).

<sup>117</sup> Robert J Robinson, Roy J Lewicki and Eileen M Donahue, 'Extending and Testing a Five Factor Model of Ethical and Unethical Bargaining Tactics: Introducing the SINS Scale' (2000) 21(6) *Journal of Organizational Behavior* 649 <<http://course.sdu.edu.cn/Download/37560d4e-dd98-477f-acdo-99db309f92ef.pdf>>.

<sup>118</sup> Rivers (n 21).

<sup>119</sup> Hartje (n 115) 175 see fn 200.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

3. Diversion;
4. Information;
5. Momentum and time;
6. Settlement.<sup>124</sup>

In Besch's classification, authority tactics include escalation and tactical setting of authority limits. Demand and concession include combinations, nibbles and using a third party as a 'bogey'. Diversions include good -guy-bad-guy routines and pretending to withdraw. Information tactics include challenging credibility and overwhelming with statistics.<sup>125</sup> Momentum and time include the setting of deadlines, as well as the use of surprise.<sup>126</sup> Settlement tactics included splitting the difference. Besch's survey also included the tactic of adjusting the thermostat to make the opponent physically uncomfortable.

The focus of Lewicki's research has been on deceptive tactics. The various categories evolved from 1983 to the following form in 2000 in the Self-reported Inappropriate Negotiation Strategies ('SINS') scale:

1. Traditional competitive bargaining;
2. Attacking the opponent's network;
3. False promises;
4. Misrepresentation; and
5. Inappropriate information gathering.<sup>127</sup>

In this classification, traditional competitive bargaining includes such tactics as making high opening demands and conveying the impression that one is not in a hurry. Attacking an opponent's network includes trying to get the opponent fired and undermining the opponent. False promises is about making promises with no intention of fulfilling them. Misrepresentation covers not only simply misrepresenting information but also denying the validity of an opponent's information or misinforming one's client or reports about the negotiations. Finally, inappropriate information gathering includes paying the opponent's friends or associates and befriending the opponent or their associates.

Rivers identified the following issues with the SINS scale:

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<sup>124</sup> Besch (n 56)<sup>24</sup> citing Chester Karass 'Down and Dirty Tactics', *Traffic Management* (June) 1992, 25-26.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> Robinson, Lewicki and Donahue (n 117).

1. It lacks content adequacy (i.e. does not cover the field, only addresses acts but not omissions);
2. Conceptually different tactics are included within the same categories (e.g., extreme offers and not being in a hurry under the banner of traditional bargaining);
3. The tactics extend to actions that have to be done outside the negotiation, such as hiring the opponent's associates.<sup>128</sup>

Rivers sought to address these limitations by developing a new, more comprehensive typology. Rivers developed a typology of EANTs which was then tested for comprehensiveness using iterative coding exercises, where the lists of tactics were repeatedly categorised and re-categorised by independent coders until they agreed on the categorisation. She reported that an unanticipated finding of this process was that EANTs need not be deceptive in order to be ethically ambiguous.<sup>129</sup> A sincere threat, for example, may still be considered ethically ambiguous and not be deceptive.<sup>130</sup> Further, as discussed in the context of defining EANTs, Rivers argued that EANTs can involve not just acts, but also omissions.<sup>131</sup> As a result of the coding exercise Rivers identified the following categories of EANTs:

1. Withholding information from the other party;
2. Making promises that are not sincere;
3. Threatening the other party;
4. Using or saying untruthful information but not as a threat or as a promise;
5. Using positive feelings toward the other party;
6. Using negative emotions/feelings towards the other party;
7. Intentionally unsettling or wearing the other party down but not by threats or lying;  
and
8. Diverting attention away from the current negotiation topic.<sup>132</sup>

Rivers developed this classification in the context of general management research based on a limited pool of tactics. Rivers for example, did not refer to the work of Hartje and Wilson

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<sup>128</sup> Rivers (n 21) 141–142.

<sup>129</sup> Ibid 152.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid, 149.

<sup>132</sup> Ibid 153–154.

on lawyers' tactics or Besch concerning military negotiators.<sup>133</sup> It is, therefore not surprising that a comparison between these scales revealed that, whilst more comprehensive, the classification developed by Rivers failed to account for some types of tactics referenced in other classifications. For example, authority tactics (claiming to have limited authority in order to get a better deal from the opponent) are not included. Likewise, the classification developed by Rivers failed to take into account timing or other tactics, such as making the opponent physically uncomfortable.

This prompted me to search for a broader classification that would be more likely to capture the entire domain of EANTs. As my literature searches of negotiation literature did not reveal a suitable framework, I looked for answers in broader ethics literature. This is where I found a reference to 5W and H framework. This framework has an ancient pedigree, tracing its origins to Thomas Aquinas and earlier to Aristotle's *Septem Circumstantiae* framework.<sup>134</sup> The framework was designed to evaluate all circumstances of any given situation.<sup>135</sup> The framework, in its modern iteration of 5Ws and H, consists of asking the following six questions:

1. Who?
2. What?
3. When?
4. Where?
5. Why?
6. How?

When applied to the tactics generated by my searches, I found that every tactic could be attributed to one of these dimensions. For example, delay tactics would fall under the 'when' aspect of negotiations. Using multiple negotiators would fall under 'who'. This framework was also easy to apply. It facilitated efficient and consistent analysis of the tactics. Tactics relating to the question 'who' tended to relate to the manipulation of negotiators or their relationship to each other. 'What' related to information, 'where' to location and 'when' to timing. Most of the tactics that responded to the question of 'why' related to the use of threats and other leverage. The question of 'how' related to abuses of process.

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<sup>133</sup> Ibid 149.

<sup>134</sup> Michael C Sloan (n 113).

<sup>135</sup> DW Robertson 'A Note on the Classical Origin of 'Circumstances' in the Medieval Confessional' (1946) 43 (1) *Studies in Philology* 9.

Following the first round of analysis, I found that the largest number of tactics were in the ‘what category’: over a third of all tactics (n = 216). There were fewer tactics in the ‘how’ category - 170 (n = 170) tactics related to this question. Not far behind was ‘who,’ which came up 127 times. The remaining categories of tactics came up substantially less frequently in the literature. The ‘when’ of negotiations - delay and timing tactics - came up only 31 times. The ‘why’ of negotiations—using threats or other leverage to give the opponent a reason to concede received surprisingly little attention, with only 29 mentions. The ‘where’ of negotiations,’ the setting, was least common, having come up in the literature only 6 (n = 6) times.

The number of tactics mentioned in each category provides an unanticipated insight into the focus of prior literature. Information-based tactics, uses of process and targeting the opponent were mentioned the most. Timing, threats and use of location have received a lot less attention. This raises the question as to why that is the case—why are some types of conduct studied or considered more often than others? This is outside the scope of this project and the aims set out in the Introduction Chapter. However, it could be a worthwhile question for future research, to understand whether the differences in numbers of references could be link to the availability bias where later researchers follow in the footsteps of others, or perhaps to the underlying structure of negotiations.

The lists consisted of tactics identified from the literature and re-arranged using the six 5W and H classification. There was considerable overlap and duplication between tactics mentioned across the literature. As such, I cleaned the data to remove duplicates and tactics that were not ethically ambiguous. This process is summarised in the next section.

#### *(a) Cleaning the Data and Ensuring the Tactics are Ethically Ambiguous*

As the total list of the tactics classified into the 5W and H categories was very large (583 tactics), it needed to be cleaned and reduced before it could be analysed and categorised further (see next section). Similarly to Rivers, I cleaned the data by combining, de-duplicating and simplifying the tactics by removing motive.<sup>136</sup> I then removed duplicates as well as tactics that could not be regarded as ethically ambiguous based on the definition of EANTs developed in Part A of this Chapter. I followed a method similar to that adopted by Rivers in cleaning her list of tactics, removing tactics which could not be considered ethically ambiguous either because:

1. they were not unethical—for example, rational persuasion; or

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<sup>136</sup> Rivers (n 21)149.

2. they were unambiguously unethical—for example, illegal.<sup>137</sup>

## 2 *The Results of Thematic Analysis Using 5w and H*

Once the data set was cleaned and filtered, the overall list of EANTs was reduced to 75 conceptually distinct tactics. These were thematically analysed further and assigned to sub-categories. The results of this work are reported below.

### (a) *‘What’ of Negotiation: Information-Based Tactics*

As noted above, the tactics involving manipulation of information—the ‘what’ of negotiations were more common than others. These tactics could be divided into two broad groups: the first involves concealing information, and the second involves presenting information in a manner that it is inconsistent with the negotiator’s beliefs in what is true.

#### (i) *Concealing Information*

Concealment can take many forms, from concealing information in plain sight, by, for example, emphasising other information, to burying it in piles of other information, to withholding parts of the true story or information that renders what has been previously provided untrue. There appears to be a tension between the general principle of the adversarial legal system that each party bears the burden of proving their own case, that is, there is no duty to arrive at the truth, and the obligation on lawyers to be honest. Concealment tactics identified in the literature are set out in the following table.

*Table 1 Information Concealing Tactics*

Concealing Information
<ol style="list-style-type: none"> <li>1. Emphasise only information which helps your client;<sup>138</sup></li> <li>2. Do not disclose intentions;<sup>139</sup></li> <li>3. Do not volunteer information adverse to own position;<sup>140</sup></li> </ol>

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<sup>137</sup> Ibid 149.

<sup>138</sup> Ibid 155.

<sup>139</sup> Gary Goodpaster, ‘A Primer on Competitive Bargaining’ (1996) 1996(2) *Journal of Dispute Resolution* 325.

<sup>140</sup> Jeffrey Krivis, ‘The Truth about Deception in Mediation’ (2004) 4(2) *Pepperdine Dispute Resolution Law Journal* 251.

4. Do not correct mistaken belief by the other negotiator/party;<sup>141</sup>
5. Ignore requests for information from the other party;<sup>142</sup>
6. Bury information by providing a lot more than is required;<sup>143</sup>
7. Paltering – provide narrow technically true responses while omitting information so as not to provide complete response;<sup>144</sup>
8. Do not disclose changes that materially affect previously disclosed information;<sup>145</sup> and
9. Do not disclose lies or criminality by client.<sup>146</sup>

(ii) *Distortion of Information*

Another type of information-based tactic involves distortion: trying to make something seem what it is not. These tactics are at odds with a basic commitment to honesty. However, in the literature, they are often represented as generally accepted and expected negotiation behaviours. Examples of such tactics include bluffing, high opening demands and exaggeration. Other types of information include misrepresenting something that is not objectively verifiable, such as personal opinions, intentions or assessment of acts.

While generally misrepresentations are considered unethical, there are many circumstances where they are legally or customarily permitted. Contract law recognises ‘puffery’—false statements in advertising that are not meant to be taken seriously.<sup>147</sup> A degree of misrepresentation can be expected in everyday interactions. When asking someone ‘how are you?’ few expect a frank and candid response. That could be a breach of the social

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<sup>141</sup> Shirrit Kronzon and John Darley, ‘Is This Tactic Ethical? Biased Judgments of Ethics in Negotiation’ (1999) 21(1) *Basic and Applied Social Psychology* 49.

<sup>142</sup> Goodpaster (n 139).

<sup>143</sup> Jim Mason, ‘How Might the Adversarial Imperative Be Effectively Tempered in Mediation?’ (2012) 15(1) *Legal Ethics* 111.

<sup>144</sup> Rogers et al (n 38).

<sup>145</sup> Wade (n 6).

<sup>146</sup> Scott S Dahl, ‘Stretching the Truth in Negotiations’ (1989) 8 *The Review of Litigation* 173.

<sup>147</sup> *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1

conventions. Lakhani observed that one of the unspoken rules of negotiation is that some tactics, such as puffing and exaggeration, are not to be taken at face value.<sup>148</sup>

The misrepresentation category is conceptually distinct from the previous category because rather than withholding or concealing information, it involves actively putting information forward. The following table sets out tactics in this category:

*Table 2 Information Distortion Tactics*

Distortion of Information
<ol style="list-style-type: none"> <li>1. Misrepresent personal opinion/evaluation of case;<sup>149</sup></li> <li>2. Misrepresent intentions/priorities;<sup>150</sup></li> <li>3. White lies – ‘I cannot accept’, ‘I cannot agree’;<sup>151</sup></li> <li>4. Exaggerated demands;<sup>152</sup></li> <li>5. Bluffing;<sup>153</sup></li> <li>6. Bargaining chips - pretend something is important when it is not;<sup>154</sup></li> <li>7. Use true facts to create a false picture;<sup>155</sup></li> <li>8. Invent allegations without supporting evidence;<sup>156</sup></li> </ol>

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<sup>148</sup> Lakhani ‘The truth about lying as a negotiation tactic: Where business, ethics, and law collide ... or do they?: Part 2’ (2007) 9(7) *ADR Bulletin* 133, 5 citing W Pengielley, ‘But you can’t do that anymore! – The effect of s52 on common negotiation techniques’ (1993) 1 *Trade Practices Journal* 113, also cited in Dr Samantha Hardy and Dr Olivia Rundle, *Mediation for Lawyers* (2010).

<sup>149</sup> Don Peters, ‘When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal’ (2007) 2007 *Journal of Dispute Resolution* 119.

<sup>150</sup> Galanter (n 83).

<sup>151</sup> Gerald B Wetlaufer, ‘The Ethics of Lying in Negotiations’ (1990) 75 *Iowa Law Review* 1219.

<sup>152</sup> Deborah Schmedemann, ‘Navigating the Murky Waters of Untruth in Negotiation: Lessons for Ethical Lawyers’ (2015) 12(October) *Cardozo Journal of Conflict Resolution* 83.

<sup>153</sup> Mark Schoenfield, ‘Strategies and Techniques for Successful Negotiations’ (1983) 69 *American Bar Association Journal* 1226.

<sup>154</sup> Scott Altman, ‘Lurking in the Shadow’ (1994) 68 *Southern California Law Review* 493; Scott R Peppet, ‘Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining’ (2002) 83(7) *Harvard Negotiation Law Review* 83.

<sup>155</sup> Wetlaufer (n 151).

<sup>156</sup> Rivers (n 21).

9. Leave false information lying around for the other side to discover;<sup>157</sup> and
10. Deny/question the other side's true information.<sup>158</sup>

*(b) 'How' of Negotiations: Using the Processes*

The next largest group of tactics related to the 'how' of negotiations. These tactics centre around three main themes: making the process more difficult than it has to be, making gratuitous requests (e.g., asking for something but offering nothing in return) and tactics involving cognitive biases (defined later).

*(i) Make Life Difficult*

Tactics involving making life difficult for the opponent focus on making the process so difficult for the opponent that they would rather concede than continue the negotiation. This includes asking for more data or information than necessary or overwhelming the opponents with data. For example, making too many demands or being obstructionist, unnecessarily disputing issues and making spurious allegations.

These tactics are ambiguous because they can be difficult to distinguish from genuine steps a party might take during negotiations or in litigation. These tactics are summarised in the following table:

*Table 3 Making Life Difficult Tactics*

Make Life Difficult
<ol style="list-style-type: none"> <li>1. Ask for more data/documents/information than necessary;<sup>159</sup></li> <li>2. Inundate the other party with data;<sup>160</sup></li> <li>3. Be obstructionist and difficult with requests;<sup>161</sup></li> <li>4. Dispute issues which ought to be conceded;<sup>162</sup> and</li> </ol>

<sup>157</sup> Robinson, Lewicki and Donahue (n 117).

<sup>158</sup> Ibid.

<sup>159</sup> Wade (n 6).

<sup>160</sup> Ibid.

<sup>161</sup> Richard Lewis, 'Tort Tactics: An Empirical Study of Personal Injury Litigation Strategies' (2017) 37(1) *Legal Studies* 162 <<http://doi.wiley.com/10.1111/lest.12138>>.

<sup>162</sup> Peppet (n 154).

5. Make spurious allegations or claims.<sup>163</sup>

(ii) *Something for Nothing*

Another set of tactics involving the ‘how’ of negotiations is gratuitous requests. The tactics involve trying to get a concession or a benefit without suffering any downside or offering anything in return. This is often done by adding or omitting terms when reducing an agreement to writing.<sup>164</sup> Offering to split the difference is another way to extract concessions from opponents when one has nothing to offer. The final stages of negotiation may also offer the opportunity to extract some minor concessions, similar to when the agreement is reduced to writing. A potentially riskier way of gaining an advantage is accepting the upside of an offer or a proposal while ignoring the downside. It is risky because it could be misleading or lead to further disputes. Examples of tactics in this category are included in the following table:

Table 4 *Gratuitous Requests Tactics*

Something for Nothing
1. When reducing agreement to writing insert additional clauses without negotiation; <sup>165</sup>
2. Split the difference offers; <sup>166</sup>
3. Nibble/one last request/concession after an agreement is reached; <sup>167</sup> and
4. Trollope ploy – pretend to receive only the good parts of the offer. <sup>168</sup>

<sup>163</sup> Wade (n 6).

<sup>164</sup> Eric Zacks, ‘Contract Review: Cognitive Bias, Moral Hazard, and Situational Pressure’ (2015) 9(2) *The Ohio State Entrepreneurial Business Law Journal*.

<sup>165</sup> Michael Meltsner and Philip G Schrag, ‘Negotiating Tactics for Legal Services Lawyers’ (1989) 23 *Clearinghouse Review* 858 <[http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clear23&section=112](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clear23&section=112)>.

<sup>166</sup> Hartje (n 115); Charles B Craver, ‘Classic Negotiation Techniques’ (2016) 52(2) *Idaho Law Review* 425.

<sup>167</sup> Craver, ‘Classic Negotiation Techniques’ (n 166); Goodpaster (n 139).

<sup>168</sup> Hartje (n 115).

(iii) *Taking Advantage of Cognitive Biases*

A subtle way of gaining an advantage involves using an opponent's cognitive biases. Rhode et al conceptualised the use of cognitive biases as negotiation tactics.<sup>169</sup> The concept of 'cognitive biases' refers to a set of mental shortcuts that individuals tend to make on a subconscious level. Because they are common to all, people can be pushed into taking these shortcuts instead of using rational thinking to identify what is in their best interests.

These tactics are ethically ambiguous because, at face value, there appears to be nothing unethical about the conduct involved in using such tactics. The tactics in this category include making early offers with items of personal value, framing requests for concessions against the magnitude of the whole negotiation and making multiple simultaneous offers. However, studies have shown that these techniques can have a surprisingly large impact on the outcomes.<sup>170</sup> These tactics are, therefore, likely to lead the opponents into a miscalculation or error, rendering them conceptually similar to 'misleading conduct' under the Australian Consumer Law. These tactics are summarised in the following table.

*Table 5 Cognitive Bias Tactics*

Taking Advantage of Cognitive Biases
<ol style="list-style-type: none"><li>1. Make early offers with items of personal value to the negotiator or his/her client;<sup>171</sup></li><li>2. Frame proposals in terms of what the other side will lose if they decline a proposal, instead of stating the proposal in terms of what the other side will gain if they accept it;<sup>172</sup></li><li>3. When asking for a concession, frame the concession against the larger magnitude of the whole matter;<sup>173</sup></li><li>4. Make early proposals which include only concessions of low objective value to use as negotiating chips in later parts of the negotiation;<sup>174</sup></li><li>5. In a proposal, offer two or more small gains instead of one gain of equal magnitude, or, in reverse, when seeking concessions, bundle the requests as one rather than seeking multiple smaller concessions;<sup>175</sup></li></ol>

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<sup>169</sup> Rhode, Schönbohm and van Vliet (n 34).

<sup>170</sup> Ibid.

<sup>171</sup> Rhode, Schönbohm and van Vliet (n 34).

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

6. Make the other party invest more time and resources in the negotiation than necessary;<sup>176</sup>
7. Include another fake option (the decoy) when presenting two options to choose from in order to increase the probability that the more desired one will be chosen;<sup>177</sup> and
8. Divert attention from real goals.<sup>178</sup>

This category was difficult to categorise in the course of the thematic analysis because it overlapped with many other categories. This prompted me to consider whether it should be kept as a standalone category. For example, the tactic of making the other party invest more time and resources in a negotiation overlaps with the category of ‘making life difficult’. Including a fake option and diverting attention overlap with ‘distortion of information’ tactics. However, ‘cognitive biases’ was kept as a separate category because of the conceptually unique mechanisms and logic underpinning such tactics.

### *(c) ‘Who’ of Negotiations: The People Factor*

The third most common type of tactics in the literature, under the heading of ‘who’ of negotiations, were addressed at the individuals involved in negotiations. After the data was cleaned, there were 19 tactics in this category. They were grouped around four conceptually distinct themes:

1. Team composition;
2. Empathy;
3. Emotions; and
4. Settlement instructions/authority.

#### *(i) Team Composition*

Tactics relating to team composition revolved around changing the number or roles of negotiators. They included changing negotiators, having more people in the negotiation to physically outnumber the opponents and the good cop/bad cop routine. The good cop/bad cop tactic is often seen in police movies. It involved one negotiator on the team acting friendly and the other acting aggressively towards the opponent. This is designed to throw off

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<sup>176</sup> Roger J Volkema, *The Negotiation Toolkit* (1999); Rhode, Schönbohm and van Vliet (n 34).

<sup>177</sup> Peters (n 149); Rhode, Schönbohm and van Vliet (n 34).

<sup>178</sup> Goodpaster (n 139); Rivers (n 21).

the opponent and encourage their cooperation via the friendly ‘cop’. The tactics in this category are listed in Table 6 below.

*Table 6 Team Composition Tactics*

Team Composition
<ol style="list-style-type: none"> <li>1. Change negotiators;<sup>179</sup></li> <li>2. Have more people on the team than necessary to outnumber the other party;<sup>180</sup> and</li> <li>3. Good cop/bad cop.<sup>181</sup></li> </ol>

(ii) *Empathy*

Another category of tactics that was identified is the tactics designed to generate empathy in the opponent. This includes flattery, pretending to care about the opponent and even bypassing an ‘unhelpful’ negotiator to communicate directly with their client. The last tactic in this list has been somewhat curtailed for the legal profession, as lawyers are generally prohibited from contacting clients represented by other lawyers. However, there is no express prohibition against using client-to-client communications to circumvent this rule. In some negotiation settings, such as commercial transactions, client-to-client communications are likely to be ongoing and integral to the overall process.

This category is distinct from the next category ‘emotions’ because in this category the focus is on trying to ingratiate oneself with the opponents and treat them in a positive manner, whilst in the last category, the focus is on the negotiator displaying a particular type of emotional behaviour. This distinction becomes salient in the context of the rules of professional conduct. The rules require lawyers to be courteous to others irrespective of the lawyers’ true attitude. The tactics in this category are listed in the following table.

*Table 7 Empathy Tactics*

Empathy Tactics
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<sup>179</sup> Besch (n 56); Rivers (n 21).

<sup>180</sup> Meltsner and Schrag (n 165); Hartje (n 115).

<sup>181</sup> Hartje (n 115); Goodpaster (n 139).

1. Pretend to care about the other negotiator/party;<sup>182</sup>
2. Pretend to like what they say;<sup>183</sup>
3. Flattery;<sup>184</sup> and
4. Talk directly to the other party by passing an ‘unhelpful’ negotiator.<sup>185</sup>

(iii) *Emotional Expressions*

The literature revealed a range of tactics involving emotions, ranging from displays of aggression or craziness at one end of the spectrum to being poker-faced on the other. A common theme across this class of tactics is conveying a response or an emotion that is not genuine. In other words, this category of tactics involves a degree of deception.

*Table 8 Emotion Tactics*

Emotion Tactics
<ol style="list-style-type: none"> <li>1. Act poker-faced;<sup>186</sup></li> <li>2. Act disappointed;<sup>187</sup></li> <li>3. Act dumb/incompetent;<sup>188</sup></li> <li>4. Pretend to be disgusted at what the opponent said;<sup>189</sup></li> <li>5. Get the client to act crazy – ‘mad dog client’;<sup>190</sup></li> </ol>

<sup>182</sup> Ingrid Smithey Fulmer, Bruce Barry and D Adam Long, ‘Lying and Smiling: Informational and Emotional Deception in Negotiation’ (2009) 88(4) *Journal of Business Ethics* 691.

<sup>183</sup> Chris Guthrie, ‘Principles of Influence in Negotiation’ (2003) 87 *Marquette Law Review* 829.

<sup>184</sup> Volkema (n 176); Asuman Akgunes and Robert Culpepper, ‘Negotiations Between Chinese and Americans: Examining the Cultural Context and Salient Factors’ (2012) 7(1) *The Journal of International Management Studies* 191 <[http://www.jimsjournal.org/21 Robert Culpepper-2.pdf](http://www.jimsjournal.org/21%20Robert%20Culpepper-2.pdf)>.

<sup>185</sup> Lewicki and Stark (n 58); Wade (n 6).

<sup>186</sup> Rivers (n 21).

<sup>187</sup> Fulmer, Barry and Long (n 182); Se Hyung Oh, ‘Does Content of Concessions Matter in Negotiation? Match between Concession Strategy and Target’s Regulatory Focus’ (Vanderbilt University, 2012).

<sup>188</sup> Volkema (n 176).

<sup>189</sup> Fulmer, Barry and Long (n 182); Rivers (n 21).

<sup>190</sup> Hartje (n 115).

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|---|
| <ol style="list-style-type: none"> <li>6. Act irrationally/crazy;<sup>191</sup> and</li> <li>7. Pretend to be angry or aggressive.<sup>192</sup></li> </ol> |
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#### 4. Settlement instructions/authority

This sub-category of tactics involves using the negotiator's authority to settle or bind a party to gain an advantage. Such tactics involve purposefully limiting one's settlement instructions, having the client reject a settlement or keeping the client in the dark in order to extract a better settlement.

The aim of such tactics appears to be to use the limits of authority to either extract concessions or create the impression that it is impossible for the opponent to secure a better outcome than offered, even where this is not true. Likewise, lawyers might hide the progress of negotiations from the client in an effort to extract a better outcome if they believe that the client might concede too easily. Tactics in this category are included in the following table.

*Table 9 Settlement Instructions/Authority Tactics*

<u>Settlement Instructions/Authority</u>
<ol style="list-style-type: none"> <li>1. Purposefully obtain limited settlement authority;<sup>193</sup></li> <li>2. Go into a negotiation without a settlement authority;<sup>194</sup></li> <li>3. Have the client reject the agreement reached by negotiators;<sup>195</sup></li> <li>4. Misrepresent own settlement authority;<sup>196</sup> and</li> </ol>

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<sup>191</sup> Craver, 'Classic Negotiation Techniques' (n 166); Meltsner and Schrag (n 165).

<sup>192</sup> Goodpaster (n 139); Craver, 'Classic Negotiation Techniques' (n 166); Ole Christer H Lund et al, 'Tactics of Hierarchy Negotiation' (2007) 41(1) *Journal of Research in Personality* 25.

<sup>193</sup> Besch (n 56); Charles B Craver, 'The Benefits to Be Derived from Post-Negotiation Assessments' [2012] (464) *GW Law Faculty Publications & Other Works*.

<sup>194</sup> Hartje (n 115); Meltsner and Schrag (n 165); Krivis (n 140).

<sup>195</sup> Meltsner and Schrag (n 165).

<sup>196</sup> Ibid; Paul F Kirgis, 'Hard Bargaining in the Classroom: Realistic Simulated Negotiations and Student Values' (2012) 28(1) *Negotiation Journal* 93; Art Hinshaw, Peter Reilly and Andrea Kupfer Schneider, 'Attorneys and Negotiation Ethics: A Material Misunderstanding?' [2013] (July) *Negotiation Journal* 265.

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|---|
| 5. Hide progress of negotiation from the client. <sup>197</sup> |
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(d) *'When' of Negotiations: Timing Tactics*

Timing tactics received surprisingly little attention in the literature. Once the data was cleaned and de-duplicated, I identified nine distinct timing tactics. Conceptually, these could be divided into two types: (1) using time to put pressure on the opponents and (2) delay.

The first category of tactics involves setting time limits on offers or other steps, timing steps around strategic events such as holidays or board meetings. These tactics are included in the following table.

Table 10 Timing Pressure Tactics

Timing Pressure
<ol style="list-style-type: none"> <li>1. Put short time limits on offers;<sup>198</sup></li> <li>2. Impose arbitrary deadlines;<sup>199</sup></li> <li>3. Leave responses till the last moment/just before deadlines;<sup>200</sup></li> <li>4. Time negotiations strategically e.g. around holidays, important board meetings, other events;<sup>201</sup> and</li> <li>5. Speed up process/trial.<sup>202</sup></li> </ol>

The other type of timing tactic is the opposite: it involves slowing down the process and delay. Examples of this tactic range from acting as if there was no hurry to acting slowly to deliberately taking steps to slow down the process. A difficulty with this tactic is that it is conceptually similar and overlaps with the tactic of making life difficult for the opponents.

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<sup>197</sup> Robinson, Lewicki and Donahue (n 117).

<sup>198</sup> Guthrie (n 183).

<sup>199</sup> Hartje (n 115).

<sup>200</sup> Besch (n 56).

<sup>201</sup> Lewis (n 161).

<sup>202</sup> Stephen M Garcia, John M Darley and Robert J Robinson, 'Morally Questionable Tactics: Attorneys and Public Defenders' (2009) 27 *Personality and Social Psychology Bulletin* 731.

However, while the tactics may overlap, one could be used without the other. Delay may be used to make life difficult for the opponents; however, it could also make their life easier. Tactics of this type are set out in the following table.

*Table 11 Delay Tactics*

Delay
<ol style="list-style-type: none"> <li>1. Pretend not to be in a hurry;<sup>203</sup></li> <li>2. Delay concessions to make them appear more valuable;<sup>204</sup></li> <li>3. Set aside more time than required for negotiations;<sup>205</sup> and</li> <li>4. Cause extensions/delay.<sup>206</sup></li> </ol>

*(e) ‘Why’ of Negotiations: External Leverage/Threats*

There have been relatively few references in the literature to tactics involving threats and external leverage. I included a reference to ‘external leverage’ in the name of this category to take into account these different variations on ‘threats’. Threats can be directed at a range of targets: the opponent’s client, the opponent’s lawyer or their respective families or associates. Threats can be made in a number of ways so as not to appear as threats. For example, veiled threats could be made in the form of mentioning issues, warnings or putting the opponent on notice. A common theme in this category appears to be using something that is outside of the scope of negotiations to gain an advantage in the negotiation. This is commonly described as ‘external leverage’.

The examples of threats identified in the literature are set out in the following table.

*Table 12 Threats/Use of External Leverage Tactics*

Threats/Use of External Leverage
<ol style="list-style-type: none"> <li>1. Warn/put the other party on ‘notice’ of what harm may come to them (reputation, regulatory investigation, other related proceedings);</li> </ol>

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<sup>203</sup> Lewicki and Stark (n 58); Wade (n 6).

<sup>204</sup> Oh (n 187).

<sup>205</sup> Rhode, Schönbohm and van Vliet (n 34).

<sup>206</sup> Lewis (n 161); Volkema (n 176); Wade (n 6).

2. Threaten the other party with harm (reputation, regulatory investigation, other related proceedings);<sup>207</sup>
3. Threaten the other party with using personal information against them if they do not concede;<sup>208</sup>
4. Escalate to the other negotiator's boss;<sup>209</sup> and
5. Threaten the other negotiator/lawyer with regulatory complaint.<sup>210</sup>

(f) *'Where' of Negotiations: Location, Location, Location*

The least frequently mentioned type of tactic involves manipulating the location to unsettle or wear down the opponents to gain an advantage in negotiations. An interesting finding was that this type of tactic was only referenced in the context of US Army negotiators<sup>211</sup> and lawyers.<sup>212</sup>

The use of location for advantage is conceptually similar to the category of gratuitous requests because one party is likely to gain an advantage with no gain to the other party. The literature refers to negotiating on own turf and making the opponents physically uncomfortable. These examples are set out in the following table:

Table 13 Location Tactics

Use Location
<ol style="list-style-type: none"> <li>1. Negotiate on your own turf;<sup>213</sup></li> <li>2. Use a thermostat/air-conditioner to make the other negotiators uncomfortable.<sup>214</sup></li> </ol>

<sup>207</sup> Lewicki and Stark (n 58).

<sup>208</sup> Ibid; Rivers (n 21).

<sup>209</sup> Besch (n 56).

<sup>210</sup> Terry Carter, 'Ethics by the Numbers: Many Lawyers Have Been Asked by Clients or Other Lawyers to Violate Conduct Rules, Survey Suggests' (1997) 83(10 (October)) *American Bar Association Journal* 97.

<sup>211</sup> Besch (n 56).

<sup>212</sup> Hartje (n 115).

<sup>213</sup> Meltsner and Schrag (n 165).

<sup>214</sup> Hartje (n 115); Besch (n 56).

## E *Summary*

This Chapter started by exploring what is meant by an EANT and developing the following definition of an EANT for the purposes of this thesis:

an act or omission, used deliberately to gain an advantage in legal negotiations which is:

- open to various interpretations;
- is of doubtful or uncertain nature; or
- lacks clarity or definiteness

according to the general moral principles by which such acts or omissions may be judged good or bad, right or wrong.

This Chapter responded to the call of previous authors for the development of a comprehensive catalogue of EANTs. It developed a definition of EANTs and search criteria that were used in a systematic search of prior literature. The search results consisted of 75 tactics which were then thematically analysed to distil the identified EANTs into six major types and subdivided into 13 sub-categories (see Table 14)

*Table 14 Summary of Tactic Types*

<p><b>What</b></p> <ol style="list-style-type: none"> <li>1. Concealing information</li> <li>2. Distortion of information</li> </ol> <p><b>How</b></p> <ol style="list-style-type: none"> <li>3. Making life difficult</li> <li>4. Gratuitous requests</li> <li>5. Use of cognitive biases</li> </ol> <p><b>Who</b></p> <ol style="list-style-type: none"> <li>6. Team composition</li> <li>7. Empathy</li> <li>8. Emotions</li> <li>9. Settlement instructions/authority</li> </ol>	<p><b>When</b></p> <ol style="list-style-type: none"> <li>10. Timing pressure</li> <li>11. Delay</li> </ol> <p><b>Why</b></p> <ol style="list-style-type: none"> <li>12. Threats/external leverage</li> </ol> <p><b>Where</b></p> <ol style="list-style-type: none"> <li>13. Location</li> </ol>
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The literature revealed a wide range of EANTs comprised of 75 conceptually distinct tactics. It was not possible to organise all identified tactics by reference to more recent inventories of tactics, largely due to the fact that, as suggested by prior researchers, much research focused on deception-based tactics. However, my research confirms that many EANTs do not involve

deception. I resolved this challenge by developing a bespoke catalogue. I organised the catalogue by reference to the 5W and H framework (What, Why, When, Who, Where and How). This framework traces its origins to Aristotle, who claimed that it could be used to evaluate moral aspects of any given situation.

In the next Chapter I will examine the Australian Solicitors Conduct Rules to see to what extent the Rules provide guidance on whether lawyers can use the EANTs.

# CHAPTER 2 - EANTs AND THE AUSTRALIAN SOLICITORS' CONDUCT RULES: ROOM FOR AMBIGUITY?

## A *Introduction*

This Chapter examines what can be learned about lawyers' approach to EANTs from the professional conduct rules. The rules have been developed by the legal profession for the legal profession. They have been recognised as the primary site of articulated ethical obligations of the profession.<sup>215</sup> Their 'primacy' suggests that the rules would be an authoritative source on the issue. The rules are also held out as 'the written expression of the collective judgment of the profession about the standards its members must voluntarily comply with'.<sup>216</sup> As an expression of the collective judgment, the rules can be expected to provide insights into the profession's approach to EANTs. Finally, Australian Solicitors' Conduct Rules ('the Rules'),<sup>217</sup> as a single written document, lend themselves to being studied. However, the Rules also occupy a nuanced and evolving epistemological and ontological niche. The rules are not a comprehensive code. They operate in a complex environment influenced by common law, other laws and broader developments within and outside the profession. This requires careful consideration in order to properly understand what can be learned from them.

Part B establishes the context and the role of the Rules by charting their evolution, as well as key developments within and outside the profession. Part C and subsequent parts focus on the substance of the Rules.

## B *The Evolution of the Rules*

The introduction of formal written rules of professional conduct is a relatively recent phenomenon for Australian lawyers. It has attracted some controversy and overlapped with

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<sup>215</sup> Australian Law Reform Commission Report 115, *Managing Discovery: Discovery of Documents in Federal Courts* (2011) [12.66].

<sup>216</sup> Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules* (2018) 29.

<sup>217</sup> In this thesis capitalised 'Rules' refers to the *Australian Solicitors Conduct Rules*, whereas lower case 'rules' is used in its generic sense to refer to all rules.

the changes in how the legal profession operated, particularly the rise of ‘alternative dispute resolution’ and negotiations more broadly. To understand the evolving nature of the rules, one must understand their context.

## 1 *Not to be Found in Writing*

Lawyers in Australia have, for a long period of time have been governed by common law and unwritten rules. The introduction of the formal written rules is a relatively recent phenomenon. As the rules apply in addition to common law and unwritten rules, it is important to understand how they interact. As I will discuss in greater detail in Part D, the rules developed in Australia do not represent a comprehensive re-statement of the common law. In fact, they leave much to the common law, see particularly Table 16 in Part D. There was even a concern that ‘ethics cannot be reduced to rules’ and that trying to do so would have undesirable consequences, starting with spiritless compliance and ending with skilful evasion.<sup>218</sup>

Additionally, it is important to understand the fundamental principles that underpin the legal framework. There is an implied contradiction between reliance on the common law on the one hand and on the unwritten rules on the other. Reliance on the unwritten rules seems to be inconsistent with some of the basic principles of the common law legal tradition. A fundamental principle that Australia has adopted from England is that everything that is not prohibited, is permitted. For example, Chief Justice of Australia Robert French cited *ex curia* the following passage from a judgment given in 1995 by the eminent English jurist Sir John Laws:

For private persons, the rule is you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions.<sup>219</sup>

The notion that one should be able to do anything (for example, use any tactic) that is not expressly prohibited by the law, is reinforced by the principle that individuals should not be

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<sup>218</sup> Gerard Brennan, ‘Ethics and the Advocate’ in *Bar Association of Queensland, Continuing Legal Education Lectures No. 9/92 - 3 May 1992* (1992). Notably, this quote, which seemingly suggests that the rules are impossible to draft and may lead to undesirable consequences, was cited in introduction to the Australian Solicitors Conduct Rules by Queensland Law Society ‘ASCR’ online <http://ethics.qls.com.au/content/ascr.html> and Law Institute Victoria <https://www.liv.asn.au/LIV-Home/Practice-Resources/Law-Institute-Journal/Archived-Issues/LIJ-October-2014/A-solicitor-s-duty--The-Victorian-Solicitor-s-Conduct-Rules>

<sup>219</sup> Robert French, ‘Rights and Freedoms and the Rule of Law’ in *Victorian Law Foundation Oration* (2017) 14 citing *R v Somerset County Council; ex parte Fewings* [1995] 1 All ER 513, 523.

punished for conduct that was not prohibited at the time it was committed. The principle can be traced to Roman law, where it was known through the maxim of *nulla crimen, nulla poena sine lege*, or ‘no crime, no punishment without law’.<sup>220</sup> This principle can be found in Magna Carta, which prohibited persecution of a person ‘except by the lawful judgement of his peers and by the law of the land,’<sup>221</sup> and in modern statutes, such as Section 4 of the *Criminal Code 1913* (WA). The principle has important practical implications. As Thomas Hobbes wrote in *Leviathan*, ‘harm inflicted for a fact done before there was a law that forbade it, is not punishment, but an act of hostility: for before the law, there is no transgression of the law.’<sup>222</sup> Thus, at least in theory, lawyers should not be punished for conduct which does not violate any known laws.

These principles appear to be inconsistent with the legal profession’s reliance on unwritten rules. If the rules are not written, how can they be known?<sup>223</sup> If they are not known, how can they be enforced? Presumably lawyers cannot then be punished for transgressions. The inconsistency can be resolved by reference to two assumptions: first, that lawyers know and understand the rules even if the rules are not in writing, and second, that, in any event, enforcement of such rules is not punishment.

Both of these principles were applied in the High Court judgment in *Clyne’s case*,<sup>224</sup> which is discussed in greater detail in Chapter 3. That case was focused to the conduct of a barrister, but the principles are of general application to all lawyers. In that case, in relation to the unwritten rules, the Court noted that many fundamental rules are not to be found in writing and writing is not necessary because ‘they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness’.<sup>225</sup> To further reinforce the point, the Court stated that ‘[T]o the Bar in general it is more a matter of "does

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<sup>220</sup> See eg a discussion of this principle in Australia in the context of retrospective laws in part 9 of Australian Law Reform Commission Interim Report 127, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (2015).

<sup>221</sup> Ibid at [9.4] citing Ben Juratowitch, *Retroactivity and the Common Law* (Bloomsbury Publishing, 2008) 28 and noting that this clause is more concerned with placing limits on the exercise of executive power.

<sup>222</sup> Ibid, citing Thomas Hobbes, *Leviathan* (Oxford University Press 1996, 1651) 207.

<sup>223</sup> Parke (n 16).

<sup>224</sup> *Clyne v New South Wales Bar Association* [1960] HCA 40; 104 CLR 186.

<sup>225</sup> Ibid [22].

not" than of "must not."<sup>226</sup> There is therefore an implied assumption that lawyers just know how far they can go as a matter of professional responsibility.

*Clyne's* case also explains how lawyers can be disciplined for violating such unwritten rules. In that case, the lawyer whose conduct was in question, was not aware that any transgression of the rules was committed.<sup>227</sup> Nonetheless, he was punished by what could be considered the most severe penalty in respect of a member a professional association: losing such membership through disbarment. In practical terms, it would mean loss of ability to practice the profession and to make a living from it. However, the High Court clarified that such an outcome should not be considered a penalty and emphasized that a disbarring order is in no sense punitive in character.<sup>228</sup> Rather, the Court characterised it as an order made for the protection of the public.<sup>229</sup> Thus, while a breach of the unwritten rules might appear to be inconsistent with the fundamental principles of the Australian legal tradition, this inconsistency seems to have been resolved by assuming that such unwritten rules are known and that those who breach those are disciplined not as individual punishment, but to protect the public at large.

While these assumptions seem to resolve theoretical inconsistencies, they were not universally accepted. The next section outlines the profession's journey to the introduction of written rules. Further, this research project will return to the assumption that lawyers know and understand how to behave in Chapter 3-6, which explore whether it bears out in negotiations in practice by reference to specific case examples and broader studies of lawyers.

## 2 *Towards National Model Rules*

While provision of guidance on the issue of professional ethics and conduct has been considered to be one of the hallmarks of a profession, in Australia, the development of the rules in Australia seems to have been forced onto the profession, rather than initiated by it.

Australian lawyers were late in adopting formal rules. In 1982 the Law Reform Commission of New South Wales noted that in contrast to the UK and in the USA, there were no rules or codes for lawyers in Australia yet that 'the law and the work of lawyers was becoming more

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<sup>226</sup> Ibid.

<sup>227</sup> Ibid [20].

<sup>228</sup> Ibid [23].

<sup>229</sup> Ibid.

complex,' necessitating development of such rules.<sup>230</sup> This can be contrasted with the situation in the United States, where, at the same time, the American Bar Association ('ABA') was already going through a second revision of its national model rules.<sup>231</sup> The first set, known as the Canons of Professional Ethics was promulgated ABA, in 1908.<sup>232</sup> The aim of the revision was to develop the rules into a code that would assist 'an individual lawyer with a busy practice' and make the rules of ethical lawyering more understandable and answers easier to find.<sup>233</sup> A corollary goal was also to reduce the need for lawyers to sift through multiple sources of law in order to identify what rules apply.<sup>234</sup> An interesting feature of this process is that in the USA, by 1982, the standards of conduct in negotiation had already become a controversial topic.<sup>235</sup> For example, the initial drafts proposals went as far as to include provisions requiring lawyers to be 'fair in negotiations,'<sup>236</sup> though these were met by stern resistance.<sup>237</sup> Similarly what was happening in the USA, the Law Reform Commission of New South Wales recommended the development of 'an authoritative indication of what good practice requires'.<sup>238</sup> However, the Law Society of New South Wales rejected this recommendation. The Law Society considered such rules unnecessary on the basis that:

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<sup>230</sup> Ibid

<sup>231</sup> Ibid.

<sup>232</sup> See eg discussion of background and detail in Michael Ariens, 'The Last Hurrah: The Kutak Commission and the End of Optimism' (2016) 49(4) *Creighton Law Review* 689 <<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=117995120&site=ehost-live&scope=site>>.

<sup>233</sup> The ABA Commission on Evaluation of Professional Standards, 'Report 101 to House of Delegates' (1982 Midyear Meeting) accessible online at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/kutak\\_2-82.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_2-82.pdf)

<sup>234</sup> Ibid, referring to having to search 'through numerous Canons, Ethical Considerations and Disciplinary Rules to ascertain the proper course of conduct'.

<sup>235</sup> See eg Ariens (n 232) 715; James J White, 'Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation' (1980) 5(4) *American Bar Foundation Research Journal* 926; Carrie Menkel-Meadow, 'The Evolving Complexity of Dispute Resolution Ethics' (2017) 30 *The Georgetown Journal of Legal Ethics* 389; Rex R Perschbacher, 'Regulating Lawyers' Negotiations' (1985) 27 *Arizona Law Review* 75.

<sup>236</sup> Ariens (n 232) 715..

<sup>237</sup> Ibid, 715.

<sup>238</sup> NSW Law Reform Commission 'Report 32 - Second Report On The Legal Profession: Complaints, Discipline And Professional Standards' (1982) [22.57].

the standards of conduct expected of a solicitor are well known and understood by the members of the profession and basically by the public at large.<sup>239</sup>

This response seems to be in line with the assumption highlighted in the previous section. It is a response that in one form or another would appear time and again in response to calls for additional guidance for lawyers.

A decade later, the New South Wales Law Reform Commission again called for the introduction of professional conduct rules for lawyers.<sup>240</sup> The Commission again observed that New South Wales lawyers lagged behind their counterparts in other jurisdictions, and considered there to be a ‘pressing need’ for modern codes of ethics and practice.<sup>241</sup> This was echoed in contemporary commentary. For example, Parke examined the ethical standards, or rather ‘lack thereof’, governing negotiation procedures involving lawyers.<sup>242</sup> Parke asked rhetorically how could lawyers be expected to know what the rules are, if they were not to be found in writing.<sup>243</sup> To further drive the point, Parke provided examples of legal negotiation teaching texts which advocated use of tactics such as undermining opponents by commenting on their age or experience, making extreme or ridiculous offers, putting on emotions and even subjecting opponents to ‘long periods of physical and mental strain’.<sup>244</sup> This seemed to suggest that lawyers might be engaging in ethically ambiguous and worse conduct.

However, it was not the persuasive force of these arguments nor a desire to help lawyers navigate ethical challenges, but the threat of legislative intervention, that ultimately led to the introduction of the New South Wales Solicitors Rules of Professional Conduct.<sup>245</sup> According to Parker, the mounting pressure, driven largely by consumer protection concerns, ‘coaxed, cajoled and often forced the legal profession in New South Wales into

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<sup>239</sup> Gino Dal Pont, ‘Regulation of the Queensland Legal Profession: The Quinquennium of Change’ (2009) 28(2) *The University of Queensland Law Journal* 183, 194 citing M Sexton and L W Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (1982), 169.

<sup>240</sup> New South Wales Law Reform Commission, *Scrutiny of the Legal Profession: Complaints against Lawyers*, vol 70 (1993).

<sup>241</sup> NSW Law Reform Commission, *Scrutiny of the Legal Profession DP26* (1992) [3.90]; New South Wales Law Reform Commission (n 240) [3.90].

<sup>242</sup> Parke (n 16).

<sup>243</sup> *Ibid* 223.

<sup>244</sup> *Ibid* 221-222 citing a book by an Australian barrister and solicitor Paul McCarthy, ‘Developing Negotiating Skills and Behaviour’ (1989) 9

<sup>245</sup> Christine Parker, ‘Justifying the New South Wales Legal Profession 1976 to 1997’ (1997) 2(2) *Newcastle Law Review* 1.

significant reforms'.<sup>246</sup> As a result, in 1994, the Law Society of New South Wales introduced its first set of professional conduct rules. This coincided with a national push for the uniformity in the regulation of the legal profession across Australia.<sup>247</sup> Shortly thereafter, the Law Council of Australia, which represents all state and territory law societies and bar associations across Australia, introduced national model rules of professional conduct in 1995.<sup>248</sup> These national model rules were largely based on the rules introduced in New South Wales.<sup>249</sup> It is not surprising that these model rules, which, to adopt Parker's description appear to have been 'coaxed and cajoled' out of a legal profession, had certain limitations, particularly when it came to lawyer negotiations.

### 3 *Paradigm Shifts: Towards Negotiation and Away from Adversarialism*

This period, when the profession's unwritten standards crystallised into formal rules that would become model in Australia, overlapped with two other paradigm shifts related to the legal profession in Australia. These changes, represented by a shift from litigation to negotiation and a retreat from adversarialism, appear to have been gradual.

The recognition that negotiation is the predominant way of resolving disputes can be traced back at least to the 1990s. The requirement for the parties to try to negotiate before they file disputes started to be increasingly incorporated into various statutes.<sup>250</sup> In 1996, the change was acknowledged by the then Chief Justice of the High Court of Australia, Sir Gerard Brennan, who said that 'the full-scale trial can no longer be regarded as the paradigm method of dispute resolution', having been replaced by private agreements.<sup>251</sup> This was also apparent from the submissions to the ALRC in 1999, which noted a 'cultural shift' to embrace alternative means of dispute resolution.<sup>252</sup> The shift was also embraced by the government authorities, who recognised the efficiencies it brought to the entire system of administration of justice.<sup>253</sup> These developments were similar to those in other jurisdictions. For example,

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<sup>246</sup> Ibid 6.

<sup>247</sup> Kelli Longworth, *National Legal Profession Reform* (2011) 2.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

<sup>250</sup> Australian Law Reform Commission DP62, *Review of the Federal Civil Justice System* (1999) [5.97].

<sup>251</sup> Gerard Brennan, 'Key issues in judicial administration' (1996) 6 *Journal of Judicial Administration* 138, 139-140.

<sup>252</sup> Australian Law Reform Commission Report 89 (n 12) [6.56].

<sup>253</sup> Ibid [6.55].

the ALRC cited Mark Galanter, who coined the term 'litigotiation' to recognise the changing nature of lawyers' work in the USA.<sup>254</sup> Genn recognised similar patterns in the UK.<sup>255</sup> More recently, the then Chief Justice of Western Australia, suggested that reference to negotiation as an 'alternative' means of dispute resolution is a 'misnomer' since they are by no means alternative—they are the primary means of dispute resolution.<sup>256</sup> Thus, there has been a paradigm shift in how the profession operates, from lawyers as litigators to lawyers as negotiators.

Another paradigm shift is the gradual retreat from the profession's traditional adversarialism driven by the duty to the client to a more tempered approach. An early and vivid expression of adversarialism can be found in a speech by Lord Brougham, counsel for Queen Caroline. The speech was given in the early nineteenth century:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.<sup>257</sup>

There has been a retreat from this position, although the precise limits of where lawyers can stop are difficult to identify. For example, the change can be noted in the case of *Chamberlain* (discussed in detail in the next Chapter), where one of the judges referred to a shift in 'a forensic culture which still tolerates, if it no longer encourages, procedural manoeuvre and the taking advantage of an opponent's error'.<sup>258</sup> This statement reflects the changes in culture which 'still' tolerate, but, it is implied at some point will no longer tolerate procedural manoeuvre. In a similar vein, a prominent Australian judge, Michael Kirby, whose career spanned the New South Wales Court of Appeal and the High Court of Australia, in 1987 referred to the courts' 'growing distaste for the resolution of substantive disputes

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<sup>254</sup> Ibid [6.57] citing Marc Galanter, 'The Federal Rules and the quality of settlements: A comment on Rosenberg's, "The Federal Rules of civil procedure in action"' (1989) 137 *University of Pennsylvania Law Review* 2231, [2233.]

<sup>255</sup> See eg Wayne Martin, 'Alternative Dispute Resolution - A Misnomer?' in *Australian Disputes Centre ADR Address* (2018) citing Hazel Genn, *Judging Civil Justice* (2010).

<sup>256</sup> Ibid.

<sup>257</sup> Proceedings in the House of Lords: Trial of Queen Caroline (Duncan Stevenson & Co., 1820 ed), vol 2, 7 cited in David A Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 83.

<sup>258</sup> *Chamberlain v the Law Society of the Australian Capital Territory* (1993) 43 FCR 148 per Jenkinson J at [5]

otherwise than on the substantive merits'.<sup>259</sup> This suggests an increasing trend against the use of tactics unrelated to the merits of the case.

Manifestations of this trend can also be seen in legislation. For example, *Industrial Relations Act 1988* (Cth) and *Native Title Act 1993* (Cth) introduced a requirement for parties to negotiate in good faith.<sup>260</sup> While that legislation did not define the meaning of this term, in *Western Australia v Taylor* (1996) 134 FLR 211 drew on US and Australian case law and legislation to develop an extensive set of criteria to determine what might constitute bad faith, as set out in the following table:

*Table 15 Indicia of Bad Faith in Negotiations based on Western Australia v Taylor.*

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| <ul style="list-style-type: none"><li>(i) unreasonable delay in initiating communications in the first instance;</li><li>(ii) failure to make proposals in the first place;</li><li>(iii) the unexplained failure to communicate with the other parties within a reasonable time;</li><li>(iv) failure to contact one or more of the other parties;</li><li>(v) failure to follow up a lack of response from the other parties;</li><li>(vi) failure to attempt to organise a meeting between the native title and grantee parties;</li><li>(vii) failure to take reasonable steps to facilitate and engage in discussions between the parties;</li><li>(viii) failing to respond to reasonable requests for relevant information within a reasonable time;</li><li>(ix) stalling negotiations by unexplained delays in responding to correspondence or telephone calls;</li><li>(x) unnecessary postponement of meetings;</li><li>(xi) sending negotiators without authority to do more than argue or listen;</li><li>(xii) refusing to agree on trivial matters eg a refusal to incorporate statutory provisions into an agreement;</li><li>(xiii) shifting position just as agreement seems in sight;</li></ul> |
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<sup>259</sup> Ipp (n 257)80 citing Kirby P in *Clayton Robard Management Ltd v Siu* (1987) 6 ACLC 57.

<sup>260</sup> See eg section 170QK(2) of *Industrial Relations Act 1988* (Cth) and s.31(1)(b) of *Native Title Act 1993* (Cth).

- (xiv) adopting a rigid non-negotiable position;
- (xv) failure to make counter proposals;
- (xvi) unilateral conduct which harms the negotiating process eg issuing inappropriate press releases;
- (xvii) refusal to sign a written agreement in respect of the negotiation process or otherwise;
- (xviii) failure to do what a reasonable person would do in the circumstances.

The ALRC recommended adopting this standard for lawyers in Report 89.<sup>261</sup> However, the profession seemed to be against it. The Law Council made a submission against such change because of a concern that good faith is ‘unclear and unrealistic’.<sup>262</sup> The ALRC maintained its recommendation for a good faith standard as its meaning could be clarified, citing *Western Australia v Taylor* (1996) 134 FLR 211 as an example.<sup>263</sup> A peculiar aspect of the Law Council’s submission is that it proposed incorporating another relatively recent development in Australian law: a prohibition against misleading and deceptive conduct.<sup>264</sup> That prohibition applies to all entities engaged in trade and commerce.<sup>265</sup> The submission is peculiar in that regard because not only was that requirement incorporated into any rules of professional conduct, but there has been a series of cases where lawyers successfully argued that it did not apply to litigation-related negotiations. This was despite the fact that the lawyers in question practiced law through incorporated entities, most recently in the case of *Martin v Norton Rose Fulbright Australia (No 11)* [2020] FCA 1641, discussed in the next Chapter.

In some quarters the change has been considered too slow, leading to legislative intervention. A notable example of this is *Civil Procedure Act 2010* (Vic). That Act was

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<sup>261</sup> Australian Law Reform Commission Report 89 (n 12) Recommendation 19 and Recommendation 20.

<sup>262</sup> *Ibid* [3.115].

<sup>263</sup> *Ibid* [3.115] and [3.113] citing *Native Title Act 1993* (Cth) s 31(1)(b). See also *Western Australia v Taylor* (1996) 134 FLR 211; and David Spencer ‘Complying with a requirement to negotiate in good faith’ (1998) 9 *Australian Dispute Resolution Journal* 226.

<sup>264</sup> *Ibid* citing s52 of the *Trade Practices Act 1974* (Cth), now s12 of the *Australian Consumer Law*.

<sup>265</sup> See section 12 of the *Australian Consumer Law*.

designed to ‘change litigation culture’ in the State of Victoria.<sup>266</sup> The Act was specifically intended to avoid that it ‘merely mirror existing professional conduct rules concerning misleading a court and not achieve an appropriate change in litigation culture’.<sup>267</sup> These comments extended to negotiations related to litigation. The act imposes obligations on litigants both during litigation and in the course of out-of-court negotiations to:

- i. act honestly at all times;<sup>268</sup>
- ii. not make claims or responses without a proper basis;<sup>269</sup>
- iii. only take steps that are necessary to facilitate resolution;<sup>270</sup>
- iv. cooperate with other parties;<sup>271</sup>
- v. not to mislead or deceive or engage in conduct likely to mislead or deceive;<sup>272</sup>
- vi. ensure legal and other costs are proportionate;<sup>273</sup>
- vii. minimise delay;<sup>274</sup>
- viii. disclose documents critical to the resolution of the dispute.<sup>275</sup>

Additionally, the Act clearly states that these rules apply not just to lawyers but also to the parties to litigation themselves, as well as their funders, and sets out clear consequences for

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<sup>266</sup> *Hudspeth v Scholastic Cleaning And Consultancy Services Pty Ltd & Ors (No 8)* [2014] VSC 567 [190] citing the Second Reading Speech in *Hansard*, Legislative Assembly, 24 June 2010, at 2606.

<sup>267</sup> *Ibid.*

<sup>268</sup> Section 17 of *Civil Procedure Act 2010* (Vic).

<sup>269</sup> Section 18.

<sup>270</sup> Section 19.

<sup>271</sup> Section 20.

<sup>272</sup> Section 21.

<sup>273</sup> Section 24.

<sup>274</sup> Section 25.

<sup>275</sup> Section 26.

breaching the rules.<sup>276</sup> This regime, which is only applicable in Victoria, was designed to create a more level playing field for all involved in civil disputes in that jurisdiction.

In a bar practice course address, Justice Fraser J of the Supreme Court of Queensland also observed a ‘retreat from some of the more extreme features of the [adversarial] system’ but noted that this did not amount to a wholesale abandonment of the system’s fundamental tenets.<sup>277</sup> Thus, more recent authorities have emphasised that while lawyers need to go as far as possible for the clients, this should be done within the bounds of what is legitimate. Similarly, in the UK, in *Tombling v Universal Bulb Co*, Denning LJ acknowledged that there are limits to adversarialism:

The duty of counsel to his client in a civil case - or in defending an accused person - is to make every honest endeavour to succeed. He must not, of course, knowingly mislead the Court, either on the facts or on the law, but, short of that, he may put such matters in evidence or omit such others as in his discretion he thinks will be most to the advantage of his client.<sup>278</sup>

The EANTs are likely to fall into the category of conduct described by Denning LJ as being ‘of most advantage’ to the client. The above passage from *Tombling* was cited with approval by Brennan J in the High Court of Australia in *Giannarelli v Wraith*, who further added that:

In representing a client, counsel is expected not only to exercise due skill and diligence but also to do to the best of counsel's ability whatever may legitimately be done in the client's interests, for that is the way in which counsel assists in doing justice according to law.<sup>279</sup>

The qualifier in the above passage that ‘whatever may legitimately’ highlights that adversarialism is not unfettered. However, as the cases of *Mullins*<sup>280</sup> and *Fleming*<sup>281</sup> demonstrate, the combination of the changing paradigms involving fundamental changes in what lawyers do (i.e. negotiate more than litigate) and how they do it (i.e. retreat from adversarial extremes), is liable to produce uncertainty and ambiguity about what standards

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<sup>276</sup> See section 10, ss28-31 of *Civil Procedure Act 2010 (Vic)*.

<sup>277</sup> Hugh Fraser, ‘The Ethics of the Advocate’ in *Bar Practice Course Final Address (2012)* [36] <<http://www.austlii.edu.au/au/journals/QldJSchol/2012/2.pdf>>.

<sup>278</sup> [1951] 2 TLR 289 at 297.

<sup>279</sup> (1988) 165 CLR 543 at 579 per Brennan J.

<sup>280</sup> *Mullins* [2006] LPT 012.

<sup>281</sup> *Fleming* [2006] WASAT 352.

of conduct apply. Indeed, these cases suggest that a different standard might apply in negotiations to that of general litigation. In *Mullins*, a disciplinary tribunal drew a comparison between what should be expected in litigation as opposed to negotiations. The Tribunal held that the lawyer erred by '[s]upposing that no more candour was to be expected of him at this mediation than of an advocate in court'.<sup>282</sup> In *Fleming*, another tribunal went even further, saying that in settlement negotiations, a lawyer 'gives up his "adversary" role in favour of a "negotiating" role'.<sup>283</sup> As such, these cases suggest that standards of conduct that evolved from litigation might not apply to negotiation.

#### 4 *Criticism of the Old Rules: Towards New Australian Solicitors' Conduct Rules*

There are signs that the rules introduced during those changes did not reflect the changing environment. The model rules that were introduced by the Law Council in 1995 had been criticised for failing to provide appropriate guidance on the conduct expected of lawyers in negotiations. Spegel, for example, criticised the previous versions of the rules for providing 'no guidance on the difficult ethical issues which arise in negotiations'.<sup>284</sup> The ALRC also highlighted that the model rules provided little to no guidance to lawyers in negotiation<sup>285</sup> and recommended the development of additional guidance.<sup>286</sup> The Law Council of Australia, agreed with the ALRC on the principle that 'the professional practice rules should provide appropriate and sufficient guidance to practitioners and cover relevant areas of practice'.<sup>287</sup> However, the Law Council argued that the model rules already provided 'appropriate and sufficient guidance to practitioners'.<sup>288</sup> This seems to be a repetition of the common law assumption that lawyers already know and understand the standards of conduct expected of them.

Yet, the critics persevered. In 2010 Hardy and Rundle reflected on the continuing uncertainty that surrounds legal ethics in negotiations.<sup>289</sup> The ALRC repeated calls for reform again in 2011, again criticising the rules and highlighting in particular that those were

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<sup>282</sup> *Mullins* [2006] LPT 012

<sup>283</sup> *Fleming* [2006] WASAT 352 [75].

<sup>284</sup> Spegel, Rogers and Buckley (n 16) [5.4].

<sup>285</sup> ALRC 1999, [3.110].

<sup>286</sup> *Ibid*, see in particular recommendation 19.

<sup>287</sup> *Ibid*.

<sup>288</sup> *Ibid*.

<sup>289</sup> Hardy and Rundle (n 15) 208, [7.2].

too general<sup>290</sup> and failed to impose positive or specific duties.<sup>291</sup> Again, the Law Council submitted that there was no need to introduce additional rules.<sup>292</sup> The Law Council rejected the notion that there is uncertainty about the applicable standards, arguing that the Rules are ‘sufficiently clear and specific to ensure that lawyers are aware of their obligations’.<sup>293</sup> Notwithstanding this, the Law Council indicated that it would produce ‘an enhanced and modern restatement’ of lawyers’ obligations in the form of new model rules: the Australian Solicitors’ Conduct Rules (the ASCR).<sup>294</sup> The Law Council indicated that the ASCR would be accompanied by detailed commentary designed to explain and illustrate by example the application of the rules, as well as improve the clarity of the rules, particularly in the application of the rules to challenging circumstances.<sup>295</sup>

The introduction of the ASCR did not quell the debate. While Wolski’s evaluation of the ASCR led her to conclude that the Rules provide ‘an adequate framework from which to derive appropriate behaviour, while preserving fundamental values of the legal profession,’<sup>296</sup> others pointed to largely the same problems as in relation to the previous rules. According to Parker and Evans, there is still ‘little that explicitly sets out specific standards for lawyers’ in the ASCR.<sup>297</sup> Dal Pont observed that the Rules do not ‘explicitly address the conduct expected of lawyers in negotiation.’<sup>298</sup> Others went further, arguing that there are problems with the drafting of the rules. Rankin argued that such problems could contribute to confusion about what principles apply and when.<sup>299</sup> This issue was also identified by Spencer and Hardy, who also suggested that the problems with drafting,

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<sup>290</sup> Ibid [12.68].

<sup>291</sup> Ibid [12.72].

<sup>292</sup> Ibid [12.75] citing Law Council of Australia, Submission DR 25, 31 January 2011

<sup>293</sup> Ibid [12.75].

<sup>294</sup> Ibid [12.77].

<sup>295</sup> Ibid [12.77].

<sup>296</sup> Bobette Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason’ (2013) 16(1) *Legal Ethics* 182.

<sup>297</sup> Parker and Evans (n 16) 210.

<sup>298</sup> Dal Pont (n 16) 697, [21.155].

<sup>299</sup> Rankin (n 16).

particularly the definition of court, may lead to uncertainty in how the rules would translate into practice.<sup>300</sup>

The debate and uncertainty are not just theoretical but have significant practical implications. In 2014, in an article in Queensland Law Society's 'Proctor,' Emerson evaluated the cases and the regulatory framework applicable to mediation and concluded that the precise duties of lawyers in negotiations remain 'a vexed question and debate continues as to whether such duties should be the subject of specific and unique regulation'.<sup>301</sup> The continuing uncertainty is also underscored by recent reported cases about EANTs, which are examined in the next Chapter. At the same time, it is important to acknowledge that the practical import of the Rules is by no means a given. Many cases contain very little discussion of the rules, and indeed, one study in Canada suggested that a majority of practising lawyers might not rely on professional codes for the purpose of resolving ethical issues.<sup>302</sup> The remainder of this Chapter will examine the Rules to understand to what extent the Law Council has achieved its aim of providing additional guidance to lawyers.

## 5 *Why Australian Solicitors Rules?*

There are several versions of the rules of professional conduct applicable to lawyers in Australia; however, this Chapter focuses specifically on the *Australian Solicitors' Conduct Rules 2011*. There are different rules because of the self-regulated and federal nature of the regulation of lawyers in Australia. Lawyers in Australia are regulated on the basis of their State and Territory professional bodies, which set their own rules. The diversity in rules is further compounded by the fact that in most States and Territories, the profession is further split into solicitors and barristers, which have separate professional bodies that separately set the rules of professional conduct of their members.<sup>303</sup> There has been a convergence between the rules, although some differences remain.<sup>304</sup> The introduction of the ASCR has

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<sup>300</sup> David Spencer, Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (3<sup>rd</sup> ed) 2014 [15.335].

<sup>301</sup> *Ibid* – focusing specifically on mediations, but the article's discussion is relevant to negotiations in general.

<sup>302</sup> Margaret Ann Wilkinson, Christa Walker and Peter Mercer, 'Do Codes of Ethics Actually Shape Legal Practice?' (2000) 45 *McGill Law Journal* 645.

<sup>303</sup> Australian Law Reform Commission DP62 (n 250) [5.16]-[5.19].

<sup>304</sup> See eg Law Council of Australia (n 216) where the Law Council's Ethics Committee considered some the differences between the barristers' and solicitors' rules.

marked an important milestone. ASCR is the most recent set of model rules and has been widely adopted across most jurisdictions in Australia. It already governs the conduct of the majority of the legal profession as the only jurisdiction not to adopt it is Northern Territory.<sup>305</sup>

In this Chapter, the ASCR is examined using conventional statutory interpretation techniques in order to understand to what extent the Rules provide guidance on EANTs. This approach has a limitation in that it could be criticised for ‘legalising’ the rules. For example, Barnes, who was an ethics solicitor with the Law Society of New South Wales, argued in relation to the rules then applicable that ‘the rules are not meant to be ‘pulled apart’ and if you are looking at the commas or other technicalities like the section titles, you are probably about to breach’.<sup>306</sup> More recently, the Ethics Committee of the Law Council highlighted that trying to interpret the rules as a statutory instrument would entail:

looking for specific exemptions or permissions, rather than focusing on whether a particular course of action would or would not be unprofessional because it offends the principle underlying the rule—leading to an ‘abdication of professional judgment’ and a ‘spiritless compliance’ with ever more prescriptive rules.

However, the approach is justified on the basis that the Rules are generally adopted as a statutory instrument, and the Ethics Committee itself acknowledges that they are an expression of the profession’s judgment on the conduct expected of its members.

## C *Application of The Rules to EANTs: a Complicated Affair*

It is important from the outset to identify whether the Rules apply to negotiations at all, and if so, how, because both of these questions are rife with misconceptions and interpretative difficulties. Negotiations involving lawyers are commonly conducted on a without prejudice basis, giving rise to a widespread belief that they are conducted only in ‘the shadow of the

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<sup>305</sup> See eg Law Council of Australia’s summary of adoption of Australian Solicitors’ Conduct Rules in each jurisdiction at <https://lawcouncil.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules> and Northern Territory [Rules of Professional Conduct and Practice](https://lawsocietynt.asn.au/images/stories/Professional_Conduct_and_Practice.pdf) accessible at [https://lawsocietynt.asn.au/images/stories/Professional\\_Conduct\\_and\\_Practice.pdf](https://lawsocietynt.asn.au/images/stories/Professional_Conduct_and_Practice.pdf) at 12 December 2023.

<sup>306</sup> Justine Rogers, ‘Chapter 14 The Lying Lawyer and the Ethics of Negotiation’ in Michael Legg (ed), *Resolving Civil Disputes* (2016) 197.

law<sup>307</sup> or 'honesty free zones'<sup>308</sup> where no rules apply. Justice Wells went as far as to refer to a superstitious belief in impunity, observing that:

[I]n some quarters of the community there is a belief, amounting almost to a superstitious obsession, that the expression "without prejudice" is possessed of virtually magical qualities, and that anything done or said under its supposed aegis is everlastingly hidden from the prying eyes of a Court.<sup>309</sup>

This belief is not entirely without foundation. The 'without prejudice' privilege has been described as 'sacred' or at the very least as a 'good working assumption'. For example, the House of Lords in *Oceanbulk*<sup>310</sup> cited the following passage by Robert Walker LJ in *Rush & Tompkins* as follows:<sup>311</sup>

Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not "sacred" (*Hoghton v Hoghton* (1852) 15 Beav. 278, 321), has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.

The dangers of relying on this assumption were highlighted in the Australian cases of *LPCC v Fleming* ('*Fleming*')<sup>312</sup> and *LSC v Mullins* ('*Mullins*')<sup>313</sup>. In *Fleming*, the Tribunal rejected the lawyer's argument that the privilege prevented the use of evidence of his conduct in negotiations to prosecute him, noting that privilege did not protect impropriety.<sup>314</sup> Similarly,

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<sup>307</sup> See eg Altman (n 154); Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (2nd Ed, 2018) 211.

<sup>308</sup> *Mullins* (n 280) [29].

<sup>309</sup> *Davies v Nyland* (1975) 10 SASR 76 at 89

<sup>310</sup> *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44 at [25]

<sup>311</sup> *Rush & Tompkins Ltd -v- Greater London Council* [1989] AC 1280.

<sup>312</sup> [2006] WASAT 352.

<sup>313</sup> [2006] LPT 012.

<sup>314</sup> *Fleming* [83].

in *Mullins*, the disciplinary tribunal cautioned lawyers against approaching negotiations ‘on the basis that they were entering an honesty-free zone’.<sup>315</sup>

A further difficulty in interpreting the rules of professional conduct is that they apply against the background of a general common law presumption that everything that is not prohibited is permitted.<sup>316</sup> This is further reinforced by the principle that individuals should not be punished for conduct that was not prohibited at the time it was committed. This principle can be found in Magna Carta, which prohibited persecution of a person ‘except by the lawful judgement of his peers and by the law of the land,’<sup>317</sup> and other statutes, such as Section 4 of the *Criminal Code 1913* (WA). The principle can be traced to Roman law, where it was known through the maxim of *nulla crimen, nulla poena sine lege*, or ‘no crime, no punishment without law’.<sup>318</sup> While this principle’s modern application is generally confined to criminal law, it raises a substantial issue when it comes to EANTs. It would seem unfair to punish lawyers for conduct which is not expressly prohibited. As such, it is pertinent to examine what the Rules actually prohibit and what they prohibit when it comes to EANTs.

### 1 *The Murky Mechanics of the Rules’ Application to EANTs*

Other than for fundamental duties, the Rules tend to be structured around various situations lawyers may have to navigate.<sup>319</sup> While the Rules contain a section on advocacy and litigation, there is no section or specific rules that refer to negotiations. This can be contrasted with some overseas practices. For example, Alberta’s Code of Professional Conduct contains a separate chapter entitled ‘The Lawyer as Negotiator’.<sup>320</sup> In fact, the word

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<sup>315</sup> *Mullins* [29].

<sup>316</sup> French (n 219) 14 citing R v Somerset County Council; ex parte Fewings [1995] 1 All ER 513, 523.

<sup>317</sup> Ibid at [9.4] citing Ben Juratowitch, *Retroactivity and the Common Law* (Bloomsbury Publishing, 2008) 28 and noting that this clause is more concerned with placing limits on the exercise of executive power.

<sup>318</sup> See eg a discussion of this principle in Australia in the context of retrospective laws in part 9 of Australian Law Reform Commission Interim Report 127 (n 220).

<sup>319</sup> Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (2014) 81.

<sup>320</sup> See eg Marjorie L Benson, ‘A Negotiating Ethics Study’ (2005) 84(Special Issue) *Canadian Bar Review* 593, at 594, citing The Law Society of Alberta <<http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm>> among other examples in an exhaustive footnote.

‘negotiation’ or its synonyms is not used in the Rules at all. As such, the Rules require close examination in order to understand how they apply to negotiations.

The starting point under the ASCR is that one should proceed from the assumption that the Rules apply to all negotiations. There is no exclusion of the application of the Rules to negotiations. According to rule 1, the Rules apply to all solicitors ‘acting in a manner of a solicitor’. There is no definition in the rules similar to that of Barristers’ Rule 11, which explains what the work of barristers entails and includes a reference to negotiating with an opponent for a client and thus might imply a limit on the scope of the rules,<sup>321</sup> nor is there anything in the Rules to suggest that negotiation is not part of what solicitors do. As such, while not stated expressly, the Rules seem to apply to negotiation conduct as a general principle.

The task of identifying rules applicable to specific types of EANTs is complicated by the Rules referring to several specific types of negotiation scenarios. Rule 22.1 refers to the ‘compromise’ of a case, and the definition of ‘court’ says it also means ‘an arbitration or mediation or any other form of dispute resolution’. This complicates the task of identifying which rule applies because, as highlighted by Rankin, the application of the ordinary principles of statutory interpretation implies that other rules, which do not refer to these scenarios, do not apply to such specific scenarios. So, for example, rule 22.1 is the only rule to refer to a compromise of a case. This would imply that no other rule applies to the compromise of a case.

The definition of ‘court’ used in the Rules can give rise to further confusion about which rules apply to which negotiations. As several authors have pointed out, the definition of court in the Rules is inherently confusing to begin with. In the glossary, the Rules say: “‘court’ means ... an arbitration or mediation or any other form of dispute resolution’.

This lumping of something from one conceptual category, a ‘court,’ which is an institution or a body, with something from another, such as ‘arbitration and mediation,’ which are processes, can produce unexpected and confusing results. According to Spencer and Hardy, translation of the extended definition into practice could lead to uncertainty.<sup>322</sup> For example, rule 3 refers to a paramount ‘duty to the court,’ which is a common law concept. The rules do not expressly say what it means and what the duty entails. The extended definition implies

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<sup>321</sup> See eg *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW).

<sup>322</sup> David Spencer, Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (3<sup>rd</sup> ed) 2014 [15.335].

that there is also a fundamental ‘duty to mediation’ and ‘duty to arbitration’.<sup>323</sup> There are other potentially confusing results. Rule 19.4 refers to the duty of disclosure to the court applicable to ex parte applications. How can there be an ‘ex parte application to mediation’? Rule 22 prohibits communicating with the court without notice to the opponent. How does one communicate with ‘alternative dispute resolution’?

The definition can lead to unexpected results, leading to confusion about whether the rules truly mean what they say. For example, rule 17.2.3 informs the court of any persuasive authority against the client’s case. Wolski argues that the effect of the expanded definition of court means that the effect of rule 17.2.3 would be that the parties in mediation are required to disclose to the opponents any persuasive authority against their interests, just like they would to a court.<sup>324</sup> However, Rogers considered that it is unlikely that this was the intention of the drafters.<sup>325</sup>

Wolski argued that rather than being read as ‘mediation,’ the definition should be read as referring to a ‘mediator’.<sup>326</sup> This approach can be seen in the *Legal Profession Conduct Rules 2010* (WA), where the term ‘court’ is defined to include ‘a person or body conducting arbitration or mediation or any other form of dispute resolution’ (emphasis added). However, this change is at odds with the express wording of the ASCR. There is no evidence to suggest it would reflect the intent of the drafters of the Rules: this definition (i.e., as including ‘mediation’ rather than ‘mediator,’ etc.) has been carried through from the previous model rules and adopted in other rules. It can be found in *Legal Profession (Solicitors) Rule 2007* (Qld), which is based on the Model Rules of Professional Conduct that the Law Council first promulgated in 1995, which in turn was based on the Rules of Professional Conduct introduced by the Law Society of NSW in 1994.<sup>327</sup> Further, despite its obvious issues, the definition was not highlighted among the many proposals for changes in

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<sup>323</sup> Law Council of Australia (n 216); note also Wolski suggested clarifying the definition in Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason’ (n 296).

<sup>324</sup> Wolski *ibid.*

<sup>325</sup> Justine Rogers ‘Chapter 14 The Lying Lawyer and the Ethics of Negotiation’ in Michael Legg (editor), *Resolving Civil Disputes* (2016).

<sup>327</sup> See eg *Solicitors Rules Revised Professional Conduct and Practice Rules 1995* (NSW).

the Rules in the Law Council’s consultation draft on the ASCR circulated in February 2018.<sup>328</sup>

A further issue with the use of the extended definition of the court is that it can give rise to uncertainty about which rules apply to negotiating scenarios in which the extended definition of the court does not apply, for example, in party-to-party commercial negotiations. The Rules do not say what happens in such circumstances. Should lawyers looking for guidance refer to rules referring to court, which do not seem to apply, or should they assume that in the absence of applicable prohibitions, the conduct is permissible? The Rules do not address this question.

*(a) Which EANTs are Permitted by the Rules and the Imperative to Use EANTs*

The ASCR contains rules which could be construed as requiring lawyers to use EANTs as a general proposition, as well as rules which permit EANTs involving taking advantage of opponents’ errors.

The rules that can be construed as encouraging the use of EANTs are the duties to act in the best interests of the client (r4.1.1), to deliver services competently (r4.1.3) and not to disclose confidential information to a client (r9.1). The first two of these duties could be interpreted as mandating the use of EANTs whenever possible because EANTs, by definition, are intended to gain an advantage for a client. Failure to do so could be perceived as a failure to act in the client’s best interests or failure to act competently. This principle is also grounded in common law,<sup>329</sup> professional conduct rules,<sup>330</sup> and usually, the contract between a lawyer and a client.<sup>331</sup> These rules can thus provide a powerful imperative to use EANTs. Parker, for example, observed that ‘while lawyers are supposed to owe their highest duty to the administration of justice, this is usually overwhelmed by the apparent fulfilment of their duty to clients by using aggressively adversarial tactics’.<sup>332</sup>

The dangers of unrestrained zealousness have resulted in excesses; however, as discussed earlier, there has been a growing trend towards recognition that the duty to act in the client’s

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<sup>328</sup> Law Council of Australia (n 216).

<sup>329</sup> *Giannarelli v Wraith* (1988) 165 CLR 543 at 579 per Brennan J citing *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289 at 297 per Denning LJ.

<sup>330</sup> Rule 4.1.1 of the ASCR.

<sup>331</sup> *Minkin v Landsberg* [2016] 1 WLR 1489.

<sup>332</sup> Parker (n 245) 22.

best interests is not absolute. Lord Brougham’s speech referenced in Section B(3) of this Chapter is an example of that.

The case law suggested that lawyers need to go as far as is legitimately possible but not beyond that. As the cases of *Mullins*<sup>333</sup> and *Fleming*<sup>334</sup> demonstrate, this line, however, can be difficult to identify, particularly when it comes to negotiations. These cases suggest that a different standard might apply in negotiations to that of general litigation. In *Mullins*, a disciplinary tribunal drew a comparison between what should be expected in litigation as opposed to negotiations. The Tribunal held that the lawyer erred by ‘[s]upposing that no more candour was to be expected of him at this mediation than of an advocate in court’.<sup>335</sup> In *Fleming*, another tribunal went even further, saying that in settlement negotiations, a lawyer ‘gives up his “adversary” role in favour of a “negotiating” role’.<sup>336</sup>

The Rules do, to a certain extent, recognise the limits on how far lawyers should go for their clients. This is not done in rule 4.1.1, as that rule simply says that lawyers must ‘act in the best interests of a client’ without qualification. However, limits on lawyers’ conduct are recognised in rule 4.1.4, which says lawyers must avoid any compromise to their integrity and rule 4.1.5, which states that lawyers must comply with the Rules and the law. These rules are discussed further in the next section.

In addition to these limits, the rules provide lawyers with discretion not to use certain tactics in the exercise of forensic judgment. Rule 17.2 provides that a lawyer will not have breached the duty to the client by confining any hearing to real issues (r17.2.1), presenting the case simply and quickly (r17.2.2) or disclosing to the court persuasive authority against the client’s interests (r17.2.3).

A further rule that could be construed as requiring the use of EANTs is rule 9.1, as it generally prohibits the disclosure of information provided by clients. Rule 9.2 contains exceptions to this rule, including permitting disclosure if authorised by the client or permitted or required by law. At face value, these rules require lawyers to use the tactic of withholding information adverse to a client’s interests. The commentary by the Law Council

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<sup>333</sup> *Mullins* (n 280).

<sup>334</sup> *Fleming* (n 281).

<sup>335</sup> *Mullins* (n 280) [34].

further emphasises this by stating that the burden is on the lawyer to show that circumstances exist justifying disclosure under rule 9.2.

Several rules permit the use of EANTs relating to taking advantage of opponents' errors. Rules 19.3 and 22.3 provide that failure to correct an error in a statement by the opponent does not amount to making a misleading statement to either the court (r19.3) or the opponent (r22.3). The drafting of Rule 30.1, which prohibits taking advantage of an opponent's error, implies that lawyers can take advantage of certain types of errors in certain circumstances. The rule says that:

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

This means that it only prohibits taking advantage if all of the following requirements are met:

- the advantage is unfair;
- the error is obvious; and
- the consequence of taking advantage would be to obtain a benefit for the client which has not supportable foundation in law or fact.

These rules seem to indicate that taking advantage of an opponent's errors might be permissible in certain circumstances, leaving the door open for tactics such as taking advantage of cognitive biases.

This section examined the rules that provide an imperative or a defence to the use of EANTs. Whilst, as Davis observed, lawyers may feel 'overwhelmed' by the duty to act in the client's best interest and thus use EANTs,<sup>337</sup> the rules include other fundamental duties that could counter these. The next section examines what limits the Rules place on their usage.

## D *Fundamental Duties*

There are two types of Rules in the ASCR that put limits on lawyers' conduct: fundamental duties, contained in the section of the rules called 'fundamental duties of solicitors' and specific rules, which are contained in the rest of the ASCR. This section focuses on how the

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<sup>337</sup> Parker (n 245) 22.

fundamental duties affect EANTs, while the rest of the duties will be considered in the next section. The Rules contain the following fundamental duties:

- paramount duty to the court and the administration of justice (r3);
- duty to be honest and courteous in all dealing in the course of legal practice (r4.1.3)
- duty to avoid any compromise to lawyers' integrity (r4.1.4);
- duty to comply with the Rules and the law (r4.1.5); and
- duty not to engage in any conduct which demonstrates that the lawyer is not a fit and proper person to practice law (r5.1) or which is likely to a material degree to:
  - diminish public confidence in the administration of justice (r5.1.1) or
  - bring the profession into disrepute (r5.1.2).

Rule 6 relates to undertakings and is not relevant to EANTs.

The application of these duties to EANTs is uncertain. Some of the duties are drafted so broadly as to appear meaningless. Others use clear and simple language which, if taken at their face value, would render EANTs as a class of conduct impermissible. However, a closer analysis of the Rules suggests that these fundamental duties should not be taken at face value, and as such, they should be considered more in the nature of aspirational statements with no practical impact on EANTs.

### 1 *Duty to the Court and the Administration of Justice: Disconnect between the Rules and the Common Law*

Rule 3 is an example of a duty that is drafted in such a way as to appear meaningless at face value, yet hides a Pandora's box of obligations at common law. This rule states that the duty to the court and the administration of justice 'is paramount'. However, the ASCR does not explicitly say what is the content of that duty, for example, what it requires lawyers to do or abstain from doing. All it states is that the duty, whatever it may be, 'is paramount'. At face value, none of the EANTs refer to any other duty being paramount, so none of them are inconsistent with this rule. However, this argument is predicated that the rules can be read at face value without reference to additional aids, particularly the common law.

The notion that rule 3 should be interpreted without reference to the common law is supported by several factors. The Rules contain a unique definition of court which is not derived from the common law. It would be odd to attribute a meaning to a common law

meaning ‘duty to the court’ where the term ‘court’ is not used in its common law meaning. Additionally, rule 3 refers to a singular ‘duty to the court and administration of justice,’ which is not a common law concept. Duty to the court and duty to the administration of justice are distinct concepts. What is meant by the expression ‘administration of justice’ is almost never defined in the law.<sup>338</sup> However, common law traditionally refers to a separate duty to the court, with the duty not to corrupt the administration of justice being a subset of that duty.<sup>339</sup> This also seems to support the idea that the ASCR refers to a unique duty not derived from the common law. Notwithstanding these arguments, the notion that rule 3 is to be interpreted without reference to the common law must be rejected for one simple reason: if rule 3 is to be interpreted as having any meaning at all, one needs to refer to the common law. The golden rule of statutory interpretation is to avoid absurd results<sup>340</sup> - otherwise, rule 3 would refer to a duty with no content.

If one assumes that the duty to the court and the duty to the administration of justice take their common law meaning, then there is a lot more to rule 3 than appears at face value. The Hon David Ipp, a prominent Australian judge, was a former Justice of the Supreme Court of Western Australia and the NSW Court of Appeal. His Honour collected and systematised the common law into a principled, structured body of law consisting of the following four broad categories:<sup>341</sup>

1. the general duty of disclosure owed to the court;
2. the general duty not to abuse the court process;
3. the general duty not to corrupt the administration of justice; and
4. the general duty to conduct cases efficiently and expeditiously.

Each of these categories contains multiple obligations arising from the duty, some of which are contained in the ASCR in the form of specific provisions. A comparison of the obligations identified by Ipp and the ASCR conducted as part of this research project is summarised in the following table.

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<sup>338</sup> Baron and Corbin (n 319).

<sup>339</sup> See eg Ipp (n 257) at 65.

<sup>340</sup> Rankin (n 16).

<sup>341</sup> Ipp (n 257) 65..

Table 16 Comparison of Common Law Duties Identified by Ipp to Australian Solicitors' Conduct Rules

<b>Duty to Court Identified by Ipp</b>	<b>ASCR counterpart</b>
1) The general duty of disclosure owed to the court	No general duty of disclosure, but see below individual instances where disclosure is required
a) making full disclosure of the relevant law to the court <sup>342</sup>	R19.6 – to inform the court of relevant authorities
b) not misleading the court by <sup>343</sup>	R19.1 broad duty not to deceive or knowingly mislead the court
(1) stating the facts which are untrue <sup>344</sup>	R19.1 broad duty not to deceive or knowingly mislead the court
(2) misleading the judge as to true facts <sup>345</sup>	R19.1 broad duty not to deceive or knowingly mislead the court
(3) concealing from the court facts which ought to be drawn to the judge's attention <sup>346</sup>	R19.4 but only in ex parte applications
(4) knowingly permitting a client to deceive the court <sup>347</sup>	R20 which requires the solicitor to draw any deceitful or misleading information or withdraw from acting
2) The general duty not to abuse court process:	No broad duty
a) a duty not to use the court process for an ulterior motive and in particular	No direct counterpart

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<sup>342</sup> Ibid 67 and fn27.

<sup>343</sup> Ibid 67.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

i) putting forward a feigned issue, not the true but fictitious cause of action <sup>348</sup>	No counterpart, although r21.3 prohibits alleging any matter of fact unless material already available provides a proper basis
ii) using procedures for purposes for which they were not intended <sup>349</sup>	No direct counterpart in relation to process, although r21.1.3 states court's "coercive powers" should not be used to harass or embarrass a person and r 21.1.4 that the powers are not used to gain a collateral advantage out of court
iii) using or allowing to be used discovered documents for collateral or ulterior purposes <sup>350</sup>	No direct counterpart, although as above, r2.1.4 prohibits use of 'coercive powers' to gain a collateral advantage out of court
b) truth in pleadings including	
i) causing unnecessary delay and expense by putting the other side to proof in respect of facts that are known to be true <sup>351</sup>	No direct counterpart, except that r17.2.1 provides that it is not a breach of a duty to client to confine issues which the solicitor believes to be the real issues
ii) pleading causes of action which are doomed to fail but which could induce the judge to look with more favour on other causes of action <sup>352</sup>	No direct counterpart
c) excessive zeal resulting in	

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<sup>348</sup> Ibid 80.

<sup>349</sup> Ibid, examples given are filing an appeal in order to delay settlement and issuing a statutory demand in order to put pressure on a company because it could result in the demand being advertised.

<sup>350</sup> Ibid 81.

<sup>351</sup> Ibid

<sup>352</sup> Ibid.

i) misleading the court <sup>353</sup>	R19.1 broad duty not to deceive or mislead the court
ii) rampant obstructionism <sup>354</sup>	No direct counterpart.
iii) raising arguments and issues that are bound to fail <sup>355</sup>	No direct counterpart, except that r17.2.1 provides that it is not a breach of a duty to client to confine issues which the solicitor believes to be the real issues
3) The general duty not to corrupt administration of justice	R3.1 states that there is a duty to the administration of justice
a) duty not to connive or attempt to substantiate a fraud or wrongdoing <sup>356</sup>	R20 provides that in the case of a delinquent client, the solicitor must correct the wrongdoing or cease acting
b) not to assist in any way in dishonourable or improper conduct <sup>357</sup>	R5.1 prohibits conduct demonstrating that the solicitor is not a fit and proper person to practise law
c) dealing with witnesses, including not producing false witnesses <sup>358</sup>	R24 specifically deals with this
d) avoiding the lawyer becoming a witness <sup>359</sup>	R27 specifically deals with this
e) avoiding conflicts of interest <sup>360</sup>	R12 specifically deals with this

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<sup>353</sup> Ibid 83 citing at 84 the decision of *Meek v Fleming* where Counsel continued to refer to a witness as a “Chief Inspector” even though that person has been demoted to “Station Sergeant” and which is said to have tipped the scale in favour of his client.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

<sup>356</sup> Ibid 87-88.

<sup>357</sup> Ibid 89 citing an example of a lawyer who advised the client “to be forgetful and evasive” in answering the police.

<sup>358</sup> Ibid 91-92.

<sup>359</sup> Ibid 92.

<sup>360</sup> Ibid 93.

4) The general duty to conduct cases efficiently and expeditiously	No counterpart
a) duty to take due care and skill <sup>361</sup>	R4.1.3
b) duty to conduct cases expeditiously <sup>362</sup>	No direct counterpart, except that r4.1.3 states that services must be delivered promptly, which seems to be aimed at delivering the services to client, rather than ensuring matters are resolved promptly
c) case management duties (i.e. breaches of rules of court which are for the benefit of the Court) <sup>363</sup>	No direct counterpart.
d) duty to take all points and to exercise an independent judgment (i.e. confine arguments only to issues worth arguing) <sup>364</sup>	No duty to take all points but r17.1 states that the solicitor must exercise forensic judgments which, according to r17.2 should;  17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;  17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement;  17.2.3 inform the court of any persuasive authority against the client's case.

This table demonstrates that the short expression, 'duty to the court,' encapsulates many obligations. The ASCR, which does say this exactly, refers to many of the obligations arising from this duty at common law in other specific provisions. However, the comparison in the

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<sup>361</sup> Ibid 95.

<sup>362</sup> Ibid.

<sup>363</sup> Ibid 97-98.

<sup>364</sup> Ibid 98-100.

table also reveals that some of the obligations arising from the duty are not included in the ASCR. Such obligations identified by Ipp as being a part of the duty to the court, but which are not in the ASCR, include obligations to avoid:

1. putting forward a feigned issue, not the true but fictitious cause of action;
2. concealing from the court facts which ought to be drawn to the judge's attention;
3. using procedures for purposes for which they were not intended;
4. using or allowing to be used discovered documents for collateral or ulterior purposes;
5. causing unnecessary delay and expense by putting the other side to proof in respect of facts that are known to be true;
6. raising arguments and issues that are bound to fail; and
7. failing to conduct cases expeditiously.

These common law obligations rule out the use of many of the tactics identified in Chapter 1. For example, the prohibition against using court processes for ulterior purposes is relevant to the class of tactics under the same name. The rules relating to information also impose obligations of disclosure that could go beyond the rule of civil procedure. The duty to conduct cases expeditiously is inconsistent with the timing tactics.

Inclusion in the ASCR of some but not all obligations arising from the duty to the court can give rise to uncertainty about whether the obligations that are excluded continue to apply. In theory, rule 2.2, which states that the ASCR applies in addition to common law, preserves their application. In practice, failure to include obligations in the Rules, which, according to rule 2.1 are intended to assist lawyers in complying with their obligations, and which, according to their drafters (the Law Council), are intended to be 'an enhanced and modern restatement' of lawyers obligations,<sup>365</sup> could create an impression that lawyers only need to refer to the ASCR. Thus, the drafting of rule 3 in the context of the Rules as a whole and the common law can lead to uncertainty about which duties or obligations apply to lawyers and which do not.

On the face of it, the absence of these duties from the Rules might suggest that they no longer apply. However, this is incorrect, as rule 2.2 expressly preserves the common law.

Despite the lack of express guidance in the rules, the content of the duty to the court is ordinarily easy to ascertain, although the task can be more difficult when it comes to the duty to the administration of justice.

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<sup>365</sup> Ibid [12.77].

## 2 *Rule 4: Other Fundamental Duties: Situational Relevance*

Rule 4 groups a number of duties under the heading ‘other fundamental duties’. Duties in this Rule are expressed in simple and clear terms. However, they could also be read as what Wade referred to as ‘weasel words’—so broad that they simultaneously capture everything and nothing at all.<sup>366</sup> If applied at face value, they could render most, if not all of EANTs impermissible. Nonetheless, as I will discuss in this section, their application to EANTs is uncertain. To recap, rule 4 imposes duties to:

- be honest and courteous (r4.1.2);
- deliver services competently (r4.1.3);
- avoid any compromise to the lawyer’s integrity (r4.1.4); and
- comply with the Rules and the law (r4.1.5).

The language of the rule is clear and simple. It employs plain language that can be understood by lawyers and the public at large. Concepts such as honesty, competence, integrity and compliance with the Rules and the law can be understood without further definition. The difficulty when it comes to these rules, particularly the duty to be honest, courteous and avoid compromises to one’s integrity, is how to interpret them in practice. In particular, should they be given their ordinary meaning or the meaning that aligns with generally accepted conventions of lawyers’ behaviour?

If these rules are interpreted in absolute terms and given their plain meaning, they would render many of the other rules redundant. For example, if lawyers are to be completely honest, why have other rules referring to honesty? Indeed, Wolski’s analysis of the Rules led her to conclude that the rules require only a certain type of honesty, but not complete honesty. According to Wolski, there are two conceptually distinct types of honesty:

- honesty as against misrepresentation (an issue which concerns the accuracy of information conveyed); and
- candour as against non-disclosure (an issue which concerns the sharing of information).<sup>367</sup>

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<sup>366</sup> Wade (n 6).

<sup>367</sup> Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason’ (n 296) 190.

Having reviewed the rules, Wolski argued that the ASCR mandates only the first type (misrepresentation) and does not require the second type (candour) of honesty.<sup>368</sup> The Ethics Committee of the Law Council of Australia agreed with this interpretation.<sup>369</sup> This indicates that while rule 4 refers to honesty broadly, the Rules in fact require only a particular type of honesty, not absolute honesty.

Lawyers' role in representing their client's interests often requires them to do things that might be perceived as lacking honesty, courtesy and integrity in the eyes of non-lawyers. Indeed, acting as a normal decent person would be anathema to what is expected of lawyers. The landmark case of *Tuckiar v the King*<sup>370</sup> provides a classic example of that. In that case, the lawyer was criticised by the High Court for failing in his duty to the client precisely for the types of conduct envisaged by this rule: being honest in repeating what the client told him, courteous in avoiding potential slander of a police officer, and, based on this, avoiding any compromises to his integrity. However, in that case, the High Court highlighted that lawyers have a particular role to play:

Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted.<sup>371</sup>

This role can be inconsistent with what a lawyer might believe to be honest, courteous and consistent with their personal integrity. A lawyer's role may lead to conduct that could result in what they perceive as an unjust outcome or contrary to what would be considered ordinarily decent. As Jenkinson J put it in a dissenting judgment in *Chamberlain*, in considering lawyers' conduct, it is imperative to consider the adversarial context and the role lawyers play in it:

It is, I think, precisely because the instinctive reaction of decent people would be to condemn the appellant's conduct as unfair that his conduct should be carefully considered in the context of a forensic culture which still tolerates, if it no longer

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<sup>368</sup> Ibid.

<sup>369</sup> Law Council of Australia (n 216) 25.

<sup>370</sup> *Tuckiar v The King* [1934] HCA 49; (1934) 52 CLR 335 at 346

<sup>371</sup> *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at [110] citing *Tuckiar v The King* [1934] HCA 49; (1934) 52 CLR 335 at 346.

encourages, procedural manoeuvre and the taking advantage of an opponent's error.<sup>372</sup>

These authorities tend to suggest that lawyers are not required to be absolutely honest, courteous and act with integrity as understood generally. Rather, these duties apply to them within the meaning given to them within the adversarial system. However, the ASCR does not define or explain what type or level of honesty, courtesy and integrity are expected in rule 4.

Applied at face value, rule 4 could render all EANTs off limits to lawyers as gaining an advantage for a client would not be courteous to the opponents and using potentially questionable tactics could be inconsistent with the duty to avoid compromises to integrity. However, the case law and commentary suggest that such a broad interpretation of the rules is at odds with the lawyers' common law role. As the Rules do not explain further how the obligations in rule 4 apply in practice, it is uncertain to what extent they affect EANTs.

*(a) Rule 5, Fit and Proper Person, Public Confidence and Profession's Reputation*

Rule 5 prohibits any conduct which demonstrates that a lawyer is not a fit and proper person to practice law or which is likely 'to a material degree' to 'diminish public confidence in the administration of justice' or 'bring the profession into disrepute'. Similarly to rule 4, this rule is drafted broadly, and it can be difficult to ascertain precisely how it should be applied in practice. At face value, the use of any EANTs could be construed as being inconsistent with this rule because using potentially unethical tactics could bring the legal profession into disrepute.

The Law Council has provided some commentary on the Rule, but this seems to add little value. The commentary states that factors relevant to such an assessment include, but are not limited to:

- disregard for the solicitor's legal and civic obligations;
- lack of integrity;
- dishonest, deceitful or fraudulent conduct;
- defiance of the court, the rule of law, or the process of justice; and

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<sup>372</sup> *Chamberlain v the Law Society of the Australian Capital Territory* (1993) 43 FCR 148 per Jenkinson J at [5]

- moral blameworthiness.<sup>373</sup>

This commentary refers back to the fundamental duties already stated in rule 4, hence it seems to add no value to the task of interpreting the rule.

Courts have recognised that it can be difficult to identify what kind of conduct would diminish public confidence in the legal profession or lead to a finding that a lawyer is an unfit person to practice law. Kitto J stated in *Ziems v The Prothonotary of the Supreme Court of New South Wales* stated that:

it will generally be agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the line is by no means always an easy task.<sup>374</sup>

In *Ziems*, the majority of the High Court (Fullagar, Kitto and Taylor JJ) allowed the appeal and set aside the order disbarring the barrister on the basis of a conviction for drunk driving which resulted in the death of another person. Dixon CJ and McTiernan J dissented. However, what *Ziems* seems to indicate is that the rule should not be applied lightly. Even convictions should not automatically ‘spell unfitness for the Bar’. This is reinforced by the following statement by Kitto J:

Yet it cannot be that every proof which he may give of human frailty so disqualifies him. The ends which he has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them.<sup>375</sup>

Rule 5 also incorporates the notion that conduct needs to be sufficiently severe to amount to a breach of the rules by requiring that the conduct diminishes public confidence in the administration of justice or brings the profession into disrepute ‘to a material degree’.

Taken together, *Ziems* and the requirement of materiality in rule 5 tend to suggest that its application should be restricted to more severe types of conduct. Contrary to the initial impression, rule 5 might not apply to EANTs because EANTs, by definition, do not include conduct that is manifestly unethical or illegal. Therefore, the use of EANTs is not likely to

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<sup>373</sup> Law Council of Australia, ‘Australian Solicitors’ Conduct Rules 2011 and Commentary’ (2013) 5 <[https://www.lawcouncil.asn.au/files/web-pdf/SolicitorsConductRulesHandbook\\_Ver3.pdf](https://www.lawcouncil.asn.au/files/web-pdf/SolicitorsConductRulesHandbook_Ver3.pdf)>.

<sup>374</sup> (1957) 97 CLR 279; [1957] HCA 46 at [298].

<sup>375</sup> Ibid.

spell unfitness to be a lawyer or materially affect public confidence in the administration of justice or the legal profession.

## E *Specific Rules Applicable to EANTs*

The Previous section focused on the fundamental duties applicable to EANTs generally. This section examines rules applicable to specific types of EANTs. As multiple rules can apply to the same class of tactics, for readability, this section is organised around the categories of tactics rather than around the Rules.

Part F considers which Rules apply to each class of EANTs identified in Chapter 1. The classes of EANTs are reproduced in the following table:

*Table 17 Summary of Tactic Types*

<p><b>What</b></p> <ol style="list-style-type: none"> <li>1. Concealing adverse information</li> <li>2. Misrepresentation</li> </ol> <p><b>How</b></p> <ol style="list-style-type: none"> <li>3. Making life difficult</li> <li>4. Gratuitous requests</li> <li>5. Use of cognitive biases</li> </ol> <p><b>Who</b></p> <ol style="list-style-type: none"> <li>6. Team composition</li> <li>7. Empathy</li> <li>8. Emotions</li> <li>9. Settlement instructions/authority</li> </ol>	<p><b>When</b></p> <ol style="list-style-type: none"> <li>10. Timing pressure</li> <li>11. Delay</li> </ol> <p><b>Why</b></p> <ol style="list-style-type: none"> <li>12. Threats/external leverage</li> </ol> <p><b>Where</b></p> <ol style="list-style-type: none"> <li>13. Location</li> </ol>
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Each sub-section that follows examines the rules relevant to each category of EANT, and then considers to what extent the Rules might assist lawyers in determining what is permissible and what is not.

### 1 *What Information Tactics are Prohibited*

As identified in the previous Chapter, the most common type of EANTs in the literature relates to information. In Chapter 1, the information-based tactics were divided into two categories:

- tactics relating to concealing information (candour); and
- tactics relating to misrepresenting or distorting information.

The tactics falling into this category identified in Chapter 1 are reproduced in the following table:

*Table 18 Information Based Tactics*

Information-based tactics
<p>Concealing information</p> <ol style="list-style-type: none"> <li>1. Emphasise only information which helps you;</li> <li>2. Do not disclose intentions;</li> <li>3. Do not volunteer information adverse to own position;</li> <li>4. Do not correct mistaken belief by the other negotiator/party;</li> <li>5. Ignore requests for information from the other party;</li> <li>6. Bury information by providing a lot more than is required;</li> <li>7. Paltering – provide narrow technically true responses while omitting information so as not to provide complete response;</li> <li>8. Do not disclose changes that materially affect previously disclosed information; and</li> <li>9. Do not disclose lies or criminality by client.</li> </ol> <p>Misrepresentation</p> <ol style="list-style-type: none"> <li>1. Misrepresent personal opinion/evaluation of case;</li> <li>2. Misrepresent intentions/priorities;</li> <li>3. White lies – ‘I cannot accept’, ‘I cannot agree’;</li> <li>4. Exaggerated demands;</li> <li>5. Bluffing;</li> <li>6. Bargaining chips - pretend something is important when it is not;</li> <li>7. Use true facts to create a false picture;</li> <li>8. Invent allegations without supporting evidence;</li> <li>9. Leave false information lying around for the other side to discover; and</li> <li>10. Deny/question the other side’s true information.</li> </ol>

In addition to rule 4 duty to be honest (discussed in the context of fundamental duties), there is a range of other rules relating to information tactics, which can be found in various parts of the ASCR. The ASCR is organised around who the lawyers are dealing with, and whether the conduct involves advocacy and litigation, and the drafters have set different standards depending on these factors.<sup>376</sup>

*(a) Constraints on Concealing of Information*

The following rules relate to the withholding of information:

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<sup>376</sup> See the table of contents in the ASCR.

Table 19 Rules and their Limitations Relevant to Information Tactics

<b>Rule</b>	<b>Duty/Obligation of a Lawyer</b>	<b>Limitation on the Rule's Application</b>
9.1	Must not disclose any confidential client information except for a permitted purpose	None
4.1.2	Must be honest in all dealings in course of the legal practice	None – fundamental duty
17.2.3	It is not a breach of duty to client to disclose persuasive authority adverse to the client's case	Only owed to the court
19.4	Must disclose all factual or legal matters not protected by privilege adverse to the client	Only owed to the court in seeking interlocutory ex parte relief
19.6	Must disclose any binding authority, appellate authority or legislation against the client's case	Only owed to the court and applies at the appropriate time in the hearing of a case
19.12	Must inform if the opponent makes a concession by mistake	Only owed to the court and the opponent
20.1	Must disclose if a client or another person has lied, falsified a document or suppressed evidence that had to be disclosed	Only owed to the court
29.1	Must fairly assist in arriving at the truth and seek impartially to have the whole of the relevant evidence placed intelligibly	Only by a prosecutor to the court

The above table reveals that very few rules require disclosure beyond authority adverse to the client's case. The exceptions to this are ex parte applications (r19.4) and acting as a prosecutor (r29.2). This is consistent with Wolski's argument discussed earlier in this

Chapter that the ASCR do not generally require disclosure of facts adverse to clients' interests.<sup>377</sup>

Rule 29.1 in particular, stands out from other rules as it applies to a particular type of lawyers—prosecutors - to assist the court to arrive at the truth and have the whole of the evidence disclosed. It sets a high standard that arguably would be most likely to produce just results. However, this standard is limited to prosecutors. The High Court confirmed in *D'Orta* that lawyers are generally not under an obligation to assist the court in arriving at the truth or the best possible legal solution.<sup>378</sup>

The situation is somewhat more complicated when it comes to the tactics involving disclosing the law adverse to one's case. The definition of the court in the ASCR has been extended to include mediation and other forms of dispute resolution.<sup>379</sup> The rules containing an obligation of this type (r17.2.3 and r19.6) arguably apply to the types of negotiations which are covered by the extended definition. Tactics involving concealing or failing to disclose adverse case authorities or legislation would not be permitted by the rules in such negotiations. Additionally, the rules require disclosure of any lies or falsehoods procured by clients (r20.1), which means that the tactic of concealing such issues is not permissible.

A limitation of all of the above rules is that they are all owed to the court. While the definition of the court is relatively wide, capturing mediation and other forms of dispute resolution, as discussed earlier, it does not cover all types of negotiations in which lawyers might engage. The rules are silent on negotiations not involving disputes, such as commercial negotiations. This can lead to uncertainty as to whether such principles apply in those cases.

Overall, the Rules address most of the tactics involving concealing information; however, the obligations imposed by the Rules are limited to particular circumstances, such as whether one is acting as a prosecutor or in a court context, and do not apply in general. This can create uncertainty and ambiguity in relation to the application of the principles embodied in the rules outside of such circumstances.

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<sup>377</sup> Wolski, 'An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason' (n 296) 189.

<sup>378</sup> *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at [110] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

<sup>379</sup> See glossary of the ASCR.

*(b) Rules Relating to Misrepresentation*

There is also a range of rules in the ASCR which apply to tactics involving misrepresentation. The Rules appear to set different standards in different circumstances. These rules are summarised in the following table.

*Table 20 Rules and their Limitations Relevant to Misleading*

<b>Rule</b>	<b>Duty/Obligation of a Lawyer</b>	<b>Limitation on the Rule's Application</b>
19.1	not deceive or knowingly or recklessly mislead	Only to the court
19.2	must correct any misleading statement	Only to the court
20.1	must inform if the client or another person has lied, falsified a document or suppressed evidence that had to be disclosed	Only to the court, during a hearing or after judgment or decision is reserved and remains pending
21.3	must not allege any matter of fact unless believes on reasonable grounds it is supported by factual material	Only in court documents or submissions during any hearing, opening and closing addresses
22.1	must not knowingly make a false statement in relation to the case (including its compromise)	Only to an opponent, only in relation to 'a case' which is defined as 'the court proceeding' or 'the dispute' in which the lawyer is advising
22.2	must correct a false statement as soon as become aware that the statement was false	To any other person
34.1.1	Must not make any statements involving grossly exceeding a client's rights or entitlements	Only if also misleads or intimidates another person

As can be seen from the above table, the Rules set higher or lower standards in relation to misrepresenting information depending on whether one is dealing with the court, an opponent or another person. The highest standard is set in relation to dealing with the

courts. Lawyers must not deceive or knowingly or recklessly mislead a court (r19.1). The rules set a lower standard when it comes to opponents in relation to a case or its compromise. The ASCR define an opponent as a lawyer representing the party opposed to one's client, and if there is no lawyer, the self-represented party. Further, the rule does not apply generally: its application is restricted to statements in relation to a 'case'. The rules define a case as a court proceeding or a dispute in which the solicitor is representing a client. As such, the application of the Rules does not extend to negotiations which do not involve a dispute, such as commercial negotiations.

When it comes to opponents, there is no prohibition against misleading them, but there is a prohibition against 'knowingly making false statements' (r22.1). The level of obligations towards other persons who are neither courts nor opponents is even lower. There is no general prohibition on misleading conduct. All that the applicable rule (r34.1.1) requires is that the statement does not 'grossly exceed' a legitimate assertion of the client's rights and entitlements. The rule also only applies to statements that mislead or intimidate the other person.

The distinction between something that is false and something that is misleading is the most salient when it comes to tactics involving the misrepresentation of subjective issues. Examples of such tactics include misrepresenting personal opinion, exaggerated demands, bluffing and use of bargaining chips (i.e., pretending that something is important when it is not in order to trade it away as a concession). With these tactics, there is no false statement in asking for more than the client might realistically expect if that is what the client seeks. However, this type of conduct can be misleading to opponents to the extent that it involves presenting something in a manner that is inconsistent with what one believes to be true, which is dishonest. If the rules prohibit false statements but not misleading statements, then it follows that misleading is not prohibited.

### *(c) Other Rules Relating to Honesty*

The rules also prohibit the tactic of making unsupported allegations; however, only in certain circumstances. Rule 21.3 provides that a lawyer must not allege any matter of fact unless the lawyer believes on reasonable grounds that the allegation is supported by factual material.

Similar to other rules, this rule is limited in its application to specific circumstances. It only applies to court documents settled by the solicitor (r21.3.1), submissions during a hearing (r21.3.2), opening address (r21.3.3) and closing address or a submission on evidence (r21.3.4). There is no explanation why drafters sought to restrict the rule to such

circumstances rather than say that in general, lawyers should not make allegations not supported by factual material.

*(d) Summary of What the Rules Permit in Relation to Information Tactics*

Overall, the Rules put limits on the use of most of the information-based tactics catalogued in this research project. However, a consistent theme that emerged in examining the Rules is that they often restrict the use of the tactics only to specified circumstances and say nothing about what happens outside such circumstances. The most frequent circumstances when the rules are engaged is if there is a link between the conduct and the broadly defined ‘court’.

The fact that the Rules tend to provide guidance in narrowly defined circumstances can lead to uncertainty as to whether the rules apply to the use of the tactics outside of those circumstances. The drafters’ approach in setting a range of standards which vary from circumstance to circumstance also makes it difficult to identify which tactics are permissible. The answer to how far lawyers can go seems to depend on whether the tactic is to be used in relation to the ‘court’ as defined in the ASCR, whether it directly involves the opponent or other persons. In summary, the rules impose a range of restrictions on the use of information-based tactics. The standards imposed by the Rules vary depending on particular circumstances, but in many cases, such as in commercial negotiations, the rules often provide very little, if any, guidance on what is permissible.

*2 How the Rules Limit the Use of Process Based Tactics*

Another category of EANTs involves using legal or negotiating processes. Such tactics have been identified as particularly problematic by the courts. Phillips J warned that tactics in this category ‘will destroy our trial system sooner rather than later unless steps are taken to stop it’.<sup>380</sup> The tactics in this category include making life difficult for the opponent, gaining something for nothing and taking advantage of cognitive biases.

The rules provide very little specific guidance on when such tactics are not permissible. Other than the duty to the administration of justice and other fundamental duties (discussed in the section on fundamental duties), there is very little in the rules to prevent the use of such tactics. The specific rules relevant to this issue are summarised in the following table.

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<sup>380</sup> Phillips J ‘The Duty of Counsel’ (1994) 68 ALJ 834 cited with approval in Ipp (n 257) 219.

Table 21 Rules and their Limitations Relevant to Making Life Difficult Tactics

<b>Rule</b>	<b>Duty/Obligation of a Lawyer</b>	<b>Limitation on the Rule's Application</b>
	<b>Making Life Difficult</b>	
17.1	must exercise forensic judgments	During the case in a matter before the court
21.1.3	must not use coercive powers of the court to harass or embarrass a person	When court powers are used and for this as a principal purpose
21.1.4	must not use coercive powers of the court to gain some collateral advantage out of court	When court powers are used and for this as a principal purpose
34.1.3	must not use tactics that go beyond legitimate advocacy designed to frustrate another person	Only 'tactics that go beyond legitimate advocacy' - this expression is not explained or defined in the rules
	<b>Something for nothing/cognitive biases</b>	
30.1	must not take advantage of an error of another lawyer or person	Only if the error is obvious, it would result in 'unfair advantage' (not defined), and only if would obtain a benefit for a client which has not supportable foundation in law or fact
34.2	must not oppress or harass a person who because of injury or another circumstance is at a significant disadvantage	prohibition limited to seeking instructions for provision of legal services i.e. 'ambulance chasing'

These rules are discussed below in turn by reference to the types of tactics they address.

*(a) Making Life Difficult for Opponents*

The rules provide little express guidance on whether the tactics involving making life difficult for the opponent can be used. These tactics are extracted in the following table.

Table 22 Making Life Difficult Tactics

Making Life Difficult
<ol style="list-style-type: none"><li>1. Ask for more data, documents or information than necessary;</li><li>2. Inundate the other party with data;</li><li>3. Be obstructionist and difficult with requests;</li><li>4. Dispute issues which ought to be conceded; and</li><li>5. Make spurious claims.</li></ol>

The key rule that appears to be directed at curtailing abuses of court processes, rule 17.1, does not explicitly state what is expected of lawyers. Rule 17.1 states that lawyers must exercise forensic judgments but does not define or elaborate on what is meant by 'forensic judgements' and how they should be exercised. The expression 'forensic judgments' has been defined in previous versions of the rules in force in Australia. For example, the Victorian *Professional Conduct and Practice Rules 2005* (Vic) contained the following definition:

"forensic judgment" means a decision of a practitioner made in the course of a case, but does not include a decision as to

- (a) the commencement of proceedings;
- (b) the joinder of parties;
- (c) admissions or concessions of fact;
- (d) amendments of pleadings;
- (e) undertakings to a court;
- (f) a plea in criminal proceedings;

but does include advice given to assist a client or an instructing practitioner to make such decisions.

It is not clear from this definition how it affects what tactics lawyers can or cannot use in negotiations. The definition seems to mostly say what is not a forensic judgment, rather than what it is. The rule that follows, rule 17.2, states that is not a breach of a duty to the client to exercise forensic judgments so as to:

- 17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;

- 17.2.2 present the client’s case as quickly and simply as may be consistent with its robust advancement; and
- 17.2.3 inform the court of any persuasive authority against the client’s case.

This implies that whatever is entailed by the forensic judgments, their exercise can result in confining disputes to real issues, presenting the case quickly and informing ‘the court’ of persuasive authority. I use the word ‘can’ here rather than ‘should’ because rule 17.2 does not actually impose a positive obligation on lawyers to use forensic judgments. It does not say that a solicitor must do all the things listed in rules 17.2.1-17.2.4. It only says that ‘it is not a breach of the duty to the client’ to exercise the forensic judgments. As such, all that rule 17.2 provides is a passive defence against the allegation that by doing those things a solicitor may have breached their duty to the client. Thus, rule 17.2 does not prohibit tactics involving making life difficult for the opponents. This approach can be contrasted with the drafting of rule 32.1 of the Western Australian *Rules of Professional Conduct 2012* (WA), which, in an analogous provision, states:

(2) A practitioner must —

- (a) confine the hearing of a matter to issues which the practitioner believes to be the real issues; and
- (b) present the client’s case as quickly and simply as consistent with its robust advancement; and
- (c) if the practitioner is aware of any persuasive authority that the practitioner reasonably believes might be against the client’s case, inform the court of that authority.

The Western Australian rule is clear and practical. It would be inconsistent with that rule to use tactics that make life difficult for the opponent. For example, asking for more documents than necessary or inundating the opponent with data would be inconsistent in confining the matter to real issues. This would also be the case with being obstructionist, disputing issues that should be conceded (i.e., not ‘real’) or making spurious cases.

A further rule that is relevant to the discussion of tactics that could make the opponents’ life difficult is rule 21. It prohibits the use of coercive powers of the court:

21.1.3 principally in order to harass or embarrass a person; and

21.1.4 principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court.

The underlying purpose of these provisions appears inconsistent with the tactics that involve making the opponents' life difficult. This is because it prohibits lawyers from harassing or embarrassing others or gaining collateral advantage out of court, which is what such tactics are about. However, similarly to many other rules considered in this Chapter, this rule is drafted narrowly. It only applies to conduct involving the use of 'coercive powers of the court'. The rule says nothing about using other processes to achieve the same outcome, for example, correspondence directed at the other party.

A final rule relevant to the discussion of this type of tactic is rule 34.1.3. This rule says that lawyers must not use tactics that go 'beyond legitimate advocacy and are designed to frustrate another person'. This is the only provision in the Rules to use the term 'tactics'. The ASCR does not define or enumerate the specific tactics which 'go beyond legitimate advocacy'. The term 'tactics' is not used anywhere else in the Rules. It is not defined in the case law.<sup>381</sup> As such, it is not possible to say which of the tactics are affected by this provision.

Overall, there are many rules which incorporate principles that appear inconsistent with the use of EANTs designed to make the opponent's life difficult. However, these rules suffer from the same limitations as many other rules discussed in this chapter: they are either drafted vaguely or without definition, which makes it impossible to ascertain whether they apply, or, when they appear applicable, they are drafted so as to apply in only a narrow set of circumstances, rendering them irrelevant to most types of negotiations.

### *(b) Getting Something for Nothing and Cognitive Biases*

It is convenient to consider these two classes of tactics involving getting something for nothing and cognitive biases together due to their similarity. They both rely on taking advantage of the opponent's weakness as human beings: the first relying on laziness, the second on the shortcuts people instinctively make when trying to make a decision (called cognitive biases). EANTs in these categories identified in Chapter 1 are reproduced in the following table.

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<sup>381</sup> Nor is there any commentary on this in the commentary by Law Council of Australia (n 373).

Table 23 *Gratuitous Requests and Cognitive Bias Tactics*

*Something for Nothing*

1. When reducing agreement to writing insert additional clauses without negotiation;
2. Split the difference offers;
3. Nibble - one last request or concession after agreement is reached; and
4. Trollope ploy – pretend to receive only the good parts of the offer.

*Taking advantage of cognitive biases*

1. Make early offers with items of personal value to the negotiator or his/her client;
2. Frame proposals in terms of what the other side will lose if they decline a proposal, instead of stating the proposal in terms of what the other side will gain if they accept it;
3. When asking for a concession, frame the concession against the larger magnitude of the whole matter;
4. Make early proposals which include only concessions of low objective value to use as negotiating chips in later parts of the negotiation;
5. In a proposal, offer two or more small gains instead of one gain of equal magnitude, or, in reverse, when seeking concessions, bundle the requests as one rather than seeking multiple smaller concessions;
6. Make the other party invest more time and additional resources in the negotiation than necessary;
7. Include another fake option (the decoy) when presenting two options to choose from in order to increase the probability that the more desired one will be chosen; and
8. Divert attention from real goals.

The ASCR says it does not contain any provisions expressly dealing with exploiting others' weaknesses.

The two rules that come closest to it are rule 30.1, which is focused on errors of the opponents, and rule 34.2, which prohibits taking advantage of persons who are at a significant disadvantage because of an injury or another factor. Neither of these rules directly addresses the tactics listed in the above table. Rule 30.1 is unlikely to curtail the use of such

tactics because its application is confined to obvious errors. The tactics in the list work in a non-obvious way. Further, the rule only applies if the conduct involves obtaining a benefit ‘which has no supportable foundation in law or fact’. There is no reason why these EANTs would not involve conduct grounded in law or fact. Rule 34.2 is likely to be applicable in rare circumstances. That rule states that

In the conduct or promotion of a solicitor’s practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

To break down this rule into its elements, it only applies to conduct:

1. in a manner likely to oppress or a harass a person;
2. so that person is or likely to be at a significant disadvantage; or
3. where the disadvantage is caused, by reason of some recent trauma or injury, or other circumstances.

While the principle behind the rule is to prohibit lawyers from taking unfair advantage of a weakness of another person, this particular rule seems to be limited to the examples at the more extreme range of such conduct, such as in relation to persons who have been recently injured.<sup>382</sup> This can again be contrasted with the ‘morality of a used car lot’. When it comes to the standard of the proverbial used car sales lots and trade and commerce more broadly, sections 21-22 of the ACL prohibit unconscionable conduct in connection with the supply of services. Section 21 refers to the common law on unconscionability, while section 22 creates a statutory concept of unconscionability.

In considering what is unconscionable, the courts adopt an ordinary dictionary definition - ‘showing no regard for conscience; irreconcilable with what is right or reasonable’.<sup>383</sup> The ASCR does not expressly impose a similar standard, although it could be argued that unconscionable conduct would be inconsistent with the fundamental duty to act with integrity in rule 4. However, in the absence of the case law or guidance, one can only speculate as to whether this is intended to be captured by the concept of integrity in rule 4.

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<sup>382</sup> Lewis (n 161) for examples refers to such tactics in the UK.

<sup>383</sup> *Qantas Airways Ltd v Cameron* (1996) 145 ALR 294; *Hurley v McDonald’s Australia Ltd* (2000) ATPR 41-741.

*(c) Summary of How the Rules Limit the Use of Process-Based Tactics*

Overall, while the Rules refer to many principles that could be considered as restricting the use of tactics involving the use of processes for ulterior purposes, the scope of such prohibitions is often left undefined or is limited to very particular circumstances. For example, while the rules say lawyers must exercise ‘forensic judgments’ and must not use ‘unfair tactics’ they do not say what this means. The prohibition against taking advantage of others, which could be relevant to trying to get something for nothing or the use of cognitive biases, is drafted narrowly, for example, limited in application to persons who have been recently injured. The Rules otherwise provide no express guidance on whether the process-based EANTs are permissible or not in most types of negotiations.

**3** *Who: Using Negotiators to Gain Advantage*

The tactics involving manipulating the conduct or the number of negotiators are divided into four different types: team composition, empathy, emotions and authority. Examples of these tactics are included in the following table.

*Table 24 People Factor Tactics*

People Factor
<i>Team composition</i> <ol style="list-style-type: none"><li>1. Change negotiators;</li><li>2. Have more people on the team than necessary to outnumber the other party; and</li><li>3. Good cop/bad cop.</li></ol>
<i>Empathy</i> <ol style="list-style-type: none"><li>1. Pretend to care about the other negotiator/party;</li><li>2. Pretend to like what they say;</li><li>3. Flattery; and</li><li>4. Communicate with the other party via the client, by-passing the lawyer.</li></ol>
<i>Emotions</i> <ol style="list-style-type: none"><li>1. Act poker-faced;</li><li>2. Act disappointed;</li><li>3. Act dumb or incompetent;</li><li>4. Pretend to be disgusted at what the opponent said;</li><li>5. Get the client to act crazy – ‘mad dog client’;</li></ol>

6. Act irrationally/crazy;
7. Pretend to be angry or aggressive.

*Settlement instructions/authority*

1. Purposefully obtain limited settlement authority/instructions;
2. Go into a negotiation without any settlement authority;
3. Have the client reject the agreement reached by the negotiators;
4. Misrepresent own settlement authority; and
5. Hide settlement progress from the client.

The rules are largely silent about the first and last types of tactics in this category—team composition and settlement authority/instructions. The only exception to this is to the extent these EANTS are inconsistent with the fundamental duty to act honestly (r4.1.1) and the duty to the administration of justice (r3) if the use of the EANTS involves dishonesty or causes delay or unnecessary costs. However, the costs would need to be quite significant to amount to a breach of the Rules. For example, in *Yara Australia Pty Ltd v Oswal*,<sup>384</sup> one of the issues the Supreme Court of Victoria considered was whether the appearance of seven counsel for the applicants, three of them senior counsel, and two of them appearing for the same party on an application for leave to appeal on a security for costs application was in contravention of the applicant’s obligation to keep costs proportionate under section 24 of the *Civil Procedure Act 2010* (Vic).<sup>385</sup> The Court found that the conduct was not excessive despite the large number of lawyers involved.

When it comes to the tactics involving empathy and emotions, the most relevant rules are the requirement, to be honest and courteous in all dealings (r4) and the prohibition against bullying, harassment and intimidation (r42.1). The requirement to be courteous is also reinforced by the prohibition against direct contact with a client represented by another lawyer (r33.1), dealing with a court in terms of personal familiarity (r18.3, because of the extended definition of ‘court’) and the prohibition against the use of tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person (r34.1.3).

The rules relevant to this class of tactics are summarised in the following table.

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<sup>384</sup> [2013] 41 VR 302.

<sup>385</sup> *Ibid* [35].

Table 25 Rules and their Limitations Relevant to People Factor Tactics

<b>Rule</b>	<b>Duty/Obligation of a Lawyer</b>	<b>When the duty applies/towards who/limitation</b>
4.1.2	Must be honest and courteous in all dealings	always
18.3	not to deal with a court on terms of informal personal familiarity	To court
33.1	must not deal directly with the client of another lawyer	Only direct contact eg no restriction on using the client as a proxy
34.1.3	must not use tactics designed to embarrass or frustrate another person	limited to 'tactics that go beyond legitimate advocacy' - this expression is not defined in the rules
42.1	must not engage in discrimination, sexual harassment or workplace bullying, including intimidating, offending, degrading or humiliating	

Whilst in theory, the requirement to be honest seems inconsistent with tactics involving putting on fake emotions or pretending, it seems unlikely that this rule would be enforced in practice. It would seem unlikely that a regulator would commence an action or a Tribunal would find a lawyer guilty for pretending to care about the other negotiator or acting 'disappointed' during a negotiation—some of the tactics in these categories.

Lawyers are, however, at a much higher risk of being found guilty of breaching the standards of professional conduct if they engage in conduct involving bullying, harassment and intimidation (r42.1).

The prohibition against 'tactics that go beyond legitimate advocacy' in rule 34.1.3 seems somewhat unclear. The Rules do not list or provide examples of what tactics might be prohibited by this rule. The Law Council has not provided any commentary. There are no common law cases or statutes that might define which tactics go beyond legitimate advocacy. Thus, the rule in effect, provides no guidance at all on what conduct is permissible and what

conduct is not permissible. The fact that there are tactics which go beyond legitimate advocacy implies that they are quite legitimate in advocacy as well.

Stafford Shepherd of the Queensland Law Society Ethics Centre published a circular on rule 34.1.3, which indicates that the focus of the rule is on the words ‘embarrass and frustrate’.<sup>386</sup> Shepherd cited *Legal Services Commissioner v Orchard*<sup>387</sup> as an example of a case where the rule could apply. The facts of that case pre-date the ASCR. In that case, the Tribunal held that threats to embarrass a person with an affidavit detailing their sexual conduct amounted to professional misconduct.

Overall, while the rules appear largely silent on the tactics involving seeking to use the number, emotions or authority of the negotiators to gain an advantage, such tactics could be considered inconsistent with the fundamental duties to the administration of justice (r3) and to act honestly and courteously (r4.1.1). Furthermore, aggressive or intimidatory conduct would be likely to be in breach of prohibitions against bullying and harassment. The impact of fundamental duties, however, is uncertain because, as outlined in the previous sections, the Rules do not provide a clear definition and scope of these rules.

#### 4 *When Are the Timing Tactics Not Permitted?*

Chapter 1 identified two types of timing tactics: those involving using timing to create pressure or urgency and those involving delay. Examples of such EANTS are reproduced in the following table:

*Table 26 Timing Tactics*

Timing
<p><i>Timing pressure</i></p> <ol style="list-style-type: none"> <li>1. Put short time limits on offers;</li> <li>2. Impose arbitrary deadlines;</li> <li>3. Leave responses till last moment/just before deadlines;</li> <li>4. Time negotiations strategically e.g. around holidays, important board meetings, other events; and</li> <li>5. Threaten to speed up process/trial.</li> </ol>

<sup>386</sup> See Stafford Shepherd ‘Ethics: Legitimate advocacy’ (2017) 37 (10) *The Proctor* 3 and [http://www.qls.com.au/Knowledge\\_centre/Ethics/Resources/Dealing\\_with\\_other\\_persons/Use\\_of\\_tactics\\_that\\_go\\_beyond\\_legitimate\\_advocacy](http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Dealing_with_other_persons/Use_of_tactics_that_go_beyond_legitimate_advocacy).

<sup>387</sup> [2012] QCAT 583

*Delay*

1. Pretend not to be in a hurry;
2. Delay concessions to make them appear more valuable;
3. Set aside more time than required for negotiators; and
4. Cause extensions/delay.

The rules which are relevant to these tactics include the duty to the administration of justice, the prohibition against using the coercive power of the court for ulterior purposes, presenting the case as quickly as possible and giving notice of adjournments.

The use of either of these types of EANTs (pressure or delay) could interact with the fundamental duty to the administration of justice (r3). This could occur, for example, if it results either in parties rushing the court processes or using a delay to avoid the resolution of disputes. However, as discussed in Part E of this Chapter, the Rules provide no guidance on the scope and content of the fundamental duty to the administration of justice. As such, while these tactics could be inconsistent with rule 3, it is not possible to say where exactly lawyers should draw the line on such tactics according to this rule.

Rule 21.1, which was highlighted in the previous section, could be relevant to EANTs relying on time pressure to the extent that they involve the threat of invoking court powers if deadlines are not met. The Rule prohibits lawyers from invoking court powers to harass or embarrass or to gain an advantage out of court. This rule, however, does not apply in circumstances where lawyers are not relying on the threat of coercive court powers, for example, timing negotiations around strategic dates, such as holidays or board meetings.

Another rule that could be relevant is rule 17.2.2. This rule was discussed in the previous section. It refers to presenting 'the client's case as quickly and simply as may be consistent with its robust advancement'. In theory, if reformulated similarly to the Western Australia version, it could prohibit delaying tactics.<sup>388</sup> However, in its present formulation, it does not impose a positive obligation. It merely says that it is not a breach of the duty to the client to do so. In the context of delay EANTs, it simply means that it is not a breach of the duty to the client not to use the delaying tactics.

The only other rule that appears relevant to timing tactics is rule 22.8, which relates to adjournments. It requires lawyers to notify opponents in the event they intend to seek an

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<sup>388</sup> Eg rule 32.1 of the *Western Australian Rules of Professional Conduct 2012* (WA).

adjournment and provide reasons for the adjournment. This could restrict lawyers' ability to use adjournments as a delaying tactics or threats of adjournment to apply pressure. However, the rule only applies in the limited circumstances of cases involving on-going litigation and the possibility of seeking adjournment.

Overall, whilst there are many rules which contain principles that would be inconsistent with the use of timing EANTs, the application of such rules is in some cases unclear, while in others, is restricted to very specific situations. Thus, in most circumstances, the rules do not prohibit the use of timing tactics.

## 5 *Why the Use of Threats and Other External Leverage Might not be Permissible*

The catalogue developed in the previous Chapter refers to a range of tactics involving the use of threats or other external leverage. EANTs of this type are reproduced in the following table.

*Table 27 External Leverage/Threats Tactics*

External leverage/threats
<ol style="list-style-type: none"> <li>1. Warn/put the other party on 'notice' of what harm may come to them (reputation, regulatory investigation, other related proceedings);</li> <li>2. Threaten the other party with harm (reputation, regulatory investigation, other related proceedings);</li> <li>3. Threaten the other party with using personal information against them if they do not concede;</li> <li>4. Threaten a party to civil proceedings with criminal proceedings;</li> <li>5. Escalate to the other negotiator's boss; and</li> <li>6. Threaten the other negotiator/lawyer with regulatory action.</li> </ol>

The Rules contain a number of provisions which are relevant to threats and other forms of external leverage. Rules 32.1 and 34.1.2 deal with explicit threats against other lawyers and other parties, while rule 28.1 addresses the implied threat posed by going to the media. While the ASCR does not prohibit the making of threats in general, it prohibits certain types of threats and certain types of conduct that could constitute an implied threat. Rule 32.1 restricts lawyers' abilities to make threats of disciplinary complaints against other lawyers. It prohibits lawyers from making allegations of unsatisfactory professional conduct and professional misconduct unless such allegations are made 'bona fide' and supported by 'available material'. The restriction to 'bona fide' complaints would be inconsistent with the making of any complaints with the aim of gaining an advantage for a client, even where there is supporting evidence. As such, the ASCR prohibits lawyers from using allegations against

other lawyers as a negotiation tactic. Rule 34.1.2 prohibits lawyers from threatening an institution with criminal or disciplinary proceedings in order to gain an advantage in civil proceedings. The rule is further reinforced by rule 21.4, which prohibits making allegations amounting to criminality, fraud or other serious misconduct unless supported by available material.

While these rules limit what types of threats can be used by lawyers, the cases of *Sing*<sup>389</sup> and *Flower & Hart*<sup>390</sup> demonstrates the practical limitations of the rules. In *Sing*, the lawyer effectively circumvented prohibitions against threatening criminal proceedings in a civil matter. In that particular case, the lawyer threatened to refer the opponent's conduct to the Police for investigation.<sup>391</sup> While the implication of such a threat was clear, the disciplinary Tribunal held that such conduct did not amount to actually threatening to institute criminal proceedings.<sup>392</sup> Thus it did not breach professional standards and was considered permissible.

A second limitation of the ASCR is that it prohibits the institution of criminal or disciplinary proceedings but not other types of legal action. The case of *Flower & Hart*<sup>393</sup> is an example of where a party who was being sued commenced a separate civil legal action against another party in order to gain leverage. In that case, the lawyers were found to have engaged in impermissible conduct, but only because the ancillary proceeding was without merit. An example of a circumstance that is not captured by the Rules can be found in family law. Parties could use threats of claiming more time with children to try to gain leverage in property settlements.

The ASCR also restricts lawyers' abilities to use publicity or a threat of publicity. Rule 28.1 prohibits the publication of any material which may prejudice a fair trial or the administration of justice relating to 'current proceedings'. Thus, it limits the parties' ability to use the tactics of threatening to go to the media to gain leverage. A limitation of this rule is that it only applies when there are current proceedings afoot. Thus, it does not restrict the parties from using publicity before proceedings are commenced or in commercial negotiations which do not involve a dispute, for example, in commercial settings.

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<sup>389</sup> [2007] LPT 004

<sup>390</sup> [1998] FCA 806

<sup>391</sup> *Ibid* [4].

<sup>392</sup> *Ibid* [307].

<sup>393</sup> [1998] FCA 806.

Overall, the ASCR imposes a number of restrictions on the tactical use of threats, including limiting the parties ability to use threats of criminal or disciplinary proceedings against other parties or their lawyers, as well as going to the media. A limitation of the Rules is that they are silent on a broad range of threats, for example, threats of civil proceedings. As the case of *Sing*<sup>394</sup> also demonstrates, the rules could be circumvented by threatening to make reports to the relevant authorities, who might, in turn, institute proceedings rather than directly instituting proceedings.

## 6 *Where the Location Cannot be Used*

The literature searches in Chapter 1 revealed that the least mentioned type of EANTs is the use of the location (venue). Tactics in this category range from insisting on negotiating on one's own turf and offering refreshments to using the air-conditioning to physically wear down the opponents.

The ASCR does not address this type of conduct specifically. However, if taken to the extreme, it could fall within the ambit of the fundamental duties to act courteously (r4.1.1), with integrity (r4.1.4) and comply with the law (r4.1.5). Not only would it be discourteous to deliberately make someone uncomfortable, but it could also amount to criminal law assault.

For example, in Queensland, criminal assault is defined as the application of any force without consent.<sup>395</sup> The definition of 'any force' includes applying heat, light, electrical force, gas, odour, or any other substance or thing, whatever is applied in such a degree as to cause injury or personal discomfort.<sup>396</sup> Tactics which involve making others physically uncomfortable could potentially fall within this definition.

## F *Summary*

The purpose of this Chapter was to examine what guidance on EANTs can be found in the rules of professional conduct adopted by the Australian legal profession. As there are multiple versions of rules adopted by various law societies and bar associations across Australia, this Chapter focused on the model rules which are the most modern iteration and which apply to most lawyers in Australia: the Australian Solicitors' Conduct Rules. The Rules were considered in their capacity as a formal expression of the profession's judgment on what its members should and should not do.

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<sup>394</sup> [2007] LPT 004.

<sup>395</sup> Section 245(1) of the *Criminal Code 1899* (Qld).

<sup>396</sup> Section 245(2) of the *Criminal Code 1899* (Qld).

The Chapter started by setting out the context in which the rules operate, including their application in addition to the common law, as well as changes in the broader environment reflecting a shift from lawyers as litigators to lawyers as negotiators. In addition, there has been a gradual retreat from adversarial extremes of the past, including, in some areas, legislation imposing obligations of good faith and other requirements on parties to negotiation.

However, when it comes specifically to the Rules, this does not seem to have been addressed. There is uncertainty both in relation to which rules apply to EANTs, as well as to how they might apply to EANTs. The difficulty in identifying which rules apply to EANTs stems from the fact that the Rules do not provide specific guidance relating to negotiations or most of the types of EANTs identified in the previous Chapter. The word ‘negotiation’ or its synonyms is not even referenced in the Rules.

As this Chapter has highlighted, there is uncertainty in how the judgment rendered by the legal profession in the form of formal rules might apply to EANTs. The next Chapter will examine whether this matters and how it might be translated into practice by reference to reported cases involving lawyers’ use of EANTs.

# CHAPTER 3 –THE GOOD, THE BAD AND THE UNEXPECTED: EANTs IN CASE LAW

## A *Introduction*

This Chapter examines the reported cases involving lawyers' use of EANTs. The cases provide a source of highly contextualised qualitative evidence that can provide insights into lawyers' assessment and use of EANTs in practice, in line with the research questions of this thesis. Even a relatively small number of cases could be significant. While it is possible that lawyers referenced in the cases were 'bad apples,' Lakhani's analysis of the statistics about disciplinary complaints processes suggests that they could be the tip of the iceberg. According to Lakhani, in Queensland, only 8 in 100 complaints against lawyers went to formal proceedings before a disciplinary tribunal.<sup>397</sup> This would be consistent with Wade's suggestion of an epidemic in the use of EANTs. The question of whether the cases are aberrations or representative of a bigger problem will be considered in the later Chapters.

In the next part of this Chapter, I will outline how I identified the cases before examining what they say about EANTs in an approach that is similar to previous studies of lawyers by Lakhani<sup>398</sup> and Sklar.<sup>399</sup> Lakhani analysed the case of *Mullins* in relation to deceptive strategies.<sup>400</sup> Sklar analysed the demographic characterises of Victorian lawyers who had been the subject of complaints and disciplinary proceedings, to identify patterns or whether it would be possible to identify a profile of problem lawyers.<sup>401</sup>

## B *Case Review*

The cases were identified using the search methodology set out in Part C of Chapter 1. This involved using search terms 'tactics' and 'negotiations' to identify initial cases in the main

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<sup>397</sup> Lakhani (n 21) 252.

<sup>398</sup> Lakhani (n 21).

<sup>399</sup> Tara Sklar et al, 'Characteristics of Lawyers Who Are Subject to Complaints and Misconduct Findings' (2019) 16(2) *Journal of Empirical Legal Studies* 318.

<sup>400</sup> Lakhani (n 21) see section 5.10.

<sup>401</sup> Tara Sklar et al, 'Vulnerability to Legal Misconduct: A Profile of Problem Lawyers in Victoria, Australia' (2020) 0(0) *International Journal of the Legal Profession* 1 <<https://doi.org/10.1080/09695958.2020.1751166>>.

databases of Australian law (Austlii, LexisNexis, Westlaw), then repeatedly using ‘citing’ and ‘cited by’ tools to conduct forward and reverse snowballing searches and identify the case law.

The cases were then filtered on the basis of the following criteria:

- focus on the conduct of lawyers rather than the parties they represented; and
- the case involved the use of at least one EANT by a lawyer.

Cases that did not meet these criteria were removed from the sample. For example, *Williams v Commonwealth Bank of Australia* [1999] NSWCA 345 involved presenting unsigned documents in such a way that the other party would have relied upon them without disclosing that they were not signed because the signatory contained information recorded in them. Likewise, *Poseidon Ltd v Adelaide Petroleum NL* [1991] FCA 848 was about using a decoy negotiation to buy time. However, these and other excluded cases do not say anything about what role lawyers may have played in those processes and hence are outside the scope of this Chapter.

A total of twelve cases were identified that met the inclusion criteria. These are listed in the following table:

Table 28 List of Reported Judgments about Lawyers Using EANTs

No	Citation	Tactics
1.	<i>Clyne v New South Wales Bar Association</i> [1960] HCA 40; 104 CLR 186 ( <i>‘Clyne’</i> )	Initiating multiple baseless proceedings against the opponent’s lawyer
2.	<i>Chamberlain v the Law Society of the Australian Capital Territory</i> [1993] FCA 527; (1993) 43 FCR 148 ( <i>‘Chamberlain’</i> )	Using the court (consent judgment) process to record an opponent’s mistake in a judgment that was to improve bargaining position in negotiations
3.	<i>White Industries (Qld) Pty Ltd v Flower &amp; Hart (A Firm)</i> - [1998] FCA 806 ( <i>‘Flower &amp; Hart’</i> )	Commencing baseless proceedings on behalf of the client; conducting the proceedings in an obstructive manner
4.	<i>Legal Practitioners Complaints Committee and Fleming</i> [2006]	Mislead the opponent into continuing to believe there was a properly executed

	WASAT 352; 48 SR (WA) 29 ( <i>Fleming</i> )	document (will), where there was not (there was an informal will)
5.	<i>Legal Services Commissioner v Mullins</i> [2006] LPT 012 ( <i>Mullins</i> )	Withholding information about a change in a material fact adverse to the client (deterioration of client's health (cancer) in a personal injuries case)
6.	<i>Legal Services Commissioner v Sing</i> [2007] LPT 004 ( <i>Sing</i> )	Threatening to invite the Police to investigate dishonoured cheques unless a debt is settled
7.	<i>Legal Services Commissioner v Garrett</i> [2009] LPT 12 ( <i>Garrett</i> )	Same as <i>Mullins</i> at 5 above
8.	<i>Legal Services Commissioner v Sampson (Legal Practice)</i> [2013] VCAT 1177 ( <i>Sampson</i> )	Claiming costs of debt recovery, threats of legal proceedings and enforcement steps such as warrants of seizure of property and garnishee orders to enforce such claims.
9.	<i>Legal Profession Complaints Committee and Amsden</i> [2014] WASAT 57 ( <i>Amsden</i> )	Commencing proceedings to recover costs to which the lawyer was not entitled
10.	<i>Victorian Legal Services Commissioner v Low (Legal Practice)</i> [2016] VCAT 1584 ( <i>Low</i> )	Using baseless allegations of domestic violence in a family law property dispute
11.	<i>Council of the Law Society of New South Wales v Searle</i> [2019] NSWCATOD 70 ( <i>Searle</i> )	Using baseless allegations of child abuse in a family law property dispute
12.	<i>Martin v Norton Rose Fulbright Australia (No 11)</i> [2020] FCA 1641 ( <i>Norton Rose</i> ) and <i>Martin v Norton Rose Fulbright Australia (25 November 2021)</i> [2021] FCAFC 216	Commencing baseless ancillary proceedings and misleading the opponent about ceasing the proceedings

Ten out of the above twelve cases involved disciplinary issues. The remaining two were *Flower & Hart*, which involved costs against lawyers, and *Norton Rose*, which was based on torts of deceit and abuse of process. The cases spanned time and State jurisdictions. The cases range in time from 1960 to 2020 and in ‘space’ from Western Australia to New South Wales, Queensland (LPT) to Victoria, ACT, Federal Court and the High Court. This underscores the long-standing nature of the problem, as well as its current relevance to lawyers across Australia.

In the next section, the cases are analysed in chronological order, starting with *Clyne*.

1 *Unleashing an Orgy of Litigation: Clyne v New South Wales Bar Association [1960] HCA 40*<sup>402</sup>

*Clyne* is a New South Wales case involving the tactic of launching multiple prosecutions against the opponent’s lawyer in the context of what the High Court described as ‘an orgy of litigation’.<sup>403</sup> The High Court judgment was on appeal from the order of the Supreme Court of New South Wales disbarring Mr Clyne.

Mr Clyne was a barrister acting for the husband, Mr Jacombe, in a family law property dispute. Mr Mann was a solicitor acting for the wife. Mr Clyne became convinced that the proceedings could be abandoned or easily compromised if only Mr Mann ceased acting for Ms Jacombe.<sup>404</sup> In order to achieve this, Mr Clyne launched four prosecutions against Mr Mann, alleging an indictable offence—unlawful maintenance.<sup>405</sup> The tactic of initiating of multiple proceedings was designed to intimidate Mr Mann into ceasing to represent the wife.<sup>406</sup>

Mr Clyne considered this tactic permissible. As the Court recounted, Mr Clyne ‘made no secret of this’.<sup>407</sup> The proceedings were ‘deliberately used the occasion to make a savage public attack on the professional character of that solicitor’.<sup>408</sup> Mr Clyne apparently saw

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<sup>402</sup> In this project I will seek to refer to open-source and free versions of the reports where possible.

<sup>403</sup> *Clyne v New South Wales Bar Association [1960] HCA 40* [3].

<sup>404</sup> *Ibid.*

<sup>405</sup> *Ibid* [1].

<sup>406</sup> *Ibid.*

<sup>407</sup> *Ibid* [20].

<sup>408</sup> *Ibid* [1]

nothing disreputable in it<sup>409</sup> and said in the open court that he saw this as the only way to get the other party to change solicitors and settle the matter.<sup>410</sup>

Whilst Mr Clyne saw nothing wrong with this course of action, the High Court disagreed. The Court noted that it was inappropriate to prosecute an obscure offence, which it considered would not apply to lawyers unless in exceptional circumstances. The Court held that the conduct warranted the disbarment of Mr Clyne. The judgment was based on the rules of the type ‘not to be found in writing,’<sup>411</sup> derived from ‘nothing more and nothing less than a generally accepted standard of common decency and common fairness’.<sup>412</sup> On that basis, the High Court considered his conduct to be professional misconduct and upheld the order of the Supreme Court to remove Mr Clyne from the roll of practitioners.

The Court did not expressly refer to how a breach of rules that cannot be found in writing would relate to the principle that there should be no punishment without crime. However, the court did hold that the order to disbar was made for the protection of the public and is ‘in no sense punitive in character’.<sup>413</sup> In summary, this case serves as a clear example of how lawyers can be disciplined, even disbarred, for breaches of standards they did not expect and are not to be found in writing but based on common decency.

## 2 *Setting a Trap: Chamberlain v the Law Society of the Australian Capital Territory [1993] FCA 527*

*Chamberlain* is an ACT case involving the tactic of using court processes to improve the bargaining position in out-of-court negotiations using what the court referred to as a trap for the opponent.<sup>414</sup> The case has a complex procedural history. The final judgment was delivered by the Federal Court of Australia on appeal from the Supreme Court of ACT. The Supreme Court suspended Mr Chamberlain’s practising certificate for a period of 6 months.

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<sup>409</sup> Ibid [20].

<sup>410</sup> Ibid.

<sup>411</sup> Ibid [22].

<sup>412</sup> Ibid

<sup>413</sup> Ibid [25].

<sup>414</sup> *Chamberlain v the Law Society of the Australian Capital Territory* [1993] FCA 527 (‘Chamberlain’) per Black CJ at [2], [26].

Mr Chamberlain was a barrister and solicitor with 25-years of experience and with good standing in the community, practising in the Australian Capital Territory.<sup>415</sup> He had a tax dispute with the Australian Tax Office ('ATO'). The ATO was claiming \$255,579.20 from Mr Chamberlain. He, in turn, challenged the ATO's assessment. Mr Chamberlain counter-offered \$25,000. The ATO refused to negotiate and commenced proceedings. However, in the writ used to commence proceedings, the ATO misplaced the decimal point. The writ referred to a claim for \$25,557,92 instead of \$255,579.20, that is, ten times less.<sup>416</sup>

As Mr Chamberlain would later admit, he realised the ATO's mistake. He sought to take advantage of it by agreeing to a consent judgment in the amount included in the writ.<sup>417</sup>

Mr Chamberlain gave evidence that he was hoping to use the consent judgment in the reduced amount to secure a position of strength from which to bargain with the ATO.<sup>418</sup> He did not genuinely consider that the judgment would be likely to hold. He assessed the judgment as having no more than a 20% chance of 'holding'.<sup>419</sup> The ATO pursued Mr Chamberlain for the balance of the tax debt. In the subsequent court challenges, ATO made some tactical decisions, including a decision not to rely on the mistake. The actions relating to the tax debt reached the High Court, where Mr Chamberlain was successful.<sup>420</sup>

The Law Society of ACT considered Mr Chamberlain's conduct in having the ATO error deliberately recorded in a consent judgment to be misconduct or conduct unbecoming of a barrister or a solicitor.<sup>421</sup> The Law Society moved a motion against Mr Chamberlain in the Supreme Court of the ACT, which was subsequently appealed to the Federal Court.<sup>422</sup> The majority of the Federal Court upheld the Supreme Court's finding that Mr Chamberlain's conduct amounted to grave impropriety, which tended to bring the profession into disrepute. Black CJ and Lockhart J delivered two leading judgments, with Whitlam J and Beazley J agreeing. Having reviewed all the facts, Lockhart J agreed with the conclusion of the majority

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<sup>415</sup> Ibid per Lockhart J at [61].

<sup>416</sup> Ibid per Black CJ at [2].

<sup>417</sup> Ibid.

<sup>418</sup> Ibid per Black CJ at [27].

<sup>419</sup> Ibid per Black CJ at [20].

<sup>420</sup> Ibid per Lockhart J at [18] citing *Chamberlain v Deputy Commissioner of Taxation* [1988] HCA 21; (1988) 164 CLR 502).

<sup>421</sup> Ibid per Black CJ at [1].

<sup>422</sup> Ibid per Black CJ at [6].

of the Supreme Court that Mr Chamberlain's conduct was improper.<sup>423</sup> Black CJ noted that in the context of an adversarial system, it is permissible to take advantage of a mistake in some circumstances but not in others. However, similarly to the Supreme Court, he found that the rules of professional conduct help identify the line that lawyers have to tread. While there were no rules of professional conduct in force at the time of the events the subject of the case, the rules which were subsequently introduced required that lawyers draw other lawyers' attention to mistakes that could lead to their clients' unnecessarily suffering delay or expense. While this rule only referred to the conduct of another lawyer, and the ATO is not a lawyer, thus rendering the rule not applicable to the facts of this case, Black CJ considered that a standard owed to a self-represented opponent could not be lower than to another lawyer, and thus applied the rule in the present case.<sup>424</sup> Black CJ considered that the rule could still be accepted as a reliable and important indicator of the accepted opinion of the members of the profession.<sup>425</sup> Thus, the majority of the Federal Court relied on the broad notions of impropriety, reinforced by the fact that the rules of professional conduct, though introduced later, in holding that the legal profession would consider Mr Chamberlain's conduct impermissible.

The majority's judgment runs in stark contrast to the two dissenting judgments: one at the Supreme Court and one at the Federal Court level. At the Supreme Court level, Higgins J noted that while Mr Chamberlain's conduct was not praiseworthy, failure to exhibit moral heroism, contrary to his own interests, should not be confused with immorality.<sup>426</sup> His honour considered that the conduct was not unlawful and that unless there was some other improper conduct, he could not be regarded as having acted disgracefully.<sup>427</sup> It would have been unconscionable for the appellant to take advantage of that error only if he had induced or fostered it or used deception to avoid its detection.

At the Federal Court level, Jenkinson J referred to the evolution of the standards of conduct over time and the importance of taking into account the broader adversarial context in which lawyers operate. Jenkinson J noted the centuries-old tradition of allowing advantage to be

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<sup>423</sup> Ibid per Lockhart J [49]-[50].

<sup>424</sup> Ibid per Black CJ at [27].

<sup>425</sup> Ibid per Black CJ at [21].

<sup>426</sup> *The Law Society of the Australian Capital Territory v Chamberlain* [1992] Supreme Court of ACT 426, 1 per Higgins J at [31].

<sup>427</sup> See eg summary of Higgins J's findings by Lockhart J in *Chamberlain v the Law Society of the Australian Capital Territory* [1993] FCA 527 at [32].

taken of opponent's errors in litigation.<sup>428</sup> While this tradition has been eroded over time, His Honour considered Mr Chamberlain's conduct was still within what it tolerated.<sup>429</sup> Further, his honour considered that it was not appropriate to judge lawyers by the standards of 'decent people' without considering the context of a forensic culture 'which still tolerates, if no longer encourages, procedural manoeuvre'.<sup>430</sup> According to Jenkinson J, Mr Chamberlain's conduct would not be regarded as professional misconduct by legal practitioners of good repute and competency.<sup>431</sup>

In the end, while there were two dissenting judgments, one highlighting that the law did not require 'moral heroism' and the other that the tactic was permissible in the adversarial context despite what ordinary decent might think, Mr Chamberlain was found to have engaged in improper conduct. When it came to the penalty, the majority assessed Mr Chamberlain's misconduct as being at the lower end of the scale of such conduct.<sup>432</sup> They found the penalty imposed by the Supreme Court of ACT, a suspension of 6 months to be disproportionate.<sup>433</sup> The majority held that Mr Chamberlain's conduct only warranted a reprimand and a costs order.<sup>434</sup>

### 3 *Buying Time Without Being Transparently Obstructive - White Industries (Qld) Pty Ltd v Flower & Hart (A Firm) - [1998] FCA 806; (1998) 156 ALR 169*

*Flower & Hart*<sup>435</sup> was a Queensland case litigated in the Federal Court involving the commencement of ancillary proceedings and being obstructive so as to buy time as negotiating tactics. The main protagonist was Flower & Hart, a firm of solicitors who acted on behalf of a property developer.<sup>436</sup> The judgment refers to the property developer 'as a sensitive and difficult client,'<sup>437</sup> although the court found that the impetus for the use of the

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<sup>428</sup> Ibid per Jenkinson J at [2]

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

<sup>431</sup> Ibid per Jenkinson J at [4]

<sup>432</sup> Ibid per Black CJ at [31] Lockhart J at [61].

<sup>433</sup> Ibid.

<sup>434</sup> Ibid per Black CJ at [32], Lockhard J at [62].

<sup>435</sup> (1998) 156 ALR 169.

<sup>436</sup> Ibid, 169.

<sup>437</sup> Ibid 176.

tactics came from the firm, not the client, and had it not been for the firm, the tactics probably would not have been used.<sup>438</sup> The Partner of the firm with the carriage of the matter, Mr Meadows, had been admitted to the legal profession over 10 years prior to the events of the case.<sup>439</sup>

The tactics were used in the defence of another company, White Industries (Qld) Pty Ltd's, debt recovery proceedings against the developer.<sup>440</sup> The developer wanted to delay payment of the debt. In order to provide the developer with 'a bargaining stance and a bargaining position,'<sup>441</sup> the lawyers devised a strategy involving commencing proceedings alleging misleading and deceptive conduct, fraud and negligence against White Industries even though such claims had no real prospects of success.<sup>442</sup> These proceedings were conducted in a deliberately obstructive manner.<sup>443</sup> An example of this was 'an extremely comprehensive set of interrogatories' comprising 700 pages dealing with over 500 variations.<sup>444</sup> The judgment refers to a written comment from the Counsel briefed by Flower & Hart, Ian Callinan QC,<sup>445</sup> as devising the strategy just short of 'transparently obstructive'.

Flower & Hart's conduct came to light when their client went bankrupt and White Industries bought out the client's files.<sup>446</sup> These files included advices and correspondence from Flower & Hart and Mr Callinan. <sup>447</sup> White Industries then used these files in seeking indemnity costs directly against Flower & Hart on the grounds that Flower & Hart commenced and

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<sup>438</sup> Ibid 251.

<sup>439</sup> While Mr Meadows is no longer registered as having a current practicing certificate with the Queensland Law Society, his LinkedIn profile indicates that he started practicing as a lawyer in 1975: <https://www.linkedin.com/in/michael-meadows-61147053/> accessed 1 September 2020.

<sup>440</sup> Ibid.

<sup>441</sup> Ibid 248.

<sup>442</sup> Ibid 246.

<sup>443</sup> Ibid 247.

<sup>444</sup> Ibid 190.

<sup>445</sup> Ibid 177, where the Court noted Mr Callinan's appointment to judicial office (as a Justice of High Court of Australia), but that the events of the case took place before that.

<sup>446</sup> Ibid.

<sup>447</sup> Ibid 169.

conducted litigation in the knowledge that it had no worthwhile prospects of success and in a manner designed to be obstructive.<sup>448</sup>

In its defence, Flower & Hart argued that it could not be an abuse of process to institute proceeding even when one had a hopeless case.<sup>449</sup> The firm argued that lawyers are entitled to serve their clients in bringing the proceeding even with the expectation that such proceedings would be unsuccessful.<sup>450</sup> Additionally, the obstructive manner in which the case was conducted was an example 'of a case being fought hard on the client's instructions not to make life easy for the opponent'.<sup>451</sup>

The Court held that the instances of conducting the case in an obstructive manner did not have a significance of their own. Rather, they were part of the implementation of the overall purpose to delay payment.<sup>452</sup> The Court found that as the purpose in instituting the proceeding was not to vindicate a right of their client, the conduct of Flower & Hart was in breach of the duty to conduct proceedings with propriety, not to be a party to an abuse of process and not to obstruct or defeat the administration of justice.<sup>453</sup> The Court also rejected the submission that reliance on senior and junior counsel to advise on the proceedings and to settle the application and the statement of claim was a legitimate defence to Flower & Hart's conduct.<sup>454</sup> The Court held that the general rule is that solicitors cannot be criticised for relying on the advice of properly instructed counsel, but they are still expected to exercise independent judgment.<sup>455</sup> The Court ordered that Flower & Hart pay White Industries' costs of the original proceedings on an indemnity basis.

In summary, this case is an example of a court ordering indemnity costs against a law firm on the basis of breaches of fundamental duties, such as the duty to the court and abuse of process in initiating and conducting proceedings without a proper basis.

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<sup>448</sup> Ibid.

<sup>449</sup> Ibid 240, 256.

<sup>450</sup> Ibid 245.

<sup>451</sup> Ibid 246.

<sup>452</sup> Ibid 247.

<sup>453</sup> Ibid 249.

<sup>454</sup> Ibid 242.

<sup>455</sup> Ibid 242-243.

#### 4 *A Moving Force in Concealing Information: Legal Practitioners Complaints Committee and Fleming [2006] WASAT 352*

*Fleming* is a Western Australian case which involved the tactic of concealing a material fact as a negotiating tactic.<sup>456</sup> The material fact was that a last will and testament ('the will') was not executed properly by the testator prior to his death.<sup>457</sup> At the time of the events subject of the case, the solicitor, Mr Fleming, had over 15 years of experience, having been admitted to practice in 1988.<sup>458</sup> The matter involved a dispute which was set against the backdrop of a broader set of matters involving a number of deceased estates. Mr Fleming's client's husband was the deceased whose will was not executed properly. There were also claims by the siblings of the client's deceased husband relating to their mother's estate.<sup>459</sup> The reason the will was considered not to have been executed properly is that it was signed without any witnesses present.<sup>460</sup> This could result in the deceased being considered intestate. Consequently, the siblings could be entitled to a share of the husband's estate.<sup>461</sup> In order to avoid the siblings' claims, Mr Fleming's client instructed Mr Fleming not to provide any details of the will to the siblings' lawyer other than that his client was the sole beneficiary.

These instructions were contrary to Mr Fleming's recommendation: he would have disclosed the informal nature of the will.<sup>462</sup> Mr Fleming formed a view that despite the deficiency in execution, the informal will was likely to be admitted to probate.<sup>463</sup> However, whilst Mr Fleming recommended disclosing the fact that the will was informal,<sup>464</sup> he could not find anything in the law that would require such disclosure contrary to the client's instructions.<sup>465</sup> As such, he proceeded with the matter without disclosing the informal nature of the will. He

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<sup>456</sup> *Legal Practitioners Complaints Committee and Fleming [2006] WASAT 352*.

<sup>457</sup> *Ibid* [1].

<sup>458</sup> This is based on his LinkedIn profile: <https://www.linkedin.com/in/david-fleming-10b51123/> accessed 21 May 2022.

<sup>459</sup> *Legal Practitioners Complaints Committee and Fleming [2006] WASAT 352* [1].

<sup>460</sup> *Ibid*.

<sup>461</sup> *Ibid* [2].

<sup>462</sup> *Ibid* [67].

<sup>463</sup> *Ibid* [17].

<sup>464</sup> *Ibid* [20].

<sup>465</sup> *Ibid* [50].

gave evidence that he expected to be asked for a copy of the will by the sibling's lawyer, at which point the informal nature of the will would come to light.<sup>466</sup>

Mr Fleming's conduct was not limited to passively withholding information. For example, at one point, he deliberately misdirected the siblings' solicitor to avoid revealing the will. The parties were negotiating a deed. The solicitor included a provision in the deed requiring annexure of the husband's will.<sup>467</sup> However, Mr Fleming managed to negotiate the removal of this provision, citing other reasons, thus sidestepping the need to reveal the will.<sup>468</sup> He also procured that the siblings agree to a bar from claims against the client's husband's estate to pre-empt possible claims.<sup>469</sup> This and other examples led the Tribunal to characterise Mr Fleming as being 'the moving force' in the other side's misconception about the will.<sup>470</sup> The informal nature of the will ultimately came to light in the probate process. The siblings then sought to challenge the will;<sup>471</sup> however, as Mr Fleming assessed, the informal nature of the Will would not stop it from being admitted to probate; that is, it did not affect the outcome.<sup>472</sup> However, the lawyer acting for the siblings complained about Mr Fleming's conduct to the Western Australian Legal Practitioners Conduct Committee.<sup>473</sup> The Committee formed a view that Mr Fleming acted unprofessionally by misleading the siblings and their solicitor and referred the matter to the Western Australian State Administrative Tribunal.

The key argument raised in Mr Fleming's defence and in justifying the tactic of withholding information as permissible is that Mr Fleming was not under an obligation to inform the opponents of 'relevant matters of which he was aware'. This was based on the general legal position in relation to negotiations.<sup>474</sup> However, The tribunal rejected this argument. The Tribunal considered the context and that, in the particular circumstance of the case, the

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<sup>466</sup> Ibid [56].

<sup>467</sup> Ibid [40].

<sup>468</sup> Ibid [41].

<sup>469</sup> Ibid [38].

<sup>470</sup> Ibid [66].

<sup>471</sup> Ibid [47].

<sup>472</sup> Ibid.

<sup>473</sup> Ibid [58].

<sup>474</sup> Ibid [73].

statements about the Will required qualification.<sup>475</sup> The duty not to bring the profession into disrepute in such circumstances may require the lawyer to draw the opponent's attention to a particular fact, even though the opponent's mistake about that fact was not induced by the lawyer.<sup>476</sup> The Tribunal also stated that in seeking to settle the matter, the lawyer 'in some senses, gives up his 'adversary' role in favour of a 'negotiating' role'.<sup>477</sup> The Tribunal did not cite any authorities for this proposition.

The Tribunal assessed the use of the tactic as being in breach of the Western Australian professional conduct rule which prohibits attempting to further the client's case by 'unfair or dishonest means'.<sup>478</sup> While not argued by the Committee, the Court also considered that it was a breach of the rule against 'conduct intended to induce and foster a mistake in a fellow practitioner'.<sup>479</sup>

In defence of the claim, Mr Fleming also sought to rely on the without prejudice privilege. He argued that the complaint against him should be struck out or stayed as an abuse of process because it involved representations arising in the context of without prejudice communications.<sup>480</sup> He submitted that the privilege protected the communications and, applying the decision in *Unilever plc v Procter & Gamble Co* (1999) 2 All ER 691, nothing less than 'unambiguous impropriety' was required to enable the disclosure of such information.<sup>481</sup>

The Tribunal considered this proposition untenable, holding that there is no room for unfairness or deception in negotiations for compromise of negotiations.<sup>482</sup> A lawyer cannot be shielded from allegations of unprofessional conduct by asserting the without prejudice

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<sup>475</sup> Ibid [73].

<sup>476</sup> Ibid.

<sup>477</sup> Ibid [75].

<sup>478</sup> Ibid [67].

<sup>479</sup> Ibid [52] where Mr Fleming is quoted as saying 'I saw nothing at that time which would have necessitated my overriding those instructions'.

<sup>480</sup> Ibid [79].

<sup>481</sup> Ibid [79]-[80].

<sup>482</sup> Ibid [83].

privilege.<sup>483</sup> The Tribunal ultimately found Mr Fleming guilty of unprofessional conduct, reprimanded him and fined him \$7,500.

In summary, this case is an example of an experienced lawyer, acting on the client's instructions and relying on general legal principles, being found to have engaged in unprofessional conduct. The Tribunal applied the rule of professional conduct against using unfair means and held that in negotiations, lawyers give up their "adversary" role in favour of a "negotiating" role.

5 *Asking the Wrong Questions: Legal Services Commissioner v Mullins [2006] LPT 012 ('Mullins') and Legal Services Commissioner v Garrett [2009] LPT 12 ('Garrett')*

*Mullins*<sup>484</sup> and *Garrett*<sup>485</sup> are two judgments arising from the same negotiation. Mr Garrett was the instructing solicitor. He instructed Mr Mullins, who was the barrister in this case. The cases involve withholding information about a material change in facts adverse to the client's claim—in this case, a deterioration in the client's health that was likely to lead to a reduction in the claim value. Mr Mullins was a prominent barrister with over 15 years of experience who actively contributed to the local community: he taught law at a local university, contributed to multiple books, served as a part-time member of the Queensland Anti-Discrimination Tribunal and was elected as a president of various professional associations.<sup>486</sup> His instructing solicitor, Mr Garrett, was a principal of a law firm who had over 20 years of experience at the time of the relevant events.<sup>487</sup> They acted for a claimant in a personal injury claim. The claimant was rendered quadriplegic in a motor vehicle accident and pursued a compensation claim against the relevant insurers.<sup>488</sup>

The events subject of the judgment occurred in the context of a mediation of the claim and before proceedings commenced. Mr Mullins, Mr Garrett and the claimant held a conference

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<sup>483</sup> Ibid [84]

<sup>484</sup> *Legal Services Commissioner v Mullins* [2006] LPT 012 ('Mullins').

<sup>485</sup> *Legal Services Commissioner v Garrett* [2009] LPT 12 ('Garrett').

<sup>486</sup> See eg <https://law.uq.edu.au/profile/10316/gerard-mullins>.

<sup>487</sup> See eg <https://attwoodmarshall.com.au/member/jeff-garrett/>.

<sup>488</sup> *Mullins* [2006] LPT 012 at [2]. As the cases refer to the same factual matrix, which was set out in more detail in *Mullins*, I will refer to the facts as set out in *Mullins*. They were adopted uncontested in *Garrett*.

a few days prior to the mediation where they discussed a schedule of damages.<sup>489</sup> The schedule included a substantial future loss component based on expert evidence, which, in turn, was based on an assumption the claimant would have an average life expectancy.<sup>490</sup> During this conference, the claimant disclosed a new development: a few weeks earlier, he had been diagnosed with cancer.<sup>491</sup> This was likely to substantially reduce the claimant's life expectancy and hence the value of the claim.<sup>492</sup> There were no medical reports in relation to the cancer.<sup>493</sup> Mr Mullins' preliminary advice was that this change would have to be disclosed.<sup>494</sup> However, the client 'did not wish to disclose the information unless legally obliged to do so'.<sup>495</sup>

In light of these instructions, Mr Mullins conducted additional research and spoke to senior counsel.<sup>496</sup> Mr Mullins concluded that the law did not oblige disclosure at the time of mediation.<sup>497</sup> There was a specific statutory provision that required disclosure one month after a 'significant change' in the medical condition.<sup>498</sup> That date would occur after the mediation. Accordingly, Mr Mullins advised that the change in circumstances would not have to be disclosed at mediation provided he did not 'positively mislead' the opponents.<sup>499</sup>

The settlement was negotiated without disclosing the cancer facts.<sup>500</sup> Subsequently, the cancer facts came to the other party's attention. This resulted in disciplinary complaints

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<sup>489</sup> Ibid [8].

<sup>490</sup> Ibid [12].

<sup>491</sup> Ibid [9].

<sup>492</sup> Ibid [17].

<sup>493</sup> Ibid.

<sup>494</sup> Ibid [10].

<sup>495</sup> Ibid [20].

<sup>496</sup> Ibid [19].

<sup>497</sup> Ibid [20].

<sup>498</sup> Ibid [18] as Section 45(3) of the *Motor Accident Insurance Act 1994* (Qld) mandated disclosure to the insurer of any "significant change in ... medical condition" since the Notice of Claim had been given within a month after the claimant had become aware of the change.

<sup>499</sup> Ibid [19].

<sup>500</sup> Ibid [22]-[23].

being made against Mr Mullins and Mr Garrett. The complaints alleged that the lawyers were guilty of professional misconduct for misleading the other party to negotiations.<sup>501</sup>

Mr Garrett and Mr Mullins were subject to separate proceedings with slightly different arguments, so I will outline *Mullins* first, then *Garrett*.

In defending his conduct, Mr Mullins relied on general adversarial principles. Specifically, It was argued on behalf of Mr Mullins that the tactic was permissible because the negotiations were ‘conducted on a tacit, common assumption that, in deciding whether to settle, the parties would rely exclusively on their own resources and information’.<sup>502</sup> The Tribunal in *Mullins* found this reasoning ‘startling’.<sup>503</sup> the Tribunal noted that ‘[c]ontext influences the extent of legal and equitable obligations of disclosure’<sup>504</sup> and erred in ‘[s]upposing that no more candour was to be expected of him at this mediation than of an advocate in court’. The Tribunal stated that mediation should not be considered an ‘honesty-free zone’.<sup>505</sup> The Tribunal cited with approval the following quote from Lord Bingham of Cornhill:

Parties entering into a commercial contract ... will assume the honesty ... of the other[s]; absent such an assumption they would not deal.<sup>506</sup>

The Tribunal also referred to the rules of conduct applicable to barristers at the time, which included a prohibition against knowingly making a false statement or where the practitioner becomes aware that the statement is false, failing to correct it.<sup>507</sup> The Tribunal considered that in his research and in asking the senior counsel for advice, Mr Mullins ‘posed the wrong questions’.<sup>508</sup> Ultimately the Tribunal found that Mr Mullins engaged in fraudulent deception, which amounted to such a substantial departure from the standard of conduct to

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<sup>501</sup> Ibid [1].

<sup>502</sup> Ibid [25].

<sup>503</sup> Ibid [26].

<sup>504</sup> Mullins at [27]

<sup>505</sup> Ibid [29].

<sup>506</sup> [Mullins [27] Citing *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [15]; [2003] 2 Lloyd’s Rep 61, 68 at [14]

<sup>507</sup> Ibid [29].

<sup>508</sup> Ibid [34].

be expected of legal practitioners of good repute and competency as to constitute professional misconduct.<sup>509</sup>

Mr Mullins' instructing solicitor, Mr Garrett, was also found to have breached his professional conduct obligations. In Mr Garrett's case, the Tribunal referred to different rules. In *Mullins*, the focus was on the rule against knowingly making false statements in the Barristers' rules,<sup>510</sup> while in *Garrett* it was on the rule against using unfair or dishonest means in the Queensland Solicitors' Handbook.<sup>511</sup> This difference is not specifically discussed in the judgment, but it could be attributed to the difference between solicitors' and barristers' rules. A further difference was that *Garrett* also involved consideration of the role of Mr Garrett's reliance on experienced Counsel's (Mr Mullins') advice. The Tribunal held that Mr Garrett, as a solicitor, could not be considered a passive recipient of advice. He brought his own knowledge, skill and expertise.<sup>512</sup> Reliance, even on experienced Counsel's advice, did not render the tactic permissible. Each lawyer was found guilty of professional misconduct, reprimanded and ordered to pay penalties (\$20,000 against Mr Mullins, \$15,000 against Mr Garrett) and costs.

This case is a further example of experienced lawyers getting it wrong about whether a negotiation tactic is permissible. What is particularly notable is that in this case, Mr Mullins, a barrister, prepared detailed advice, consulted with senior counsel, and, according to the Tribunal, still got it wrong.

## 6 *Stopping Just Short of Ethical Lines: Legal Services Commissioner v Sing* [2007] LPT 004

*Sing*<sup>513</sup> was about making subtle threats. As the Tribunal put it, it involved consideration of 'how far a solicitor may ethically go in raising the prospect of recourse to criminal process with a view to encouraging the discharge of civil liability'.<sup>514</sup>

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<sup>509</sup> Ibid [31].

<sup>510</sup> Ibid [29].

<sup>511</sup> *Fleming* [2006] WASAT 352 [7], [74]; *Garrett* [2009] LPT 12 [13].

<sup>512</sup> *Garrett* [2009] LPT 12 [23].

<sup>513</sup> [2007] LPT 004.

<sup>514</sup> Ibid [2].

Mr Sing was a solicitor with over 15-years of experience.<sup>515</sup> Mr Sing sent a letter of demand on behalf of his wife, Mrs Sing, in relation to a dispute with her tenant. The tenant presented cheques for the bond money and rental, which were dishonoured.<sup>516</sup> In correspondence with the tenant, Mr Sing threatened to activate a written complaint to the Police attached to the letter.<sup>517</sup> The complaint was about the dishonoured cheques if the money was not paid, inviting the Police to interview the tenant and take such action as appropriate.<sup>518</sup>

The Tribunal noted that there was no professional rule in Queensland dealing with this issue and that the Solicitors' Handbook provided no relevant guidance.<sup>519</sup> However, there was a relevant rule in the model rules of professional conduct.<sup>520</sup> The rule prohibited threatening the institution of criminal proceedings against another person in default of that person's satisfying a civil liability.<sup>521</sup> Further, the Criminal Code contained an offence against extortion which prohibited concealment of 'a crime' or abstaining from 'prosecution for a crime'. In the circumstances, The Tribunal noted that while it was clear that the letter contained a threat, the threat had to be carefully defined.<sup>522</sup> Mr Sing did not say that he, his wife or the Police would prosecute the tenant.<sup>523</sup> The threat was to invite the Police to investigate. The Tribunal also noted that Mr Sing was not invoking his professional status to intimidate the recipient of the letter.<sup>524</sup> He stated matters of fact without embellishment or assertions as to legal conclusion or judgment.<sup>525</sup> The Tribunal concluded that in the circumstances, Mr Sing stopped short of crossing the ethical lines.<sup>526</sup>

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<sup>515</sup> Based on LinkedIn profile <https://www.linkedin.com/in/michael-sing-05026597> accessed 21 May 2022.

<sup>516</sup> Ibid [4]-[5].

<sup>517</sup> Ibid [4].

<sup>518</sup> Ibid [5].

<sup>519</sup> Ibid [10].

<sup>520</sup> Ibid.

<sup>521</sup> Ibid.

<sup>522</sup> Ibid [7]

<sup>523</sup> Ibid [8].

<sup>524</sup> *Sing* [2007] LPT 004 [9].

<sup>525</sup> Ibid [10].

<sup>526</sup> Ibid [23].

7 *Keeping Up with the Changes: Legal Services Commissioner v Sampson (Legal Practice) [2013] VCAT 1177*

The tactic used in the Victorian case of *Sampson* was sending threatening letters of demand with no proper basis.<sup>527</sup> Ms Sampson was an experienced lawyer, with what the Tribunal described as ‘an impressive record of service to the community and to the profession’. This included a school directorship and committee membership, three terms serving as President of the Eastern Suburbs Law Association, being a Law Institute of Victoria counsellor, serving on the Suburban and Country Lawyers Committee of Management, helping to establish a community youth support scheme and doing *pro bono* legal work.<sup>528</sup> Ms Sampson conducted a bulk debt collection practice mainly on behalf of video rental stores.<sup>529</sup> In her practice, she sent out pro forma letters which demanded payment of the debt and the costs of collecting the debt. Additionally, the letters threatened that legal proceedings would be issued, and there would be garnishee and seizure orders against them that would impact their credit rating.<sup>530</sup>

The template letters of demand used by Ms Sampson evolved over time. The templates were based on the templates previously approved by the Law Institute of Victoria.<sup>531</sup> At the time they were approved, it was considered permissible to claim costs of debt recovery, even though no proceedings were underway. There had been complaints about Ms Sampson’s letters of demand previously, and the letters were amended in consultation with the Law Institute.<sup>532</sup> Subsequently, the Law Institute changed its guidance on what was permissible in letters of demand, saying that legal costs could not be claimed prior to proceedings being issued.<sup>533</sup> Ms Sampson failed to keep up with the changes and used older style letters.

These letters were the subject of complaints to both the Australian Competition and Consumer Commission (ACCC) and to the Legal Services Commissioner (LSC) in Victoria.<sup>534</sup>

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<sup>527</sup> *Legal Services Commissioner v Sampson (Legal Practice) [2013] VCAT 1177 [4]*.

<sup>528</sup> See the subsequent case on costs *Legal Services Commissioner v Sampson (Correction) (Legal Practice) [2013] VCAT 1439 (16 August 2013) at [21]*.

<sup>529</sup> *Legal Services Commissioner v Sampson (Legal Practice) [2013] VCAT 1177 [60]*.

<sup>530</sup> *Ibid* [4].

<sup>531</sup> *Ibid* [28].

<sup>532</sup> *Ibid* [64]-[72].

<sup>533</sup> *Ibid* [74].

<sup>534</sup> *Ibid* [16] referring to *Australian Competition and Consumer Commission v Sampson [2011] FCA*

The ACCC charged Ms Sampson for engaging in misleading or deceptive conduct or conduct that was likely to mislead or deceive, in contravention of s 52 of the *Trade Practices Act 1974* (Cth). The ACCC argued that the letters represented that:

- Ms Sampson’s client had legal entitlement to recover costs where in fact the client did not have such entitlement;
- if legal action was taken, then it would necessarily result in the debtor incurring additional costs associated with the legal proceedings, even though in reality, this might not occur; and
- the letters were drafted to look like court documents.<sup>535</sup>

Ms Sampson did not contest the charges and pleaded guilty.<sup>536</sup> There were various practical reasons for her agreeing to the consent orders in the Federal Court, including an illness and the complexity, stress and cost entailed in contesting the case.<sup>537</sup>

Once the ACCC matter was finalised, Ms Sampson faced charges by the Legal Services Commissioner. The Commissioner alleged that the letters breached standards of professional conduct. Two grounds were advanced. First, the letters contained representations that Ms Sampson knew or reasonably believed were untrue, in breach of the ASCR rule 28.1.<sup>538</sup> This was because the letters said that legal proceedings would be commenced when Ms Sampson did not hold such instructions.<sup>539</sup> Second, the letters were calculated to mislead or intimidate and grossly exceed the legitimate assertion of the rights of clients, in breach of rule 28.2. This was because they included a claim for costs to which Ms Sampson’s clients were not entitled.<sup>540</sup>

Ms Sampson contested these charges. The response to the first charge was simple: the letters were not untrue.<sup>541</sup> The Legal Services Commission had not discharged the onus of proving that Ms Sampson ‘knew or reasonably believed’ the statements to be untrue as required by

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<sup>535</sup> *Australian Competition and Consumer Commission v Sampson* [2011] FCA 1165 at [7]

<sup>536</sup> *Ibid* [8].

<sup>537</sup> *Legal Services Commissioner v Sampson (Legal Practice)* [2013] VCAT 1177 [192].

<sup>538</sup> [2013] VCAT 1177 [10]

<sup>539</sup> *Ibid*.

<sup>540</sup> *Ibid*.

<sup>541</sup> *Ibid* [10], [21].

the wording of rule 28.1.<sup>542</sup> In relation to the second charge, Ms Sampson argued that it was not misleading to claim costs associated with the debt recovery.<sup>543</sup> Even if it was, the claim of costs did not ‘grossly’ exceed the legitimate assertion of the client’s rights as required by the wording of rule 28.2.<sup>544</sup>

The Tribunal accepted Ms Sampson’s arguments in relation to the first charge, holding that the Legal Services Commissioner had not discharged its onus of proof. The Tribunal noted that rule 28.1 makes it very difficult to prove a breach of this rule against the practitioner as it requires proof of actual knowledge.<sup>545</sup> This was despite the fact that Ms Sampson had previously pleaded guilty to charges of having engaged in misleading and deceptive conduct in the ACCC prosecution. The Tribunal attributed the difference to the fact that the charge, in contrast to the ASCR, did not require proof of a mental element of the offence.<sup>546</sup> Thus, they involved no finding of intent or even carelessness, importing no moral obloquy.<sup>547</sup>

The Tribunal did find, however, that the letters breached the professional standards because they included a claim for costs to which the client was not entitled.<sup>548</sup> The Tribunal was not persuaded that approval of the form of the letters by the Law Institute of Victoria was a defence.<sup>549</sup> The Tribunal noted that the applicable standards had undergone significant evolution in recent decades and even from the time Ms Sampson engaged with the Law Institute and the letters that were the subject of the proceedings were sent.<sup>550</sup> The Tribunal was careful to judge Ms Sampson by the standards that were in force at the time the letters were sent.<sup>551</sup>

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<sup>542</sup> Ibid [21]-[23].

<sup>543</sup> Ibid [22]-[23].

<sup>544</sup> Ibid [24]-[27]

<sup>545</sup> Ibid [38].

<sup>546</sup> Ibid [48]

<sup>547</sup> Ibid [213].

<sup>548</sup> Ibid [35].

<sup>549</sup> Ibid [37].

<sup>550</sup> Ibid [37], [48]

<sup>551</sup> Ibid [31].

Whilst the amounts claimed may have been modest—around \$30-\$225,<sup>552</sup> the Tribunal found that claiming any amount to which there was no legal entitlement grossly exceeded the entitlement and thus amounted to a breach of rule 28.2.<sup>553</sup> The Tribunal found Ms Sampson guilty of professional misconduct and ordered her to undertake CPD and pay \$25,599 in costs.

Overall, this case is another example of an experienced lawyer getting it wrong despite efforts to stay compliant. In this case, the Law Institute of Victoria changed its stance on what it considered permissible so that it became professional misconduct to use the form of the letters of demand that it had previously approved. The case also highlights a discrepancy between the standards of conduct applicable to lawyers as opposed to those in trade and commerce, as the Legal Services Commissioner could not prove dishonesty under the professional conduct rules, even though the lawyer previously pleaded guilty to having engaged in misleading and deceptive conduct under consumer law.

## 8 *An Honest Mistake is No Defence: Legal Profession Complaints Committee and Amsden [2014] WASAT 57*

*Amsden* is a Western Australian case,<sup>554</sup> which, similarly to *Sampson*, involved a claim for pre-litigation costs. Ms Amsden was a solicitor who owned units in a strata complex. She was an experienced lawyer, having been admitted to practice for 29 years. She practised exclusively in criminal law, having only participated in civil litigation in three matters, all in her personal capacity and on her own behalf.<sup>555</sup> The case arose as a result of Ms Amsden's dispute with the owners of another strata unit. Ms Amsden engaged lawyers and incurred legal costs and disbursements in connection with that dispute.<sup>556</sup> That dispute resulted in WA State Administrative Tribunal proceedings, which were settled without an order as to costs. Ms Amsden subsequently issued a letter of demand for the costs and disbursements. When this was not resolved, she commenced proceedings in the WA Magistrates Court to recover the legal costs incurred in the original dispute. The Magistrates Court dismissed the proceedings on the basis that it was the wrong jurisdiction, and in any event, the original

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<sup>552</sup> Ibid [3].

<sup>553</sup> Ibid [143].

<sup>554</sup> *Legal Profession Complaints Committee and Amsden* [2014] WASAT 57 ('Amsden').

<sup>555</sup> Ibid [8].

<sup>556</sup> Ibid [1].

dispute was in a no-cost jurisdiction, and thus, there would not have been any legal entitlement to costs.<sup>557</sup>

A day later, the owners of the other unit submitted a complaint to the Legal Service Committee about Ms Amsden. They complained that Ms Amsden attempted to get them to pay her legal fees and disbursements without a legal entitlement to do so.<sup>558</sup> The Committee, having considered the complaint, offered Ms Amsden the option to have the matter dealt with summarily if she accepted that she engaged in unsatisfactory conduct. Ms Amsden, however, opted to contest this allegation in the Western Australian State Administrative Tribunal.<sup>559</sup>

The Committee contended that Ms Amsden's actions were impermissible on multiple grounds, both at common law as well as by reference to the professional conduct rules.<sup>560</sup> The Committee argued that the conduct could be characterised as misconduct under either limb of the common law definition adopted in *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 (*Kyle*):

1. conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or
2. conduct that, to a substantial degree, fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence.<sup>561</sup>

The Committee further argued that there were breaches of the Western Australian Solicitors Rules of Professional Conduct as follows:

1. conduct which may be prejudicial to, or diminish public confidence in, the administration of justice or may bring the profession into disrepute;<sup>562</sup>
2. attempting to further a client's matter by unfair or dishonest means;<sup>563</sup> and

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<sup>557</sup> Ibid [28].

<sup>558</sup> Ibid [29]-[30].

<sup>559</sup> Ibid [30].

<sup>560</sup> Ibid [2].

<sup>561</sup> Ibid [43].

<sup>562</sup> Ibid [53].

<sup>563</sup> Ibid [56].

3. claiming costs from the other person unless the client has a right to recover those costs (rule 18).<sup>564</sup>

During the disciplinary hearing, Ms Amsden conceded that the unit owners had no legal liability to pay the money demanded by her, and she had no legal right to make such claims.<sup>565</sup> However, she argued that she did not engage in professional misconduct or unprofessional conduct. Ms Amsden's primary defence to these allegations was that she held an honest but mistaken belief that she was entitled to the costs that she claimed.<sup>566</sup> She also argued that in making the claims and commencing proceedings, she acted in a personal matter, in a personal capacity, not as a lawyer in the course of legal practice.<sup>567</sup>

The Tribunal rejected these arguments. It held that an honest mistake of law is not a defence to an allegation of professional misconduct.<sup>568</sup> Her acting in a personal capacity was no defence because lawyers are subject to professional obligations even in circumstances where they are not acting on behalf of a client.<sup>569</sup> The Tribunal cited *Chamberlain* as an authority for this proposition.<sup>570</sup> The Tribunal found that Ms Amsden's conduct breached both common law and professional conduct rules obligations.<sup>571</sup>

The Tribunal found it to be within the first limb of *Kyle* in that it could be regarded as disgraceful or dishonourable by practitioners of good repute and competence.<sup>572</sup> The conduct breached the professional conduct rules as alleged by the Committee.<sup>573</sup> The Tribunal additionally found that the lawyer's conduct involved abuse of process and breaches of other duties, including a breach of duties of fairness not to demand payment when there was no existing liability to make payment and not to bring legal proceedings without a founding cause of action, and the breach of a duty of propriety to the Court not to commence and

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<sup>564</sup> Ibid [57].

<sup>565</sup> Ibid [44].

<sup>566</sup> Ibid [4].

<sup>567</sup> Ibid [5].

<sup>568</sup> Ibid [68].

<sup>569</sup> Ibid [54], [62].

<sup>570</sup> Ibid [62].

<sup>571</sup> Ibid [49].

<sup>572</sup> Ibid [49].

<sup>573</sup> Ibid [52].

prosecute proceedings which involve an abuse of process.<sup>574</sup> An unusual feature of these additional findings is that many of the duties it refers to, such as a ‘duty of fairness not to demand payment where there is no existing liability’ or ‘duty of propriety to the Court,’<sup>575</sup> are mentioned without citation or referenced in any rules, prior case law or textbooks. The Tribunal found that Ms Amsden engaged in professional misconduct and imposed a \$5,000 fine and a costs order of \$20,339.40.

Overall, this case is an example of an experienced lawyer getting it wrong, albeit not in their primary area of practice. The Tribunal found the commencement of proceedings to recover costs to constitute professional misconduct both at common law and according to the Rules, even though the lawyer claimed genuine, if mistaken, belief about entitlement to such costs.

## 9 *Allegations of Domestic Violence in a Family Property Dispute: Victorian Legal Services Commissioner v Low (Legal Practice) [2016] VCAT 1584*

The tactic considered in *Low*<sup>576</sup> was making unfounded allegations relating to domestic violence in a family law dispute. Ms Low was an experienced solicitor with over 20-years of experience.<sup>577</sup> She was acting on behalf of a mother in a family law dispute about spending time with a child. The mother instructed Ms Low that the father of the child was in breach of parenting orders,<sup>578</sup> and as a result, the mother had not seen the child for an extended period of time.<sup>579</sup>

Based on the mother’s instructions, Ms Low sent a letter to the father, putting him on notice of the breaches and alleging that his conduct could amount to domestic violence.<sup>580</sup> In writing the letter, Ms Low adapted passages from a judgment in the matter of *M v M* (1998) FamCa 1742. These passages highlighted the potential extreme effects of discouraging children’s contact with a parent. The letter said that such conduct was abusive and

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<sup>574</sup> Ibid [49].

<sup>575</sup> See eg ibid [64].

<sup>576</sup> *Victorian Legal Services Commissioner v Low (Legal Practice)* [2016] VCAT 1584 (‘Low’).

<sup>577</sup> Ibid [16].

<sup>578</sup> Ibid [20].

<sup>579</sup> Ibid.

<sup>580</sup> Ibid [20].

tantamount to domestic violence.<sup>581</sup> It concluded with an invitation to participate in negotiations about the parenting orders.<sup>582</sup>

The father complained about this letter to the Legal Services Commission. The Commission then pursued charges on the basis that sending such a letter demonstrated a lack of professional competence by the lawyer. The Commission did not initially specify what particular norm of professional conduct was breached, that is, why the sending of the letter demonstrated incompetence.<sup>583</sup> However, in the course of the arguments before the Tribunal, the Commission submitted that the norm breached was the making of the allegations without a reasonable basis.<sup>584</sup>

In Ms Low's defence, it was submitted, among other things, that:

- 'the letter is forceful and professionally drafted';<sup>585</sup>
- there is nothing unprofessional or unethical in making allegations of domestic violence because these were based on client instructions and appropriate in the context;<sup>586</sup>
- there was an obligation on the practitioner to make serious allegations against a party if there was a reasonable basis for making them, such as client's instructions;<sup>587</sup>
- it is important to identify something more than mere negligence for it to amount to professional misconduct.<sup>588</sup>

On the facts of the case, the Tribunal found it so inherently unlikely that the wife would have given instructions to the Respondent about the behaviour of the children using the exact language of the judgment *M v M*, that this satisfied the Briginshaw standard that she did not do so.<sup>589</sup> In other words, the Tribunal found that the client did not provide instructions to justify the making of serious allegations of abuse and domestic violence. In terms of the

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<sup>581</sup> Ibid [124].

<sup>582</sup> Ibid [46].

<sup>583</sup> Ibid [69].

<sup>584</sup> Ibid [70].

<sup>585</sup> Ibid [37].

<sup>586</sup> Ibid.

<sup>587</sup> Ibid [78].

<sup>588</sup> Ibid [89].

<sup>589</sup> Ibid [124].

specific charges, the Tribunal interpreted ‘competence’ as a component of a charge of unsatisfactory professional conduct in a broad manner, encompassing conduct in the context of the legal profession as a whole and not just in the context of a client relationship.<sup>590</sup> The Tribunal did not challenge the submission that conduct needs to be sufficiently serious to warrant discipline. However, it concluded that the lawyer’s conduct on the facts of the case in making the allegations without foundation was of such a serious nature as to fall short of the standard of competence that a member of the public is entitled to expect of a reasonably competent Australian lawyer. This amounted to unsatisfactory professional conduct.<sup>591</sup> The Tribunal found the lawyer guilty of this and ordered costs on a standard basis.<sup>592</sup>

In summary, in this case, an experienced lawyer made a strenuous allegation of abuse and domestic violence, which she argued she was permitted and even obligated to make on client instruction. However, the Tribunal found it so unlikely that the instructions supported such allegations as to find the lawyers’ conduct to have fallen short of the standards of competence expected of Australian lawyers. The case, therefore, does not stand for a proposition that allegations of domestic violence should not be made in family law children’s matters but rather that such allegations need to be made on a proper basis.

10 *The Threat of Using Embarrassing Photographs: Council of the Law Society of New South Wales v Searle [2019] NSWCATOD 70*

*Searle* is also a case involving allegations of child abuse in a family law matter. Ms Searle had been in practice for 31 years.<sup>593</sup> She was a former Chair of the Family Law Committee<sup>594</sup> and, in pleading mitigation, provided character references from nine people, including clients and colleagues, attesting to her being a competent, thoughtful and professional solicitor.<sup>595</sup> However, she had been subject to disciplinary caution seven years prior and found to have engaged in professional misconduct and unsatisfactory professional conduct of a different nature three years before the events in this case.<sup>596</sup>

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<sup>590</sup> Ibid [126].

<sup>591</sup> Ibid [127].

<sup>592</sup> Ibid [128].

<sup>593</sup> *Council of the Law Society of New South Wales v Searle* [2019] NSWCATOD 70 [48].

<sup>594</sup> Ibid [31].

<sup>595</sup> Ibid [60]-[61].

<sup>596</sup> Ibid [43], [62].

This case arose out of Ms Searle acting on behalf of a wife in a family law property dispute ('the client'). The events took place shortly prior to a conciliation conference before a Registrar of the Family Court of Australia.<sup>597</sup> The client briefed Ms Searle with embarrassing photos allegedly kept by the husband in his home office. One depicted his stepdaughter aged about 11, nude from the waist up and sitting on his lap and another of her, aged between 17 and 19, in sexy underwear.<sup>598</sup> As the family law dispute was about property, not children, the photos were referenced as evidence of the considerable humiliation, stress and embarrassment the client suffered during the relationship, which justified her receiving a large share of the property.<sup>599</sup> Ms Searle then sent an email to the other party's lawyer drawing their attention to the embarrassment and the potential child abuse charges that could arise from including such photos in evidence before the Court.<sup>600</sup> Ms Searle urged the lawyer to convince their client to settle to prevent this from occurring.<sup>601</sup> She also showed the photographs to the husband's lawyer.<sup>602</sup> This resulted in the Husband complaining to the Legal Services Commissioner and initiating disciplinary proceedings against Ms Searle.<sup>603</sup>

The Council of the Law Society charged that Ms Searle's conduct in threatening to use a material that may lead to criminal charges in settlement negotiations amounted to professional misconduct within the meaning of s 297 of the *Legal Profession Uniform Law* (NSW) and at common law.<sup>604</sup> Ms Searle admitted the conduct and that it constituted professional misconduct<sup>605</sup> but denied that there was a breach of rule 21.4 of the ASCR.<sup>606</sup> The rule prohibits alleging any matter of fact amounting to criminality, fraud or other serious misconduct without available material to provide a proper basis.

Ms Searle submitted that she genuinely believed that the allegations made by her had a proper basis (photographs and client instructions), that she informed her client of the

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<sup>597</sup> Ibid [6].

<sup>598</sup> Ibid.

<sup>599</sup> Ibid.

<sup>600</sup> Ibid [7].

<sup>601</sup> Ibid.

<sup>602</sup> Ibid [8].

<sup>603</sup> Ibid [10].

<sup>604</sup> Ibid [11].

<sup>605</sup> Ibid [12].

<sup>606</sup> Ibid [14].

seriousness of the allegations and the possible consequences, and that the client then instructed her that she wished the allegation to be made.<sup>607</sup> Ms Searle also argued that she engaged in conduct which was out of character for her, and she did not appreciate that she was doing anything inappropriate.<sup>608</sup> With the benefit of hindsight, she said that a key factor was that she became too involved in the matter, and this clouded her judgment.<sup>609</sup>

Ms Searle was found guilty of unsatisfactory professional conduct and professional misconduct, reprimanded and ordered to pay a penalty of \$12,000 and costs.<sup>610</sup> This case is another example of an experienced lawyer who did not appreciate that the EANT used, which in this case was the threats she made in relation to child abuse in a family law property division, could be construed as professional misconduct.

### 11 *Lawyers Who Act for Themselves: Martin v Norton Rose Fulbright Australia*

The *Norton Rose*<sup>611</sup> cases involved a tactic of using ancillary proceedings in order to gain negotiating advantage. The proceedings involved a global law firm, Norton Rose. The case has a long procedural history, with two judgments specifically evaluating Norton Rose's conduct. *Martin v Norton Rose Fulbright Australia (No 11) [2020] FCA 1641* was the judgment in the first instance and *Martin v Norton Rose Fulbright Australia (25 November 2021) [2021] FCAFC 216* was the judgment on appeal. There is a stark difference in how the firm's conduct was characterised in the two judgments, so these are examined in turn.

The firm sought to terminate one of the partners within the firm, Mr Martin.<sup>612</sup> In response, Mr Martin commenced a general protections application in the Fair Work Commission ('FWC') against Norton Rose.<sup>613</sup> Norton Rose, in turn, commenced an action in the Federal Court of Australia ('FCA') to restrain the FWC proceedings.<sup>614</sup> The partner with the carriage

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<sup>607</sup> Ibid [14]. This positively satisfies (i.e. there is no breach of) rule 21.4 of the ASCR.

<sup>608</sup> Ibid [22].

<sup>609</sup> Ibid [22].

<sup>610</sup> Ibid [67].

<sup>611</sup> *Martin v Norton Rose Fulbright Australia (No 11) [2020] FCA 1641* ('Norton Rose').

<sup>612</sup> Ibid [7].

<sup>613</sup> Ibid [8].

<sup>614</sup> Ibid [13].

of the matter on behalf of Norton Rose was Mr David Cross, admitted to practice in NSW in 1990.<sup>615</sup>

Norton Rose then agreed to ‘stop’ the FCA proceedings as part of subsequent negotiations and in preparation for an upcoming mediation between the parties (‘the stop representation’).<sup>616</sup> The firm then claimed that it could not stop the proceedings. It also took steps such as back-dating documents and argued that the filing process had gone too far.<sup>617</sup>

In the first instance, the trial judge focused on the fact that Norton Rose deliberately failed to stop the FCA proceedings in order to leave Mr Martin with reduced bargaining power.<sup>618</sup>

Norton Rose’s internal correspondence reflected that this might be advantageous, for example, saying that it would not be a bad thing to conduct mediation with FCA proceedings in the background. Mr Martin argued that such conduct was not permissible on the basis that it amounted to:

- the tort of deceit;
- deceptive and misleading conduct within the meaning of Australian Consumer law;<sup>619</sup> and
- the tort of abuse of process.<sup>620</sup>

Norton Rose denied this. Counsel for Norton Rose argued that there was no deceit or misrepresentation, rather, that perhaps there was some ‘infelicitous language’.<sup>621</sup> The trial judge rejected this. He found the representations made by Norton Rose to be false and misleading.<sup>622</sup> Furthermore, the trial judge found that applying a backdated signature was

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<sup>615</sup> Ibid [9], date of admission obtained via NSW Law Society ‘Find a Lawyer’ tool: <https://www.lawsociety.com.au/for-the-public/find-a-lawyer>.

<sup>616</sup> *Martin v Norton Rose Fulbright Australia (No 11) [2020] FCA 1641* [57].

<sup>617</sup> Ibid.

<sup>618</sup> Ibid [122].

<sup>619</sup> Ibid [58].

<sup>620</sup> Ibid [64].

<sup>621</sup> Ibid [94].

<sup>622</sup> Ibid [120], [178].

not only intentionally misleading but also inconsistent with Norton Rose's duty of frankness to their opponent.<sup>623</sup>

A key issue in dispute was whether the tort of deceit alone was made out or whether there was also misleading and deceptive conduct pursuant to the ACL. Mr Martin argued that the representations were made in trade and commerce as this is defined to include any professional activity.<sup>624</sup> Norton Rose disagreed, arguing that it is insufficient that the representations were made in connection with trade and commerce. It would be more appropriate to characterise the representations as being made within the course of litigation.<sup>625</sup> The trial judge accepted Norton Rose's submissions. The authorities relied upon by Mr Martin could be distinguished as they all concerned negotiations conducted in commercial settings rather than as an aspect of legal proceedings.<sup>626</sup> By contrast, there was a line of authorities that lawyers conduct in litigation that should not be characterised as in trade or commerce.<sup>627</sup> As such, the ACL did not apply.

In relation to the abuse of process, Mr Martin argued that Norton Rose's attempt to restrain FWC proceedings through FCA proceedings was 'an Alice in Wonderland Mad Hatter's Tea Party version of what might be considered a jurisdictional challenge'.<sup>628</sup> He argued that the commencement of FCA litigation was an oppressive, unreasonable and abusive stand to take, which amounted to 'intentional frustration of the usual jurisdiction of the court'. He submitted that it was an attempt to delay and intimidate him with threats of a costs order, which was compounded by the briefing of both senior and junior counsel, including arguing constitutional issues.<sup>629</sup> Norton Rose responded by saying that the proceedings were permissible as they were commenced for a proper purpose.<sup>630</sup>

The trial judge agreed that Norton Rose's FCA proceedings were an abuse of process. He cited *Williams v Spautz* [1992] HCA 34; 174 CLR 509, where the majority found that it is enough that the person alleging an abuse of process show that the 'predominant purpose' of

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<sup>623</sup> Ibid [184].

<sup>624</sup> Ibid [189]-[190].

<sup>625</sup> Ibid [195]-[196].

<sup>626</sup> Ibid [211].

<sup>627</sup> Ibid [212].

<sup>628</sup> Ibid [365].

<sup>629</sup> Ibid [365].

<sup>630</sup> Ibid [372].

the other party in using the legal process has been a purpose other than that for which the process has been designed.<sup>631</sup> Mr Martin met that burden. The Court held that the ancillary proceedings brought the administration of justice into disrepute.<sup>632</sup> It was plain that FWC had jurisdiction to evaluate its own jurisdiction, and it was inappropriate to bring proceedings in another court to restrain its jurisdiction.<sup>633</sup>

The trial judge rejected that reliance on counsel by Norton Rose could be a defence. He held that the firm should have exercised its own judgment and could not hide behind counsel.<sup>634</sup> Having found that Norton Rose committed a tort of deceit and a tort of abuse of process, the trial judge ordered aggravated and exemplary damages and referred Norton Rose's professional conduct for investigation by the Law Society of NSW. The trial judge noted that this case was 'salutary' as to the risks, even to a global law firm, of acting on its own behalf.<sup>635</sup>

The judgment on appeal did not involve any challenge to the primary judge's factual findings, so the facts were the same.<sup>636</sup> The result on appeal might seem surprising given the strong language and condemnation of Norton Rose's conduct by the trial judge, which was manifested in aggravated and exemplary damages, as well as the referral for a professional conduct investigation. In a unanimous judgment, the Full Court of the Federal Court of Australia allowed the appeal, dismissed all claims against Norton Rose and ordered costs against Mr Martin.

The Full Court was far less critical of Norton Rose's conduct. The Court highlighted the relevance of 'ordinary human experience, through the prism of rational and reasonable expectations of human conduct'.<sup>637</sup> The Court further noted, '[f]oolishness, carelessness, incompetence, self-serving statements, outright inaccuracy, dilatoriness, and failures to follow through are all part of ordinary human experience, even in the context of lawyers providing legal services' and that such issues should not be equated to deceit.<sup>638</sup> While the Court noted that Norton Rose's communications were demonstrably wrong on more than

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<sup>631</sup> Ibid [66]-[67] (emphasis in original).

<sup>632</sup> Ibid [396].

<sup>633</sup> Ibid [393].

<sup>634</sup> Ibid [395].

<sup>635</sup> Ibid [461].

<sup>636</sup> *Martin v Norton Rose Fulbright Australia (25 November 2021)* [2021] FCAFC 216 at [15].

<sup>637</sup> [61].

<sup>638</sup> Ibid.

one occasion, the Court considered that, at worst, this amounted to ‘self-serving puffery’ and, at best, exhibited a lack of care and precision about what was being communicated.<sup>639</sup> For example, when it came to back-dating the court application, the Court noted that it occurred in the context where the document already bore that date, and the document had been filed on this date.<sup>640</sup> It considered that it could never have occurred to any reasonable lawyer in Mr Cross’s position that he was doing anything improper or potentially misleading or deceptive.<sup>641</sup> The Court held that no reasonable person could have been led into error (i.e., misled) by the conduct of Norton Rose.<sup>642</sup> In an implied retort to Mr Martin, the Court said that this could have occurred only to a person ‘of a highly suspicious nature and excessively literal turn of mind’.<sup>643</sup> The Court allowed the appeal and dismissed the claim for deceit.<sup>644</sup>

The Court also applied the *Spautz* decision in relation to the tort of abuse of process but reached the opposite conclusion to that of the trial judge. It noted that according to *Spautz*:

commencement or maintenance of the proceeding must be for a purpose which does not include—at least to any substantial extent—the obtaining of relief within the scope of the remedy.<sup>645</sup>

In this case, the Court considered that the relief sought, that is, dismissal of the Fair Work proceedings, was within the scope of the remedy for which Norton Rose applied.<sup>646</sup> That was the primary purpose of the ancillary proceedings. Further, this case could be distinguished from prior authorities on the tort of abuse of process which were designed to, for example:

affect negotiations to take control of a company; put pressure on an opposing party to settle a different dispute; prevent a bank taking possession of property; interfere with, embarrass and hinder a police officer from carrying out his duties to investigate corruption in the poker machine industry; induce a university to secure the

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<sup>639</sup> [111].

<sup>640</sup> [84].

<sup>641</sup> Ibid.

<sup>642</sup> Ibid [123].

<sup>643</sup> Ibid.

<sup>644</sup> [184].

<sup>645</sup> [192].

<sup>646</sup> [200].

defendant's reinstatement; delay or defer the time for payment of an obligation; vex a criminal defendant.<sup>647</sup>

The court also disagreed with the trial judge's finding that Norton Rose's application to the Federal court was hopeless, instead characterising it as 'contestable'.<sup>648</sup> In any event, the Court held that the trial judge erred in holding that costs of defending such ancillary proceedings could not be considered damages, and as such, irrespective of whether there was an abuse of process, Mr Martin suffered no damage.

This case is the most recent of cases considered in this Chapter. What is particularly notable about it is that it represents a departure from the patterns set by the prior case law. While even at the trial level, the trial judge was highly critical of the firm's conduct, the appeal judgment proceeded from a recognition that minor slips occur, such as '[f]oolishness, carelessness, incompetence, self-serving statements, outright inaccuracy, dilatoriness, and failures to follow through are all part of ordinary human experience, even in the context of lawyers providing legal services' and that 'such issues should not be equated to deceit'. At the time of writing it is not known whether, in light of these comments, how the Law Society of New South Wales will act on trial judge's referral of Norton Rose for disciplinary investigation.

## C Summary

The cases provide highly contextual examples of how lawyers assess conduct in negotiations as well as examples of use of specific tactics, which contributes to the understanding of the research questions set out in the Introduction Chapter. The cases could be broadly divided into three buckets. In the first bucket, one could put the good, those who tried to navigate the challenges posed by EANTs and select the correct approach. *Sing* is an example of this being done successfully. *Mullins*, who went to the extent of writing out lengthy advice and consulting senior counsel and, arguably, *Fleming*, are examples of where experienced lawyers identified the ethical ambiguity, resolved it, but resolved it incorrectly. In the second bucket, one could put lawyers who did not even realise that there was an ethical issue involved in the use of EANTs. *Clyne*, *Sampson*, *Amsden* and *Low* arguably fall into this category. The third, and perhaps most controversial bucket, is cases where lawyers appeared to have tried to adopt what can be described, to paraphrase Ian Callinan's email in *Flower & Hart*, 'a non-transparent approach'. This approach could suggest that the practitioners

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<sup>647</sup> [202], citations omitted in the judgment.

<sup>648</sup> [204].

realised their conduct was ethically questionable and thus took steps to mitigate this. In *Flower & Hart*, it was by not being transparent. In *Fleming*, by avoiding questions, in *Chamberlain*, using another lawyer, who would be unaware of important details to take procedural steps.

The case law revealed the use of a wide range of EANTs by lawyers, including examples in most categories of EANTs identified in Chapter 1. In particular, the cases included ‘what’ - information-based tactics (*Mullins*,<sup>649</sup> *Garret*,<sup>650</sup> *Fleming*),<sup>651</sup> ‘how’ - making the opponent’s life difficult and abuse of process (*Chamberlain*,<sup>652</sup> *Flower & Hart*,<sup>653</sup> *Norton Rose*),<sup>654</sup> ‘when’ - delay (*Flower & Hart*)<sup>655</sup> and ‘why’ - threats (*Sing*,<sup>656</sup> *Searle*,<sup>657</sup> *Low*<sup>658</sup>). The only 5W and H category not considered in the case law is ‘where’—location-based tactics.

The cases also involved a diverse group of lawyers. The characteristics of lawyers identified in individual cases are summarised in the following table:

*Table 29 Individual Characteristics of Lawyers in the Reported Judgments*

<b>Name</b>	<b>Gender</b>	<b>Years in practice</b>	<b>Practice type</b>	<b>Practice size</b>	<b>Area of law</b>	<b>State/Territory</b>
<i>Clyne</i>	Male	unknown	Barrister	Sole	Family Law	NSW
<i>Chamberlain</i>	Male	25+	Solicitor	Small firm	Tax	ACT

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<sup>649</sup> [2006] LPT 012.

<sup>650</sup> [2009] LPT 12.

<sup>651</sup> [2006] WASAT 352.

<sup>652</sup> (1993) 43 FCR 148.

<sup>653</sup> (1998) 156 ALR 169.

<sup>654</sup> [2020] FCA 1641.

<sup>655</sup> (1998) 156 ALR 169.

<sup>656</sup> [2007] LPT 004.

<sup>657</sup> [2019] NSWCATOD 70.

<sup>658</sup> [2016] VCAT 1584.

<i>Flower &amp; Hart</i>	Male	n/a	Solicitor /large firm <sup>659</sup>	Large firm	Civil Litigation	QLD
<i>Fleming</i>	Male	15+	Solicitor	Small firm	Wills and Estates	WA
<i>Mullins</i>	Male	15+	Barrister	Sole	Personal Injury Law	QLD
<i>Garrett</i>	Male	20+	Solicitor	Medium firm	Personal Injury	QLD
<i>Sing</i>	Male	15+	Solicitor	Medium firm	Property Law	QLD
<i>Sampson</i>	Female	20+	Solicitor	Small firm	Civil Litigation	VIC
<i>Amsden</i>	Female	20+	Community/ legal aid	Large practice	Property	WA
<i>Low</i>	Female	20+	Solicitor	n/a	Family Law	VIC
<i>Searle</i>	Female	20+	Solicitor	Small firm	Family Law	NSW
<i>Norton Rose</i>	Male	n/a	Solicitor/ large firm	Large global firm	Industrial Relations	South Australia/ NSW

In contrast to Sklar's results, no single characteristic or profile of a lawyer who uses EANTs can be discerned in this table.<sup>660</sup> The cases include male and female lawyers, solicitors and barristers, small practices to global firms, as well as a range of areas of law. All of the lawyers whose conduct was considered in the cases had at least 15 years of experience. This lack of

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<sup>659</sup> The case also extensively considered the role of Ian Callinan QC prior to his elevation to the High Court.

<sup>660</sup> Sklar et al (n 399).

discernible patterns in relation to individual characteristics of lawyers except for a high level of experience raises an important question: do the cases refer to the conduct of a few bad apples, or is it evidence of a bigger problem, perhaps with the profession itself where even its most eminent members fall prey to the problems caused by EANTs?

# CHAPTER 4— EMPIRICAL STUDIES OF LAWYERS: SIGNS OF AN EPIDEMIC?

## A *Introduction*

Chapter 3 examined the reported cases of lawyers using EANTs. A key limitation of that Chapter is the small number of cases, which left one uncertain as to whether those cases were about a few bad apples in an otherwise honourable profession or, to the contrary, just the tip of the iceberg, representing a much bigger problem. This Chapter continues the investigation using another strand of evidence: empirical studies of lawyers.

The Chapter is organised into two parts. The first part provides an overview of the literature on this topic, sets out the methodology and provides a high-level overview of the search results and the studies as a whole. The second part reviews the studies.

## B *Research Context and the Need to Extend Prior Reviews*

The systematic searches of literature conducted as part of this research project revealed several strands of research that is relevant to the question of how far can lawyers go in negotiation. The most recent review of prior studies was conducted by Hinshaw. It focused on the US studies relating to lawyers' use of deception. Hinshaw reviewed prior US studies, including an unpublished study of over 3,000 lawyers by Pepe. However, Hinshaw's review did not include studies from the UK and Australia, as well as Garcia's 2009 study of perceptions of EANTs by prosecutors and defence lawyers. The most recent Australian review of the evidence was conducted by Lakhani, who also mostly drew on the US studies—largely due to the low numbers in Australia. This Chapter expands on this review by broadening the search to studies that go beyond deception and by including not only the US but also UK and Australian studies.

This Chapter builds and expands on these reviews. The search for the literature followed the general methodology outlined in Section C of Chapter 1. Briefly, this included using search terms such as EANTs or 'negotiation tactics' to identify an initial body of studies using the most relevant and comprehensive search engines (Google Scholar, Lexis, Westlaw). These searches were then extended using forward and reverse snowballing searches, for example, identifying papers which cited these initial studies or have been cited in these studies, and so on.

The studies were then filtered for relevance. Studies were excluded if they did not refer to any EANTs or if they did not involve a study of practising lawyers. Studies which included a combination of practising lawyers and other participants, for example, judges or mediators, were not excluded from the results. However, studies of students were excluded due to the concerns that they do not replicate the pressures and experiences of practising lawyers. This process resulted in the exclusion of many studies which provide interesting insights into how people in general negotiate, as well as studies of lawyers outside the context of negotiation. Sternlight and Robbennolt highlighted the many insights behavioural science studies might hold for lawyers' ethical conduct.<sup>661</sup> Such studies have been summarised in a series of reviews which cover over 443 studies containing over 1,134 findings.<sup>662</sup> That is too large a body of knowledge to meaningfully address within the confines of this project, and whilst potentially instructive, it was excluded due to not addressing the condition of lawyers directly. Similarly, studies of lawyers which do not provide insight into negotiating processes were also excluded from this Chapter. An example of such a study is Wilkinson's study which suggested a lack of reliance on professional codes for the purpose of resolving ethical issues by the majority of lawyers practising in Ontario, Canada.<sup>663</sup>

This methodology yielded A total of fifteen (n = 15) studies, which are listed in the following table:

Table 30 Summary List of Studies about Lawyers and EANTs

	Study	Type/purpose
1.	Stephen D Pepe, <i>Standards of Legal Negotiations</i> (unpublished, 1983)	Questionnaire and role plays about standards of legal negotiations in the USA

<sup>661</sup> Jean R Sternlight and Jennifer K Robbennolt, 'Behavioral Legal Ethics' (2013) 45 *Arizona State Law Journal* 1107, 1116.

<sup>662</sup> Robert C Ford and Woodrow D Richardson, 'Ethical Decision Making: A Review of the Empirical Literature' (1994) 13(3) *Journal of Business Ethics* 19; Terry W Loe et al, 'A Review of Empirical Studies Assessing Ethical Decision Making in Business' (2000) 25(3) *Journal of Business Ethics* 185 <<http://www.jstor.org/stable/25074310>><http://www.jstor.org/page/info/about/policies/terms.jsp>> <<http://www.jstor.org>>; Michael J O'Fallon and Kenneth D Butterfield, 'A Review of the Empirical Ethical Decision-Making Literature: 1996–2003' (2005) 59 *Journal of Business Ethics* 213; Jana Craft, 'A Review of the Empirical Ethical Decision-Making Literature: 2004-2011' (2013) 117(2) *Journal of Business Ethics* 221; Kevin Lehnert, Yung hwal Park and Nitish Singh, 'Research Note and Review of the Empirical Ethical Decision-Making Literature: Boundary Conditions and Extensions' (2015) 129(1) *Journal of Business Ethics* 195 <<http://dx.doi.org/10.1007/s10551-014-2147-2>>.

<sup>663</sup> Wilkinson, Walker and Mercer (n 302).

2.	Hazel Genn, <i>'Hard Bargaining: Out of Court Settlement in Personal Injury Actions'</i> (Clarendon Press, 1987)	Interviews and questionnaire to analyse out of court settlement in the UK
3.	Larry Lempert, In Settlement Talks, Does Telling the Truth Have Its Limits? (1988) 2 <i>Inside Litigation</i> 1	Questionnaire on ethical challenges in negotiations scenarios in the USA
4.	Scott S Dahl, 'Stretching the Truth in Negotiations' (1989) 8 <i>The Review of Litigation</i> 173	Interviews around scenarios involving grey ethical issues in negotiations in the USA
5.	Scott Altman, 'Lurking in the Shadow' (1994) 68 <i>Southern California Law Review</i> 493	Questionnaire about trading time with children for financial terms in family law disputes in the USA
6.	Rob Davis, 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers' (1994) 68 (October) <i>The Australian Law Journal</i> 734	Multi-choice questionnaire to ascertain attitudes to negotiating cases in Australia
7.	Debra Lamb, 'Chapter 10: Ethical Dilemmas: What Australian Lawyers Say About Them' in Stephen Parker and Charles Sampford (eds), <i>Legal Ethics and Legal Practice: Contemporary Issues</i> (Oxford University Press, 1995).	Interviews about difficult ethical issues (in general) in Australia
8.	Andy Boon, 'Ethics and Strategy in Personal Injury Litigation' (1995) 22(3) <i>Journal of Law and Society</i> 353	Interviews about ethics and strategy in litigation in the UK
9.	Terry Carter, 'Ethics by the Numbers: Many Lawyers Have Been Asked by Clients or Other Lawyers to Violate Conduct Rules, Survey Suggests' (1997) 83 (10 (October)) <i>American Bar Association Journal</i> 97	Show of hands survey on ethical issues related to litigation in the USA
10.	Tamara Goriely, Richard Moorhead and Pamela Abrams, <i>Research Study 43: More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour</i> (2002)	Interviews plus a study of 150 files pre and post-reforms in the UK

11.	Don Peters, 'When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal' (2007) 2007 <i>Journal of Dispute Resolution</i> 119	Questionnaire to investigate lawyer honesty in negotiations in the USA
12.	Peter Reilly, 'Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help' (2009) 24 (3) <i>Ohio State Journal on Dispute Resolution</i> 481	Questionnaire (replicating Lempert 1988) in the USA
13.	Stephen M Garcia, John M Darley and Robert J Robinson, 'Morally Questionable Tactics: Attorneys and Public Defenders' (2009) 27 <i>Personality and Social Psychology Bulletin</i> 731	Questionnaire about attitudes towards negotiation tactics in the USA
14.	Art Hinshaw and Jess K Alberts, 'Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics' (2011) 16 <i>Harvard Negotiation Law Review</i> 95 <sup>664</sup>	Questionnaire to investigate ethical response in a negotiation scenario in the USA
15.	Richards Lewis, 'Tort Tactics: an Empirical Study of Personal Injury Litigation Strategies' (2017) 37(1) <i>Legal Studies</i> 162 <sup>665</sup>	Structured interviews about personal injuries litigation in the UK

A few features are worth highlighting before I turn to the examination of individual studies. First, similarly to case law examined in the previous Chapter, studies of lawyers' conduct have been conducted since the early 1980s, with the most recent study in 2018. Additionally, the studies have been conducted across a range of jurisdictions, including the USA, the UK and Australia. Second, the studies involved a range of different methodologies, including surveys, interviews, role plays and studies of actual files. There appeared to be a distinct preference for particular methods in the USA, where most of the studies involved surveys, and in the UK, where the studies tended to involve interviews. In Australia, one of the studies

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<sup>664</sup> See further analysis in Art Hinshaw and Jess K Alberts, 'Gender and Attorney Negotiation Ethics Gender and Attorney Negotiation Ethics' (2012) 39 *Washington University Journal of Law & Policy* 145.

<sup>665</sup> Also see expanded and revised version in Richard Lewis, 'Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action' [2018] (2) *Journal of Personal Injury Law* 113

involved a survey and the other involved interviews. Third, there have been many more studies in the USA (n = 9) than in the UK (n = 4) or in Australia (n = 2). The legal systems in these jurisdictions are different, but share considerable similarities, particularly when it comes to lawyers' conduct in negotiations. There has been a cross-pollination of ideas between the legal systems of the two countries.<sup>666</sup> For example, US literature was cited in the seminal case of *Mullins* in Australia,<sup>667</sup> and UK cases were cited in relation to many of the lawyers' duties identified by David Ipp in Australia.<sup>668</sup> Thus, this Chapter will draw on overseas studies in addition to Australian studies.

It is also useful to highlight some of the features of the studies as a body of knowledge, which are not apparent from the above table.

### 1 *Broader Context: Studies of Ethical Decision-Making Literature*

There has been a considerable amount of research in relation to what factors might lead to ethically questionable or unethical behaviours, as well as in relation to how EANTs are perceived by negotiators. Fewer studies examined the intersection between these factors and fewer still, how these apply to lawyers. Sternlight and Robbennolt drew attention to such studies in their review of the implications of behavioural science studies for lawyers' ethical conduct.<sup>669</sup> Studies of ethical decision-making have been summarised in a series of reviews, which over a number of decades, have compared 443 studies containing over 1,134 findings.<sup>670</sup> The studies have investigated a long list of factors on ethical conduct, summarised in Table 30.

*Table 31 Factors Influencing Ethical Decision Making*

<b>Psychological Phenomena</b>	Philosophy/values
Ethical blind spots and fading	Education/Employment/Experience
Loss framing	Peers/Management
	Religion/Spirituality

<sup>666</sup> Robert French, 'United States Influence on the Australian Legal System' (2018) 43(1) *University of Western Australia Law Review* 11.

<sup>667</sup> *Legal Services Commissioner v Mullins* [2006] LPT 012 [29], see particularly footnote 16.

<sup>668</sup> Ipp (n 257).

<sup>669</sup> Sternlight and Robbennolt (n 661) 1116.

<sup>670</sup> Ford and Richardson (n 662); Loe et al (n 662); O'Fallon and Butterfield (n 662); Craft (n 662); Lehnert, Park and Singh (n 662).

Utilitarian reasoning and reference to external standards	Personality (including locus of control and Machiavellianism)
Omission bias	Personal values
Agency relationship	Cognitive moral development
Acting for the benefit of another	Emotions and mood
Unfair behaviour of others	Decision style
Time pressure	
Cognitive depletion	<b><u>Organisational factors</u></b>
Status	Codes of conduct
Intuition and moral reasoning	Policies and procedures
Self-justification	Rewards/Sanctions
	Organisational culture/ethical climate
<b><u>Individual factors</u></b>	Organisational size
Gender	Competitiveness
Age	Moral intensity
Cultural values/Nationality	

The next part reviews what can be learned about lawyers' approach to EANTs from studies identified in this Chapter.

## C *Examination of Studies of Lawyers*

Many of the studies share significant similarities and, in some cases, methodologies. In order to make the results easier to analyse and compare, the reviews in this section are grouped together by country of origin (starting with Australia, then the UK, then the USA) and then chronologically, with studies sharing substantial similarities considered together.

### 1 *Australian Studies: Emerging Symptoms of an Epidemic*

There have been two studies in Australia which are relevant to negotiation ethics of lawyers. Davis conducted a study of the attitudes and beliefs of personal injury lawyers in

Queensland.<sup>671</sup> The study included questions about the prevalence of some of EANTs and revealed a split in opinions between plaintiff and defendant lawyers.<sup>672</sup> Lamb conducted a study of ethical dilemmas faced by lawyers, which also touched on negotiations.<sup>673</sup>

(a) *Davis's 1995 Survey of Queensland Personal Injury Lawyers*

Davis surveyed 105 personal injury plaintiff and defendant lawyers in Queensland.<sup>674</sup> The object of Davis's study was to examine how personal injury negotiations are conducted from the perspective of psychological and decision theory.<sup>675</sup>

The survey included sixteen questions relating to various aspects of personal injury practice. Three of these questions involve EANTs, with the participants asked if they agreed or disagreed with the following statements:

1. it is often necessary to misrepresent the strength of your position to get a good negotiated result;
2. when I say an offer is my last offer, I am nearly always exaggerating; and
3. defendants deliberately delay cases so as to increase the financial pressure on plaintiffs.<sup>676</sup>

Davis found that 36% of the plaintiff and 39% of the defendant lawyers agreed or strongly agreed with the first statement, that is, that it is often necessary to misrepresent the strength of one's position.<sup>677</sup> Fewer lawyers agreed or strongly agreed that they are nearly always exaggerating when saying it is their last offer: the proportion was 24% for both plaintiff and defendant lawyers.<sup>678</sup> In contrast to these responses, there was a sharp difference in relation to the third question. While Almost half (47%) of the plaintiff lawyers agreed with the

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<sup>671</sup> Rob Davis, 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers' (1994) 68(October) *The Australian Law Journal* 734.

<sup>672</sup> Ibid.

<sup>673</sup> Debra Lamb, 'Chapter 10: Ethical Dilemmas: What Australian Lawyers Say About Them' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford University Press, 1995).

<sup>674</sup> Davis (n 671).

<sup>675</sup> Ibid 735.

<sup>676</sup> Ibid, 750

<sup>677</sup> Ibid.

<sup>678</sup> Ibid.

statement that defendants often delay cases, this dropped to less than one in ten for defendant lawyers (9.8%). Davis hypothesised that the difference was due to the defendant lawyers recognising that such conduct is not appropriate.<sup>679</sup>

The main limitations of this study are that it is quite dated, having been published in 1994, it had a relatively modest sample size (n = 105) and it involved quite a narrow cross-section of the Australian legal profession: personal injury lawyers in only one jurisdiction (Queensland).<sup>680</sup>

*(b) Lamb's Interviews of Lawyers About Ethical Challenges Generally*

Lamb interviewed seventeen (n = 17) practising lawyers across New South Wales, Queensland and the ACT.<sup>681</sup> The sample was diverse and included solicitors, barristers, and government lawyers, junior and senior, as well as city, suburban and regional lawyers, practising across multiple practice areas of law, including family, criminal, commercial, tax, property and corporate law.<sup>682</sup> Lamb's interviews were semi-structured. The participants were asked to describe any situations they faced which raised difficult ethical issues.<sup>683</sup> An advantage of this methodology is that it contains no prompts or forced answers; that is, there was no guarantee that issues relating to negotiations would be raised by the participants. However, Lamb reported that both junior and senior lawyers expressed concerns about negotiation ethics.<sup>684</sup> Lamb reported examples of two specific issues being raised. First, junior lawyers being taken advantage of by their more senior counterparts.<sup>685</sup> Second, there was a concern that most commercial solicitors believed it was acceptable to exaggerate and be less than truthful in other circumstances.<sup>686</sup> At the heart of the concern was that lawyers

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<sup>679</sup> Ibid 739–740.

<sup>680</sup> See eg Bobette Wolski, 'An Evaluation of the Current Rules of Professional Conduct Governing Legal Representatives in Mediation in Australia and the United States and of a Range of Proposed Alternative "Non-Adversarial" Ethics Systems for Lawyers' (Bond University, 2011) in section 7.6 noting lack of qualitative and empirical evidence in relation to lawyers' conduct in mediations in particular.

<sup>681</sup> Lamb (n 2).

<sup>682</sup> Ibid 219.

<sup>683</sup> Ibid.

<sup>684</sup> Ibid 232, however, Lamb did not disclose the number of participants who raised these concerns.

<sup>685</sup> Ibid.

<sup>686</sup> Lamb (n 2) 232.

either did not know or understand that such conduct could be unethical and likely to be misleading and deceptive within the meaning of the *Trade Practices Act 1974* (Cth).<sup>687</sup>

The participants also reported the actual use of several ethically ambiguous tactics. For example, one junior lawyer reported being instructed by her supervisor to include as many documents as possible in the affidavit while making sure that such documents are not blatantly irrelevant.<sup>688</sup> This was designed to frustrate the other party—in a similar way to the strategy designed by Ian Callinan QC as reported in the judgment of *Chamberlain* examined in Chapter 3.<sup>689</sup> Other reported tactics included deliberate delays, such as entering hopeless defences or commencing hopeless actions, again, a strategy reported in *Chamberlain*,<sup>690</sup> or ‘taking every point’ in a litigious matter in an attempt to bankrupt the opponents.<sup>691</sup>

Overall, Lamb’s study highlighted several concerns raised by practising Australian lawyers. This included concerns about whether lawyers know and understand what standards apply in negotiations, the actual use of EANTs, and possible factors, such as seniority, that might affect the use of EANTs. The fact that the conduct of lawyers in negotiations was not raised by the interviewer but was brought up by the participants also suggests that this is an issue that is a real problem and is high on some lawyers’ agenda. However, the small (n = 17) sample and date of the study (1995), make it an unreliable predictor of the issues faced by Australian lawyers today.

## 2 *Interviews of Lawyers in the United Kingdom: Anecdotal Evidence of the Use of Ethically Ambiguous Tactics and Impact of Rules*

The Australian and English law on lawyers’ duties to the court is very similar. Many of the authorities cited by David Ipp in his systematic analysis of the duties to court are English. It is, therefore, instructive to consider what English studies say about the conduct of English lawyers. Similar to Lamb’s study, these studies adopted an interview methodology that focused on conduct that is broader than just EANTs, but reveals much about EANTs.

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<sup>687</sup> Ibid.

<sup>688</sup> Lamb (n 2) 230.

<sup>689</sup> Lamb (n 2) 230.

<sup>690</sup> Ibid.

<sup>691</sup> Ibid, 233.

(a) *Genn 1987: Hard Bargaining and Out of Court Settlement in Personal Injury Actions*

Genn's study focused on investigating how the rules of law and procedure are mobilized and manipulated to gain leverage over the opposing side and the influence on the bargaining of 'extra-legal' factors.<sup>692</sup> Genn sought to use several methodologies, including interviews, questionnaires and an observational study. The interviews were quite lengthy, lasting between an hour and half a day and involved 30 solicitors, 20 barristers and 12 representatives of insurance companies.<sup>693</sup> The interviews were then developed into a questionnaire, which was completed by 131 law firms that represented personal injury claimants.<sup>694</sup> The observational component of the study was more limited, as only one participant was prepared to allow Genn to sit in on negotiations. Genn found that negotiators considered it legitimate to exploit any weakness displayed by the opponents.<sup>695</sup> The participants reported the use of delay as a powerful tool against their opponents.<sup>696</sup> In response to an open-ended question about what was most disagreeable in negotiations, many participants referred to delays, derisory low offers, failure to concede liability when it is clear and obstructiveness.<sup>697</sup> In responding to the inverse of this, that is, what they enjoyed in negotiations, many indicated securing inflated damages or larger-than-anticipated settlements.<sup>698</sup> This implies exaggeration of claims to begin with.

(b) *Goriely 2002: Impact of the Reform of the Rules*

In 2002, Goriely's study was designed to evaluate the impact of Lord Woolf's reforms of rules of civil procedure which were designed to reduce cost, delay and complexity brought about by a culture of excessive adversarialism. Whilst this aim is broader than an investigation of EANTs, it provides insights into the use of EANTs and the impact that guides lawyers' conduct, albeit in this case, these were not professional conduct rules.<sup>699</sup>

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<sup>692</sup> Ibid 15.

<sup>693</sup> Hazel Genn, 'Hard Bargaining: Out of Court Settlement in Personal Injury Actions' (1987).

<sup>694</sup> Ibid 17–18.

<sup>695</sup> Ibid 137.

<sup>696</sup> Ibid 103–104.

<sup>697</sup> Ibid 138–145.

<sup>698</sup> Ibid.

<sup>699</sup> Ibid xi.

Goriely conducted 54 in-depth semi-structured interviews with practitioners and claims managers who negotiate legal claims, supplemented by a study of 300 personal injury files.<sup>700</sup>

The participants of this study reported that Lord Woolf's civil procedure reforms in the UK brought about a change in the culture of negotiations, including less adversarialism and more cooperation in resolving disputes.<sup>701</sup> Following Lord Woolf's reforms, there was general agreement around increased openness. The parties became willing to exchange more information earlier.<sup>702</sup> Likewise, the introduction of judicial case management has led to cooperation and getting to the issues faster.<sup>703</sup> A review of the files revealed that there were fewer spurious requests and time wasted on unnecessary correspondence.<sup>704</sup> However, such behaviours were not eliminated entirely. For example, one interview participant reported that the old tactics had just adapted to the new rules.<sup>705</sup> Another said that the process of negotiating claims remained essentially adversarial, albeit in a friendlier form.

The study of the files revealed little overall change, despite improvements in some areas. The number of communications to reach a similar stage in the matter (letters, phone calls or meetings) was 14 pre-Woolf and 15 post-Woolf.<sup>706</sup> However, there was something of an increase in the quality of communications as the number of follow-up requests or futile threats decreased.<sup>707</sup> Nonetheless, the average time until settlement (i.e., the conclusion of negotiations) remained much the same, at 13 months.<sup>708</sup> Goriely noted that the study was unable to provide meaningful data on whether the changes in the rules produced 'more settlements'.<sup>709</sup> While some study participants reported that there were about a third fewer

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<sup>700</sup> Ibid 4.

<sup>701</sup> Ibid 165.

<sup>702</sup> Ibid 165.

<sup>703</sup> Ibid.

<sup>704</sup> Ibid 168–169.

<sup>705</sup> Ibid 166.

<sup>706</sup> Ibid.

<sup>707</sup> Ibid 169.

<sup>708</sup> Ibid 171.

<sup>709</sup> Ibid 163.

matters that resulted in legal proceedings, there were so few cases going to trial that it made it extremely difficult to ascertain any difference.<sup>710</sup>

Overall, this study suggests that changes in rules can lead to improvements in negotiating culture, including lower use of EANTs, such as spurious requests and withholding of information. However, at the same time, there is evidence that some of the old tactics were adapted to the new rules.

(c) *Boon 1995: An Expectation of Deception and Gamesmanship*

Boon interviewed four English trade union lawyers.<sup>711</sup> The small sample translated into a high level of detail reported in the study, thus providing valuable qualitative insights into the negotiation processes. Boon focused on ethics and strategy in personal injury litigation. Trade union lawyers were selected as a sample due to being high-volume repeat negotiators.<sup>712</sup>

Boon's interviews revealed what might be considered as 'unspoken rules of the game,' with lawyers on both the claimant and the defendant sides expecting a degree of deception and gamesmanship to occur.<sup>713</sup> For example, participants reported that excessive demands were both common and necessary.<sup>714</sup> Further, two participants reported using the pressure of rising costs and litigation to get better outcomes.<sup>715</sup> One also acknowledged using bluffs as a tactic.<sup>716</sup> Further, participants indicated deliberate withholding of relevant information.<sup>717</sup>

An interesting insight reported by Boon is that some participants used 'conditional cooperation' in relation to their opponents.<sup>718</sup> What this means is that if the opponent acted reasonably, they would act reasonably in response.<sup>719</sup> For example, if the respondents

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<sup>710</sup> Ibid.

<sup>711</sup> Andy Boon, 'Ethics and Strategy in Personal Injury Litigation' (1995) 22(3) *Journal of Law and Society* 353.

<sup>712</sup> Ibid, 353.

<sup>713</sup> Ibid 367.

<sup>714</sup> Ibid, 362.

<sup>715</sup> Ibid, 358.

<sup>716</sup> Ibid 359.

<sup>717</sup> Ibid 362.

<sup>718</sup> Ibid 359.

<sup>719</sup> Ibid 360.

genuinely tried to settle claims, the participants would avoid unnecessarily running up costs.<sup>720</sup> What this suggests is that there is a mutual awareness of what is considered good behaviour and what is considered bad behaviour, which in turn, influences how each party behaves.

*(d) Lewis 2017: Personal Injury Lawyers' Conduct Revisited*<sup>721</sup>

Lewis conducted structured interviews of twenty-nine (n = 29) personal injury lawyers in England and Wales to find out what tactics they used to achieve their aims in personal injury litigation.<sup>722</sup> This is the most recent study of lawyers' use of EANTs identified during the literature searches.

While the focus of the study was on litigation, the participants referred to the usage of many different types of EANTs. Examples include the following:

- delaying making claims to deny the ability to gather evidence/prepare to the other party;<sup>723</sup>
- deliberately taking steps to complicate the legal processes;<sup>724</sup>
- timing offers when the counterparty is most vulnerable;<sup>725</sup>
- trying to take advantage of stress and depressive disorders with low offers;<sup>726</sup>
- starting with exaggerated offers;<sup>727</sup>
- deliberately hurrying the other party to rattle them;<sup>728</sup>
- prolonging the litigation and being generally obstructive;<sup>729</sup>
- using junior staff with no authority to agree to negotiated outcomes.<sup>730</sup>

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<sup>720</sup> Ibid.

<sup>721</sup> Lewis (n 161).

<sup>722</sup> Ibid.

<sup>723</sup> Ibid 172.

<sup>724</sup> Ibid 174.

<sup>725</sup> Ibid 176.

<sup>726</sup> Ibid.

<sup>727</sup> Ibid 177.

<sup>728</sup> Ibid 179.

<sup>729</sup> Ibid.

<sup>730</sup> Ibid.

- escalating to bosses/supervisors;<sup>731</sup> and
- grinding people into submission by using legal processes;<sup>732</sup>

What is particularly notable about this study is the broad range of EANTs it touches on. The above list covers most of the categories of EANTS identified in Chapter 2: information-based tactics, making life difficult for opponents, team composition, settlement authority and timing. An interesting aspect of the study, made conspicuous by its absence, is a lack of discussion of ethical issues that arise from the use of such tactics or how they might relate to the professional conduct rules. The study refers to the participants' concerns about their reputation; however, these refer primarily to the need to sometimes take a stand and contest legal cases so as not to appear weak.

## D *The US Studies: a Well Explored Problem Area with Particular Limitations*

Literature searches identified four large-scale US studies between the US and the Australian legal frameworks applicable to lawyers that share similarities and a number of smaller-scale studies. The four large studies are discussed first, one by one, followed by a brief examination of the smaller-scale studies.

### 1 *Pepe's 1983 Unpublished Study of 3,006 lawyers: A Lost Treasure Revealed*

Pepe conducted what, to date, has been the largest and most comprehensive of all studies of lawyers' negotiation conduct.<sup>733</sup> The purpose of the study was to counter the tradition of academic writing without consulting with the practitioners and to provide a real-world perspective to increase the profession's understanding of lawyers' bargaining behaviours.<sup>734</sup>

The study provides a treasure trove of data and insights into lawyers' conduct in negotiations. It was conducted at a scale unmatched by any other study. It involved a survey of 3,006 participants, comprised of 1,034 litigators from Michigan, 1,513 litigators from national firms across the USA, 256 state judges, 75 federal judges and 128 law professors. It also included 124 role-plays. The inclusion of judges and academics provided interesting insights not only into the attitudes of the practitioners but also how they compared to judges,

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<sup>731</sup> Ibid 180.

<sup>732</sup> Ibid 182.

<sup>733</sup> Stephen D Pepe, *Standards of Legal Negotiations* (1983).

<sup>734</sup> Ibid, 2

students and academics.<sup>735</sup> However, the study was never formally published, as its author became a judge. Fortunately, it was identified and reported on by Hinshaw as part of his broader review of prior literature.

*(a) Withholding of Information*

The study suggests that a significant proportion of the legal profession considers the tactic of withholding relevant information permissible and actually uses it. The study involved a scenario about a change in material evidence (witness testimony). The participants were asked to indicate if it was permissible to facilitate settlement without disclosing the change. Pepe reported that 70.5% of litigators from Michigan, who were primarily personal injury plaintiff lawyers, said that it was permissible to facilitate settlement without disclosing the change.<sup>736</sup> However, the figure dropped down to 50.5% for what Pepe described as “national litigators”, consisting primarily of defence and corporate litigators.<sup>737</sup>

Further, mock negotiations revealed that when asked to actually negotiate the scenario, the use of tactics jumped up: 98% of the defendants withheld the change in evidence (121 out of 124).<sup>738</sup> Moreover, in over 70% of the negotiations, the lawyers made positive assertions about pre-change evidence without disclosing the change.<sup>739</sup> In other words, not only did they withhold information about the change, but they also relied on past information which was no longer valid. Pepe suggested that this dramatic increase in acceptance of the tactic suggests that in actual negotiations, lawyers were more likely to withhold the information than reported in surveys.<sup>740</sup>

When Pepe asked about the frequency of the use of misrepresentation in negotiations, 12-28% of participants said that other lawyers regularly or frequently made representations they reasonably believed to be false.<sup>741</sup>

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<sup>735</sup> Ibid 25.

<sup>736</sup> Ibid 30.

<sup>737</sup> Stephen D Pepe, *Summary of Selected Findings of the Study of the Standards of Legal Negotiations* (1983) 3.

<sup>738</sup> Ibid 4.

<sup>739</sup> Ibid.

<sup>740</sup> Ibid.

<sup>741</sup> Stephen D Pepe, *Interim Report and Preliminary Findings for Submission to the American Bar Association Commission on Evaluation of Professional Standards and the American Bar Association House of Delegates at Their February 1983 Meeting* (1983) 11.

Thus, the study revealed that many lawyers considered tactics involving withholding information permissible, and a substantial minority of the participants reported that misrepresentations were used regularly or frequently by other lawyers.

*(b) Delay*

Pepe also surveyed the lawyers on the use of delay for tactical reasons. Almost half of the lawyers believed procedures could be used to get delay as leverage: 46% of Michigan lawyers and 47% of National litigators.<sup>742</sup>

There was a notable discrepancy in what lawyers said about how frequently they used delay and how frequently delay was used by others. Just over 20% of participants said they would threaten delay. However, more than half of the sample estimated that defence lawyers routinely contributed to delay as a negotiation tactic, that is, use it in practice.<sup>743</sup>

*(c) Threats and External Leverage*

Pepe asked the participants if they would use the threat of reporting the other party to the regulatory authorities as a tactic. In the scenario, the other party were described as illegal immigrants. They could face deportation if reported to the authorities.<sup>744</sup> A significant minority (15-17%) of participants said they could expressly use this as a threat to get a better settlement. A much higher proportion of lawyers indicated it would be permissible to make this threat indirectly through the client: 41% of National and 32% of Michigan lawyers.<sup>745</sup>

*(d) Factors Associated with the Use and Assessment of EANTs*

Pepe investigated a range of issues that could influence lawyers' responses to the survey.

First, he asked lawyers to rank what played the greatest role in their decision-making when confronted with a serious ethical problem.<sup>746</sup> The responses indicated that personal ethical and philosophical were ranked first (over 90%) followed by the Code of Professional

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<sup>742</sup> Ibid, 11.

<sup>743</sup> Ibid.

<sup>744</sup> Ibid, 12

<sup>745</sup> Ibid.

<sup>746</sup> Pepe, 'Standards of Legal Negotiations' (n 733) 27.

Responsibility (73% of national lawyers, 64% of Michigan lawyers).<sup>747</sup> The opinion of one's legal colleagues was third (66% of National lawyers, 60% of Michigan).<sup>748</sup>

Pepe also analysed what he referred to as 'patterns' in how the responses correlated with the participants' characteristics. This revealed that the participants with the following characteristics were less likely to find EANTs permissible:

- large firm/elite lawyers as opposed to smaller firms;
- those who were practising religion than those who were not;
- older rather than younger;
- in a large firm - up to 4 years in practice, then more permissible at 4-6 years, then less permissible again after 6<sup>th</sup> year;
- no single 'profile of a deceptive litigator' possible;
- for the top 10% deceptive - years in practice, education, gender and race were not significant factors; and
- for the 10% least deceptive—higher income was significant but not location, education, gender or race.<sup>749</sup>

Pepe did not report p-value or include detailed data beyond a high-level summary of these patterns. Pepe's analysis of the data also revealed an interesting insight into the differences between how different stakeholders in the legal profession perceive deception. Pepe developed a 'deception index' which was derived from responses to clusters of questions in

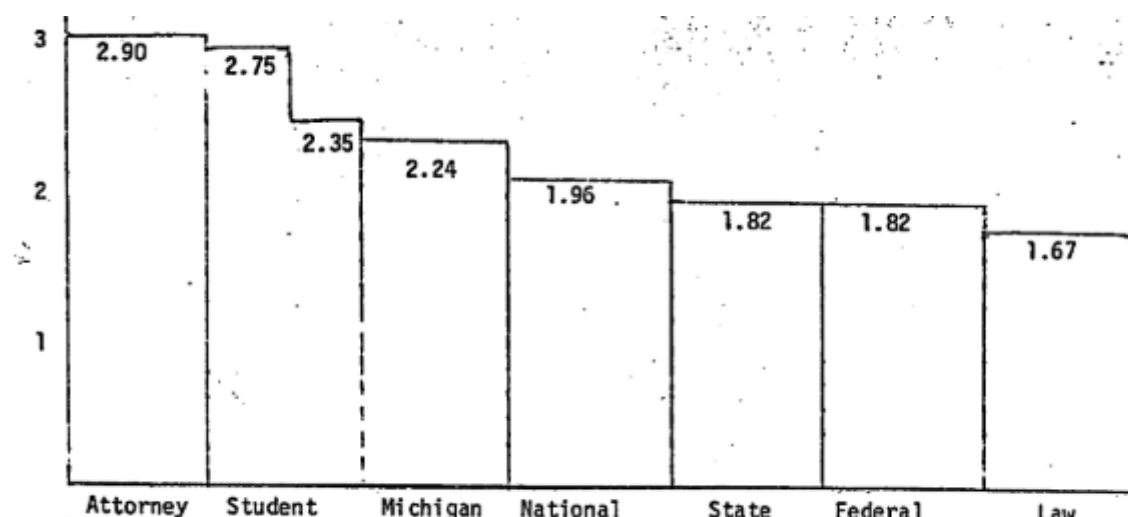


Figure 2 Chart from Pepe's Study with 'Honesty Index' Comparing Lawyers, Students, Judges and Professors

<sup>747</sup> Ibid.

<sup>748</sup> Ibid.

<sup>749</sup> Pepe, 'Summary of Selected Findings of the Study of the Standards of Legal Negotiations' (n 737)

the questionnaire and where a higher number meant greater acceptance of deceptive practices. Figure 2 reveals the results of that exercise.

The figure reveals that academics (Law Professors) were the least accepting of deceptive practices, followed by Federal Judges. By contrast, practising lawyers were most likely to accept this conduct, even more so when placed in an actual negotiation situation in a role play, as were law students.

Overall, Pepe's study represents the most comprehensive effort to understand lawyers' use of EANTs thus far and provides insights into the assessment and use of EANTs and the factors that influence this. Consistently with Wade,<sup>750</sup> who argued over 30 years later, the study points towards the widespread acceptance and use of EANTs, combined with a complicated range of factors that underpin it, revealing disagreements within the profession and its stakeholders about what is permissible and what is not.

## 2 *Altman's 1994 Survey of 976 Family Lawyers: Children as Bargaining Chips*

Altman surveyed 976 family lawyers in California.<sup>751</sup> The participants were asked about how they negotiate children's custody and financial matters, specifically whether claims for parties to spend more time with children were used as a bargaining chip to achieve better terms in the division of property. The study investigated both the assessment and prevalence of the use of this tactic.

Altman reported that a substantial minority of participants said that threats relating to spending time with children were permissible in property division negotiations. Just over one in five, 22% of participants, agreed or strongly agreed that this is ethically permissible.<sup>752</sup> In line with this, 21.48% of participants indicated reported actual use of the tactic by them or their client in the year leading up to the survey.<sup>753</sup> However, the proportion of lawyers who said that other lawyers used this tactic was much higher: 60.95% of lawyers stated that in the year preceding the survey, the opposing counsel or their clients stated or clearly implied that they might litigate over custodial time if the other party did not agree to a favourable financial settlement.<sup>754</sup>

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<sup>750</sup> Wade (n 6).

<sup>751</sup> Altman (n 154).

<sup>752</sup> Ibid 537 comprised of 7% who strongly agreed and 15% who agreed.

<sup>753</sup> Ibid 536.

<sup>754</sup> Ibid 534.

Altman also reported significant levels of use of exaggerated claims for negotiating purposes. A third (33%) of participants reported asking for more custodial time than the client actually wanted, and of these, 23% stated that this was done in order to trade finances for custody (n = 8), or secure better custodial terms and trade finances for custody (n = 69).<sup>755</sup>

The study also provided some evidence of the impact of external factors on the participants' responses (or rather lack thereof). Altman found that little variation in response could be explained by factors such as attorney gender, client income, or location.<sup>756</sup>

Overall, in Altman's study, more than 20% of family lawyers were prepared to and actually did use children as bargaining chips to achieve a better financial outcome for their clients. Furthermore, over 60% of lawyers reported having encountered such threats in the year preceding the survey. Such behaviour was not associated with lawyers' gender or location.

### 3 *Garcia's 2009 Study of 163 Lawyers: A Cross-Disciplinary Perspective*

Garcia, a Professor of Psychology, chose to study lawyers as a real-world population who engaged in repeat negotiations with clearly defined roles. The purpose of the study was to investigate whether the roles had different perceptions of the appropriateness of EANTs.<sup>757</sup> Garcia surveyed 163 US public defenders and District Attorneys using an adapted version of the SINS scale. The SINS scale has been rigorously tested and has the strongest external validity for business students, not lawyers.<sup>758</sup> In order to make it relevant to lawyers, Garcia reduced the survey to four of the sixteen tactics on the original SINS scale tactics and added one about speeding up a trial. This left the following tactics on the survey:

1. in return for concessions now, offer to make concessions that you know you will not follow through on;
2. make an opening demand that is far greater than what you really hope to settle for;
3. deny the validity of the information that your opponent has that weakens your negotiating position, even though that information is true and valid;
4. threaten to post-pone or speed-up trial, whichever is worse for your opponent; and

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<sup>755</sup> Ibid 537.

<sup>756</sup> Ibid 499.

<sup>757</sup> Ibid.

<sup>758</sup> Ibid 732.

5. intentionally misrepresent information to your opponent in order to strengthen your negotiating arguments or position.<sup>759</sup>

The participants were asked to rate the above tactics on a scale of 1 (not at all appropriate) to 7 (very appropriate). They were first asked to provide a rating on tactics when used by them personally and then, when used in response to such tactics used by their opponents. The participants were also asked to predict how they thought their opponents would rate these tactics.<sup>760</sup> The results revealed that making excessive demands were rated as the most appropriate of the tactics in the survey, at 3.78 by the District Attorneys and 5.61 by the Public Defenders.<sup>761</sup> The second highest-rated tactic was threatening to postpone or speed up a trial, rated at 2.68 and 4.70, respectively.<sup>762</sup> These results are significant in that with the mid-point of 4 (between not at all appropriate), they suggest that according to District attorneys, the tactics were on average, rated closer to the ‘not all appropriate’ end of the scale. By contrast, the Public Defenders rated these tactics as being closer to the ‘very appropriate’ end of the scale. The remaining tactics were rated as significantly less appropriate. Denying the validity of true facts received a rating of 1.79 from District Attorneys and 2.45 from the Public Defenders. The balance of the tactics was rated at somewhere between 1 and 2 for both groups.<sup>763</sup> In all cases, the participants rated the tactics more when those had already been used against them.<sup>764</sup>

When asked to predict how their usual opponents would respond, each group expected the other to assess the tactics to be more appropriate than they did. For example, while Public Prosecutors and District Attorneys rated intentionally misrepresenting information to their opponents 1.11 and 1.16, respectively (i.e., not at all appropriate), each predicted that the other group would rate this tactic at 3.11 and 3.17 (i.e., almost halfway between appropriate and not appropriate).<sup>765</sup> In other words, the participants expected the members of the other group to be less ethical than themselves.<sup>766</sup>

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<sup>759</sup> Ibid 736.

<sup>760</sup> Ibid.

<sup>761</sup> Ibid 738.

<sup>762</sup> Ibid.

<sup>763</sup> Ibid.

<sup>764</sup> Ibid.

<sup>765</sup> Ibid 737.

<sup>766</sup> Ibid 739.

A key limitation of this study is that the participants were asked to indicate ‘how appropriate’ the tactics were. The difficulty with the use of this wording is that it neither reveals whether the participants believed the tactics to be permissible nor whether they would use the tactics. Nonetheless, the study reveals that lawyers in different roles assess tactics differently, and they also expect their opponents to assess EANTs as more appropriate than they would themselves.

#### 4 *Withholding Evidence Re-visited: Hinshaw’s study of 734 lawyers in 2011*

Hinshaw surveyed 734 lawyers by reference to a scenario developed to test whether the participants would withhold material evidence.<sup>767</sup> The scenario involved a pre-litigation settlement conference hypothetical. Participants were instructed that their client claimed that their former sexual partner infected him with a hypothetical fatal Sexually Transmitted Disease called DONS. Shortly before the conference, the client advised that the previous test results were false positives. The plaintiff did not have the virus. However, the client still wanted to pursue the claim and did not want to reveal the information about the false positives. The participants were then asked a series of questions about what they could and could not do in these circumstances.

More than half of the participants (62%, n = 452) said that they would not agree to the client’s request to withhold the information. However, a significant proportion said they would follow the client’s instructions (19%, n = 142). Quite a few were not sure (19%, n = 140).<sup>768</sup> Those who said no or were not sure were asked a follow-up question: would they be prepared to withhold the information about the change if the client instructed them ‘to disclose the true DONS status only if directly asked about it?’ A majority, consisting of 62% of this subset of participants, said that they could not withhold the information. However, a further 13% would now agree to it, and 23% were unsure.<sup>769</sup> The cumulative effect of this was that close to half of the lawyers would agree to withhold information and pursue a claim that had no substance if instructed to do so by the client.<sup>770</sup>

Hinshaw also investigated what factors may have influenced the participants’ responses. The participants were asked about the legal issues involved. This revealed confusion or

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<sup>767</sup> Art Hinshaw and Jess K Alberts, ‘Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics’ (2011) 16 *Harvard Negotiation Law Review* 95.

<sup>768</sup> *Ibid* 118.

<sup>769</sup> *Ibid* 128.

<sup>770</sup> *Ibid* 128.

misunderstanding about concepts in the rules. For example, 16% of participants failed to identify what was the relevant material fact. Around two-thirds (67%) identified something as material that was not.<sup>771</sup> There was also considerable ignorance and uncertainty about basic legal principles. For example, 26% failed to identify if, and 13% were not sure if withholding information constituted a misrepresentation. When asked why it might be permissible to withhold information,<sup>772</sup> The participants identified the following reasons:

- client confidentiality;
- privilege; and
- client instructions.<sup>773</sup>

On the opposite of this, the top three reasons for disagreeing with using the tactic:

- personal integrity;
- violation of the rules of professional conduct; and
- personal moral compass.<sup>774</sup>

The participants believed other lawyers were more likely to agree to use the tactic than they would themselves.

In analysing statistical relationships between the participants' responses and their demographic characteristics, Hinshaw found that the experience of participants as measured by years in practice (more than 20 years) was associated with a small but statistically significant increase in the likelihood that they would refuse to use the tactic and a decrease in being uncertain.<sup>775</sup> Expectations of others' conduct were also associated with how the participants responded in their own right. Gender had no impact on the response to the original request but was associated with differences in response to the follow-up requests.<sup>776</sup>

Overall, this study revealed a lack of consensus and understanding among the participants about whether the tactic of withholding of information is permissible in negotiations. The participants referred to different reasons for assessing whether the tactic is permissible or not. Other factors, such as demographic characteristics, were also associated with how the

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<sup>771</sup> Ibid 122.

<sup>772</sup> Ibid 123.

<sup>773</sup> Ibid 125, reporting on top 10 reasons.

<sup>774</sup> Ibid 128.

<sup>775</sup> Ibid 146.

<sup>776</sup> Hinshaw and Alberts (n 664).

participants responded, albeit that while statistically significant, their impact appeared to be relatively subtle.

## 5 *Small Sample Studies*

In addition to the above studies involving large samples, there has been a series of studies which provided only limited information about their methodology, had small sample sizes or suffered from other limitations. These are set out below.

### *(a) Lempert (1988) and Reilly (2008): Studies 20 Years Apart*

In 2008, Reilly<sup>777</sup> replicated Lempert's study from 20 years earlier. Lempert's sample consisted of 9 law professors who had written on ethics, five experienced litigators, and one judge.<sup>778</sup> Reilly's sample included a total of 30 participants: 8 law professors, 21 practising lawyers, and 1 federal judge.<sup>779</sup> The studies involved questions asked around hypothetical scenarios. The scenarios involved tactics such as lying about authorised settlement limits, lying about an injury, exaggerating an injury, and mistaken impressions. The reason for Reilly replicating Lempert's methodology was to investigate whether there had been any change in practising lawyers' understanding of the standards applicable to negotiations over time.

Reilly's results revealed that since Lempert's study, the proportion of participants prepared to withhold information about changes in material fact had increased from 7% (n = 1) to 20% (n = 6). A further 13% (n = 4) of participants were prepared to withhold the information but indicated that they wanted to qualify their answer. A substantial proportion of lawyers, ranging from 20% to over 70%, were prepared to say "yes" to whether they would lie to an opponent about their settlement limit, misrepresent the extent of the client's emotional distress, or correct the opponent's mistake.<sup>780</sup> Reilly concluded that the confusion regarding standards applicable in negotiation was present in 2008, just as it was in 1988.

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<sup>777</sup> Peter Reilly, 'Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help' (2009) 24(3) *Ohio State Journal on Dispute Resolution* 481.

<sup>778</sup> *Ibid* 516.

<sup>779</sup> *Ibid* 517.

<sup>780</sup> *Ibid* 518.

*(b) Dahl 1989 and 14 Austin Lawyers*

Dahl asked 14 Austin lawyers a series of detailed questions about scenarios involving the following tactics:

1. fraud by the client (doctored evidence revealed after settlement agreed);<sup>781</sup>
2. puffery (pretending there is a better offer out there in commercial negotiations);<sup>782</sup>
3. candour with the client;<sup>783</sup>
4. candour with the other side;<sup>784</sup>
5. exploiting a mistaken assumption;<sup>785</sup>
6. candour regarding the law;<sup>786</sup>
7. recanting previous testimony;<sup>787</sup>
8. threatening to report administrative infringements in a civil suit;<sup>788</sup>
9. bargaining chips (e.g. claiming something the client is not really interested in to trade it away for another concession);<sup>789</sup> and
10. not settling when the opponent made an offer within the settlement authority.<sup>790</sup>

The results are somewhat difficult to interpret, as in many cases, specific numbers and percentages are not provided. Dahl reported that ‘a majority’ of lawyers indicated that they would not disclose a material change without specifying how large a majority. Only 1 out of the 14 participants (7%) ‘would consider withdrawing’ from acting if instructed to do so.<sup>791</sup> Another participant indicated that they would signal to the opponent that the ‘case has

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<sup>781</sup> Ibid 179.

<sup>782</sup> Ibid 183.

<sup>783</sup> Ibid 184.

<sup>784</sup> Ibid 185.

<sup>785</sup> Ibid 187.

<sup>786</sup> Ibid 189.

<sup>787</sup> Ibid 190.

<sup>788</sup> Ibid 191.

<sup>789</sup> Ibid.

<sup>790</sup> Ibid 192.

<sup>791</sup> Ibid 190

problems that you are not aware of'. Two (14%) would have affirmatively relied on previous evidence, which was undermined by the new information.

When it came to using threats of reporting the other party's illegal immigrant status, 6 participants (43%) would have 'discussed' it without making an explicit threat; 3 (21%) would use it as an express threat. Only 4 participants (29%) would not have raised the issue at all.<sup>792</sup>

Similar results were reported in relation to raising issues as bargaining chips. Most participants were prepared to raise false issues to trade them as concessions. Only 3 out of the 14 participants (21%) characterised it as 'unethical'.<sup>793</sup> Most participants indicated that they would refuse to say that there was a better offer from someone else when there was not one. However, 2 participants considered this permissible and 1 considered it could be done if there was no possibility of being sued for it.<sup>794</sup> According to Dahl, 'a few' lawyers reported the practice of not informing clients about settlement offers. Further, most participants said they made false demands in the course of their practice.<sup>795</sup>

Dahl also found that very few of the participants were well acquainted with specific provisions of the rules of professional conduct. There was also some variation in responses based on styles and personalities, particularly what Dahl described as 'dramatic' and 'reactive' lawyers.<sup>796</sup> Further, sophisticated and experienced lawyers were more confident in their responses, even though they were not always legally correct.<sup>797</sup> Dahl found that female lawyers were more averse to using threats.<sup>798</sup>

Overall, this study, while of limited reliability on its own, fits into the general pattern of other studies, which suggests that there is a lack of understanding and agreement among lawyers about what can be done in negotiation.

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<sup>792</sup> Ibid 191.

<sup>793</sup> Ibid 193.

<sup>794</sup> Ibid 184.

<sup>795</sup> Ibid 192.

<sup>796</sup> Ibid 196.

<sup>797</sup> Ibid 196-197.

<sup>798</sup> Ibid 197.

(c) *Carter 1996 On-the-fly Survey*

In 1996, Carter conducted a brief show of hands survey during a professional conference.<sup>799</sup> The participants (n = 100) were surveyed on whether they considered it ethical to engage in puffery involving misrepresentation.<sup>800</sup> Approximately 61% of participants considered such conduct ethically permissible. Additionally, 73% said that they had actually engaged in puffery in practice.<sup>801</sup>

When asked about filing disciplinary complaints against other lawyers as a tactic, 82% considered it not permissible.<sup>802</sup>

(d) *Peters 2007 Exploratory Survey*

In 2007 Peters reported the results of an explorative survey of lawyers (N = 23), including five mediators who were willing to share their observations.<sup>803</sup> The aim was to investigate lawyers' truthfulness in negotiation.<sup>804</sup> The article does not explain its methodology or set out detailed results. However, it mentions that Peters followed the questionnaire and survey approaches of previous studies, such as Dahl's 1989 and Lempert's 1988 studies. The survey questions focused on how often lawyers observed various types of lies in negotiations—such as lies about material facts, lies about non-material facts and opinions, lies about negotiation authority, lies about agreement alternatives and lies about interests and priorities.

On average, the participants reported observing lies in 25% of mediations.<sup>805</sup> Some participants reported this as being as high as 80%, while the lowest response was 0%. The median response was 20%. On average, the lies concerned material facts in 17% of mediation sessions.<sup>806</sup> Lies about non-material facts, such as claims and objectives, were reported by

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<sup>799</sup> Carter (n 210).

<sup>800</sup> Ibid.

<sup>801</sup> Ibid.

<sup>802</sup> Ibid.

<sup>803</sup> Ibid 121.

<sup>804</sup> Peters (n 149).

<sup>805</sup> Ibid 124.

<sup>806</sup> Ibid.

the participants in 35% of negotiations,<sup>807</sup> 43% for lies about the bottom line<sup>808</sup> and For negotiation authority, it was 36%.<sup>809</sup>

Overall, this study suggests that a substantial proportion of all negotiations, somewhere in the range of 20%-40%, involve one form of misleading and deceptive conduct or another.

## E *Summary*

While Chapter 3 looked at individual cases of the use of EANTs, this Chapter focused on studies of lawyers in larger numbers to get a sense of what might be happening at scale. Systematic searches of the literature for studies about lawyers and EANTs revealed 15 studies, 2 of which were conducted in Australia, 4 in the UK and the rest in the USA.

The studies represent a large and up-to-date body of work, with sample sizes ranging into many hundreds and even thousands of lawyers, such as Pepe's (n = 3,006), Altman's (n = 976) and Hinshaw's (n = 734) studies and some of the most recent, such as Lewis (2016), revealing lawyers' use of a wide range of EANTs. While the two Australian studies are dated (reported in 1995) and had relatively small samples (N = 17 and n = 15), they repeated the same patterns that can be consistently seen in the overseas studies:

- Lawyers do not know or agree on what is permissible in negotiations and what is not.
- Lawyers use a wide range of EANTs, not limited to deception.
- Lawyers' use of EANTs in a significant fraction of negotiations (from 20% to 98%, depending on the study and the specific tactic).
- Lawyers suspect that lawyers with different characteristics might use the tactics more than themselves (plaintiff v defendant, more experienced v less experienced etc).

These patterns emerge starting with the earliest studies, dating back to the early 1980s, and continue across time to the most recent studies. All this tends to suggest that perhaps the lawyers whose conduct was examined in the previous Chapter were not bad apples.

However, a piece of the puzzle is missing, making this conclusion unsafe. The studies represent a significant body of literature that, despite many different samples of the profession and methodologies, all point to the same conclusion. Yet, there is lack of contemporary Australian evidence. This begs the question: does this apply in contemporary Australia? What is needed is to test whether the conclusions of the overseas studies also hold true in Australia. The next Chapter sets out how I developed and administered a survey to explore these issues with a sample of 275 lawyers across Australia.

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<sup>807</sup> Ibid 130.

<sup>808</sup> Ibid.

<sup>809</sup> Ibid 133.

# CHAPTER 5 –STUDY DESIGN AND SURVEY SAMPLE: PROBING THE PHENOMENON OF EANTs IN AUSTRALIA

## A *Introduction*

The examination of the reported cases (Chapter 3) and prior studies of lawyers (Chapter 4) revealed a consistent line of evidence pointing largely in the same direction: that there is disagreement among lawyers about which EANTs are permissible. Nonetheless, lawyers use a wide range of EANTs in negotiations. A key limitation of prior evidence is that it is often based on small samples or samples of lawyers from overseas. There is a need for contemporary evidence about Australian lawyers' assessment and usage of EANTs.

This Chapter systematically develops a methodology for an original study designed to address some of the main limitations of the previous studies outlined in Chapter 4. Another aim of this Chapter is to develop a methodology to test whether the conclusions suggested in Chapter 5 hold true among Australian lawyers today.

In doing so, this Chapter seeks to develop knowledge in relation to some of the questions being investigated in this project:

- To what extent do the lawyers assess different types of EANTs as permissible?
- What is the frequency of use of EANTs among lawyers?
- What factors are associated with the lawyers' assessment and prevalence of the use of different types of EANTs?

Other than the Introduction and a Summary, this Chapter contains three substantive Parts. Part B explains the development of the methodology. It starts by explaining the overall strategy and reasoning followed in designing the study, taking into account the aims of the overall project. This is followed by an explanation of the specific design of the survey instrument, including question selection, precise wording, and response options. This part draws heavily on the four preceding Chapters. The tactics are selected from the catalogue developed in Chapter 1, based on the legal issues identified in Chapter 2 (issues with the Rules) and Chapter 3 (the case law), while seeking to adopt and adapt the best features of prior studies reviewed in Chapter 4.

Part C sets out how the survey was administered. It outlines the challenges faced in recruitment. Part D sets out the characteristics of the sample recruited. The substantive results of the study are set out in Chapter 6.

## B *Development of a Survey Methodology*

This section sets out the process and reasons adopted in selecting a quantitative methodology and developing the survey. A fundamental choice in every study is whether to follow a qualitative or quantitative methodology or a mix of the two.<sup>810</sup> Qualitative methodologies are generally used to explore attitudes, behaviour and experiences.<sup>811</sup> Many of the UK-based studies, as well as Lamb's study in Australia, outlined in Part C(1) of Chapter 4, are examples of this. They revealed the participants' attitudes and experiences towards the issues being investigated. Quantitative research generates numerical data and statistics.<sup>812</sup> Most of the USA studies considered in Part D of Chapter 4 fall into this category. They generated data about prevalence, such as what proportion of participants considered the EANTs permissible and how often the EANTs were used.

Given the need for data about prevalence and risk factors, this thesis adopts a quantitative methodology. As discussed in the Introduction Chapter, the debate around whether there is a need to improve the rules of conduct appeared to have reached a standstill due to a divergence of views as to whether there is a problem that needs to be solved. While some commentators, such as Wade, claimed that the standards are ambiguous and the use of potentially unethical tactics is commonplace,<sup>813</sup> others, such as the Law Society of New South Wales, have contended that the standards are well understood, and lawyers ordinarily act ethically. The ALRC and Law Council in unison called for evidence on the prevalence of improper conduct and associated risk factors.<sup>814</sup> Prevalence is best understood by reference to numbers and statistics: a task that is best tackled using quantitative methods.

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<sup>810</sup> Catherine Dawson, *Practical Research Methods* (2002) 14.

<sup>811</sup> *Ibid.*

<sup>812</sup> *Ibid.*

<sup>813</sup> Wade (n 6).

<sup>814</sup> Australian Law Reform Commission Report 115 (n 215) [12.57].

## 1 *Development of the Survey Instrument*

This thesis used an iterative process to develop the structure and answer format of the survey. The process started with analysing and selecting key features of the leading studies of lawyers' ethics in negotiations from Chapter 4, taking into account issues identified in other Chapters to develop a draft questionnaire. Once ethics approval was secured, the draft was piloted with a small convenience sample of practising lawyers (n = 4). The piloting process is described in the next section.

A number of response options were explored, but ultimately, the design choice was informed by the need to align the study with the overall research questions of this thesis. Previous studies provided a variety of templates, including different question structures and response options. Garcia, for example, asked lawyers to rate abstract 'appropriateness' of tactics on a 7-point Likert scale.<sup>815</sup> Hinshaw asked the participants to indicate whether, in hypothetical scenarios, they would use certain tactics on a yes/no/unsure basis. Hinshaw deliberately removed the option for participants to say that they would withdraw from the case.<sup>816</sup> This was done in order to avoid satisficing—selecting an easy and non-controversial choice. By contrast, rather than ask about hypotheticals, Pepe and Altman asked the participants to indicate how frequently they and other lawyers used certain tactics.<sup>817</sup> They also asked what the participants considered 'permissible'. This latter approach is most aligned with the underlying objective of this thesis to elicit what lawyers actually do in practice. It was therefore adopted in the questionnaire.

The study developed here first asks the participants to consider what is permissible, then to indicate how frequently (if at all) other lawyers use EANTs, and finally, how frequently the respondents themselves use the tactics. This thesis uses 4- and 5-point Likert scales in order to keep the response options as simple as possible and reduce the burden on the participants.

A 4-point Likert scale is used for the question about whether a tactic is permissible. The response options are 'permissible,' 'probably permissible,' 'probably not permissible' and 'not permissible'. There is no middle option to avoid 'satisficing' responses.<sup>818</sup> The question therefore forces the respondents to pick an option on either side of the scale. The intent behind this question design is to replicate the difficult choices lawyers need to make in practice. The questions use the word 'probable' as the probability is a concept familiar to

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<sup>815</sup> Garcia, Darley and Robinson (n 202).

<sup>816</sup> Hinshaw and Alberts (n 767) 118.

<sup>817</sup> Pepe, 'Standards of Legal Negotiations' (n 733); Altman (n 154) 534.

<sup>818</sup> Hinshaw and Alberts (n 767) 117.

lawyers. The High Court of Australia, for example, considered that ‘probable means likely to happen’.<sup>819</sup> ‘Probably’ is used instead of ‘likely’ because it does not require a qualifier—such as ‘how likely’.

A 5-point Likert scale is used for the questions relating to the frequency of use of tactics. The response options are ‘never,’ ‘seldom,’ ‘about half the time,’ ‘frequently’ or ‘always’. The two extremes (never and always) and the middle option (half the time) provide objective reference points, while the two remaining options provide an opportunity for the participants to give more graded responses. This approach is designed to generate data that is as accurate as possible and with a sufficient level of detail without putting too much cognitive burden on the participants. For example, it is much easier to quickly assess whether a tactic is used ‘seldom, half the time or often’ than in 20%, 40% or 80% of negotiations. The survey is designed to be exploratory—future studies may drill into the detail or use more objective data, for example, by way of studying lawyers’ files.<sup>820</sup>

## 2 *Piloting Question Design: Scenarios vs Abstract Statements*

Both a scenario-based approach and an abstract question-based approach are valid in questionnaire design. While abstract questionnaires are more common, scenarios also have over five decades of use in empirical research and have been gaining in popularity.<sup>821</sup> Scenarios are commonly used for training in professional ethics, not just in law but also psychology and medicine.<sup>822</sup> In medicine, they have been found to be particularly useful in examining professional attitudes, perceptions, and beliefs, forensic judgments, and general practitioners’ decision-making.<sup>823</sup>

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<sup>819</sup> *R v Crabbe* (1985) 156 CLR 464; at 469[1985] HCA 22 at [8] per Gibbs CJ., Wilson, Brennan, Deane and Dawson JJ

<sup>820</sup> See eg Richard Ingleby, *Matrimonial Breakdown and the Legal Process: The Limitations of No-Fault Divorce* (1989); Tamara Goriely, Richard Moorhead and Pamela Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour: Research Study 43* (2002).

<sup>821</sup> Peter M Steiner, Christiane Atzmüller and Dan Su, ‘Designing Valid and Reliable Vignette Experiments for Survey Research: A Case Study on the Fair Gender Income Gap’ (2016) 7(2) *Journal of Methods and Measurement in the Social Sciences* 52.

<sup>822</sup> Spencer C Evans et al, ‘Vignette Methodologies for Studying Clinicians’ Decision-Making: Validity, Utility, and Application in ICD-11 Field Studies’ (2015) 15(2) *International Journal of Clinical and Health Psychology* 160 <<http://dx.doi.org/10.1016/j.ijchp.2014.12.001>>.

<sup>823</sup> *Ibid.*

Most of the empirical studies of lawyers considered in Chapter 4 used a scenario-based approach. Two of the best examples are Pepe's study, which had the largest number of participants and Hinshaw, whose study is one of the most recent, which provided a scenario and asked questions about what the survey participants would do in a particular situation and why. Thus, a scenario-based approach appeared to be most commonly used in the studies of lawyers and would be most likely familiar to the participants. On this basis, the pilot version of the questionnaire used scenarios.

The questionnaire was piloted on a convenience sample of four ( $n = 4$ ) anonymous practising lawyers: two barristers and two solicitors. The two barristers and one of the solicitors had diverse general practices and experience across civil and criminal law. The remaining solicitor was a commercial, corporate lawyer. They provided feedback on an initial and revised version of the survey. Efforts to arrange focus groups through the Law Society of Queensland and the Law Society of New South Wales to test and pilot the final version of the questionnaire were unsuccessful.

The feedback received from piloting the questionnaire highlighted two closely linked problems with a scenario-based approach: 1) lack of relevance and 2) the cognitive burden on the participants. Two of the pilot participants indicated that the scenarios were not relevant to them or their practice areas. This was despite the fact that they had generalist practices and the scenarios were based on simple personal injury hypotheticals requiring no prior knowledge—similar to the approach taken by Pepe and Hinshaw in designing their surveys. Another pilot participant commented that the use of scenarios was a deterrent to completion. Despite being only a few lines long, the participant felt it took too much time to read, consider and analyse the scenarios. The participant recommended that the questionnaire should get to the point quicker. This issue is not unique to this questionnaire: Pepe, for example, acknowledged in the instructions to the participants that his questionnaire would take about 60 minutes to complete.

The problems of relevance and the burden on the participants were addressed by using shorter, more abstract questions. The survey was amended along the lines of the surveys used in Garcia's<sup>824</sup> and Altman's<sup>825</sup> studies (see Part D of Chapter 4). Altman asked if lawyers considered it permissible for lawyers to 'state or clearly imply in negotiations that they might litigate over custodial time if not given certain financial terms' in a family law context.<sup>826</sup>

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<sup>824</sup> Garcia, Darley and Robinson (n 202).

<sup>825</sup> Altman (n 154).

<sup>826</sup> *Ibid* 539.

Garcia asked participants to rate the appropriateness of five negotiation tactics: exaggeration, false promises, denying the validity of true information, misleading, and threatening delays.<sup>827</sup> The questionnaire used in Garcia's study was derived from a rigorously tested SINS scale developed by Robinson and Lewicki.<sup>828</sup>

### 3 *Selection of the Tactics for the Survey*

One of the issues that emerged in considering prior studies in Chapter 4 is that the open-ended interviews of UK lawyers revealed a wide range of tactics but produced no quantifiable data, while the quantitative studies of US lawyers produced quantifiable data but only on a few types of EANTs. In designing the study, I aimed to develop a survey which would both test a diverse variety of tactics but also produces quantifiable data.

Given the practical limitations of a PhD, it was feasible to study only a small proportion of tactics identified in Chapter 1. This section explains the reasoning behind the selection of the five tactics used in the survey:

- exaggeration;
- withholding of information;
- threats;
- abuse of process; and
- making the opponent uncomfortable.

The tactics were selected so as to generate evidence in relation to some of the key issues highlighted in the previous chapters, but also with a view to testing their general relevance to all types of legal practice.

The first two tactics (exaggeration and withholding of information) are based on the manipulation of information. Manipulation of information and deception is one of the most studied areas and, as identified in Chapter 2, a category of tactics that has attracted more attention than any other. The review of the Rules in Chapter 2 and reported cases in Chapter 3 revealed both recent and older cases, as well as ambiguities in the Rules. This topic appears quite important and relevant to Australian lawyers and hence is incorporated into the survey instrument.

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<sup>827</sup> Garcia, Darley and Robinson (n 202) 736.

<sup>828</sup> Robinson, Lewicki and Donahue (n 117).

Two types of tactics are used because, as Wolski argued, the Rules appear to distinguish between two types of honesty.<sup>829</sup> One relates to the accuracy of information conveyed, and the other is concerned with ‘the sharing of information or, conversely, the withholding of it’.<sup>830</sup> The only previous empirical study of lawyers in Australia (Davis<sup>831</sup>, see Chapter 4 Section C) highlighted that a significant proportion of lawyers considered it necessary to exaggerate. Thus, exaggeration is included in the questionnaire.

The issue of withholding of information is also important. Seminal cases reviewed in Chapter 3, such as *Mullins*<sup>832</sup> and *Fleming*,<sup>833</sup> demonstrate that even experienced practitioners who put their mind to it can get their assessment of such tactics wrong. Thus, the tactic of withholding information is also included in the survey.

The third tactic that is included in the survey relates to the use of threats or external leverage. Threats appear to be a particularly difficult area to traverse and are mentioned in the majority of the recent cases, including *LSC v Sing* in Queensland; *Legal Profession Complaints Committee v MLS* [2010] WASAT 135 in Western Australia and *Legal Services Commissioner v Sampson (Legal Practice)* [2013] VCAT 1177 (10 July 2013) in Victoria. Threats require the navigation of a number of fine lines, including courtesy, extortion and protection under the Australian Consumer Law.

The fourth tactic, abuse of process, is a tactic that has received much media attention and judicial consideration. This tactic has been the subject of high-profile cases, most notably *Flower & Hart*,<sup>834</sup> which implicated Ian Callinan before his elevation to the High Court. The significance of this tactic is that it has even been described as a ‘threat that could destroy our justice system’.<sup>835</sup>

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<sup>829</sup> Wolski, ‘An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason’ (n 296) 190.

<sup>830</sup> See also more recently Bobette Wolski, ‘On Mediation, Legal Representatives and Advocates’ (2015) 38(1) *UNSW Law Journal* 5, 14.

<sup>831</sup> Davis (n 671).

<sup>832</sup> [2006] LPT 012.

<sup>833</sup> [2006] WASAT 352.

<sup>834</sup> (1998) 156 ALR 169.

<sup>835</sup> Ipp (n 257) 219.

The final tactic that is included in the survey—making the opponent physically uncomfortable—is included because it is something of an outlier among the tactics identified in Chapter 1. It is rarely mentioned in the literature and never in cases. However, it was also one of the tactics that was mentioned in Lewis’s 2017 study of lawyers. These characteristics make it interesting to explore and compare to the other tactics, which have received a lot more legal and scholarly attention.

The five tactics selected for the study represent most of the main classes of tactics identified in Chapter 1. The only classes which are not included are the timing tactics and the tactics relating to manipulating individuals. They were not included because they are conceptually similar and often go hand in hand with abuse of process or making an opponent uncomfortable.

#### 4 *Question Wording: Principles*

Once the decision was made on the tactics to be studied, I developed questions using the following three principles:

1. the wording targets conduct which is ambiguous under the Rules considered in Chapter 2;
2. avoid morally or legally loaded questions that might prompt desirable responses (for example, do not refer to misrepresentation, or threats directly); and
3. use plain and clear language.

An issue that was considered but deemed outside the scope of the survey design was whether to incorporate references to materiality into the question. For example, exaggeration could be only slight or could be egregious. Likewise, making someone uncomfortable could involve setting the air-conditioning to so it is just slightly uncomfortable or very hot.

I have left this out of the study design because the intent of the survey instrument is to test the underlying principles in line with the ASCR and the general law, but also because it is a complex and unresolved subject that warrants a separate investigation. The ASCR, for example, is largely silent on materiality. Rule 4, for example, requires honesty and integrity without qualifications or reservations. This would imply that even minor exaggeration would not be permitted. Likewise, in the criminal law of Western Australia, which could apply to making someone physically uncomfortable, there is no tolerance for even ‘minor’ assault.<sup>836</sup>

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<sup>836</sup> See eg *Pearce v Paskov* [1968] WAR 66 in which the Supreme Court of Western Australia rejected the principle ‘de minimis non curat lex’ – law is not concerned with trivialities in this context.

The next five sections explain the development of the specific wording of the questions included in the survey.

(a) *Exaggeration*

The first tactic is about the accuracy of information. It is formulated as follows:

Exaggerate what the client is realistically entitled to.

Exaggeration could be a relatively common type of behaviour on which the Rules provide conflicting guidance. Davis's survey in Queensland found that 37% of personal injury lawyers agreed that it was often necessary to misrepresent the strength of their position.<sup>837</sup> The Rules say that there is a fundamental duty to be honest in all dealings (r.4.12), which seems to be inconsistent with exaggeration since, by definition, it involves going 'beyond the limits of truth'.<sup>838</sup> In the Western Australian context, for example, Standing suggested that exaggeration is not acceptable at all.<sup>839</sup> However, both the Law Council of Australia<sup>840</sup> (who drafted the Rules) and Wolski<sup>841</sup> interpret rule 34.1.1, as permitting exaggeration that falls short of grossly exceeding legitimate assertion of the client's rights.<sup>842</sup>

The question is worded so as to test whether lawyers think that exaggeration in general is permitted. The complicated language of the rules which refers to 'legitimate assertion of the rights or entitlements' is simplified to 'what the client is realistically entitled to'. Whilst 'realistic entitlement' is not an established legal test, neither is the 'legitimate assertion' used by the rules. The rules use the word 'real' both in the glossary and r17.2.1, so lawyers should not find it difficult to interpret. Genn's interviews revealed that many negotiators considered the value of each case to be in a range between 'realistic' (i.e., what a judge was likely to

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<sup>837</sup> Davis (n 671).

<sup>838</sup> *Macquarie Dictionary* (online at 1 June 2020) 'exaggeration'.

<sup>839</sup> Steven Standing, 'Ethical and Legal Obligations in Mediations and Other Negotiations' [2015] (August) *Brief*.

<sup>840</sup> Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules* (2018) 134.

<sup>841</sup> Bobette Wolski, 'The Truth About Honesty and Candour in Mediation: What the Tribunal Left Unsaid in Mullins' Case' (2012) 36 *Melbourne ULR* 706 <<https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=36+Melbourne+U.+L.R.+706&srctype=smi&srcid=3B15&key=881649294964b09bdd1274c8b77bcc9f>>.

<sup>842</sup> The rule prohibits solicitors from making 'any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client'.

award) to ‘favourable’ (based on unexpected advantages arising from negotiations);<sup>843</sup> this terminology should be easily understood by practitioners.

*(b) Withholding Information*

The second tactic is about withholding information from the other negotiator. It reads: withhold information that is advantageous to the other side\*(\*other than for criminal defence).

The cases of *Mullins*<sup>844</sup> and *Fleming*<sup>845</sup> demonstrate how difficult it is for lawyers to navigate disclosure obligations in out-of-court negotiations. The wording of this tactic is derived from the common law *Peruvian Guano* test,<sup>846</sup> which applied to litigation. The more recent jurisprudence of the High Court relating to misleading and deceptive conduct refers to a ‘reasonable expectation of disclosure’ test;<sup>847</sup> however, this test does not lend itself to being formulated as a tactic.

An important feature of this tactic is that it refers to ‘information’ rather than ‘facts,’ ‘evidence’ or ‘law’. The Rules refer to all of these concepts in various contexts—ranging from the duty to protect the confidentiality of information (r9.1), to disclosing facts in ex parte applications (r19.4), drawing the courts’ attention to law against the client’s case (r19.6) or evidence about which the opponent might be mistaken (r19.12). As *Mullins*<sup>848</sup> demonstrates, professional standards can also have a complex interaction with the rules of disclosure applicable to the particular negotiating setting.

Given this complexity, the question is intentionally designed to ask lawyers a simple question: do they think it is permissible to withhold information that might be against their case? The question might, however, be too simple, so I would recommend that future research explores the various dimensions of it to understand if it matters whether one refers to facts, evidence, law or another type of information, whether the answers change if one

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<sup>843</sup> Genn (n 693).

<sup>844</sup> [2006] LPT 012.

<sup>845</sup> [2006] WASAT 352.

<sup>846</sup> *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55

<sup>847</sup> See *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* [2010] HCA 31 per French CJ and Kiefel J at [19]-[21]

<sup>848</sup> [2006] LPT 012.

qualifies such information as being ‘material,’ and when are changes to information disclosed.

Finally, this tactic is expressly framed to exclude the criminal defence context. This is done for two reasons. First, a fundamental feature of the criminal justice system in Australia is that the defendants are not generally under any obligation to disclose anything adverse to their cases. Second, piloting the questionnaire without expressly excluding this context prompted comments from participants as they felt obliged to point out such an omission.

*(c) Threats: External Leverage*

Another topic that can be difficult to navigate for lawyers is the use of threats. The tactic in the survey is worded as follows: use or suggest using something beyond the content of the negotiation for external leverage (e.g., going to media, contacting a regulatory authority).

The tactic was worded specifically so as to avoid using the word ‘threat’ while capturing what the conduct actually entails. Reference to threats was excluded based on the feedback received during piloting and is in line with the approach of previous studies. The feedback received during piloting was that lawyers are alive to the use of this word and will ‘skirt around an explicit threat’. Altman took account of this phenomenon by asking the participants whether threats of asking for more time with children were *clearly implied* in family property negotiations. Pepe explored this by asking lawyers, first, whether they considered it permissible to use a threat and then, as an alternative, whether they would *stress* that something might happen, that is, make an implicit rather than explicit threat.

The distinction between explicit and implicit threats was also highlighted in Chapter 3 in the context of the discussion of the cases of *LSC v Sing*<sup>849</sup> and *Sampson*.<sup>850</sup> In *Sing*, the practitioner stopped short of making an explicit threat by saying that it was his intention to refer the matter for investigation to competent authorities. Sing was not disciplined. However, when the threat was explicit—such as in *Sampson*, the lawyer was found to have breached the relevant ethical standards. The Rules provide patchwork guidance.

The tactic is framed around a common theme across multiple types of threats: using something that is external to what the dispute is about to gain leverage. As this could be difficult to interpret, two examples are included in brackets in the description of this tactic.

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<sup>849</sup> [2007] LPT 004.

<sup>850</sup> [2013] VCAT 1177.

*(d) Abuse of Process*

The tactic of using processes is worded as follows: use a legal process for a purpose for which it is not intended (e.g., to cause delay or require unnecessary disclosure).

The wording of this tactic also emerged from the consideration of case law in Chapter 3. Ipp referred to this type of conduct as using processes for an ‘ulterior’ purpose. This word has negative connotations and hence was replaced by a more simple description: purpose for which it is not intended. Examples are also included in relation to this tactic and are drawn from the case of *Flower & Hart*,<sup>851</sup> which concerned the conduct of a lawyer who assisted a party in delaying proceedings and making burdensome requests.

*(e) Making the Opponent Uncomfortable*

The final tactic is worded as follows: put negotiators in uncomfortable circumstances (e.g., last-minute change of venue, hot or cold room). This tactic is not framed to take into account any particular cases or rules, as none specifically apply to it. It is intended to simply test a tactic that has come up in the literature to see how lawyers would respond to a tactic on which there is effectively no explicit guidance.

## 5 *Demographic Questions, Research Ethics and Opt Out*

As noted in the introduction to this Chapter, one of the aims of this study is to address the lack of information on factors that might be associated with potentially unethical conduct. The survey design takes this into account by including questions about the participants’ demographic characteristics. The section is included for two reasons: first, to see if any of the demographic factors have a statistical relationship with the responses provided in relation to the tactics; and second, to better understand if the sample is representative.

The review of the prior studies in Chapter 4 revealed a range of approaches to studying the impact of other factors. Pepe, for example, referred to the firm size, post-admission experience and gender. Hinshaw also tested whether the participants correctly understood the law.<sup>852</sup> As noted in Chapter 4 Section B, there is a very wide range of factors that could have an impact on lawyers’ conduct.

The choice is much narrower when it comes to checking what characteristics might make the sample representative. The main document that tracks the characteristic of the legal

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<sup>851</sup> (1998) 156 ALR 169.

<sup>852</sup> Hinshaw and Alberts (n 767).

profession in Australia is the 'State of the Profession' report published by the Law Society of New South Wales.<sup>853</sup> The report refers to a variety of factors that lawyers might be interested in, including some that are unique to the legal profession. In addition to age, gender and other general characteristics, the report refers to areas of law and the level of post-admission experience of lawyers.

In addition to these theoretical considerations, the survey design had to receive the approval of the University of Western Australia Human Research Ethics Committee. The Committee expressed concern about an early version of the questionnaire: asking for too much demographic data could undermine the anonymity of the participants.

In order to address this concern, the questions were kept to a fairly high level. The responses were 'bucketed' and kept at a high level of generality. For example, instead of asking the participants their exact age or number of years of post-admission experience or the number of lawyers in their practice, they only had to pick a response of a few broad categories or brackets.

Ultimately, the survey asked the participants to provide the following data:

- whether they have a current practising certificate;
- age bracket;
- self-described gender (male, female, in another way);
- years in practice since admission;
- practice sector (e.g. solicitors, barrister, in-house etc);
- practice size;
- main practice area (area of law, multiple responses possible);
- State/Territory; and
- location.

Additionally, the participants were provided with an option to opt out of demographic questions altogether. Twenty-two (n = 22) participants expressly selected this option. A further twenty-two lawyers (n = 22) dropped out of the questionnaire after completing the first question but without completing the demographic questions.

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<sup>853</sup> Law Society of New South Wales, *2018 National Profile of Solicitors* (2019)  
<[https://www.lawsociety.com.au/sites/default/files/2019-07/2018 National Profile of Solicitors\\_final report\\_190619.pdf](https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors_final%20report_190619.pdf)>.

Whilst this reduced the amount of the data collected, the amount of data collected from the remaining participants (n = 233) was sufficient to conduct statistical analysis and gain insight into the overall composition of the sample.

## 6 *How Statistical Analysis Was Used to Study Relationships within the Data*

Statistical analysis was used to interpret and evaluate relationships between the responses to different questions. The Analysis was performed using the Qualtrics Stats iQ system version current as of August 2020.<sup>854</sup> The results of this analysis are reported in Chapter 6.

The relationships were analysed using Pearson's chi-squared test. Whilst the p-values produced by the chi-squared test are reported in the next Chapter, the underlying data itself is only reported for the results where the p-value is less than .05. Such results are conventionally considered as being 'statistically significant'.

The focus on statistically significant p-values follows the scientific convention, but it also has its limitations.<sup>855</sup> P-values indicate how likely it is that, based on the assumed statistical model, one variable has no impact on the other—the 'null hypothesis'.<sup>856</sup> The smaller the p-value, the less likely it is that there is no statistical relationship between the two variables. In other words, lower p-values indicate that there is a statistically significant relationship between variables. There is no scientific basis for adopting a p-value of .05 as a cut-off point for what is 'statistically significant;' this is merely a convention. It provides a useful shortcut in the sense that anything above .05 would have increased the likelihood of occurring by chance or coincidence.

However, this is not to imply that the p-value is the same as the probability that random chance produced the observed data.<sup>857</sup> The P-value is merely a statistical test that indicates a relatively close fit between statistical models.

Adoption of this threshold for reporting the results is not intended to be dismissive of the value of the data where the p-value is above .05. Such data may demonstrate areas where

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<sup>854</sup> See further technical details at <https://www.qualtrics.com/support/stats-iq/analyses/statistical-test-assumptions-technical-details/> accessed 20 August 2020.

<sup>855</sup> Ronald L Wasserstein and Nicole A Lazar, 'The ASA's Statement on p-Values: Context, Process, and Purpose' (2016) 70(2) *American Statistician* 129 <<http://dx.doi.org/10.1080/00031305.2016.1154108>>.

<sup>856</sup> *Ibid.*

<sup>857</sup> *Ibid.*

there is a low likelihood of finding a statistical or causal relationship. This can help shape future research so that time is not wasted on areas which are unlikely to yield insights or results. Additionally, results which show that there are no statistically significant relationships can challenge prior assumptions.

P-values in this Chapter are reported in accordance with the 6<sup>th</sup> edition of the APA style manual (American Psychological Association, 2010) so that exact values to three decimal places are reported, but for p-values less than .001 as  $p < .001$ .

In addition to reporting on p-values, this thesis follows the recommendation of the American Statistical Association (ASA) in reporting the 'effect size'. This is an abstract measure of association between two variables which provides insights into how much effect a variation in one variable has on another variable. In this Chapter, this measure is calculated using Cramer's V test.

*(a) Risk of False Positive Findings with Multiple Tests: Bonferroni Correction*

The statistical tests were run by reference to the ten sets of responses (dependent variable) and eight demographic data points (independent variable). This resulted in 80 tests. The significant number of tests meant that there was a strong case for applying Bonferroni correction to p-values. The underlying reason for this is to avoid the criticism of 'data dredging'—in other words, running statistical tests until a significant result emerges.<sup>858</sup> For example, when 80 tests are run on a set of data, there is a 98.5%<sup>859</sup> probability that there will be a statistically significant result by chance.

There is also a case against applying the correction in circumstances such as this project. Perneger explained that the correction is based on the assumption of a 'universal null hypothesis'.<sup>860</sup> In other words, any single one of the results would prove a single overall relationship.<sup>861</sup> In the context of this project, such a hypothesis would have to be very broad—something to the effect that the 'external variables influence lawyers' so that any one

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<sup>858</sup> Rolf HH Groenwold, Jelle J Goeman and Saskia Le Cessie, 'Multiple Testing: When Is Many Too Much?' (2021) 184(2) *European Journal of Endocrinology* 11.

<sup>859</sup> Calculated using the online calculator:

<https://www.quantitativeskills.com/sisa/calculations/bonfer.php?Alpha=0.05&N=80&Corr=0.00&Df=00> accessed 1 August 2020.

<sup>860</sup> Thomas V Perneger, 'What's Wrong with Bonferroni Adjustment' (1998) 316(7139) *British Medical Journal* 1236.

<sup>861</sup> *Ibid.*

variable would prove it. However, this is not the aim of this research project. The project is exploratory in nature. Each EANT is conceptually distinct, as are the variables. Each test in this case is unique. To paraphrase Perneger, a medical example would be if a doctor ordered 80 tests to diagnose a condition. If they were 80 of the same test used to diagnose a single condition, then Bonferroni correction would be necessary, as one of the tests could be a false positive by chance. However, if the tests are different and any one of them could point to any one of multitudes of conditions, then a Bonferroni correction would be unnecessary.<sup>862</sup> In fact it would likely have a negative impact—rendering positive results as false negatives. This project is intended to be in the second category.

Multiple testing remains a subject of ongoing debate. The current best practice appears to be to report all the results while highlighting their potential limitations. As such, when the results are reported in the next Chapter, I will report both the results by reference to the conventional alpha of  $p < .05$  and the alpha following Bonferroni correction.

## 7 *Limitations*

This study's design leads to its main limitation: lack of reference to objective data. While the project, to adapt the language of the ALRC, sought to move away from 'anecdote and impression' and towards a 'platform of empirical reality,' much of the information in this thesis is based on lawyers' perceptions. To give an example, the survey results in Chapters 4 from other studies and 6 in this study, are based on how lawyers think they would assess EANTs and how frequently they think EANTs are used. Therefore, the responses could reflect their individual perceptions, which could be different from objective reality. However, at a higher level, this is consistent with this research project's epistemological and ontological positions, which assume that there may be multiple realities which are socially constructed, shaped and informed by lawyers' individual experiences.

The survey design could be affected by desirability or satisficing biases, whereby respondents could have provided answers which they might have thought might make them look good or that the researcher sought. Despite the recruitment efforts, my exploratory study also had a limited sample (275 participants), which might not be representative of the broader profession. An objective study of lawyers' files or observations of actual negotiations on a larger scale could reveal a completely different picture. It is possible that in practice EANTs are encouraged by lawyers and used in every negotiation, but the opposite is also a possibility: that they are almost never used, and the survey responses are a product of a few

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<sup>862</sup> Ibid 1236.

outliers, or a social construct influenced by popular media. This is an inherent limitation of the methods and approaches used in this thesis.

However, it is a limitation that may be difficult to address. Secrecy is an integral feature of legal negotiations. It could be difficult to overcome at scale or even at all because lawyers might not consent to waive it to assist research. Additionally, the act of trying to objectively measure lawyers' conduct may influence the results. Participants might self-censor both in the sense of avoiding using EANTs while under observation or excluding themselves from the study for fear of being found out or waiving legal or without prejudice privilege. Another mitigating factor is that while this project partly relies on self-reported surveys and perceptions, its findings are strengthened by the variety of evidence used, which all point to the same conclusion. While one survey could be considered unreliable, it looks different when it suggests conclusions consistent with over a dozen prior studies, including those overseas, even more so when considered in light of reported cases, which are court judgments and involve significant stakes for those involved.

## C *Recruitment of the Participants*

The study participants were recruited in March-July 2020 using an open invitation distributed through a range of channels. This included various law societies and bar associations across Australia, my supervisors' and my own professional networks and social media. A link to live survey results was included as an incentive to participate. All recruitment was conducted in accordance with prior Human Research Ethics approvals.<sup>863</sup>

### 1 *Recruitment Strategy*

The law societies and bar associations were approached through their national peak bodies: the Law Council of Australia and the Australian Bar Association. The constituent members of these national bodies were requested to circulate the following invitation to their own members:

Where do lawyers draw the line on negotiation tactics and which tactics do they use?  
Complete the following brief and anonymous online survey to help UWA PhD  
researcher and see live results of others' responses:  
[http://uwa.qualtrics.com/jfe/form/SV\\_doDgxkswvnlodtb](http://uwa.qualtrics.com/jfe/form/SV_doDgxkswvnlodtb)

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<sup>863</sup> The University of Western Australia has provided approval to conduct this research with reference number RA/4/1/8406 in accordance with its ethics review and approval procedures.

Follow-up messages were sent to the societies and bar association to check if they had sent out or were planning to send out the invitation to their members. The only professional body to decline to send out the invitation was the Law Society of New South Wales. The Law Institute of Victoria circulated the invitation by 'liking' it on social media. The professional networks approached to disseminate this invitation included law firms and not-for-profit organisations. The law firms which were approached had a presence across multiple States and included specialist as well as full-service law firms. The non-profit organisations included Legal Aid and Aboriginal Legal Services Bodies.

The invitation to participate in the survey was also distributed using my (Twitter and LinkedIn) and the University of Western Australia's (Twitter and Facebook) social media accounts.

## *2 Challenges in Recruitment and Comparison of Channels*

All responses were anonymous. For this reason, the source of the referral was not tracked. This hinders an informed comparison of the effectiveness of the different channels used to recruit participants. However, as there was a difference in timing when each of the methods was used, a number of observations can be made about the effectiveness of the adopted recruitment processes.

First, the number of participants who responded is relatively low in comparison to the total potential audience of the invitations sent out by various law societies and bar associations, particularly as it is mandatory for most types of lawyers to be members of such organisations.

Second, there was a noticeably large influx of responses received after a Legal Aid body sent out the invitation to participate to their in-house and panel law firms. This particular invitation was sent out at a time when participant responses from other sources were down to a few a week. Thus it stood out.

Third, there was no noticeable surge in responses when the invitation was posted on social media even though the invitation was posted by UWA School of Law, which had close to a thousand 'followers' and was 'liked' by the Law Institute of Victoria and law academics with had many thousands of 'followers'.

The lack of effectiveness of recruitment through some of the State and Territory professional associations raises interesting questions about the level of their engagement with their members, their commitment to facilitating research, but also the relevance of the research to practising lawyers. Failure in any one of these factors could result in lower participation

rates. It is outside of the scope of this project to provide a detailed analysis of this process, although the high level of participation following the Legal Aid message seems to indicate the problem did not lie with the profession's interest in the subject of this research.

However, future researchers may wish to note this as a word of caution in relying on law societies and bar associations as a recruitment channel. I would instead recommend engagement with other professional associations and non-profit sector organisations, which include or contract with a lot of practising lawyers, such as Legal Aid.

The next section of this Chapter outlines the characteristics of the sample.

## D *Characteristics of the Sample*

A total of 233 of 275 respondents (84%) answered demographic questions. Twenty-two respondents (n = 22, 8%) chose to expressly opt out of providing such data. The remainder did not complete this question.

Overall, the sample was diverse. There was a substantial representation of lawyers across all Australian jurisdictions, practice areas, and with different demographic characteristics.

In terms of jurisdictions, Western Australia was best represented (n = 103), followed by Queensland (n = 49), NSW (n = 33) and Victoria (n = 23), Tasmania (n = 9), South Australia (n = 7), Australian Capital Territory (n = 4) and Northern Territory (n = 2) (Figure 3).

### State/Territory

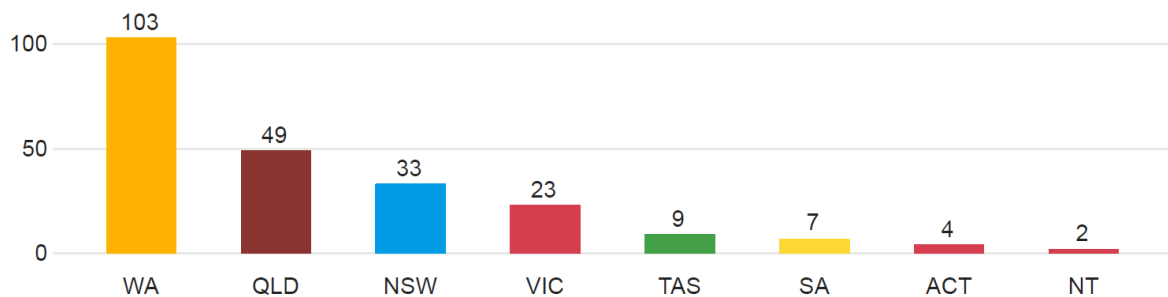


Figure 3 Distribution of Study Participants by State and Territory

The sample included lawyers who work in City/CBD locations (77%) as well as suburban (12%) and regional/remote (11%) locations.

# Location

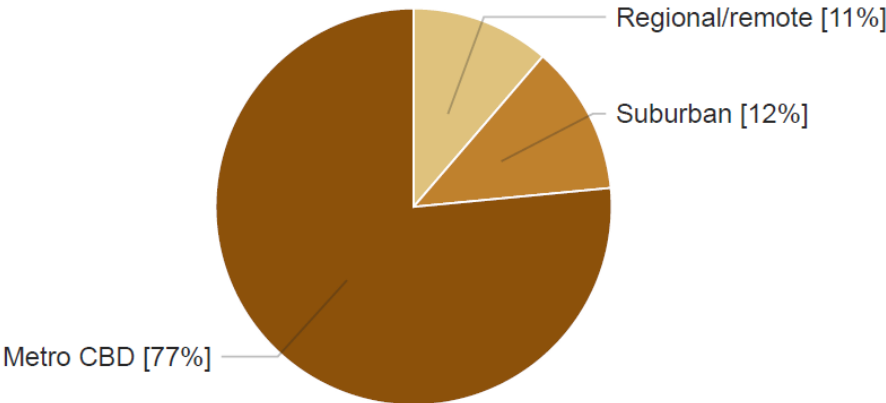


Figure 4 Distribution of Study Participants by Urban and Regional Location

The gender of the sample was evenly between females (49.8%) and males (49.8%), and one respondent identified in another way (0.4%).

# How do you describe your gender?

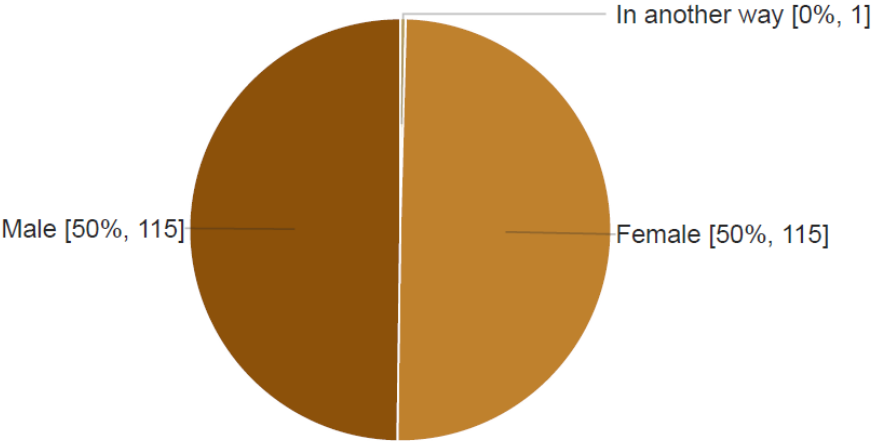


Figure 5 Participants by Gender

In the survey sample, there was an even spread of respondents across the age groups. Younger lawyers (under 30) were under-represented (7%) when compared to the national profile, where they make up 18% of the profession.<sup>864</sup> The 30-39 group at 27% is closer to the national figure of 32%. Similarly, the 40-49 group, which was also 27% of the sample, is not

<sup>864</sup> Law Society of New South Wales (n 853).

far off the national sample, where they make up 22%. More senior lawyers are somewhat over-represented as they make up 15% of the national profession but 20% of the sample. Likewise, the most senior of lawyers, those over the age of 60 made up 18% of the sample, whereas nationally, they make up 13% of the profession.

### Age

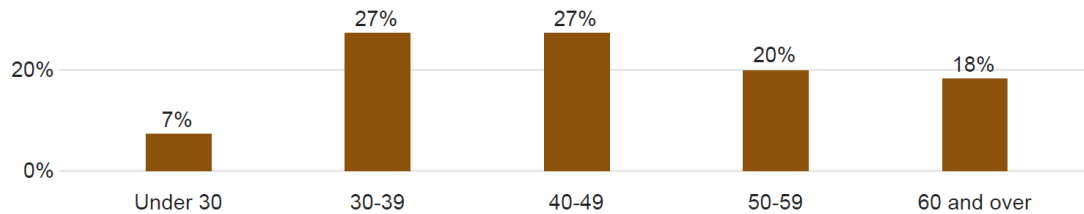


Figure 6 Participants by Age

The number of years the respondents have been admitted is relatively similar to the national profile published by the Law Society of New South Wales.<sup>865</sup> More junior lawyers are somewhat under-represented in the sample when compared to the profession nationally: 4% compared to 9% nationally for those with less than one year since admission and 13% to 19% for those between 2 and 5 years of experience. The figures are closer for those with 6 to 10 years (16% in the sample compared to 18% nationally) and 11 to 15 years (18% vs 13%). The more long-standing members of the profession with over 16 years of experience are over-represented (49% compared to 39% nationally).

### Years in legal practice since admission

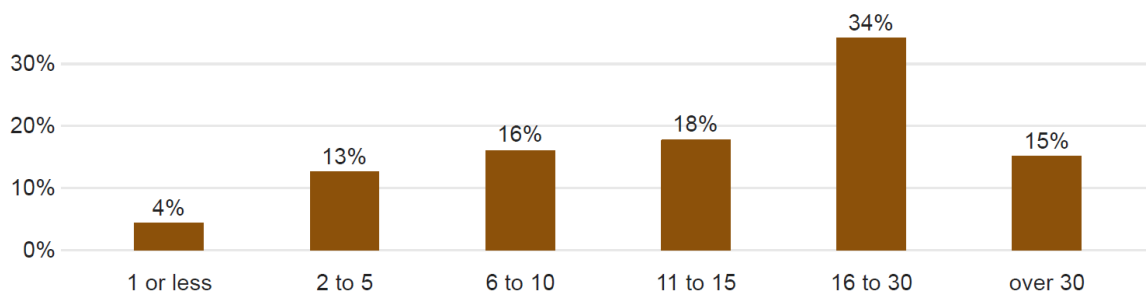


Figure 7 Participants by Years Since Admission

Different practice sizes were represented, ranging from sole practitioners (45%, many of whom no doubt were barristers), small practices with 2-4 partners or principal lawyers (25%) and 5-10 (9%) as well as medium practices with 11-20 partners or principals (4%), and

<sup>865</sup> Ibid.

21-39 partners (2%) as well as from larger practices with over 40 partners or principals (17%).

### Practice size

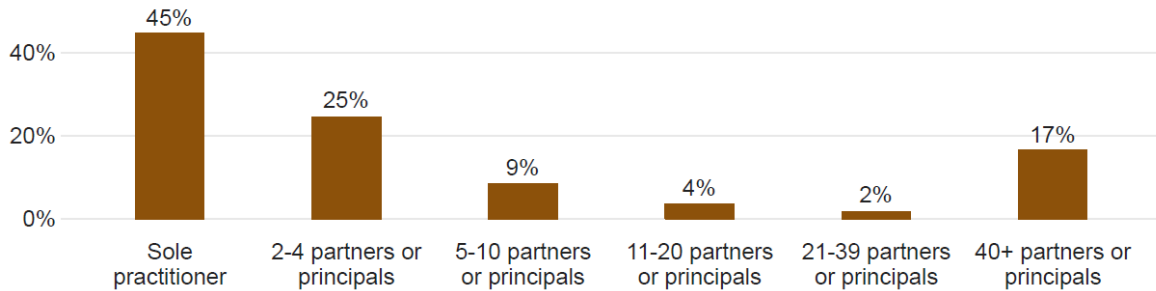


Figure 8 Participants by Practice Size

The sample comprised a diversity of groups within the profession, including solicitors (59%), barristers (24%), in-house counsel (3%), government lawyers (5%), non-profit (3%) and other lawyers(6%).

### Practice sector

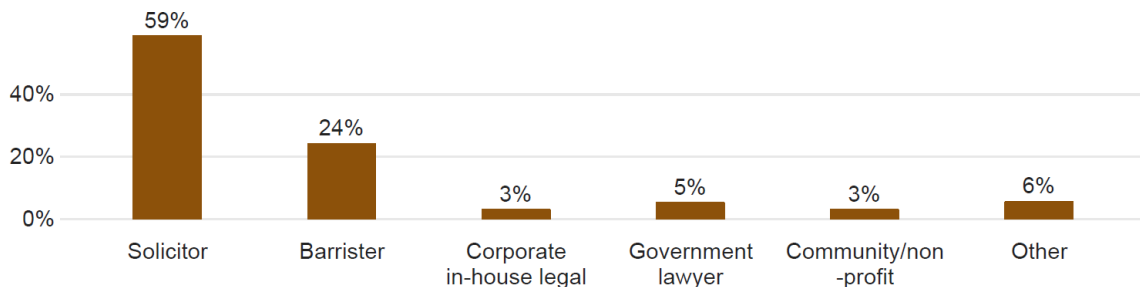


Figure 9 Participants by Practice Type

The respondents were invited to select all the main areas of law in which they practice. On average, they selected 1.4 areas per respondent. The selections were as follows:

Administrative law (n = 16), Civil Litigation (n = 60), Commercial law (n = 54), Corporate (n = 9), Criminal (n = 44), Employment/Industrial (n = 36), Family law (n = 70), Insurance (n = 13), Personal Injury (n = 34), Property/Conveyancing (n = 13), and Wills and Estates (n = 25).

## Main practice area(s)

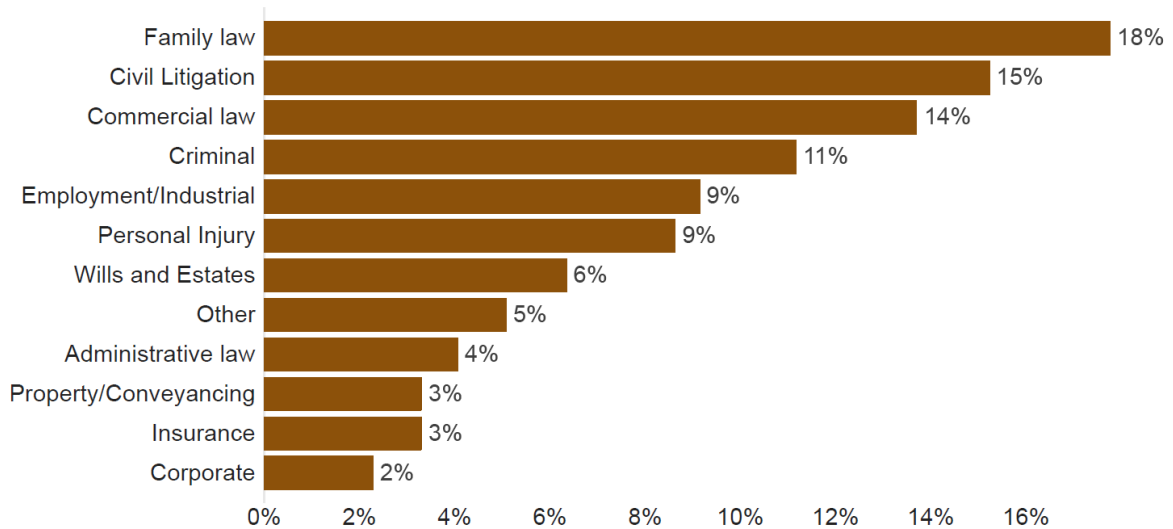


Figure 10 Participants by Main Practice Areas (Multiple Selections Possible)

## E Summary

This Chapter outlined how I developed a survey designed to explore some of the key answers suggested by the literature considered in the previous Chapters. The underlying aim was to develop a tool for gathering data about how lawyers assess EANTs and how frequently they use such tactics. This dictated a quantitative approach.

The survey was developed through an iterative process, using prior studies as a template and as a source of guidelines in each phase. The draft survey was piloted and tested, and amended in line with the feedback from the pilot participants. The survey includes tactics of exaggeration, withholding of information, external leverage, use of processes and making the opponent uncomfortable. They were selected from the catalogue developed in Chapter 1. The questions were formulated to focus on the ambiguities in the Rules identified in Chapter 2. The questions were further refined on the basis of feedback received from testing on a limited number of practising lawyers. The final survey questions are set out in Appendix 1.

Demographic questions were added in order to better understand the characteristics of the sample and also to facilitate displaying a statistical relationship between demographic factors and the participants' responses. As set out in the next Chapter, the relationship between this data and the responses about tactics was analysed using Pearson's Chi-Squared Test and given the large number of tests ( $n = 80$ ), Bonferroni correction was applied to the alpha, reducing it from  $p < .05$  to  $p < .000625$ .

# CHAPTER 6 –EXPLORATORY SURVEY RESULTS: AUSTRALIAN LAWYERS AND EANTS

## A *Introduction*

Chapter 5 explained the process of developing and administering a survey to 275 lawyers across Australia, including the sample characteristics. This Chapter presents the results of the survey and the statistical analysis of the data. The results follow the structure of the survey; they are set out descriptively in Parts B-F by reference to individual tactics in the order that they appeared in the survey. Part G contains a summary including summary diagrams of how lawyers responded, specifically whether they considered the EANTs permissible, how frequently they used the EANTs and how frequently they thought other lawyers used EANTs.

## B *Exaggeration*

The survey results revealed that almost half of the participants (48%) assessed exaggeration as not permissible. Less than one in six (15%) considered it permissible, with the rest assessing it as either probably not permissible (15%) or probably permissible (22%). When it came to the frequency of use of exaggeration, 44% reported never using this tactic themselves, 33% using it seldom, 11% about half the time and 12% were using it often. Very few participants never encountered other lawyers using exaggeration as a negotiation tactic (only 4%). A slightly higher proportion (13%) thought others used it seldom. However, more than four in five (83%) thought the tactic was used at least half the time or more. This is comprised of 17% of the total sample who thought it is used half the time, 54% often, and 12% all the time.

Statistical analysis of the relationships within the data revealed that the participants' use and assessment of exaggeration were highly correlated with their responses in relation to how frequently other lawyers used the tactic ( $p < .0006$ ). There was a direct and positive relationship. In other words, those participants who indicated that others 'often' or 'always' use this tactic were more likely to find this tactic permissible and use it themselves with a higher frequency. The opposite was also true. Those who indicated that others never or only seldom exaggerated were more likely to assess the tactic as not permissible (82-83%) and less likely to use it.

Statistical analysis of demographic factors revealed that none except for one factor had a statistically significant relationship with the responses given in relation to exaggeration. The only factor that was statistically significant in this context was the participants' State or Territory in relation to whether the participants would find exaggeration permissible ( $p = .02$ ). The results revealed that the largest proportion of lawyers who did not think exaggeration was permissible was in the NT (100%), followed by the ACT (75%), Tasmania (56%),<sup>866</sup> Western Australia (55%) and New South Wales (55%). A substantially lower proportion of participants assessed the tactic as not permissible in Queensland (37%) and South Australia (29%), with Victoria being last (22%). Victoria also had the largest proportion of lawyers who assessed the tactic as 'permissible'.

Three aspects of these results were particularly surprising:

1. the extent of discrepancy between the frequency with which the participants said they used the tactic as opposed to how often they perceived that the other lawyers used the tactic;
2. that fewer participants said they never used the tactic (44%) than assessed it as not permissible (48%); and
3. only one demographic factor had a statistically significant association with responses -State and Territory.

In the first case, the result was surprising because of how big the difference was between how the participants reported their own use of the tactic and its use by other lawyers. The difference was the starkest in relation to this tactic, closer to the extremes. While 44% of participants said that they never used this tactic, only 4% could say the same in relation to other lawyers. Towards the other end of the spectrum, while only 12% indicated that they used exaggeration 'often,' more than half (54%) said other lawyers use the tactic 'often'.

The second surprise finding challenges the assumption that lawyers always abide by what they consider to be permissible. The results indicate that some of the participants used exaggeration even though they considered it not permissible. This flows from the fact that 48% of the participants assessed the tactic as not permissible, but only 44% indicated that they never used it. That is, at least 4% of these respondents used it to some extent.

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<sup>866</sup> Note: Tasmania (n=9) and the territories (n=2-4) had also very small sample sizes, which skewed the data.

The finding that only one out of seven demographic factors (State or Territory) had a statistically significant relationship with the results was surprising because previous studies suggested other factors, such as age, gender and experience as being more likely to influence the responses.

## C *Withholding of Information*

With regard to the EANT of 'Withholding of Information,' two in five of the participants (39%) considered that it is not permissible to withhold information. Slightly over one in five (22%) considered it permissible, with 23% reporting that it is probably permissible rather than not permissible (16%). Similar proportions of participants indicated that they never used this tactic (43%) or used it seldom (30%), with just over a quarter (27%) indicating they used it about half the time or more. The participants indicated that they believed other lawyers used the tactic, too, with only 7% saying they thought other lawyers did not use it. Among those who said other lawyers used this tactic, 35% thought it was used seldom, 17% about half the time, 35% frequently and 7% often.

The participants' assessment of the tactic had a statistically significant association with its use by other lawyers ( $p < .0006$ ), age ( $p = .012$ ) and State or Territory ( $p = .015$ ). The participants' own frequency of use of the tactic was only associated with its use by other lawyers ( $p < .0006$ ) and one other factor: years in practice. Statistical analysis did not reveal any other statistically significant relationships in relation to these variables.

Similar to the results in relation to the other tactics, the conduct of other lawyers directly correlated with the participants' own use and assessment of the tactic. Namely, the higher the frequency of use of the tactic by other lawyers, the more likely the survey participants were to consider it permissible and use it with a higher frequency. The opposite was also true.

When it came to age, the trend appeared to be for older participants to find the tactic either permissible or not permissible, with fewer selecting the options reflecting uncertainty in assessment ('probably permissible' and 'probably not permissible'). The youngest lawyers, under 30 years old, were least likely to find the tactic permissible (12%), while this figure was the highest for the most senior participants, as 29% of lawyers over 60 considered the tactic permissible.

There was also a statistically significant relationship between the participants' reported State or Territory and their assessment of whether withholding of information is permissible. Around half of the participants from Queensland and Western Australia (45% and 51%,

respectively) considered this tactic not permissible. This can be contrasted with less than a quarter in Victoria, New South Wales and Tasmania (22%, 15% and 22%, respectively). The number of participants from South Australia, ACT and NT was too low to draw meaningful conclusions.

The only other factor that was statistically significant in relation to withholding of information was the number of years since admission, which could be interpreted as the proxy for measuring experience. The proportion of participants who said they never used this tactic fluctuated between 41% and 49% for participants with more than one year of experience. Only 20% of those with one or fewer years reported never using the tactic.

The unexpected outcomes in relation to this tactic were analogous to those found in relation to exaggeration. The first was that there was a higher-than-expected difference between how frequently the survey participants said they used the tactic as opposed to how frequently it was used by other lawyers. The second unexpected finding was that only a few of the external factors had a statistically significant association with the survey responses.

## D *External Leverage/Threats*

Almost half of the participants (49%) considered that it is not permissible to use external leverage, such as going to the media or contacting regulatory authorities, as leverage in negotiations. An even higher percentage, almost two-thirds (64%), said that they never used this tactic. A similar proportion (68%) said that other lawyers use this tactic only seldom (54%) or never (14%). In terms of the remaining participants, only a small proportion considered this tactic permissible (15%) and just over a third (36%) indicated uncertainty, comprised of 16% saying it is probably not permissible and 20% saying it is probably permissible. About a quarter of participants said they use the tactic seldom (27%), and less than 9% used it more frequently. Likewise, less than a third (32%) of participants said that others use the tactic half the time or more.

Similar to the other tactics, there was a direct and statistically significant relationship ( $p < .001$ ) between the participants' assessment and use of this tactic, on the one hand, and the use of the tactic by other lawyers. A higher perceived frequency of use by other lawyers was associated with the participants being more likely to find this tactic permissible and use it with a higher frequency. The opposite was also true.

There was also a statistically significant relationship between the participants' assessment of whether the use of external leverage is permissible and their State or Territory. Excluding States or Territories with less than 10 participants, in the majority of States, around 41-44%

found this tactic not permissible (NSW, Victoria and Queensland). Western Australia was an outlier, with a significantly higher percentage of lawyers finding the tactic not permissible (64%). Victoria was an outlier in terms of the proportion of lawyers who considered the tactic permissible as over a third (35%) assessed it as permissible, which can be contrasted with 7%-16% for other States.

There were two surprise results:

- 1) more than twice as many lawyers in Victoria found this tactic permissible than in any other jurisdiction; and
- 2) almost 50% more found it not permissible in WA.

## E *Abuse of Process*

This tactic of using processes for which they were not designed was assessed as the least permissible of all the tactics in the survey. More than four in five lawyers (83%) considered it not permissible, and just 1% permissible. The responses of the remaining participants were also skewed towards assessing the tactic as not permissible, with 11% saying it is 'probably not permissible,' compared to 6% who said it is 'probably permissible'.

Interestingly, fewer participants indicated that they never used this tactic (77%) than the proportion of participants who said it is not permissible (83%). This implies that at least 6% of participants who considered it not permissible still used it.

In general, there was a relatively low proportion of lawyers who indicated that they used this tactic at least to some degree, 20% reported using it seldomly, with only 3% indicating they used it more frequently. What is interesting, however, is that despite low levels of acceptance and self-reported usage, the participants still believed that other lawyers used this tactic quite frequently. Only 12% thought that other lawyers never abuse processes. Almost half (48%) thought that this tactic is used seldom. This leaves 40% who considered that this tactic is used half the time or more frequently, with 20% of participants saying it is used by other lawyers half the time, 17% frequently and the remaining 2% always.

The participants' responses to whether the tactic is permissible and how frequently they used the tactic had a statistically significant association with the perceived frequency of use of this tactic by other lawyers. The more other lawyers used the tactic, the more likely the participants were to assess it as being permissible or use it themselves with a higher frequency. The opposite was also true. The participants who said other lawyers did not use the tactic or used it seldom were more likely to consider it not permissible and were more likely to use it with a lower frequency.

Additionally, the frequency of use of the tactic by the participants was associated with the participants' number of years since admission ( $p < .0006$ ) and their practice sector ( $p = .013$ ). The participants who had been in practice longer generally tended to use the tactic less. Thus while 50% of those with one year of experience said they never used this tactic, the figure increased to 76% for those with 2- to 5 years of experience and higher still among those with 6 to 10 years (84%), then slightly higher for the 11- to 15-years cohort (85%) and higher yet for those with over 30 years since admission (86%). The only exception to this trend was in the 16- to 30-years group, where 75% reported never using the tactic.

The practice sector (i.e., whether one is a solicitor, barrister, etc.) also appeared to relate to the participants' responses. The highest usage was reported among in-house counsel, government lawyers and solicitors, as around a quarter of participants in these categories (29%, 25% and 23%, respectively) used this tactic at least to some extent. By contrast, lawyers practising as barristers in the community/non-profit sector or other branches were likely to use this tactic less frequently. Only 8%-18% of participants in these sectors used the tactic at all.

Similar to exaggeration, an unexpected outcome was that fewer participants reported not using it (77%) than the number who considered it not permissible (83%). This implies that some lawyers might use tactics which they consider not permissible.

## F *Making the Opponent Physically Uncomfortable*

The tactic of putting the other negotiator in physically uncomfortable circumstances was considered as not permissible by 55% of the participants. Only 9% considered it permissible, with the rest assessing it as probably not permissible (15%) or probably permissible (22%). Despite these numbers, relatively few participants reported using this tactic. The vast majority (89%) said they had never used this tactic. A small proportion (10%) indicated they used it seldomly, leaving only 1% who said they use it more frequently.

While the participants indicated that they believed that other lawyers used the tactic more frequently, the numbers are relatively low. Eighty-four percent (84%) of lawyers said the tactic is used seldom (45%) or never (39%) by other lawyers. Eight percent (8%) believed it is used about half the time, with the same proportion (8%) saying other lawyers use it more frequently.

Statistical analysis revealed that the perceived frequency of use of this tactic by other lawyers had a statistically significant relationship with both the assessment and the frequency of use of the tactic by the survey participants (in both cases,  $p < .0006$ ). Higher perceived

frequency of use of the tactic by other lawyers was associated with the participants being more likely to consider the tactic as more permissible and using it with a higher frequency. The opposite was also true, as lawyers who said that other lawyers never used the tactic were likely to say that they themselves never used it and considered it not permissible. Thus, 99% of participants who said that other lawyers never used this tactic never used the tactic themselves. This figure went down to 88% for those who said other lawyers 'seldom' used this tactic, 82% for those who said it was used half the time, and 47% for those who said it was used more frequently.

Additionally, State and Territory were associated with the participants' assessment of the tactic ( $p = .02$ ). Also, both the number of years in practice and practice sector were associated with the participants' frequency of use of the tactic ( $p = .004$  and  $p < .0006$ , respectively).

When it comes to State and Territory, there was a far larger proportion of participants from New South Wales ( $n = 33$ , 18%) and Victoria ( $n = 23$ , 26%) who considered this tactic permissible than in other States and Territories. By contrast, only 4% in Queensland and 5% in Western Australia found this tactic permissible, and none of the participants from South Australia, Tasmania and ACT assessed it as permissible. The proportion of participants who considered this tactic as not permissible was largely similar across all States and Territories. It was between 55% and 59% in all jurisdictions except New South Wales (42%) and Victoria (52%).

The proportion of lawyers who never used this tactic declined as the number of years in practice increased, except at the extremes. Thus, while 100% of participants who had 2 to 5 years in practice said they never used this tactic, this figure came down to 92% for those with 6 to 10 years, then to 90% and 89% for those with 11 to 15 and 16 to 30 years in practice, respectively. It increased slightly for those with over 30 years in practice to 91%. The proportion was the lowest at 80% for those with 1 year or less since admission.

The practice sector also had a statistically significant association with how frequently the participants made opponents uncomfortable. The proportion of those who never used the tactic was equally high (92%) among solicitors, government lawyers, and 'other' types of lawyers. It was slightly less among barristers (89%) and lower still among in-house counsel and community lawyers, both at 86%. The frequency of use of the tactic was low among those who chose other response options: in all sectors except community/non-profit lawyers, no one used the tactic more frequently than 'seldom'. In the community/non-profit sector, however, 14% used it often. It is important to note that the sample among those in the

community/non-profit sector was very low (n = 7), so this percentage is due to a single response.

The two surprising results in relation to this tactic are the much higher proportion of lawyers who found this tactic permissible in New South Wales and Victoria than in other jurisdictions and that the proportion of lawyers who used the tactic at least to some extent generally increased the longer they had been in practice.

## G Results as a Whole

The results to substantive responses are summarised in the following figures:

### Whether the tactic is permissible

275 Responses

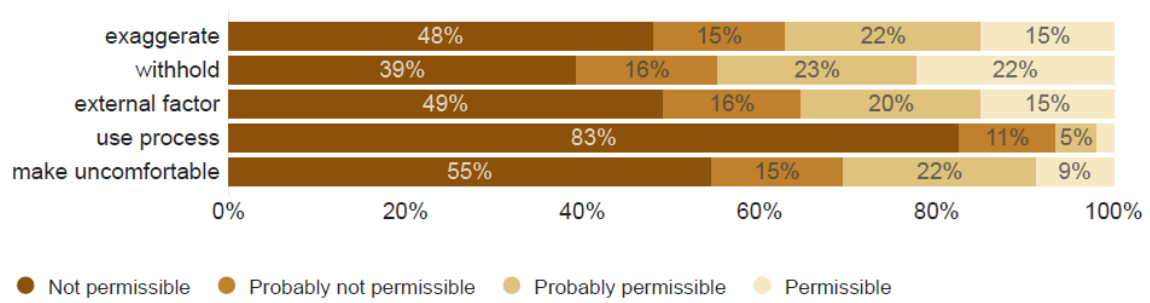


Figure 11 Summary of Responses by Tactic about What is Permissible

### How frequently others use the tactic

269 Responses

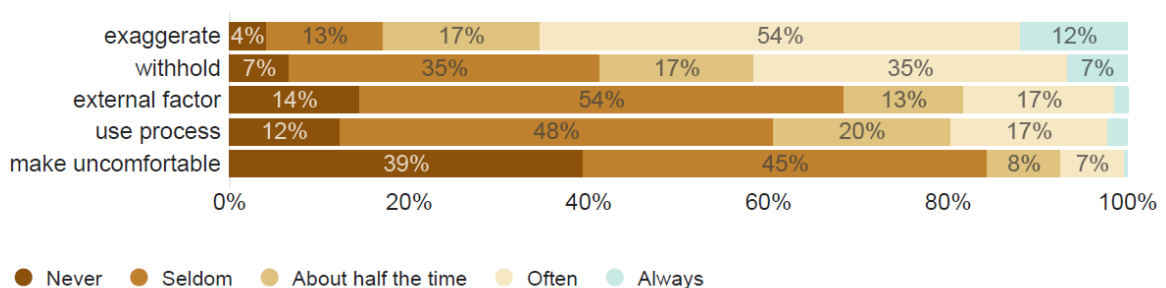


Figure 12 Summary of Responses by Tactic about Frequency of Use by Other Lawyers

## How frequently I use the tactic

266 Responses

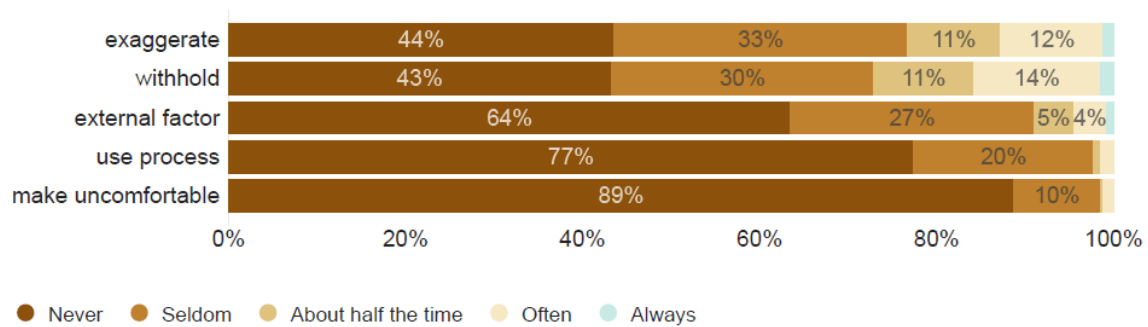


Figure 13 Summary of Responses by Tactic about Frequency of Use by Participants

Overall, this figure demonstrates substantial disagreement among lawyers in relation to what is permissible in negotiations, coupled with relatively high rates of usage, both as self-reported by the participants and in terms of the prevalence among other lawyers as reported by the participants. The participants reported that they used tactics significantly less frequently than the frequency with which they believed other participants used the tactics.

Statistical analysis of relationships within the data is summarised in Table 32 below.

Table 32 Summary of Chi-squared Test Results

p-values	Peer conduct	Gender	Age	Years in practice	Practice size	Sector	State/ Terr.	Location
<b>Assessment</b>								
Exaggerate	<0.0006	0.590	0.928	0.091	0.111	0.591	0.020	0.191
Withhold information	<0.0006	0.053	0.012	0.238	0.384	0.436	0.015	0.950
External leverage	<0.0006	0.604	0.115	0.358	0.375	0.756	0.012	0.852
Abuse process	<0.0006	0.243	0.356	0.111	0.523	0.508	0.393	0.287
Make uncomfortable	<0.0006	0.099	0.259	0.462	0.478	0.358	0.020	0.251
<b>Frequency</b>								
Exaggerate	<0.0006	0.600	0.614	0.100	0.398	0.731	0.244	0.870
Withhold information	<0.0006	0.468	0.505	0.031	0.538	0.055	0.161	0.979

External leverage	<0.0006	0.217	0.181	0.329	0.985	0.120	0.387	0.439
Abuse process	<0.0006	0.708	0.699	<0.0006	0.723	0.013	0.542	0.580
Make uncomfortable	<0.0006	0.745	0.604	0.004	0.774	<0.0006	0.711	0.984

Table 32 contains the results of statistical tests performed on the data. Statistically significant results in the data are highlighted in green and in yellow. The results highlighted in yellow meet the threshold of statistical significance customarily adopted in scientific literature,  $p < .05$ . This threshold suggests that there is less than a 5% probability of the relationships between data sets being due to chance. The results highlighted in green meet a much higher threshold of statistical significance  $p < .000625$ . This threshold is based on Bonferroni correction. As explained in Chapter 5 Section 6, Bonferroni correction is applied in circumstances where there is concern that multiple testing might lead to accidental findings of statistical significance. It imposes a higher threshold to mitigate this risk. However, best practice dictates that both the ordinary threshold and the higher threshold are reported.

This table demonstrates that peer conduct (Question 2—how frequently others used tactics) had a statistically significant association with all of the responses relating to the respondents’ assessment (Question 1) and frequency of use of EANTs (Question 3).

The only two other variables that had a statistically significant association (based on alpha with Bonferroni correction) with the results were:

- the years in practice and frequency of abuse of process (Question 3); and
- practice sector and frequency of making the opponents uncomfortable.

If the results are considered by reference to the conventional threshold of statistical significance ( $p < .05$ ) but do not meet the corrected alpha, then there would be a case for arguing that a much larger set of variables affect lawyers’ conduct and decision-making. This would include the statistically significant association between the following responses:

- age and how the participants assessed withholding information ( $p = .012$ );
- years in practice and the participants’ frequency of use of:
  - withholding information ( $p = .031$ ); and
  - making uncomfortable ( $p = .004$ );
- practice sector and frequency of abuse of process ( $p = .013$ );

- State/Territory and assessment of:
  - exaggeration (p = .020);
  - withholding of information (p = .015);
  - external leverage (p = .012); and
  - making uncomfortable (p = .020).

The rest of the tests in relation to the factors noted above revealed no statistical relationships. In other words, in relation to age, for example, the only statistically significant result was in relation to the impact of age and how the participants assessed withholding information, but no other response. There were no statistically significant results at all in relation to the following factors: Gender, Practice Size and Location (Metro CBD, Suburban, Regional/Rural).

Overall, the pattern that emerged is that various demographic factors generally had an impact on some, but not all of the tactics. The factors also tended to impact either frequency of use or assessment of tactics, but not both. Some factors had no statistically significant results.

## H *Summary*

This Chapter reported the results of the survey developed in the previous Chapter. The survey was administered to 275 Australian lawyers.

The results indicate that the participants were split on whether the EANTs included in the survey (exaggeration, withholding of information, threats, abuse of process and location) are permissible. Most of the participants reported that, at least on occasion, they themselves used some of these EANTs. Further, few participants reported never encountering such tactics in practice. Indeed, when questioned on how often others use EANTs, the results suggest that the use of EANTs is rife.

Statistical analysis of the results revealed few statistically significant relationships between the participants' demographic characteristics and their responses. To the extent there were statistically significant relationships, their impact appears to be practically imperceptible. Demographic factors, such as age, gender, location (rural vs suburban vs metro) and jurisdiction, were not associated with whether lawyers would consider EANTs permissible, would themselves use EANTs or would be likely to be targets of EANTs.

However, one factor had a very strong and direct statistical association with both how the participants assessed the EANTs and how frequently they used the EANTs: the perceived frequency of use of EANTs by other lawyers. Participants who reported that other lawyers used EANTs with high frequencies were more likely to use EANTs with a higher frequency themselves as well as to assess the EANTs as permissible.

The implications of these results and issues identified in prior Chapters are discussed in the next Chapter.

## CHAPTER 7—SYNTHESIS: A MATERIAL PROBLEM?

### A *Introduction*

This research project set out to investigate the limits of lawyers' professional conduct by reference to ethically ambiguous negotiation tactics. This investigation focused on exploring the following questions:

- to what extent do the lawyers assess different types of EANTs as permissible;
- what is the frequency of use of EANTs among lawyers; and
- what factors are associated with the lawyers' assessment and prevalence of the use of different types of EANTs.

Preliminary searches suggested that this would be a relatively straightforward undertaking as, at least theoretically, the profession has an advanced set of professional conduct rules complemented by a relatively small body of case law. However, as I will argue in this Chapter, lying beyond this superficial simplicity, my research revealed a significant problem: Australian lawyers lack a shared understanding of the limits of permissible conduct in negotiations. This problem is coupled with potentially widespread use of EANTs. Nor does it seem to be strongly associated with a particular type of a lawyer. I will argue that this is not a problem caused by a few bad apples or even by 'the barrel'—the profession itself. Rather, it is a symptom of a much larger paradigm shift in how the profession operates. This calls for a comprehensive re-think and concerted response.

### B *No Evidence—No worries?*

The systematic and comprehensive searches used in this research project to trawl through all available literature revealed very little 'hard' evidence that the Australian legal profession might have a problem when it comes to ethically ambiguous negotiation tactics or identifying the limits of professional conduct in negotiations. The available evidence consisted of around a dozen reported cases stretching back over the past sixty years, plus two studies reported in 1995 which suggested some differences of opinion among lawyers about the use of a couple of tactics. At the same time, the profession's peak representative bodies suggested that there was no problem. In response to a Law Reform Commission inquiry in 1999, the Law Council of Australia submitted that there is 'no evidence of systemic problems' and that legal

practitioners ordinarily act ethically and professionally.<sup>867</sup> A similar submission was made by the Law Society of Queensland, which claimed that the vast majority of its members acted ethically.<sup>868</sup> In the same vein, in 2011, in the context of a Law Reform Commission inquiry into discovery, the Law Council submitted that the legal obligations on lawyers were ‘sufficiently clear and specific to ensure that lawyers are aware of their obligations’.<sup>869</sup>

The claims that obligations are clear and specific and that lawyers ordinarily act ethically and professionally started to fall apart upon closer examination of the substance behind them. For example, the rules of professional conduct, which are held up as representing the judgment of the profession, do not even contain the word ‘negotiation’. Further, a detailed examination of the rules in Chapter 2 revealed that they provide limited guidance in several narrowly defined circumstances but are generally ambiguous about most EANTs that lawyers could encounter in negotiations. A common response to criticism of the rules is that they are one of many sources of obligations on lawyers—as a profession, lawyers' conduct and peer expectations are an even more significant factor.

While the Australian cases and studies are few, they all seem to point to a bigger problem: a fundamental lack of understanding of the limits of what is permissible in negotiation, combined with the common use of tactics which could be in breach of such limits. Wade<sup>870</sup> and Lakhani<sup>871</sup> also argued that the use of some deceptive tactics was an accepted convention. According to Parke, the use of ‘irrational’, ‘aggressive’ and ‘posturing’ tactics is ‘already well entrenched in negotiation practice in Australia’.<sup>872</sup> This seems to parallel the situation in the USA. Dal Pont cited US literature referring to an observation that disingenuous behaviour is ‘indigenous to most legal negotiation and could not realistically be prevented due to the non-public nature of bargaining interactions’.<sup>873</sup> Other authors have suggested that this might be due to the nature of negotiation, as it is ‘widely regarded as

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<sup>867</sup> Australian Law Reform Commission Report 89 (n 12) [12.44].

<sup>868</sup> Ibid [12.45].

<sup>870</sup> Wade (n 6).

<sup>871</sup> Lakhani (n 21).

<sup>872</sup> Parke (n 16) 226; Ysaiah Ross, ‘Ethics in Law Lawyers’ Responsibility and Accountability in Australia 5th Edition’.

<sup>873</sup> Charles B Craver, ‘Negotiation Ethics: How to Be Deceptive without Being Dishonest/How to Be Assertive without Being Offensive’ (1997) 38 *South Texas Law Review* 713, 719.

inherently deceptive,<sup>[1]</sup> strewn with falsehoods<sup>[2]</sup> and even requiring talent for deceit'.<sup>874</sup> This echoes the results in the two Australian studies relevant to EANTs. Davis's studies suggested relatively high rates of use of EANTs (exaggeration and threats), while Lamb's study revealed concerns that lawyers might unknowingly use tactics which go beyond what is legally permissible (in that case, breaching prohibition against misleading and deceptive conduct). Australian evidence also fits into the broader pattern of international evidence. There have been multiple studies in the USA, some with thousands of participants, which all pointed to a lack of consensus among lawyers about what is permissible. Similar patterns can be seen in UK studies, which, adopting interview methodologies, revealed the usage of a broad spectrum of EANTs by lawyers.

These patterns are also repeated and can be found in case law, which grounds the evidence base in lawyers' lived experience. Lawyers fail to recognise that limits may apply, let alone interpret and follow those limits. In *Mullins*, a highly experienced lawyer engaged in tactics that he considered within the limits of the law, but a disciplinary tribunal considered to be tantamount to fraud. In *Garrett*, a solicitor relied on a barrister's advice about withholding information which he did not realise 'was patently flawed' and which 'should have been apparent'.<sup>875</sup> In *Fleming*, the lawyer saw nothing in the law that would require disclosure of certain facts.<sup>876</sup> In *Chamberlain*, the lawyer 'was quite frank about what he did and indeed saw nothing wrong with it'.<sup>877</sup> In *Clyne's* case, the lawyer made no secret of his use of the tactic and saw nothing disreputable in it.<sup>878</sup> In *Searle*, the lawyer followed rule 21.4 of the *Solicitors' (Conduct) Rules*, saying at the time she genuinely believed that the allegations made by her had a proper basis, that she informed her client of the seriousness of the allegations and the possible consequences, and that the client then instructed her that she wished the allegation to be made.<sup>879</sup> She did not think she was doing anything inappropriate, though when faced with the charges, she accepted using unlawful threats.<sup>880</sup> In *Amsden*, the

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<sup>874</sup> Justine Rogers, 'Chapter 14 The Lying Lawyer and the Ethics of Negotiation' in Michael Legg (ed), *Resolving Civil Disputes* (2016) 197.

<sup>875</sup> *Legal Services Commissioner v Garrett* [2009] LPT 12 [24]

<sup>876</sup> *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352 [50], [73]

<sup>877</sup> *Chamberlain v the Law Society of the Australian Capital Territory* (1993) 43 FCR 148 per Black CJ at [39].

<sup>878</sup> *Clyne v New South Wales Bar Association* [1960] HCA 40; 104 CLR 186 [20]

<sup>879</sup> *Council of the Law Society of New South Wales v Searle* [2019] NSWCATOD 70 [14]

<sup>880</sup> *Ibid* [22].

lawyer did not realise her claim had no prospects of success.<sup>881</sup> All of these cases are proven examples of lawyers who were not aware that some principles or limits might have applied to their use of EANTs.

These issues are also occasionally echoed in literature, both professional and academic. For example, in Queensland, Emerson claimed that the precise duties of lawyers in negotiations remained ‘a vexed question and debate continues as to whether such duties should be the subject of specific and unique regulation’.<sup>882</sup> In Western Australia, Sher referred to the fact that lawyers had many misconceptions about what is permissible in negotiations.<sup>883</sup> Spencer and Hardy argued that the values in negotiation are poorly articulated; it is a discussion that is waiting to happen.<sup>884</sup>

While, on the face of it, these case examples seem to undermine Law Council’s argument that lawyers understand their obligations in negotiations, these cases and the argument are not irreconcilable. Rather, this raises the question of whether the problem might be one of a few bad apples rather than the profession as a whole. This is discussed in the next session.

### C *A Problem that Goes Beyond a Few Bad Apples?*

This section considers the merits and the problems associated with the argument that the cases might be exceptions to the general state of the profession (i.e., good level of understanding of the limits in negotiations) rather than represent the problem experienced by the majority of the profession.

On the face of it, one could argue that it is apparent that the cases involved exceptional conduct and that any lack of understanding might be a problem of a few bad apples. The case law contains many references to the exceptional nature of the conduct it considers. In *Clyne’s case*, the practitioner was disbarred ‘for the protection of the public’.<sup>885</sup> In *Chamberlain*, the majority held that abuse of the processes amounted to grave impropriety that brought the

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<sup>881</sup> Ibid [4].

<sup>882</sup> Emerson (n 8).

<sup>883</sup> Sher (n 9).

<sup>884</sup> Hardy and Rundle (n 15); Spencer and Hardy (n 16) 209.

<sup>885</sup> *Clyne v New South Wales Bar Association* [1960] HCA 40 [25].

legal profession into disrepute.<sup>886</sup> The firm in *Flower & Hart* was found to have conducted proceedings with impropriety, engaged in abuse of process and obstructing or defeating the administration of justice.<sup>887</sup> *Mullins* involved what was tantamount to fraudulent deception. *Fleming* and *Garrett* demonstrated the use of unfair and dishonest means.<sup>888</sup> Claims made by Sampson grossly exceeded her clients' entitlement.<sup>889</sup> Ms Amsden was found guilty of having engaged in abuse of process and disgraceful or dishonourable conduct.<sup>890</sup> Threats made in *Low* amounted to conduct that fell short of the standard of competency expected of practitioners,<sup>891</sup> and in *Searle*, the baseless threats made by the lawyer amounted to 'extremely serious misconduct'.<sup>892</sup> The strong language used by the Courts and Tribunal in many of these cases suggests that these cases are not about navigating difficult issues. Rather, they are about a few problematic individuals.

The case law contains a few exceptions (*Sing* and *Norton Rose*), which seem to prove the rule. In *Sing*, the practitioner stopped just short of crossing ethical lines.<sup>893</sup> In *Norton Rose 12*, the trial judge found the firm's conduct to be abuse of process and bringing the profession into disrepute. On appeal, the Federal Court appeared to be more understanding of the firm's conduct and reversed the findings, saying that '[f]oolishness, carelessness, incompetence, self-serving statements, outright inaccuracy, dilatoriness, and failures to follow through are all part of ordinary human experience'.<sup>894</sup> These cases suggest that it is, in fact, possible to navigate ethical lines, such as in *Sing*. Further, as demonstrated in *Norton Rose*, the Courts can be understanding of minor transgressions of such lines through minor lapses of judgment. This seems to reinforce the impression that the other cases represent 'bad apples' of the profession.

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<sup>886</sup> *Chamberlain v the Law Society of the Australian Capital Territory* (1993) 43 FCR 148 per Lockhart J [49]-[50].

<sup>887</sup> *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* - [1998] FCA 806 [249].

<sup>888</sup> *Fleming* [2006] WASAT 352 [7], [74]; *Garrett* [2009] LPT 12 [13].

<sup>889</sup> *Legal Services Commissioner v Sampson (Legal Practice)* [2013] VCAT 1177 [143].

<sup>890</sup> *Legal Profession Complaints Committee and Amsden* [2014] WASAT 57 [49].

<sup>891</sup> *Victorian Legal Services Commissioner v Low (Legal Practice)* [2016] VCAT 1584 [127].

<sup>892</sup> *Council of the Law Society of New South Wales v Searle* [2019] NSWCATOD 70 [64].

<sup>893</sup> *Legal Services Commissioner v Sing* [2007] LPT 004 [23].

<sup>894</sup> *Martin v Norton Rose Fulbright Australia (25 November 2021)* [2021] FCAFC 216.

## 1 *Two Problems with the Bad Apples Argument*

I would suggest two significant problems with the argument that the case law might represent an exception rather than the rule when it comes to Australian lawyers' understanding of the standards applicable in negotiations. These problems are what the cases say about the lawyers involved and what we can learn about lawyers from prior studies.

### (a) *Not Bad Apples?*

While the conduct of some of the practitioners could imply that they were bad apples, this is not the full picture. Many of the lawyers involved were long standing members of the profession and of high repute. For example, Mr Chamberlain had ten affidavits filed as character evidence. The evidence came from close friends as well as fellow practitioners, some of them among the most eminent in the city. It was enthusiastic ('beyond reproach,' 'would not knowingly do anything .... which might be regarded as conduct unbecoming,' 'no other person for whom I have more respect,' 'true gentleman,' 'epitomizes the fine tradition of solicitors').<sup>895</sup> Mr Mullins reportedly was one of Queensland's most eminent torts lawyers: a barrister of nearly 20 years standing, one of the authors of the new five-volume *Civil Liability Australia*, a one-time Queensland President of the Australian Plaintiff Lawyers' Association, handpicked by the President of the Australian Lawyers Alliance Queensland for the taxpayer-funded job of assisting in the high profile case relating to 'Dr Death' Patel, and chosen as a decision maker in Queensland's Anti-Discrimination Tribunal. According to *The Australian*, the prosecution is the result of a crackdown on lawyers who withhold facts.<sup>896</sup> Likewise, Ms Searle: has been a Councillor of the Law Society (1996-2002); Director and Deputy Chairman and member of various committees of the College of Law (1998-2002); Member of the Law Society Civil Litigation Committee (1997-2002) and Chairman of Family Law Committee (1997-2002), Membership Committee (2000-2002) and Professional and Public Programs Committee (1997); Director and member of the Legal Qualifications and Law Extension Committees of the Legal Practitioners' Advisory Board (1998-2002); and Director of the Specialist Accreditation Board and Appeal Board (1996-2002).<sup>897</sup> Ms Sampson had an impressive record of service to the community and to the profession. This includes a school directorship and committee membership, three terms served as President of the Eastern Suburbs Law Association, being a LIV counsellor, serving on the Suburban

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<sup>895</sup> *Chamberlain v the Law Society of the Australian Capital Territory* (1993) 43 FCR 148 per Miles CJ at 19.

<sup>896</sup> McDonald (n 32).

<sup>897</sup> *Council of the Law Society of New South Wales v Searle* [2019] NSWCATOD 70 [2].

and Country Lawyers Committee of Management, helping to establish a community youth support scheme and doing *pro bono* legal work. There were no professional disciplinary findings against Ms Sampson other than this reported case.<sup>898</sup> The most prominent practitioner whose conduct is referenced in the case law was Ian Callinan QC in *Flower & Hart*, who was counsel advising the firm on the use of delaying and frustrating tactics.<sup>899</sup>

Further, many of the cases suggest that the practitioners' conduct was not culpable as it might at first seem. *Mullins* is perhaps the most obvious example. He tried to stay on the right side of the law. In that case, the practitioner advised the client against the use of the tactic, sought advice of senior counsel and, under client pressure, prepared extensive written advice analysing the proposed course of conduct. He was trying his best to navigate the issues but could not identify anything that would enable him to act contrary to the client's instructions. *Fleming* referred to a similar situation—the practitioner there also recommended against the use of the tactic but was not aware of any principle against its use when instructed by a client.

In other cases where lawyers were perhaps less diligent, the facts reveal a failure to exercise good judgment rather than significant deviance. In *Searle*, the practitioner admitted that she became too involved in the matter, feeling sorry for the client and angry at the other party, which clouded her judgment.<sup>900</sup> *Flower & Hart*,<sup>901</sup> *Garrett*<sup>902</sup> and *Norton Rose*<sup>903</sup> all involved solicitors pleading reliance on counsel as a justification for their conduct. *Flower & Hart* referred to case authorities to the effect that solicitors cannot be criticised for relying on the advice of properly instructed counsel.<sup>904</sup> However, in all three cases, this reliance was held to be misplaced, and the lawyers were told that they should have exercised independent judgment. In *Flower & Hart* the tribunal held that whilst the general rule is that solicitors cannot be criticised for relying on the advice of properly instructed counsel, they are still

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<sup>898</sup> *Legal Services Commissioner v Sampson (Correction) (Legal Practice)* [2013] VCAT 1439 [21].

<sup>899</sup> Ruth Hill, 'Australian Judge's Colourful Past', *Radio New Zealand* (online at 21 March 2015) <<https://www.rnz.co.nz/news/national/269239/australian-judge%27s-colourful-past>>.

<sup>900</sup> *Ibid* [22].

<sup>901</sup> (1998) 156 ALR 169.

<sup>902</sup> [2009] LPT 12.

<sup>903</sup> [2020] FCA 1641.

<sup>904</sup> (1998) 156 ALR 169, 242-243.

expected to exercise independent judgment.<sup>905</sup> Similarly, in *Garrett*, the Tribunal considered that the solicitor was not a passive recipient of advice and brought his own knowledge, skill and expertise.<sup>906</sup> While practitioners' failure to exercise proper judgment cannot be commended, it is difficult to interpret the mistake of reliance on someone else, particularly someone with specialised expertise, such as counsel, as evidence of 'bad' character. Further, the failure of experienced lawyers to identify that there are significant issues at stake could be interpreted as an example of just how little awareness there is among the profession. This begs the question: when prominent and experienced members of the profession fail to identify and apply the correct principles in negotiations, could it be the case that rather than them being a few bad apples, there is a bigger issue?

*(b) Not a few?*

In this section, I zoom out from individual cases to examine how they compare to studies involving many lawyers.

Studies suggest that exaggeration and other types of misleading conduct, which are referenced in some cases, are relatively prevalent. Three of the cases—*Sampson*,<sup>907</sup> *Amsden*<sup>908</sup> and *Norton Rose*,<sup>909</sup> involved misrepresentation that could be construed as an exaggeration. In *Sampson* and *Amsden*, the issue was claiming a right to compensation where there was none at law; In *Norton Rose*,<sup>910</sup> about whether the firm actually did what it claimed to do (withdrawing ancillary proceedings). It was mentioned by lawyers interviewed in the studies by Genn<sup>911</sup> in the UK, Lempert<sup>912</sup> and Dahl<sup>913</sup> in the USA and Lamb<sup>914</sup> in Australia. In Australia, Davis found that 24% of personal injury lawyers in Queensland

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<sup>905</sup> Ibid.

<sup>906</sup> [2009] LPT 12 [23]

<sup>907</sup> [2013] VCAT 1177.

<sup>908</sup> [2014] WASAT 57.

<sup>909</sup> [2020] FCA 1641.

<sup>910</sup> Ibid.

<sup>911</sup> Genn (n 693).

<sup>912</sup> Larry Lempert, 'In Settlement Talks, Does Telling the Truth Have Its Limits?' (1988) 2 *Inside Litigation* 1.

<sup>913</sup> Dahl (n 146).

<sup>914</sup> Lamb (n 673).

agreed with the statement that it is often necessary to use exaggeration. In the USA, Carter reported that when asked about ‘puffery,’ (which is conceptually similar to exaggeration),<sup>915</sup> 61% of lawyers considered it permissible and 73% reported actually using it.<sup>916</sup> In the survey that I conducted as part of this project, I found that while a large proportion of lawyers said exaggeration was not permissible (48%), more than half of the professions were still in doubt (37% saying either ‘probably permissible or ‘probably not permissible’) or considered it permissible (15%). Even fewer Australian practitioners said that they never used exaggeration (44%), with the majority (56%) admitting that they used exaggeration to some extent. These lawyers did not think they were ‘bad apples’ themselves either: only 4% of lawyers said that other lawyers never use exaggeration. This suggests that 96% believed other lawyers used the tactic at least to some extent, suggesting widespread use of the tactic among the profession.

Another issue that came up in cases that does not seem a rare phenomenon is the tactical withholding of information. It was at the heart of *Fleming*<sup>917</sup> and *Mullins*.<sup>918</sup> In the USA, Pepe found that 31%-50% of lawyers considered it permissible to withhold information about false testimony in settlement negotiations,<sup>919</sup> and if asked about it, 46%-56% considered it permissible to give partially true but incomplete answers. Hinshaw reported that 19% of lawyers considered the tactic of withholding information permissible. Additionally, in Hinshaw’s study, 19% of lawyers indicated that there were ‘unsure’ about the conduct. The results also fit into the general pattern comprised of smaller-sample US studies. The small sample of those studies could imply skewed and unrepresentative results. For example, Dahl referred to ‘a majority’ of lawyers finding the tactic permissible; however, this would have meant only seven or more participants in his study, as his overall sample was fourteen (n = 14). Lempert found that 20% of lawyers considered this tactic permissible; however, this was only six participants (n = 6). In the survey I conducted in Australia, 23% of participants

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<sup>915</sup> For example, the United States Federal Trade Commission (FTC) defined puffery as a "term frequently used to denote the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." See eg *Better Living, Inc et al*, 54 F.T.C. 648 (1957), aff'd, 259 F.2d 271 (3rd Cir. 1958)

<sup>916</sup> Carter (n 210).

<sup>917</sup> [2006] WASAT 352.

<sup>918</sup> [2006] LPT 012.

<sup>919</sup> Pepe, ‘Interim Report and Preliminary Findings for Submission to the American Bar Association Commission on Evaluation of Professional Standards and the American Bar Association House of Delegates at Their February 1983 Meeting’ (n 741) 35.

considered the tactic ‘probably permissible’ and 16% ‘probably not permissible’—that is, a combined total of 39% who sat on the fence, suggesting a lack of consensus on whether the tactic is permissible.

Studies also refer to the actual usage of this tactic. The usage of this tactic was documented in the UK by Boon<sup>920</sup> and Lewis,<sup>921</sup> whose respective study participants referred to it in the interviews. In my survey, 43% of participants indicated that they never used this tactic, so more than half the participants said they used it to some extent. The participants also believed there was a high prevalence of use of this tactic among other lawyers: only 7% said they thought that other lawyers never used it, with 59% saying it was used by other lawyers half the time or more.

These findings are not confident to tactics relating to honesty, such as misleading or withholding information. The case of *Singh, Low* and *Searle* refers to the use of threats. In the USA, Pepe found that while only 15%-17% ordinarily considered threats permissible, the figure increased to 50% when the threats were made indirectly, for example, not by the lawyer but through the client. While this aspect of Pepe’s study was not replicated in the present project, it seems to be echoed in some of the more recent cases reported in Chapter 3. For example, in *Searle*,<sup>922</sup> the lawyer indicated that if the matter did not settle, photos of the male defendant with his half-naked underage daughters would be revealed during the proceedings. In *Low*,<sup>923</sup> the lawyers referred to the ‘risk’ of another’s party conduct being perceived as domestic violence. In *Sing*,<sup>924</sup> in a dispute about rent, the lawyer threatened to refer some to the Police ‘for investigation’ rather than a criminal prosecution. This suggests that lawyers try not to be obvious about using this tactic. The uncertainty about the standards and how far lawyers can go in terms of threats is also reflected in other studies. Dahl found three-quarters of lawyers would use the threat of a regulatory complaint.<sup>925</sup> Carter’s survey contradicted Dahl’s in that in Carter’s study 82% of lawyers considered it not permissible to use the threat of a regulatory complaint about the opposing lawyer as a

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<sup>920</sup> Boon (n 711).

<sup>921</sup> Richard Lewis, ‘Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action’ [2018] (2) *Journal of Personal Injury Law* 113.

<sup>922</sup> [2019] NSWCATOD 70.

<sup>923</sup> [2016] VCAT 1584.

<sup>924</sup> [2007] LPT 004.

<sup>925</sup> Dahl (n 146).

negotiation tactic.<sup>926</sup> When I surveyed Australian lawyers, I found that 49% in the present study assessed this tactic as not permissible. This runs in stark contrast to the three-quarters of US lawyers who considered it not permissible in Altman's study and even more (82%) in Carter's study.

Study participants also reported actual usage of threats as a tactic. In Altman's study, 21.5% admitted to using this tactic.<sup>927</sup> In my survey, 78% said that other lawyers used the tactic to some extent, 9% said that they used the tactic about half the time or more, with 27% saying they used it seldom and 64% saying they never used it. Reported usage by other lawyers was higher. Altman found that 61% of lawyers reported receiving at least one threat to use children in a property settlement in the year leading up to the study.<sup>928</sup>

Several cases also referred to the tactic of using processes for purposes for which such processes were not designed. Such tactics were used in *Clyne*,<sup>929</sup> *Chamberlain*,<sup>930</sup> *Flower & Hart*,<sup>931</sup> and most recently, in the 2020 case of *Norton Rose*.<sup>932</sup> *Clyne* involved multiple baseless prosecutions, *Chamberlain* involved the use of the court consent order process to improve bargaining position, *Flower & Hart* initiated baseless proceedings and made life difficult for the opponents, and most recently, *Norton Rose* involved commencing ancillary proceedings as part of broader negotiation. The tactics' reported usage and prominence in the case law could suggest that while it might be considered less permissible, this does not affect its usage in practice.

The tactic was mentioned by the interviewees of Genn<sup>933</sup> and of Goriely<sup>934</sup> in the UK. In the USA, Pepe reported that 46%-47% of lawyers considered this permissible (framed as the use

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<sup>926</sup> Carter (n 210).

<sup>927</sup> Altman (n 154) 500.

<sup>928</sup> Ibid 499.

<sup>929</sup> [1960] HCA 40.

<sup>930</sup> (1993) 43 FCR 148.

<sup>931</sup> (1998) 156 ALR 169.

<sup>932</sup> [2020] FCA 1641.

<sup>933</sup> Genn (n 693).

<sup>934</sup> Goriely, Moorhead and Abrams (n 820).

of processes to cause delay).<sup>935</sup> When it comes to prevalence, Pepe's study also indicated a high frequency of use of this tactic, as 50% of participants in that study said processes are routinely used to cause delay. In my survey 36% of participants said they used the tactic. Pepe's results are similar to the only Australian study to have investigated the use of this tactic—the study by Davis.<sup>936</sup> In 1995 Davis reported that 47% of plaintiff lawyers<sup>937</sup> agreed with the statement that defence lawyers routinely use processes to cause delay (compared to 50% by Pepe). However, In Davis's study only 9.8% of defence lawyers agreed that they themselves routinely use this tactic.

In my survey of Australian lawyers, 83% assessed this tactic as not permissible. Only 11% indicated uncertainty, 5% said it is 'probably permissible' and just 1%, 'permissible.' Despite this lack of acceptance, only 77% of Australian lawyers in my study said that they never used this tactic, which is less than the proportion of participants who said it is not permissible (83%). This implies that at least 6% of participants who considered it not permissible still used the tactic. Of the remainder of the participants, 20% reported using it seldom, with only 3% indicating they used it more frequently. Once again, the participants still believed that other lawyers used this tactic even more. Only 12% thought that other lawyers never used it. Almost half (48%) thought that this tactic is used by other lawyers 'seldom' and 40% considered that this tactic is used half the time or more frequently (20% of participants said it is used by other lawyers 'half the time,' 17% 'frequently' and the remaining 2% 'always').

In my study, I also explored a tactic that was not mentioned in the case law: making the opponents physically uncomfortable. The tactic of putting the other negotiator in physically uncomfortable circumstances was considered as not permissible by just over half (55%) of the participants. Only 9% considered it permissible, with the rest assessing it as probably not permissible (15%) or probably permissible (22%). Despite these numbers, relatively few participants reported using this tactic. The vast majority (89%) said they had never used this tactic. A small proportion (10%) indicated they used it seldomly, leaving only 1% who said they use it more frequently. Many more lawyers thought this tactic was never used by other lawyers than in relation to any other tactic in my survey (39%), compared to the next highest of 14% for external leverage and 12% for the use of processes. What is notable about these

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<sup>935</sup> Pepe, 'Interim Report and Preliminary Findings for Submission to the American Bar Association Commission on Evaluation of Professional Standards and the American Bar Association House of Delegates at Their February 1983 Meeting' (n 741) 11.

<sup>936</sup> Davis (n 671).

<sup>937</sup> Ibid 750.

results is that while there was still a lack of agreement on whether it is permissible or not, there seemed to be a much lower frequency with this tactic. This might suggest that the cases are indeed manifestations of common tactics. In other words, rather than being one-off occurrences or ‘bad apples’, the cases should be seen as a tip of a much larger iceberg.<sup>938</sup>

In my survey, I also conducted statistical analysis to check whether I could single out a group of ‘delinquent’ lawyers or bad apples who might have a different understanding of EANTs from the rest of the profession. Previous studies suggested an association between demographic factors and solicitors' conduct or perceptions. For example, Pepe found that participants were likely to consider EANTs<sup>939</sup> less permissible based on the following factors:

- large firm/elite lawyers as opposed to a smaller firm
- those who are practising religion than those who do not
- older rather than younger; and
- in a large firm: up to 4 years in practice, then more permissible at 4-6 years, then less permissible again after the 6<sup>th</sup> year.<sup>940</sup>

Pepe also had significant negative findings, that is, finding that there is no statistical relationship between certain factors. In particular, the findings did not lend themselves to the identification of a single ‘profile of a deceptive litigator’. Furthermore, there was no statistical association between years in practice, education, gender and race and whether the participants were likely to be among the top 10% of most deceptive respondents. Likewise, location, education, gender and race did not seem to be associated with whether the participants would find themselves among the 10% least deceptive respondents. Hinshaw initially found no statistically significant difference in relation to the assessment of EANTs between males and females, although differences seemed to emerge on deeper analysis.

The present study found that only a few factors had a statistically significant relationship with the participants' responses. Ten out of these 12 were the relationship between the assessment (question 1) or frequency of participant use (question 2) to use of EANTs by

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<sup>938</sup> Lakhani (n 21) 252.

<sup>939</sup> While the acronym EANTs was coined much later, the conduct Pepe considered can be classified as such.

<sup>940</sup> Pepe, ‘Summary of Selected Findings of the Study of the Standards of Legal Negotiations’ (n 737) 13.

others (question 3). All ten of these had extremely low p-values, indicating a very strong statistical association. The relationship between these variables was also simple and clear: the higher frequency of use of EANTS by other lawyers was associated with a higher frequency of the use of these tactics by the lawyers and a higher likelihood that they would find the tactics permissible. The remaining two other tests which passed the Bonferroni-corrected threshold were years in practice in relation to the frequency of abuses of process and practice sector in relation to making the opponent uncomfortable. However, while there was a statistically significant association, it was not clear how these factors influenced each other. In sum, the results of my study suggest that a key predictor of whether lawyers will find a tactic permissible or how frequently they use it is how frequently they think other lawyers have used it. Variables such as gender, age, practice size and location, as suggested by prior research, appeared to have no statistically significant association with the participants' responses.

When applied to the larger problem being discussed here, the results suggest that the problem applies across the board. It is not confined to a few bad apples mentioned in the case law or any section of the Australian legal profession, whether by reference to gender, age, practice size, type or location. It seems that it is a problem that affects lawyers across the board. According to the research set out above, EANTs are widely used, and most practitioners have encountered EANTs in practice. In the next section, I will move from the individual level to the profession as a whole, exploring the question, 'are EANTs a problem for the profession as a whole?'

## D *The Profession's Perspective on the Problem*

The foregoing discussion suggests that EANTs are an issue that affects most lawyers. In response to my survey, more than 85% of lawyers indicated that other lawyers used four out of five EANTs featured in the survey (eg only 4% said they never encountered exaggeration, 7% withholding of information, 14% use of external factors and 12% use of processes for ulterior motives by other lawyers). The actual exposure to EANTs could be higher: it is possible that the remainder simply were unaware of the use of EANTs against them. As such, EANTs could be an issue that affects almost all Australian lawyers. Further, there are several indicators that this is a long-standing issue. EANTs were mentioned in the mid-1990s in the studies by Davis and by Lambs. These are the earliest Australian studies, but if US experience and case law are any guide, the problem associated with the lack of understanding could date back to a much earlier time (Pepe's study was in the early 1980s, but Clyne's case was reported in 1960). The very limited attention paid to this problem begs

the question as to why that is the case. In this section, I will argue that this is because the problem of EANTs is an ‘elephant in the room’ for the legal profession.

The expression ‘an elephant in the room’ is understood to refer to ‘an obvious problem or difficult situation that people do not want to talk about,’<sup>941</sup> often because it makes at least some of them uncomfortable and is personally, socially, or politically embarrassing, controversial, inflammatory or dangerous.<sup>942</sup> However, the expression originates from a fable about a person who goes to a museum and notices all manner of things but inadvertently fails to notice its largest exhibit: an elephant.<sup>943</sup> As I will explain in this section, the problem of the lack of understanding of EANTs by lawyers merits this label, although likely close to its original meaning.

## E *A Problem of Elephantine Proportions*

Like an elephant, the problem seems very large: as noted in the introduction, EANTs may have a significant impact on the outcome of negotiations, and, based on my survey and other literature, it seems to affect almost all lawyers. However, EANTs are rarely mentioned in professional publications. Not just EANTs, but even the word ‘negotiation’ is not even used in the rules of professional conduct—despite negotiation being recognised as the main paradigm of how disputes are resolved by lawyers in Australia.

### 1 *Lack of Recognition of the Problem*

One of the key challenges I faced in pursuing the topic of EANTs was the lack of comprehensive written information about it. I started this project because I kept ‘bumping’ into the problem associated with a lack of clarity around what tactics could be legitimately used in negotiations by myself and others. The original intent of the project was to apply the rules of professional conduct (which I expected to contain the answers) to the domain of negotiation tactics (which I expected to be well-chartered). However, the more I investigated it, the more I realised how little is known and agreed about it. This was surprising but is partly the reason that most Chapters in this thesis refer to comprehensive searches I

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<sup>941</sup> See eg, *Cambridge Dictionary Online* (accessed 12 April 2023) ‘an elephant in the room’ <https://dictionary.cambridge.org/dictionary/english/elephant-in-the-room>

<sup>942</sup> *Cambridge academic content dictionary*, (2015) ‘Elephant in the room’.

<sup>943</sup> See Ivan Andreevich Krylov, *Krilof and his fables*, (1768-1844) (Translation London, 1869). referenced in <http://blog.lubans.org/index.php?itemid=3159>

conducted—which originally felt like an excuse, but I now recognise as an explanation for the scarcity of useful resources.

The lack of understanding of EANTs and how lawyers ought to navigate those could be seen as a recurrent theme in this thesis. While the case law seems to lay blame at the feet of individual practitioners, studies suggest it is a much wider issue. The rules avoid it completely by not even using the word ‘negotiation’ or its synonyms. However, it was gingerly acknowledged in professional publication—as an ‘area of longstanding debate’ in Queensland Law Society’s ‘Proctor’ or ‘misconceptions about what is permissible’ in Law Society of Western Australia’s ‘Brief’, as well as by the ALRC, which recommended the development of ‘practical guidance’ in 1999. Why, then has the profession produced no meaningful response decades after the ALRC recommendation?

## F *Deliberately ignored or missed inadvertently?*

While there have been suggestions of deliberate avoidance of the problem of EANTs by the Australian legal profession, there could be a different, much more innocent explanation: a problem that is difficult to define and measure, which emerged gradually over time.

The profession’s failure to provide additional standards and guidance to the profession could suggest that a problem lies with the profession. As noted in Chapter 3, provision of such guidance is the responsibility of the profession and, indeed, what distinguishes it from other occupations. To reiterate, as Lord Donaldson MR noted in *X Ltd v Morgan-Grampian (Publishers) Ltd*,<sup>944</sup> ‘[o]ne of the hallmarks of a profession is that it gives clear and unambiguous guidance to its members on issues of professional ethics and conduct’. The Law Council, which represents the legal profession across Australia and which is in charge of drafting and updating the ASCR, referred to the Rules as ‘the written expression of the collective judgment of the profession about the standards its members must voluntarily comply with’.<sup>945</sup> Further, the need for additional guidance can be traced back to at least 1982, when the Law Reform Commission of New South Wales recommended the development of ‘an authoritative indication of what good practice requires’.<sup>946</sup> The Commission noted that in contrast to the UK and in the USA, there were no rules or codes for lawyers in Australia, yet

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<sup>944</sup> [1991] 1 AC 1 at 20

<sup>945</sup> Law Council of Australia (n 216) 29.

<sup>946</sup> New South Wales Law Reform Commission, *Second Report on the Legal Profession: Complaints, Discipline and Professional Standards*, vol Report 32 (1982) [22.57]

<<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-32.pdf>>

that ‘the law and the work of lawyers were becoming more complex,’ necessitating the development of the rules.<sup>947</sup> This notion was repeated in different contexts later, in 1992-1993, and there was a further call for the introduction of professional conduct rules by the New South Wales Law Reform Commission.<sup>948</sup> In 1999, the Australian Law Reform Commission specifically concluded that the Model Rules provided little to no guidance to lawyers on negotiations<sup>949</sup> and recommended the development of additional guidance,<sup>950</sup> and again in 2011 inquiry into Managing Discovery.<sup>951</sup> Taken together, all of this seems to suggest that the legal profession accept that it is responsible for providing guidance on the conduct expected of its members, and, critically, that there have been many calls for more guidance, including specifically in relation to the negotiation.

There is some evidence to suggest that rather than step up to the challenge, the profession’s response has been to ignore or avoid it. The initial response was to avoid it. In relation to the initial calls for guidance, the Law Society of New South Wales submitted that there was no need for additional guidance as ‘the standards of conduct expected of a solicitor are well known and understood by the members of the profession and basically by the public at large’.<sup>952</sup> Increased pressure from legislators in the 1990s ‘coaxed, cajoled and often forced the legal profession in New South Wales into significant reforms,’<sup>953</sup> and, in order to avoid Federal Government takeover of regulation, the Law Council introduced National Model Rules of Professional Conduct substantially based on the Rules of Professional Conduct adopted by the Law Society of New South Wales.<sup>954</sup> However, as leading commentators noted, the model rules contained an almost complete lack of guidance with respect to the ethical issues that arise in negotiations.<sup>955</sup> When the problem of lack of guidance and understanding of applicable standards was flagged again in 1999, the Law Council indicated

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<sup>947</sup> Ibid

<sup>948</sup> New South Wales Law Reform Commission (n 240).

<sup>949</sup> Ibid, [3.110].

<sup>950</sup> Ibid, see in particular recommendation 19.

<sup>951</sup> Australian Law Reform Commission Report 115 (n 215).

<sup>952</sup> Gino Dal Pont, ‘Regulation of the Queensland Legal Profession: The Quinquennium of Change’ (2009) 28(2) *The University of Queensland Law Journal* 183, 194 citing M Sexton and L W Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (1982), 169.

<sup>953</sup> Parker (n 245) 6.

<sup>954</sup> Ibid.

<sup>955</sup> Spiegel, Rogers and Buckley (n 16) [5.6], 88.

no response was needed as the model rules already provided ‘appropriate and sufficient guidance to practitioners’.<sup>956</sup> In response to further calls for better guidance in 2011, the Law Council submitted that there is ‘no evidence of systemic problems’ and that legal practitioners ordinarily act ethically and professionally.<sup>957</sup> However, it relented and agreed to produce ‘an enhanced and modern restatement’ of lawyers’ obligations in the form of new model rules: the Australian Solicitors’ Conduct Rules (‘the ASCR’).<sup>958</sup> The Law Council indicated that the rules would be accompanied by a detailed commentary designed to explain and illustrate by example the application of the rules, as well as improve the clarity of the rules, particularly in the application of the rules to challenging circumstances.<sup>959</sup>

Unfortunately, commentary from one of the members of the working group tasked with developing ASCR, suggests that the drafters of the ASCR focused on the lowest common denominator, that is, ‘what the law would allow rather than what was the right thing to do’.<sup>960</sup> Consistent with this, commentary in professional publications suggested that the problem remained largely the same. For example, in Queensland, Emerson claimed that the precise duties of lawyers in negotiations remain ‘a vexed question and debate continues as to whether such duties should be the subject of specific and unique regulation,’<sup>961</sup> and in Western Australia, Sher referred to the fact that lawyers had many misconceptions about what is permissible in negotiations.<sup>962</sup>

Perhaps the most vivid account of the profession’s response to EANTs is Professor Wade’s characterisation of the case of *Mullins* as a ‘crucifixion’. Crucifixion invokes the notions of deliberate punishment of a prominent practitioner as a threat to others and implies the profession treats the use of an EANT as a form of heresy. That description is not unique: a contemporary account of *Mullins* in the Australian newspaper referred to the case in the context of ‘a crackdown against lawyers who withhold facts’.<sup>963</sup> The Legal Services Commissioner of Queensland considered the case to be a timely reminder for lawyers to be

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<sup>956</sup> Australian Law Reform Commission Report 89 (n 12).

<sup>957</sup> Ibid [12.44].

<sup>958</sup> Ibid [12.77].

<sup>959</sup> Ibid [12.77].

<sup>960</sup> Neil Watt, ‘Lawyers in the Witness Box’, *Justinian* (online at 2012) <<https://justinian.com.au/archive/lawyers-in-the-witness-box.html>>.

<sup>961</sup> Emerson (n 8).

<sup>962</sup> Sher (n 9).

<sup>963</sup> McDonald (n 32).

candid in mediation and everyday dealings.<sup>964</sup> *Mullins* does not seem unique when one considers other cases discussed in this thesis. For example, *Amsden* was found to have engaged in professional conduct for commencing a debt recovery proceeding under a mistaken belief that she had a legal right to do so. Rather than simply face the costs of an unsuccessful proceeding as any other litigant would have, she was held to have abused the legal process and breached various duties to the court.<sup>965</sup> Other cases also involved similar issues, as lawyers did not seem to be aware of what transgressions they make have committed—rather, one could argue, they were also victims of crackdowns or crucifixions.

A prosecution-based approach that has been perceived as crackdowns or crucifixions may attract publicity and increase awareness, but it would be unlikely to encourage debate and lead to a deeper understanding of the phenomenon. Such an approach would also seem inconsistent with how the profession's representatives agreed to approach the matter in ALRC 89, when the Law Council of Australia (which represents all the Law Societies and Bar Association across Australia) agreed with the ALRC on the need to provide guidance and practical explanations on expected standards of conduct in negotiations.<sup>966</sup>

Another interesting aspect of the profession's response to various law reform commissions touching on the subject is that the profession's representatives, even when they agreed to make changes, consistently adopted a 'nothing to see here' approach. In other words, they denied the existence of a problem. This can be traced back to the earliest inquiry: by the Law Reform Commission of New South Wales in 1982. In an inquiry into the Legal Profession: Complaints, Discipline and Professional Standards, the Commission recommended the development of 'an authoritative indication of what good practice requires,' while recognising that 'the law and the work of lawyers were becoming more complex'.<sup>967</sup> The Law Society of New South Wales (which is the oldest and largest law society in Australia), rather than embracing this task, rejected this recommendation saying that 'the standards of conduct expected of a solicitor are well known and understood by the members of the profession and basically by the public at large'.<sup>968</sup> Similarly, the Law Society of New South

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<sup>964</sup> *Ibid.*

<sup>965</sup> *Legal Profession Complaints Committee and Amsden* [2014] WASAT 57 [49]

<sup>966</sup> Australian Law Reform Commission Report 89 (n 12)32, recommendation 19.

<sup>967</sup> New South Wales Law Reform Commission (n 12) [22.57].

<sup>968</sup> Gino Dal Pont, 'Regulation of the Queensland Legal Profession: The Quinquennium of Change' (2009) 28(2) *The University of Queensland Law Journal* 183194 citing M Sexton and L W Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (1982) 169.

Wales and the Law Council and Australia initially pushed back on the ALRC 89 (in 1999) recommendation for the development of rules to address lawyer conduct in negotiation.<sup>969</sup> The existence of the ‘elephant’ seems to have been denied yet again in 2011; the ALRC concern that the rules and guidance provided to lawyers were so general that lawyers may be uncertain how to apply broad concepts to the specific scenarios that arise in everyday practice<sup>970</sup> was met with denial. The Law Council again rejected the notion that there is uncertainty about how far lawyers can go, submitting that the legal obligations, at least as they relate to the subject of this inquiry (discovery), were ‘sufficiently clear and specific to ensure that lawyers are aware of their obligations’.<sup>971</sup> Furthermore, the Law Council submitted that there is ‘no evidence of systemic problems’ and that legal practitioners ordinarily act ethically and professionally.<sup>972</sup> A similar submission was made by the Law Society of Queensland, which claimed that the vast majority of its members acted ethically.<sup>973</sup>

Repeated refusal to acknowledge the existence of a problem with lawyers’ ethical conduct in general in the circumstances where there are numerous indicators that there is one (i.e., commentary, studies, law reform commission recommendations) could be interpreted as a deliberate denial, that is, the elephant in the room that is intentionally being ignored. However, Hanlon’s razor provides a much simpler and, therefore likely explanation. Hanlon’s razor says ‘never attribute to malice that which is adequately explained by stupidity’.<sup>974</sup> While at the individual level most Australian lawyers seem to be aware of EANTs, they have failed to develop a collective understanding of it and a response to it as a profession.

Negotiation was not always recognised as a core part of lawyers' work. There seems to have been a gradual shift from trials to negotiation as the main paradigm of dispute resolution that is mentioned in the 1990s.<sup>975</sup> However, this shift does not seem to have translated into how the profession governs itself. The current rules of professional conduct, for example, seem to have evolved from the rules which pre-date this shift. For example, the ASCR are an

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<sup>969</sup> Australian Law Reform Commission Report 89 (n 12) [3.110].

<sup>970</sup> Ibid [12.68].

<sup>971</sup> Ibid [12.75].

<sup>972</sup> Ibid [12.44].

<sup>973</sup> Ibid [12.45].

<sup>974</sup> Arthur Bloch, *Murphy's Law Book Two: More Reasons Why Things Go Wrong!* (1980), 52.

<sup>975</sup> Australian Law Reform Commission Report 89 (n 12) [6.53].

evolution of the Model National Rules of Professional Conduct, which, in turn, were based on the NSW Rules of Professional Conduct introduced in 1994. Thus, the rules' failure to mention even the word negotiation, let alone address what conduct is expected of lawyers in negotiation, could be seen as a reflection of the profession's failure to adapt to the new paradigm.

This perspective is also echoed in the case law. In *Fleming* the Tribunal held that in some senses, in negotiation, a lawyer 'gives up his 'adversary' role in favour of a 'negotiating' role'.<sup>976</sup> The Tribunal rejected the practitioner's attempt to rely on the general legal position that there was no obligation to positively inform the opponent of relevant matters.<sup>977</sup> Similarly, in *Mullins*, the Tribunal applied a standard of conduct that is different to that in general litigation. It rejected the practitioner's argument that parties should rely on their own resources and instead held that the negotiants could expect a measure of honesty from each other.<sup>978</sup> The lawyers in these cases seem to have applied the old rules to the new paradigm.

Further, this perspective could provide an explanation for why many of the cases took place in the first place: the lawyers were not aware of the shift in the paradigm and that the old rules could not be relied upon. This could also be why the practitioners whose conduct was considered in the cases were so candid and seemingly unapologetic about their conduct: they expected to be judged by the old rules. In *Chamberlain*, for example, the lawyer 'was quite frank about what he did and indeed saw nothing wrong with it'.<sup>979</sup> In *Clyne's* case, the lawyer made no secret of his use of the tactic and saw nothing disreputable in it.<sup>980</sup>

A further factor in support of the theory that the changes in paradigm went unnoticed could be that the confidential nature of negotiation discourages reporting and discussion of what happens in negotiations. In contrast to litigation, where much of what occurs ends on the public record, confidential discussions are often clouded in secrecy, protected by the mythical properties of without prejudice privilege. There may also be a disincentive to discuss the use of EANTs. Those who use EANTs might not want to attract attention to their

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<sup>976</sup> *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352 [75].

<sup>977</sup> *Ibid* [73].

<sup>978</sup> *Legal Services Commissioner v Mullins* [2006] LPT 012 [27] and [29].

<sup>979</sup> *Chamberlain v the Law Society of the Australian Capital Territory* (1993) 43 FCR 148 per Black CJ at [39].

<sup>980</sup> *Clyne v New South Wales Bar Association* [1960] HCA 40; 104 CLR 186 [20]

conduct because they are at risk of having crossed ethical lines. Those against whom EANTs were used might not want to admit to this fact or struggle to identify a sufficient basis on which to call out inappropriate conduct. The ambiguity inherent in EANTs not only provides a justification for their users but also hinders the ability of their victims to call out their conduct. After all, an allegation against a fellow practitioner that lacks an appropriate foundation is itself professional misconduct and a violation of the rules of professional conduct.

Overall, the profession's failure to notice the need to adapt to a paradigm change in how it operates—that is, establishment of negotiation as a core lawyer activity, seems to provide a plausible explanation for why EANTs are such a big problem. This would also mean that as far as the elephants in the room are concerned, EANTs are closer to the original meaning of the phrase: EANTs are a big problem that Australian lawyers fail to notice as a profession. The case law, rather than being a record of crucifixions, appears to be more of a symptom of lawyer' failure to understand how to operate under a new paradigm.

This characterisation of EANTs also provides a pathway forward. In order to deal with the elephant in the room, one must first acknowledge its existence. This thesis has shone a light on the problem and laid a foundation for addressing the problem. As the problem seems to be one of a lack of awareness, lack of consensus and understanding, solutions most likely lie in education.

Existing rules and regulations can provide ready templates for agreeing on baselines. The cases of *Sampson* and *Norton Rose* highlighted the discrepancy between the rules applicable to lawyers and those that apply in trade and commerce pursuant to the Australian Consumer Law, particularly the prohibitions against misleading and deceptive conduct. ALRC and the Law Council both seemed to agree as far back as 1999 that professional conduct rules should prohibit misleading and deceptive conduct.<sup>981</sup> The rule makers could also draw upon the common law duties identified by Ipp, legislation such as the *Civil Procedure Act 2010* (Vic) and the good faith standard, including the criteria developed in *Western Australia v Taylor* (1996) 134 FLR 211.

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<sup>981</sup> Australian Law Reform Commission Report 89 (n 12) [3.115].

## G *Summary*

This Chapter discussed whether EANTs pose a problem for Australian lawyers and the nature of that problem. Discussion of the literature gathered and analysed as part of this project, including the rules of professional conduct, case law and studies of lawyers all point to a conclusion that the old assumption that lawyers know and understand what is expected of them in negotiations, no longer hold true. In investigating the question of how lawyers assess EANTs, I found a lack consensus, leading to a conclusion the problem is not in where lawyers draw ethical lines, but, that more fundamentally, they do not seem to agree on where to draw these lines.

In exploring the frequency of use and characteristics of lawyers who use EANTs, I came to a conclusion that this problem cannot be written off as a problem of a few bad apples. For example, many of the lawyers in the case law appear to have been experienced practitioners who seem to have simply been unaware or incorrectly applied of the standards expected of them by the courts. Further, studies suggest that they are far from being few. Overseas studies, as well as my exploratory survey of Australian lawyers, suggest that the profession is split about whether EANTs such as exaggeration, withholding relevant information, threats, abuse of process or even making the opponent uncomfortable are permissible.

Surveys suggest that the problem is pervasive. Very few lawyers have not encountered EANTs in negotiations. The problem appears to be an ‘elephant in the room’. Everyone knows about it, yet it remains unaddressed, whether by the profession’s rules or otherwise. This Chapter argues, however, that the problem is not an elephant in the room as the expression is understood today, that is, something deliberately ignored, but closer to the Krylov’s original metaphor: something major that simply has not been noticed through oversight. In this Chapter, I argued that this was because there has been a paradigm shift from lawyers as litigators to lawyers as negotiators, combined with a gradual retreat from adversarial standards in negotiations. As lack of awareness, understanding and consensus appear to be at the heart of the problem, education appears to be as the most appropriate way to address it. Education can increase awareness of the problem and its potential consequences, help lawyers develop an understanding of the challenge posed by EANTs, and develop consensus about where to draw the ethical lines and other responses to EANTs. This thesis paves the way for addressing this challenge by shining the light on the problem, including by identifying and categorising EANTs and associated literature which can be used to develop consensus and educate the profession about EANTs.

## CONCLUSION

I started this project to solve a problem: the lack of a clear understanding of how far lawyers can go in negotiations. I assumed that if I worked through the problem methodically and systematically, I would find all the possible answers. In this concluding chapter, I present conclusions of this research project. I begin by reviewing the aims and scope of the thesis, its contribution to knowledge, the limitations of the project as a whole and finally, future recommendations.

The thesis makes a substantial and original contribution to the knowledge about lawyers conduct in negotiation through systematic and comprehensive study of typologies, assessments and frequency of use of ethically ambiguous negotiation tactics. In investigating the research questions set out in the Introduction Chapter, my research revealed disagreement on whether and which EANTs are permissible and likely widespread use of EANTs which does not seem to be limited to or associated with a particular characteristic of lawyers. A central contribution of the project is to challenge the traditional notion that the standards of lawyers' conduct are well known and understood by practicing lawyers. This thesis integrates an empirical perspective into what is usually a theoretical debate, thus grounding it in reality. Although this thesis relies on surveys that are based on lawyers' subjective perceptions and which may suffer from limitations inherent in such research design, such as limited sample size and satisficing, the various strands of research, including an original exploratory survey of Australian lawyers, plus the wealth of studies from USA and UK to the contemporary local Australian context, paint a comprehensive and consistent picture. This stands in contrast to previous reliance on anecdotal and non-Australian sources. The surveys of lawyers, both overseas and domestic, consistently reveal a lack of consensus on what EANTs are permissible, yet they also demonstrate that EANTs are perceived as a common phenomenon in negotiation. This lack of understanding, combined with frequent usage, is rarely acknowledged in Australian legal discourse. Further, my exploratory survey as well as preponderance of overseas studies suggest that lack of understanding and usage of EANTs are not associated with a particular stereotype of a lawyer – young or old, of particular gender, from the bush or city, but apply across the board.

Another contribution of the thesis is expanding the understanding of types of EANTs that lawyers might face. The thesis developed a catalogue of EANTs based on systematic and comprehensive searches and analysis of prior literature which spans multiple domains, from information, time, to process, people and location. The catalogue provides not only insight into the scope of the challenge posed by EANTs, but also a framework for further exploration of ethical implications of EANTs and development of professional conduct guidelines.

This thesis not only shines light on ‘the elephant in the room,’ a problem that was long suspected but has been the subject of conjecture: that Australian lawyers lack a shared understanding of the limits of permissible conduct in negotiations, yet engage in conduct that could go beyond such limits. It also suggests possible explanations for it, paving the way for addressing the problem. Through doctrinal and empirical research, synthesised in Chapter 7, I show that this is not a problem caused by a few bad apples or even by ‘the barrel’ – the profession itself. Rather, as discussed in the previous Chapter, it is most likely a product of a paradigm shift from a profession focused on litigation to a profession that primarily focussed on negotiation. If this conclusion is accepted, the case law, rather than being a record of crucifixions, can be understood as a symptom of lawyer” failure to understand how to operate under a new paradigm.

This thesis uses tactics as a unit of analysis for studying lawyers’ ethical approach to negotiations. Chapter 1 explains that the term ethics was used as understood broadly, incorporating not just written law but also the profession’s customs and usages. The incorporation of customs and usages into the definition adds weight and supports the conclusion of this thesis that Australian lawyers disagree on what is permissible in negotiation. This conclusion is not self-evident from an examination of the rules of professional conduct alone. It is implied by the case law, discussed in Chapter 3, which refers to many lawyers failing to identify ethical issues in their usage of EANTs. However, it is most apparent from the results of surveys of lawyers. The surveys consistently reveal lack of consensus and perceived pervasiveness of EANTs. In other words, the usage of EANTs is perceived to be part of the profession’s customs and usages. The analysis of the survey results from this project indicates that the frequency with which lawyers perceive EANTs to be used stands out as a critical factor. This perception seems to greatly influence whether lawyers view the use of EANTs as acceptable or not.

This research project’s approach to its primary aim of establishing ‘how far lawyers can go in negotiations’ evolved as the project progressed. A review of the literature revealed a broader range of EANTs than originally anticipated. While prior research and commentary primarily focused on deception and, to a lesser degree, threats and misuse of processes, my systematic searches, detailed in Chapter 1, also revealed EANTs involving other aspects of negotiations, such as time, locations, and using the people involved. These were summarised in a catalogue of tactics, which, when analysed against the rules of professional conduct and case law, revealed significant gaps and ambiguities in what was expected of lawyers in negotiations. In this way, the project revealed that the original plan to simply classify EANTs into those permitted and those not permitted for use by lawyers was impossible, thus revealing the limits of what was ‘knowable’ in relation to EANTs. The project thus evolved

towards exploring the limits of knowledge by looking at the topic from a different perspective, by reference to broader studies of lawyers, including by conducting an exploratory survey to understand Australian lawyers' lived reality when it comes to EANTs.

The journey towards understanding the extent of knowledge and reality of this project was assisted by the project's constructivist epistemological and relativist ontological approaches (developed in Part F of the Introduction Chapter). This contributes to the project's greatest strength: a nuanced yet comprehensive exploration of EANTs incorporating large swathes of the available evidence, ranging from the literature on the tactics to case law and a range of studies. In particular, the constructivist empirical approach, which is predicated on the idea that knowledge is shaped by experience, context and perspective, facilitated synthesis not only of 'black letter' knowledge, such as literature about EANTs and rules of professional conduct, both as a normative document but also as an expression of the collective judgment of the profession but also what could be learned about the topic from surveys and case studies. These different strands of evidence, however, all pointed towards the same conclusion: a lack of a common understanding of EANTs among Australian lawyers.

The relativist ontological stance meant that the project proceeded on the basis that there could be multiple lived 'realities' of EANTs, shaped and informed by lawyers' individual experiences. For example, it is possible that some lawyers correctly knew and understood expectations relating to EANTs, and others did not. The potential differences were explored both in the context of individual cases (Chapter 3) as well as what can be learned about lawyers from surveys (Chapters 4-6). However, while overseas research, such as Hinshaw's study, suggests that there could be underlying factors, my investigation points towards a conclusion that EANTs are a problem that applies across the board as far as the Australian legal profession is concerned. The study revealed no particular demographic of a lawyer who might assess them as being permissible or not permissible. Nor did the study reveal any meaningful differences in how EANTs may have been used, for example, by reference to age, gender, location, practice type, practice area or firm size. Even the case law, despite a relatively small sample, reflected a diverse sample of lawyers of both genders, different practice areas and firm sizes. All but one (*Sing*) seemed to share the same problem: lack of understanding of issues involved in using EANTs. Thus, counter-intuitively for a project that assumes that there may be multiple realities, this research project arrived at a conclusion that there is a shared reality of ambiguity when it comes to EANTs.

An important factor that is beyond the scope of this thesis is the practical impact of the use of EANTs on stakeholders and the outcomes of negotiations. The potential impacts were flagged in section E of the Introduction Chapter. These impacts could be significant of

themselves in the sense that they could affect the outcome of negotiations reputations of negotiators, cause distrust or even a ‘cheater’s high’. However, if they are understood properly, they could also influence lawyers’ conduct and actual use of EANTs. If Wade’s claim that lawyers’ conduct is primarily affected by the prudence and practicality approach to ethics, an understanding of practical impacts could play an integral role in whether they would consider using EANTs or not. An example of this is the insight that while those who used half-truths (i.e., withheld information) often think they are not lying, those on the receiving end equated such conduct to lying.<sup>982</sup> A detailed consideration of this issue, however, was outside the scope of this project because this project aimed to address questions that precede it: what can lawyers do, and what do they actually do? It would be speculative to consider the impacts if, as the Law Council and Law Societies tended to maintain that lawyers know and understand the standards of conduct expected of them and usually conduct themselves ethically, as discussed in Part B of Chapter 2.

The main conclusion of this research project, namely that there is a lack of agreement and a shared understanding among Australian lawyers about where to draw the lines when it comes to EANTs and that this is a problem that applies across the board, also suggests a path forward. The problem can only be addressed by developing consensus and a shared understanding of where Australian lawyers should draw ethical lines. The rules of professional conduct could be a useful tool in that exercise, as they could provide a common frame of reference. Drafters of the rules could draw upon developments outside the profession, such as the framework for good faith negotiations that applies in Native Title law, various civil procedures and consumer protection laws (see Part B, Chapter 1). However, the role of the rules and such guidance should not be overstated. My exploratory survey, for example, did not provide any evidence that lawyers practising in those areas were more consistent in their approach to EANTs than others. Indeed, one of the few prior Australian studies raised a concern that lawyers practising in consumer law seemed to be behaving in a manner inconsistent with the prohibition against misleading and deceptive conduct.<sup>983</sup> However, the rules could provide a frame and a common song sheet for developing consensus, whether through enforcement or education. On that note, enforcement does not seem like a promising avenue. There is no evidence to suggest that the reported cases have had an impact on lawyers’ use of EANTs.

Given the lack of understanding of how to navigate EANTs in the profession, education is the best option for tackling the epidemic. A key component of such education should be raising

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<sup>982</sup> Rogers et al (n 38) 3.

<sup>983</sup> See Lamb’s study explored in Section 1(a), Part C of Chapter 4.

awareness. A greater awareness of tactics might lead to a reduction in their use—a tactic perceived is a tactic disarmed. Additionally, lawyers should be educated about the impacts of the tactics. This should go beyond the obvious effects of breaching professional standards and extend to the practical effects of tactics. For example, the fact that research suggests threats consistently result in worse outcomes could be a warning to those considering such tactics. The fact that half-truths (as, for example, reported in the cases of *Mullins* and *Fleming*), while perceived as truths by those making them, are usually perceived as lies by others could be more discouraging to negotiators than any prohibition in the rules.

In conclusion, this research project identified the elephant in the room – a significant but largely unspoken problem in lawyer negotiations. As with all such elephants, the key seems to address it seems to lie in education. In order to deal with the elephant, the profession must first acknowledge its existence and raise awareness about it. This thesis has laid an evidenced based foundation for dealing with the problem. With this knowledge, future researchers and the legal profession can leverage existing case law and legislation, as well as this and other future research and research about the practical impacts of EANTs to develop a comprehensive knowledge-based approach so that even behind closed doors, Australian lawyers can more confidently navigate EANTs.

## APPENDIX 1 – SURVEY QUESTIONS

It can often be difficult for lawyers to know which negotiation tactics are permissible or not permissible to use.

### Question 1

What is your assessment of the following tactics:

(a) exaggerate what the client is realistically entitled to

- Not permissible (1)
- Probably not permissible (2)
- Probably permissible (3)
- Permissible (4)

(b) withhold information that is advantageous to the other side\*

\*other than for criminal defence

- Not permissible (1)
- Probably not permissible (2)
- Probably permissible (3)
- Permissible (4)

(c) use or suggest using something beyond the content of the negotiation for external leverage (eg going to media, contacting a regulatory authority)

- Not permissible (1)
- Probably not permissible (2)
- Probably permissible (3)
- Permissible (4)

(d) use a legal process for a purpose for which it is not intended (eg to cause delay or require unnecessary disclosure)

- Not permissible (1)
- Probably not permissible (2)
- Probably permissible (3)
- Permissible (4)

(e) put negotiators in uncomfortable circumstances (eg last minute change of venue, hot or cold room)

- Not permissible (1)
- Probably not permissible (2)
- Probably permissible (3)
- Permissible (4)

**Question 2**

How often have you encountered or think you have encountered **other lawyers** using the following as a negotiation tactic:

(a) exaggerate what the client is realistically entitled to

- Never (1)
- Seldom (2)
- About half the time (3)
- Often (4)
- Always (5)

(b) withhold information that is advantageous to the other side\*

\*other than for criminal defence

Never (1)

Seldom (2)

About half the time (3)

Often (4)

Always (5)

(c) use or suggest using something beyond the content of the negotiation for external leverage (eg going to media, contacting a regulatory authority)

Never (1)

Seldom (2)

About half the time (3)

Often (4)

Always (5)

(d) use a legal process for a purpose for which it is not intended (eg to cause delay or require unnecessary disclosure)

Never (1)

Seldom (2)

About half the time (3)

Often (4)

Always (5)

(e) put negotiators in uncomfortable circumstances (eg last minute change of venue, hot or cold room)

Never (1)

Seldom (2)

About half the time (3)

Often (4)

Always (5)

### Question 3

Please estimate how often **you** have engaged in the following tactics in negotiations:

(a) exaggerate what the client is realistically entitled to

Never (1)

Seldom (2)

About half the time (3)

Often (4)

Always (5)

(b) withhold information that is advantageous to the other side\*

\*other than for criminal defence

Never (1)

Seldom (2)

About half the time (3)

Often (4)

Always (5)

(c) use or suggest using something beyond the content of the negotiation for external leverage (eg going to media, contacting a regulatory authority)

Never (1)

Seldom (2)

About half the time (3)

Often (4)

Always (5)

(d) use a legal process for a purpose for which it is not intended (eg to cause delay or require unnecessary disclosure)

- Never (1)
- Seldom (2)
- About half the time (3)
- Often (4)
- Always (5)

(e) put negotiators in uncomfortable circumstances (eg last minute change of venue, hot or cold room)

- Never (1)
- Seldom (2)
- About half the time (3)
- Often (4)
- Always (5)

## Individual Characteristics

There is evidence that attitudes towards various negotiation tactics vary from one individual to the next based on their level of experience and other circumstances.

You are therefore asked to answer a few simple demographic questions.

This information is also collected anonymously. However, you may opt out of this part if you wish by clicking on the “opt out” button at the bottom of this page.

Do you hold a current practicing certificate?

Yes (1)

No (2)

Age

Under 30 (1)

30-39 (2)

40-49 (3)

50-59 (4)

60 and over (5)

How do you describe your gender?

- Male (1)
- Female (2)
- In another way (3)

Years in legal practice since admission

- 1 or less (1)
- 2 to 5 (2)
- 6 to 10 (3)
- 11 to 15 (4)
- 16 to 30 (5)
- over 30 (6)

Practice sector

- Solicitor (1)
- Barrister (2)
- Corporate in-house legal (3)
- Government lawyer (4)
- Community/non-profit (5)
- Other (7) \_\_\_\_\_

Practice size

- Sole practitioner (1)
- 2-4 partners or principals (2)
- 5-10 partners or principals (3)
- 11-20 partners or principals (4)
- 21-39 partners or principals (5)
- 40+ partners or principals (6)

Main practice area(s)

- Commercial law (1)
  - Wills and Estates (2)
  - Civil Litigation (3)
  - Family law (4)
  - Personal Injury (5)
  - Insurance (6)
  - Criminal (7)
  - Administrative law (8)
  - Property/Conveyancing (9)
  - Corporate (10)
  - Employment/Industrial (11)
  - Other (12)
-

State/Territory

- NSW (9)
- VIC (10)
- QLD (11)
- WA (12)
- SA (14)
- TAS (15)
- ACT (13)
- NT (16)

Location

- Metro CBD (1)
- Suburban (2)
- Regional/remote (3)

If you wish to opt out of providing demographic information click 'opt out' below and then 'continue without providing responses'.

- Opt out (1)



# BIBLIOGRAPHY

## A *Articles/Books/Reports/Speeches*

Adair, Wendi L et al, 'Effective Influence in Negotiation' (2013) 43(4) *International Studies of Management and Organization* 6

<<http://mesharpe.metapress.com/openurl.asp?genre=article&id=doi:10.2753/IMO0020-8825430401>>

Agndal, Henrik, 'Current Trends in Business Negotiation Research: An Overview of Articles Published 1996-2005' (2007) 3 *Working Paper Series in Business Administration* 1

<[http://swoba.hhs.se/hastba/papers/hastba2007\\_003.pdf](http://swoba.hhs.se/hastba/papers/hastba2007_003.pdf)>

Agndal, Henrik, Lars-Johan Åge and Jens Eklinder Frick, 'Two Decades of Business Negotiation Research: An Overview and Suggestions for Future Studies' (2017) 32(4)

*Journal of Business & Industrial Marketing* JBIM-11-2015-0233

<<http://www.emeraldinsight.com/doi/10.1108/JBIM-11-2015-0233>>

Akgunes, Asuman and Robert Culpepper, 'Negotiations Between Chinese and Americans: Examining the Cultural Context and Salient Factors' (2012) 7(1) *The Journal of*

*International Management Studies* 191 <[http://www.jimsjournal.org/21 Robert Culpepper-2.pdf](http://www.jimsjournal.org/21%20Robert%20Culpepper-2.pdf)>

Al-Khatib, Jamal A et al, 'The Impact of Deceitful Tendencies, Relativism and Opportunism on Negotiation Tactics: A Comparative Study of US and Belgian Managers' (2011) 45(1/2)

*European Journal of Marketing* 133

Al-khatib, Jamal A, Avinash Malshe and Mazen Abdulkader, 'Perception of Unethical Negotiation Tactics : A Comparative Study of US and Saudi Managers' (2008) 17

*International Business Review* 78

Alavoine, Claude, *Ethics in Negotiations: The Confrontation between Representation and Practices* (No 2014–272, 2014) <<http://www.ipag.fr/fr/accueil/la-recherche/publications-WP.html>>

Alavoine, Claude, *Unethical Practices in Negotiations. The Confrontation between Internal and External Factors*, IPAG Business School vol 223 (No 2014–223, 2014)

Alavoine, Claude, 'You Can't Always Get What You Want: Strategic Issues in Negotiation' (2012) 58 *Procedia - Social and Behavioral Sciences* 665

<<http://dx.doi.org/10.1016/j.sbspro.2012.09.1044>>

Alavoine, Claude and Claudine Batazzi, 'Attribution Theory and Unethical Practices in Negotiation: How To Explain What Is Unbearable?' (2013) 5(2) *International Journal of Business and Management Studies* 33

<[http://www.sobiad.org/eJOURNALS/journal\\_IJBM/archieves/2013\\_no2/Claude-Alavoine.pdf](http://www.sobiad.org/eJOURNALS/journal_IJBM/archieves/2013_no2/Claude-Alavoine.pdf)>

Albin, Cecilia, 'The Role of Fairness in Negotiation' (1993) 9(3) *Negotiation Journal* 223

Alder, G Stoney and Rebecca M Guidice, 'The Ethics of Bluffing: The Effects of Individual Differences On Perceived Ethicality and Bluffing Behavior' (2010) 6 *Journal of Business & Leadership* 10

Alexander, Nadja and Jill Howieson, 'Chapter 10: Tough Skills for Tough Negotiators' in *Negotiation: Strategy Style Skills* (2nd ed, 2010)

Alschuler, Albert, 'How to Win the Trial of the Century: The Ethics of Lord Brougham and the O. J. Simpson Defense Team' (1998) 29 *McGeorge Law Review* 32

Altman, James M, 'Considering the A.B.A'.S 1908 Canons of Ethics' (2003) 71(6) *Fordham Law Review* 2395

Altman, Scott, 'Lurking in the Shadow' (1994) 68 *Southern California Law Review* 493

Ambard, Celine and Gerald Autier, 'Negotiating in an Intercultural Environment - A Swedish Perspective' (Linkopings University, 2003)

Ames, Jonathan, 'Regulator Faces Corporate Rebellion', *The Times* (26 February 2009)

Anand, Krishnan S, Pnina Feldman and Maurice E Schweitzer, 'Getting to NO: Theory and Evidence for Instrumental Negotiations' [2008] (July) *SSRN Electronic Journal* 1

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1127882](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1127882)<http://ssrn.com/paper=1127882>>

Andrews, David, 'Back to the Ivory Tower?' [2002] *European Lawyer* 62

Angelowitsch, Genna, 'Civil Procedure Act: A Civilised Profession?' (2020) 94(3) *Law Institute Journal* 32

Angyal, Robert SC, 'The Ethical Limits of Advocacy in Mediation' NSW Bar Association Course (May 2011)

<<http://www.civiljustice.info/cgi/viewcontent.cgi?article=1004&context=profstan>>

- Anton, Ronald, 'Drawing the Line: An Exploratory Test of Ethical Behavior in Negotiations' (1990) 1 (3) *The International Journal of Conflict Management* 265
- Ariens, Michael, 'The Last Hurrah: The Kutak Commission and the End of Optimism' (2016) 49(4) *Creighton Law Review* 689  
<<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=117995120&site=ehost-live&scope=site>>
- Australian Law Reform Commission, *Discussion Paper 62: Review of the Federal Civil Justice System* (1999)
- Australian Law Reform Commission, *Interim Report 127: Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2015)
- Australian Law Reform Commission, *Report 115: Managing Discovery: Discovery of Documents in Federal Courts* (2011)
- Australian Law Reform Commission, *Report 89: 'Managing Justice: A Review of the Federal Civil Justice System'* (2000)
- Bagaric, Mirko and Penny Dimopoulos, 'Legal Ethics Is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics' (2003) 3(2) *QUT Law and Justice Journal* 367
- Bailer, Stefanie, 'What Factors Determine Bargaining Power and Success in EU Negotiations?' (2010) 17(5) *Journal of European Public Policy* 743
- Baines, Simon et al, 'Corporate Legal Work "Unfit for Purpose"' (2009) 44 (May)
- Banai, Moshe et al, 'Attitudes Toward Ethically Questionable Negotiation Tactics: A Two-Country Study' (2014) 123 *Journal of Business Ethics* 1
- Bant, Elise and Jeannie Marie Paterson, 'Silence and the Regulation of Misleading Conduct : A Taxonomy I Developing a Rational Law of Misleading Conduct' (Chapter 1) 1
- Bar-Gill, Oren, 'The Evolution and Persistence of Optimism in Litigation' (2006) 22 (2) *Journal of Law, Economics and Organization* 490
- Baron, Paula and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (2014)
- Baron, Paula and Lillian Corbin, 'The Unprofessional Professional: Do Lawyers Need Rules?' (2017) 20 (2) *Legal Ethics* 155
- Barry, Bruce and Erin M Rehel, 'Lies, Damn Lies, and Negotiation: An Interdisciplinary Analysis of the Nature and Consequences of Deception at the Bargaining Table' in *Handbook*

*of Research in Conflict Management* (2014) <<http://papers.ssrn.com/abstract=2321783>>

Baumeister, Roy F et al, 'The Glucose Model of Mediation : Physiological Bases of Willpower as Important Explanations for Common Mediation Behavior' (2015) 15(2011) *Pepperdine Dispute Resolution Law Journal* 377

Bazerman, Max H et al, 'Negotiation' (2000) 51 *Annual Review of Psychology* 279

Beel, Joeran and Bela Gipp 'Google Scholar's Ranking Algorithm: The Impact of Citation Counts (An Empirical Study)' in André Flory and Martine Collard, editors, Proceedings of the 3<sup>rd</sup> IEEE International Conference on Research Challenges in Information Science (RCIS'09), 439, Fez (Morocco), April 2009

Belton, Ian K, Mary Thomson and Mandeep K Dhimi, 'Lawyer and Nonlawyer Susceptibility to Framing Effects in Out-of-Court Civil Litigation Settlement' (2014) 11(3) *Journal of Empirical Legal Studies* 578

Bendersky, Corinne and Kathleen L McGinn, 'Open to Negotiation: Phenomenological Assumptions and Knowledge Dissemination' (2010) 21(3) *Organization Science* 781

Benson, Marjorie L, 'A Negotiating Ethics Study' (2005) 84 (Special Issue) *Canadian Bar Review* 593

Bloch, Arthur '*Murphy's Law Book Two: More Reasons Why Things Go Wrong!*' (1980)

Bobek, Donna D, Robin W Roberts and John T Sweeney, 'The Social Norms of Tax Compliance: Evidence from Australia , Singapore , and the United States' [2007] (February) *Journal of Business Ethics*

Bohns, Vanessa K and Francis J Flynn, 'Underestimating Our Influence over Others at Work' (2013) 33 H(July) *Research in Organizational Behavior* 97

Bohns, Vanessa K, Mahi M Roghanizad and Amy Z Xu, 'Underestimating Our Influence Over Others' Unethical Behavior and Decisions' (2013) 40(3) *Personality and Social Psychology Bulletin* 348 <<http://psp.sagepub.com/cgi/doi/10.1177/0146167213511825>>

Boon, Andy, 'Ethics and Strategy in Personal Injury Litigation' (1995) 22(3) *Journal of Law and Society* 353

Boon, Andy, 'Regulation and Discipline' [2015] *Lawyers' Ethics and Professional Responsibility* 63 <<http://journals.sagepub.com/doi/10.1177/1476127016655998>>

Booth, Peter, Lynton Hogan and Susan Gatford, 'Unconscionable Conduct: Specific

- Instances and the Court's Response' in *Monash University Law Chambers* (2015)  
<<https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>>
- Bordone, Robert C, 'Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes' (2005) 21 *Ohio State Journal on Dispute Resolution* 1
- Bordone, Robert C and Chad M Carr, 'Critical Decisions in Negotiation: A New Video Resource for Teaching Negotiation' (2013) 29(4) *Negotiation Journal* 463
- Boussalis, Constantine and Henry E Smith, 'Experimental Analysis of the Effect of Standards on Compliance and Performance'
- Braithwaite, John Bradford, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47
- Braithwaite, John Bradford and Christine Parker, 'Conclusion' in *Regulating Law* (2004) 269
- Brasco, CJ et al, 'Understanding Ethical Limits on Attorney Behavior in Settlement Negotiations : A Practical Approach' (2016) 45(3) *The Brief* 12
- Brennan, Gerard, 'Ethics and the Advocate' in *Bar Association of Queensland, Continuing Legal Education Lectures No. 9/92 - 3 May 1992* (1992)
- Brennan, Gerard, 'Key issues in judicial administration' (1996) 6 *Journal of Judicial Administration* 138, 139-140.
- Brett, Jeanne M and Michele J Gelfand (eds), *The Handbook of Negotiation and Culture* (Stanford University Press, 2004)
- Brett, JM and MJ Gelfand, 'A Cultural Analysis of the Underlying Assumptions of Negotiation Theory' [2006] *Culture* 173
- Brooks, Alison Wood and Maurice E Schweitzer, 'Can Nervous Nelly Negotiate? How Anxiety Causes Negotiators to Make Low First Offers, Exit Early, and Earn Less Profit' [2011] *Organizational Behavior and Human Decision Processes*
- Brown, Ashley D and Jared R Curhan, 'The Polarizing Effect of Arousal on Negotiation' (2013) 24(10) *Psychological Science* 1928  
<<http://pss.sagepub.com/content/24/10/1928.abstract>>
- Brown, Garrett, 'The 2011 Chief Justice Joseph Weintraub Lecture' (2012) 65(1) *Rutgers Law Review* 217

- Brown, Liam, 'Gross Negligence in Exclusion Clauses: Is There an Intelligible Difference from Ordinary Negligence' (2005) 16(2001) 1
- Bryman, Alan and Bell, Emma *Business Research Methods* (2011)
- Burchill, Frank, 'Walton and McKersie, A Behavioral Theory of Labor Negotiations (1965)' [1999] (8) *Historical Studies in Industrial Relations* 137  
<<http://online.liverpooluniversitypress.co.uk/doi/10.3828/hsir.1999.8.7>>
- Burge, Mark Edwin, 'Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution' (2005) 15 *Cardozo Journal of Conflict Resolution* 143
- Burke, Alafair S, 'Prosecutorial Passion, Cognitive Bias, and Plea Bargaining' (2007) 91(1968) *Marquette Law Review* 1
- Burr, Anne M, 'Ethics in Negotiation: Does Getting to Yes Require Candor?' (2001) 56 *Dispute Resolution Journal* 8  
<<http://search.proquest.com/docview/198086843?accountid=14549%5Cnhttp://hl5yy6xn2p.search.serialssolutions.com/?genre=article&sid=ProQ:&atitle=Ethics+in+negotiation:+Does+getting+to+yes+require+candor?&title=Dispute+Resolution+Journal&issn=10748105&date=2001>>
- Cameron, Camille, 'Case Note\* Hired Guns and Smoking Guns': (2002) 25(3) *UNSW Law Journal* 768  
<[https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID2662147\\_code1850033.pdf?abstractid=2662147&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2662147_code1850033.pdf?abstractid=2662147&mirid=1)>
- Caputo, Andrea, 'A Literature Review of Cognitive Biases in Negotiation Processes' (2013) 24(4) *International Journal of Conflict Management* 374  
<<http://www.emeraldinsight.com/journals.htm?issn=1044-4068&volume=24&issue=4&articleid=17097393&show=html>>
- Carter, Terry, 'Ethics by the Numbers: Many Lawyers Have Been Asked by Clients or Other Lawyers to Violate Conduct Rules, Survey Suggests' (1997) 83(10 (October)) *American Bar Association Journal* 97
- Chang, Linda, Mandy Cheng and Ken T Trotman, 'The Effect of Framing and Negotiation Partner's Objective on Judgments about Negotiated Transfer Prices' (2008) 33(7-8) *Accounting, Organizations and Society* 704 <<http://dx.doi.org/10.1016/j.aos.2008.01.002>>
- Clarke, Ben, 'An Ethics Survey of Australian Criminal Law Practitioners' (2010) 142(April 2002) *Ethics* 142

Clarke, Graeme S, 'Misleading or Deceptive Conduct Cases in the Supreme Court of Victoria' (2015) 89 (6) *Australian Law Journal* 1

Clenny, Elizabeth Foster, 'Negotiators at Work: Three Essays on Employee Negotiation Skill Development and Exhibition' (Georgia State University, 2013)  
<[http://scholarworks.gsu.edu/managersci\\_diss/23](http://scholarworks.gsu.edu/managersci_diss/23)>

Clough, Raymond, 'Legal Education & Practice: The Ethics of Negotiation' [2017] (2) *Law by Law* 22

Coalson, David, 'Self-Serving Bias: A Review of Research on Variability and Outcomes' (2014) 1 *PhD Thesis*

Cohen, Jonathan R, 'Let's Put Ourselves Out of Business: On Respect, Responsibility, and Dialogue in Dispute Resolution' (2003) 108(Summer) *Penn State Law Review* 227

Cohen, Jonathan R, 'The Immorality of Denial' (2005) 79 *Tulane Law Review* 903  
<<http://scholarship.law.ufl.edu/facultypub,%5Cnhttp://scholarship.law.ufl.edu/facultypub/41>>

Cohen, Jonathan R, 'When People Are the Means: Negotiating with Respect' (2001) 14(3) *Georgetown Journal of Legal Ethics* 739  
<<http://search.proquest.com/docview/227347584?accountid=14549%5Cnhttp://hl5yy6xn2p.search.serialssolutions.com/?genre=article&sid=ProQ:&atitle=When+people+are+the+means:+Negotiating+with+respect&title=The+Georgetown+Journal+of+Legal+Ethics&issn=10415548&da>>

Cohn, Lynn P and Noam Ebner, 'Bringing Negotiation Teaching to Life: From the Classroom to the Campus to the Community' in J Coben &G DiPalo C. Honeyman (ed), *Rethinking Negotiation Teaching Series Vol. 2: Venturing Beyond the Classroom* (2011) 153

Collins, Denis, 'Behavioral Ethics' (2010) 20 *Business Ethics Quarterly* 127

Condlin, Robert J, 'Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role' (1992) 51 *Maryland Law Review* 1

Condlin, Robert J, 'Bargaining With a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining , or Why We Can't All Just Get Along' (2007) 9(1) *Cardozo Journal of Conflict Resolution* 1

Condlin, Robert J, 'Bargaining Without Law' (2011) 56 *New York Law School Law Review* 281

- Condlin, Robert J, “Every Day and in Every Way We Are All Becoming Meta and Meta” or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)’ (2008) 23(2) *Ohio State Journal on Dispute Resolution* 231
- Condlin, Robert J, ‘Legal Bargaining Theory’s New “Prospecting” Agenda: It May Be Social Science, But Is It News?’ (2010) 10(2) *Pepperdine Dispute Resolution Law Journal* 215
- Condlin, Robert J, “Practice Ready Graduates”: A Millennialist Fantasy’ [2014] Draft of November 18
- Condlin, Robert J, ‘The “Nature” of Legal Dispute Bargaining’ (2016) 17 *Cardozo Journal of Conflict Resolution* 393
- Constantinescu, Gabriel-Cristian, ‘Creating and Controlling the Ethical Framework of Mediation’ (2014) 4(3) *International Journal of Academic Research in Accounting, Finance and Management Sciences* 138  
<<http://hrmars.com/index.php/journals/papers/IJARAFMS/v4-i3/1071>>
- Cooley, John W, ‘Defining the Ethical Limits of Acceptable Deception in Mediation Defining The Ethical Limits of Acceptable Deception in Mediation’ (2004) 4(2) *Collaborative Law* 263
- Cooley, John W, ‘Mediation Magic: Its Use and Abuse’ (1997) 29 *Loyola University Chicago Law Journal* 1  
<<http://heinonline.org.ezproxy.library.uq.edu.au/HOL/Page?handle=hein.journals/luclj29&id=11&div=&collection=journals%5Cnhttp://files/1126/Page.html>>
- Coope, Samantha and Sue Morris, ‘Personal Injury Litigation Negotiation and Settlement’ 1 *Scottish Executive Social Research* 2002
- Cordell, Andrea and Andrea Cordell, ‘Negotiation Tactics’ [2019] *The Negotiation Handbook* 66
- Côté, Stéphane, Ivona Hideg and Gerben A van Kleef, ‘The Consequences of Faking Anger in Negotiations’ (2013) 49(3) *Journal of Experimental Social Psychology* 453  
<<http://dx.doi.org/10.1016/j.jesp.2012.12.015>>
- Craft, Jana, ‘A Review of the Empirical Ethical Decision-Making Literature: 2004-2011’ (2013) 117(2) *Journal of Business Ethics* 221
- Craver, Charles B, ‘Classic Negotiation Techniques’ (2016) 52(2) *Idaho Law Review* 425
- Craver, Charles B, *Effective Legal Negotiation and Settlement* (2010)

- Craver, Charles B, 'How To Conduct Effective Telephone and E-Mail Negotiations' (2015) 17(1) *Cardozo Journal of Conflict Resolution* 1
- Craver, Charles B, 'Negotiation Ethics: How to Be Deceptive without Being Dishonest/How to Be Assertive without Being Offensive' (1997) 38 *South Texas Law Review* 713
- Craver, Charles B, 'Negotiation Ethics for Real World Interactions' (2010) 25 *Ohio State Journal on Dispute Resolution* 299
- Craver, Charles B, 'The Benefits to Be Derived from Post-Negotiation Assessments' [2012] (464) *GW Law Faculty Publications & Other Works*
- Craver, Charles B, 'The Impact of Negotiator Styles on Bargaining Interactions' (2011) 35 *American Journal of Trial Advocacy* 1
- Creswell, John, 'Qualitative, Quantitative. and Mixed Methods Approaches' in *Research Design: Qualitative, Quantitative. and Mixed Methods Approaches* (Second, 2003) 1
- Croft, Clyde, 'Changing the Culture of Civil Litigation: A Practitioner's Duties under the Civil Procedure Act' in *Law Institute of Victoria Costs Conference* (2014)
- Crotty, Susan K and Leigh Thompson, 'When Your Heart Isn't Smart: How Different Types of Regret Change Decisions and Profits' (2009) 20(4) *International Journal of Conflict Management* 315
- Cyriac, John, *Power Is Irrelevant in Negotiation, Only Influence Is Relevant* (2008)
- D'Amato, Anthony, 'On the Connection Between Law and Justice' (1993) 26 *University of California Davis Law Review* 537  
<<http://anthonydamato.law.northwestern.edu/Adobefiles/A93b.PDF>>
- Dahl, Scott S, 'Stretching the Truth in Negotiations' (1989) 8 *The Review of Litigation* 173
- Dal Pont, Gino, 'Are Ethical Principles Malleable in the Negotiation Environment?' (2008) 82(9) *Law Institute Journal* 74
- Dal Pont, Gino, *Lawyers' Professional Responsibility* (5th ed, 2013)
- Dal Pont, Gino, 'Lawyers Owe Duties beyond Their Clients, Which May Extend to the Conduct of Negotiations' (2005) 79(4) *Law Institute Journal* 2
- Dal Pont, Gino, 'Prospects of Success' [2017] *LIV Ethics* 1
- Dal Pont, Gino, 'Regulation of the Queensland Legal Profession: The Quinquennium of

- Change' (2009) 28(2) *The University of Queensland Law Journal* 183
- Dalton, Dan R and Catherine M Dalton, 'Trips and Tips for Negotiation Self-Defense: Forewarned Is Forearmed' (2011) 54 *Business Horizons* 63
- Dane, Erik and Scott Sonenshein, 'On the Role of Experience in Ethical Decision Making at Work: An Ethical Expertise Perspective' [2014] *Organizational Psychology Review* 1  
<<http://opr.sagepub.com/lookup/doi/10.1177/2041386614543733>>
- Danziger, S, J Levav and L Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108(17) *Proceedings of the National Academy of Sciences* 6889
- Dash, Samuel, 'Legal Ethics and Morality: Can a Legally Ethical Lawyer Be a Moral Person?' in *Dash Frank G. Raichle Lecture Series on Law in Society* (1999) 209
- Davis, Rob, 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers' (1994) 68(October) *The Australian Law Journal* 734
- Dawson, Catherine, *Practical Research Methods* (2002)
- Dellech, Dorsaf, 'Relational Variables and Ethical Behaviour of Negotiator' (2012) 3(3) *Journal of Business Studies Quarterly Ethics* 57  
<<http://ezproxy.net.ucf.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=buh&AN=91712427&site=ehost-live>>
- van Dijk, Eric et al, 'A Social Functional Approach to Emotions in Bargaining: When Communicating Anger Pays and When It Backfires' (2008) 94 *Journal of Personality and Social Psychology* 600
- Dingwall, Robert et al, 'Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases' (2000) 20(1) *Legal Studies* 1
- Dixon, Owen, 'Professional Conduct' in *Inaugural Lecture to the Law Students of the University of Melbourne upon the Occasion When Professional Conduct First Became a Subject in the Curriculum of the Law School* (1953)
- Dodek, Adam M, 'Canadian Legal Ethics: Ready for the Twenty-First Century at Last' (2009) 10(6-7) *German Law Journal* 1047
- Dolak, Lisa A, 'Negotiation Ethics: Not an Oxymoron' (2003) 22(1) *Newsletter - Intellectual Property Law* 16
- Dolan, Michael, 'Ethics Primer Vic Quoting Sir Brennan' [2019] *LIV Ethics* 1

- Dolan, Michael, 'Top 10 Myths about Ethics' [2018] *LIV Ethics* 1
- Doliński, Dariusz et al, 'Would You Deliver an Electric Shock in 2015? Obedience in the Experimental Paradigm Developed by Stanley Milgram in the 50 Years Following the Original Studies' (2017) 8(8) *Social Psychological and Personality Science* 927
- Dominique, Allen, 'Against Settlement? Owen Fiss, Adrand Australian Discrimination Law' (2009) 10(4) *International Journal of Discrimination and the Law* 191
- Donohue, William a and Paul J Taylor, 'A General Model of Strategic Reciprocation' [2006] (July) *SSRN Electronic Journal* <<http://www.ssrn.com/abstract=913642>>
- Donohue, William a and Paul J Taylor, 'Role Effects in Negotiation: The One-down Phenomenon' (2007) 23(3) *Negotiation Journal* 307
- Douglas, Yellowlees and Samantha Miller, 'Availability Bias Can Improve Women's Propensity to Negotiate' (2015) 6(2) *International Journal of Business Administration* 86
- De Dreu Carsten KW and Terry L Boles, 'Share and Share Alike or Winner Take All?: The Influence of Social Value Orientation upon Choice and Recall of Negotiation Heuristics'. (1998) 76(3) *Organizational behavior and human decision processes* 253 <<http://www.ncbi.nlm.nih.gov/pubmed/9878510>>
- De Dreu, Carsten KW, Sander L Koole and Frans L Oldersma, 'On the Seizing and Freezing of Negotiator Inferences: Need for Cognitive Closure Moderates the Use of Heuristics in Negotiation' (1999) 25(3) *Personality and Social Psychology Bulletin* 348
- Druckman, Daniel and Noam Ebner, 'On Teaching Games, Claims, and New Frames: Rethinking the Use of Simulation in Negotiation Education' [2013] (January) *Negotiation Journal* 61
- Drumwright, Minette, Robert Prentice and Cara Biasucci, 'Behavioral Ethics and Teaching Ethical Decision Making' (2015) 13(3) *Decision Sciences Journal of Innovative Education* 431
- Druz, Marina, Alexander Wagner and Richard Zeckhauser, 'Tips and Tells from Managers: Reading Between the Lines of Conference Calls' in *Erasmus Finance Seminars* (2013) 1
- Duhl, Gregory M, 'The Ethics of Contract Drafting' (2010) 14 *Lewis & Clark Law Review* 989
- Ebneyamini, Shiva and Mohammad Reza Sadeghi Moghadam, 'Toward Developing a Framework for Conducting Case Study Research' (2018) 17(1) *International Journal of Qualitative Methods* 1

- Edginton, John A, 'Ethics at Sea: Ethics Issues for Maritime Lawyers and Insurers' (1996) 70 *Tulane Law Review* 415
- Edmonds, Chris, 'Misconduct of Australian Lawyers Under-Aligning the Common Law Tests with the New Statutory Regime' (2013) 39(3) *Monash University Law Review* 776
- Eldred, Tigran W, 'The Psychology of Conflicts of Interest in Criminal Cases' (2009) 58 *Kansas Law Review* 43
- Elfenbein, Hillary Anger et al, 'Are Some Negotiators Better than Others? Individual Differences in Bargaining Outcomes' (2008) 42(6) *Journal of Research in Personality* 1463 <<http://dx.doi.org/10.1016/j.jrp.2008.06.010>>
- Elfenbein, Hillary Anger, 'Individual Differences in Negotiation: A Nearly Abandoned Pursuit Revived' (2015) 24(2) *Current Directions in Psychological Science* 131 <<http://cdp.sagepub.com/content/24/2/131>>
- Elfenbein, Hillary Anger et al, 'Why Are Some Negotiators Better than Others? Opening the Black Box of Bargaining Behaviors'. in *23rd Annual International Association of Conflict Management Conference* (2010)
- Elfenbein, Hillary Anger and Jared R Curhan, 'The Effects of Subjective Value on Future Consequences: Implications for Negotiation Strategies' in *The Psychology of Negotiations in the 21st Century Workplace : New Challenges and New Solutions* (2011) 363
- Emerson, Mike, 'Legal Ethics and Mediation: Is the ASCR Enough?' [2014] (October) *The Proctor* 36
- Engler, Henry, 'Behavioral Compliance : How to Stop "Good People" from Doing Bad Things', *Reuters* (2016) 1
- Erkus, Ahmet and Moshe Banai, 'Attitudes towards Questionable Negotiation Tactics in Turkey' (2011) 22(3) *International Journal of Conflict Management* 239
- Evans, Spencer C et al, 'Vignette Methodologies for Studying Clinicians' Decision-Making: Validity, Utility, and Application in ICD-11 Field Studies' (2015) 15(2) *International Journal of Clinical and Health Psychology* 160 <<http://dx.doi.org/10.1016/j.ijchp.2014.12.001>>
- Eyster, Mary Jo, 'Clinical Teaching , Ethical Negotiation, and Moral Judgment' (1996) 75 *Nebraska Law Review* 752
- Fanning, D, 'Academic Phrasebank 2015b Enhanced Ed2' (2008) 89(1) *Music and Letters* 139 <<https://academic.oup.com/ml/article->

lookup/doi/10.1093/ml/gcm073%0Ahttp://www.phrasebank.manchester.ac.uk/general  
functions.htm Academic>

Farkas, Brian, 'Old Problem , New Medium: Deception In Computer-Facilitated Negotiation  
And Dispute Resolution' (2012) 14 *Cardozo Journal of Conflict Resolution* 161

Farnsworth, Ward et al, 'Ambiguity About Ambiguity: An Empirical Inquiry into Legal  
Interpretation' (2010) 2(1) *Journal of Legal Analysis* 257

Farrow, Trevor CW, 'The Negotiator as Professional: Understanding the Competing Interests  
of a Representative Negotiator' (2007) 03(02) *Comparative Research in Law & Political  
Economy* Research Paper No. 3/2007

Feldman, Heidi Li, 'Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?'  
(1996) 69 *California Law Review* 885

Feldman, Yuval, 'Behavioral Ethics Meets Behavioral Law and Economics' [2013] (October)  
*The Oxford Handbook of Behavioral Economics and the Law (Handbook Draft)* 1  
<<http://ssrn.com/abstract=2226711>>

Feldman, Yuval and Eliran Halali, 'Regulating "Good" People in Subtle Conflicts of Interest  
Situations' [2014] *Available at SSRN* 1

Feldman, Yuval and Henry E Smith, 'Behavioral Equity' (2014) *Journal of Institutional and  
Theoretical Economics* 137

Fells, Ray, *Effective Negotiation: From Research to Results* (2009)

Fishbach, Ayelet and Kaitlin Woolley, 'Avoiding Ethical Temptations' (2015) 6 *Current  
Opinion in Psychology* 3

Fiss, Owen M, 'Against Settlement' (1984) 93(6) *The Yale Law Journal* 1073

Fleck, Denise et al, 'Neutralizing Unethical Negotiating Tactics: An Empirical Investigation  
of Approach Selection and Effectiveness' (2014) 30(1) *Negotiation Journal* 23

Fleck, Denise et al, 'Truth or Consequences: The Effects of Competitive-Unethical Tactics on  
Negotiation Process and Outcomes' (2013) 24(4) *International Journal of Conflict  
Management* 328

Fleck, Denise, Roger J Volkema and Sergio Pereira, 'Dancing on the Slippery Slope: The  
Effects of Appropriate Versus Inappropriate Competitive Tactics on Negotiation Process and  
Outcome' [2016] *Group Decision and Negotiation*

<<http://link.springer.com/10.1007/s10726-016-9469-7>>

Fleming, Don, 'Regulating the Australian Legal Profession the Law Societies and Bar Associations' (2008) 38(4) *Jurnal Hukum & Pembangunan* 449

Flood, John, 'The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation' (2011) 59(4) *Current Sociology* 507

Flynn, Asher and Arie Freiberg, 'Plea Negotiations: An Empirical Analysis' (2018) 544 *Trends & issues in crime and criminal justice* 1

Ford, Robert C and Woodrow D Richardson, 'Ethical Decision Making: A Review of the Empirical Literature' (1994) 13(3) *Journal of Business Ethics* 19

Foster, Chase, Jane Mansbridge and Cathie Jo Martin, 'Negotiation Myopia' in *Negotiating Agreement in Politics* (2013) 73

Fox, Kenneth H and Sharon Press, 'Venturing Home: Implementing Lessons from the Rethinking Negotiation Project' in *Educating Negotiators for a Connected World* (2012)

Francis, Andrew M, 'Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism' (2005) 12(2) *International Journal of the Legal Profession* 173

Fraser, Hugh, 'The Ethics of the Advocate' in *Bar Practice Course Final Address* (2012)  
<<http://www.austlii.edu.au/au/journals/QldJSchol/2012/2.pdf>>

French, Robert, 'Rights and Freedoms and the Rule of Law' in *Victorian Law Foundation Oration* (2017)

French, Robert, 'United States Influence on the Australian Legal System' (2018) 43(1) *University of Western Australia Law Review* 11

Freshman, Clark, Adele Hayes and Greg Feldman, 'The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know about How Mood Relates to Successful Negotiation' (2002) 2002(1) *Journal of Dispute Resolution* 1

Friedman, Raymond A and Debra L Shapiro, 'Deception and Mutual Gains Bargaining: Are They Mutually Exclusive?' (1995) 11(3) *Negotiation Journal* 243

Frith, Katherine, 'The Advertising Milieu and Beauty of Advertising' in *Persuasion Ethics Today* (2016)

Fulmer, Ingrid Smithey, Bruce Barry and D Adam Long, 'Lying and Smiling: Informational and Emotional Deception in Negotiation' (2009) 88(4) *Journal of Business Ethics* 691

- Furnham, Adrian and Hua Chua Boo, 'A Literature Review of the Anchoring Effect' [2010] *The Journal of Socio-Economics*
- Gageler, Stephen, 'Evidence and Truth' (2017) 13 *The Judicial Review* 1
- Galanter, Marc, 'The Federal Rules and the quality of settlements: A comment on Rosenberg's, "The Federal Rules of civil procedure in action"' (1989) 137 *University of Pennsylvania Law Review* 2231
- Galanter, Marc, 'The Quality of Settlements' [1988] *Journal of Dispute Resolution* 55
- Galanter, Marc, 'Worlds of Deals: Using Negotiation to Teach about Legal Process' (1984) 34(1979) *Journal of Legal Education* 268
- Galle, Brian, 'Tax, Command... or Nudge?: Evaluating the New Regulation' (2014) 92(4) *Texas Law Review* 837
- Garcia, Stephen M, 'Power and the Illusion of Transparency in Negotiations' (2002) 17(1) *Journal of Business and Psychology* 133
- Garcia, Stephen M, John M Darley and Robert J Robinson, 'Morally Questionable Tactics: Attorneys and Public Defenders' (2009) 27 *Personality and Social Psychology Bulletin* 731
- Gardner, Glen, 'Competence in Negotiation: Hitting the Moving Target' (Ethical Negotiation Seminar, Law Society of Saskatchewan CPD, 2014)
- Gaspar, Joseph P, Redona Methasani and Maurice Schweitzer, 'Fifty Shades of Deception: Characteristics and Consequences of Lying in Negotiations' (2019) 33(1) *Academy of Management Perspectives* 62
- Gaspar, Joseph P and Maurice E Schweitzer, 'The Negotiator's Challenge: Anticipating, Detecting, and Contending with Deception in Negotiations' (2012) 6(3) *Negotiation and Conflict Management Research* 160 <<http://www.ssrn.com/abstract=2056885>>
- Geiger, Ingmar, 'A Model of Negotiation Issue-Based Tactics in Business-to-Business Sales Negotiations' [2017] *Industrial Marketing Management*  
<<http://linkinghub.elsevier.com/retrieve/pii/S001985011730130X>>
- Gelfand, Michelle J, Ashley C Fulmer and Laura Severance, 'Psychology of Negotiation and Mediation' in *APA Handbook of Industrial and Organizational Psychology* (2010)
- Genn, Hazel, 'Hard Bargaining: Out of Court Settlement in Personal Injury Actions' (1987)
- Genn, Hazel, 'What Is Civil Justice for? Reform, ADR, and Access to Justice' (2012) 24(1)

*Yale Journal of Law and the Humanities* 397 <[http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/yallh24&section=21](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/yallh24&section=21)>

Gibson, Kevin, 'Ethics: The New Canon of Negotiation Ethics' (2004) 87(4) *Marquette Law Review* 747

Gifford, Donald G, 'A Context-Based Theory of Strategy Selection in Legal Negotiation' (1985) 46(1) *Ohio State Law Journal* 41

Gifford, Donald G, *Legal Negotiation: Theory and Application* (West Publishing Co, 1989)

Gino, Francesca and Catherine Shea, 'Deception in Negotiations: The Role of Emotions' in R Croson and G Bolton (eds), *Handbook of Conflict Resolution* (Oxford University Press, 2012) 47

Glozman, Edy, Netta Barak-Corren and Ilan Yaniv, *False Negotiations: The Art & Science of Not Reaching an Agreement* (2013)

Gneezy, Uri, 'Deception: The Role of Consequences' (2005) 95(1) *American Economic Review* 384

Goldberg, Steven H, "'Wait a Minute. This Is Where I Came In." A Trial Lawyer's Search for Alternative Dispute Resolution Resolution' (1997) 653 *Brigham Young University Law Review* 652

Golding, Clinton, 'Advice for Writing a Thesis (Based on What Examiners Do)' (2017) 4(1) *Open Review of Educational Research* 46  
<<https://doi.org/10.1080/23265507.2017.1300862>>

Goodpaster, Gary, 'A Primer on Competitive Bargaining' (1996) 1996(2) *Journal of Dispute Resolution* 325

Goriely, Tamara, Richard Moorhead and Pamela Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour: Research Study* 43 (2002)

Gould, Kim, 'Locating a "Threshold of Seriousness" in the Australian Tests of Defamation' (2017) 39 *Sydney Law Review* 333

Governance Institute, *Ethics Index 2019* (2020)

Gratch, Jonathan, Zahra Nazari and Emmanuel Johnson, 'The Misrepresentation Game: How to Win at Negotiation While Seeming like a Nice Guy' [2016] (Aamas) *Aamas* 2016 728

Griggs, Lynden, 'Reforming Unconscionability' [2009] (90) *Precedent* 17

<<http://search.informit.com.au.ezp.lib.unimelb.edu.au/fullText%5Cndn=20092085%5Cnres=AGISPT%5Cnpapers2://publication/uuid/7083CCC1-5846-487C-A5BB-93B178A1E00F>>

Groenwold, Rolf HH, Jelle J Goeman and Saskia Le Cessie, 'Multiple Testing: When Is Many Too Much?' (2021) 184(2) *European Journal of Endocrinology* 11

Guidice, Rebecca M, G Stoney Alder and Steven E Phelan, 'Competitive Bluffing: An Examination of a Common Practice and Its Relationship with Performance' (2009) 87(4) *Journal of Business Ethics* 535

Gurr, David Drysdale, Lawrie, 'An Australian Perspective on School' [2015] *Asia Pacific Journal of Education* 1

Gusenbauer, Michael, *Google Scholar to Overshadow Them All? Comparing the Sizes of 12 Academic Search Engines and Bibliographic Databases*, vol 118 (Springer International Publishing, 2019) <<https://doi.org/10.1007/s11192-018-2958-5>>

Guthrie, Chris, 'Principles of Influence in Negotiation' (2003) 87 *Marquette Law Review* 829

Guthrie, Chris, Jeffrey J Rachlinski and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93(1) *Cornell Law Review* 1

Guthrie, Chris and David Sally, 'The Impact of the Impact Bias on Negotiation' (2004) 87(4) *Marquette Law Review* 817

<<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=12761530&site=ehost-live>>

Hardy, Samantha and Olivia Rundle, *Mediation for Lawyers* (2010)

Harman, Joe, 'From Alternate to Primary Dispute Resolution: The Pivotal Role of Mediation in (and in Avoiding) Litigation' in *National Mediation Conference, Melbourne* (2014)

Hartje, Jeffrey H, 'Lawyer's Skills in Negotiations: Justice in Unseen Hands' (1984) 1984 *Journal of Dispute Resolution* 119

Haselhuhn, Michael P et al, 'Negotiating Face-to-Face : Men ' s Facial Structure Predicts Negotiation Performance' (2014) 25(5) *The Leadership Quarterly* 835  
<<http://dx.doi.org/10.1016/j.leaqua.2013.12.003>>

Haslam, Nick, Steve Loughnan and Gina Perry, 'Meta-Milgram: An Empirical Synthesis of the Obedience Experiments' (2014) 9(4) *PLoS ONE*

- Hausken, Kjell, 'Game-Theoretic and Behavioral Negotiation Theory' (1997) 6(6) *Group Decision and Negotiation* 511  
<<http://www.springerlink.com/content/x453h4k741304660/>>
- Hayne, Kenneth M, *Final Report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, vol 1 (2019)
- Hayne, Kenneth M, 'The Vanishing Trial' in *Supreme and Federal Courts Judges Conference* (2008) 1
- Hebert, John and Alan Meade, 'Examination of Psychological Type and Preferred Negotiation Tactics and Strategies of Contract Negotiators' (Air Univeristy, 1992)
- Hiatt, Jennifer, 'The Rules of Professional Conduct: A Conflicting Guide for Counsel in Child Custody and Access Proceedings' (2012) 1(1) *Western Journal of Legal Studies*
- Hinshaw, Art, 'Teaching Negotiation Ethics' (2013) 63(1) *Journal of Legal Education* 82
- Hinshaw, Art and Jess K Alberts, 'Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics' (2011) 16 *Harvard Negotiation Law Review* 95
- Hinshaw, Art and Jess K Alberts, 'Gender and Attorney Negotiation Ethics Gender and Attorney Negotiation Ethics' (2012) 39 *Washington University Journal of Law & Policy* 145
- Hinshaw, Art, Peter Reilly and Andrea Kupfer Schneider, 'Attorneys and Negotiation Ethics: A Material Misunderstanding ?' [2013] (July) *Negotiation Journal* 265
- Hirsh, Jacob B, Jackson G Lu and Adam D Galinsky, 'Research in Organizational Behavior Moral Utility Theory: Understanding the Motivation to Behave (Un)Ethically' [2018] *Research in Organizational Behavior* <<https://doi.org/10.1016/j.riob.2018.10.002>>
- Hobbes, Thomas, 'Leviathan' (Oxford University Press 1996, 1651)
- Hoffinan, Saul D and Greg J Duncan, 'What Are the Economic Consequences of Divorce?' (1988) 25(4) *Demography* 641
- Hogan, Andrew, 'The Naive Negotiator: An Empirical Study of Ethics' (2013) 26 *The Georgetown Journal of Legal Ethics* 725
- Hollander-Blumoff, Re, 'Social Psychology, Information Processing, and Plea Bargaining' (2007) 1(1992) *Marquette Law Review* 163  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2084338](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084338)>
- Holmes, Vivien et al, 'Regulating Lawyers and Ethical Infrastructure Perception of Ethics'

[2017] *LIV Ethics*

Honeyman, Christopher et al, 'Ethics in Negotiations: A Cross Cultural Perspective' (2013) 13(13) *Marquette University Law School Legal Studies Research Paper Series* 247

Honeyman, Christopher and Andrea Kupfer Schneider, 'Catching up with the Major-General: The Need for a "Canon of Negotiation"' (2003) 87(4) *Marquette Law Review* 637

Honoré, Tony, 'The Dependence of Morality on Law' (1993) 13(1) *Oxford Journal of Legal Studies* 1

Hornuf, Lars and Georg Haas, 'Regulating Fraud in Financial Markets: Can Behavioural Designs Prevent Future Criminal Offences?' (2014) 7(2) *Journal of Risk Management in Financial Institutions* 192

Horrigan, Bryan, 'New Directions in How Legislators, Courts, and Legal Practitioners Approach Unconscionable Conduct and Good Faith' [2012] *Supreme Court History Program Yearbook* 171 <<http://www.law.uq.edu.au/documents/cli-sem-series/2012/Horrigan-paper-18-10-12.pdf>>

Huang, Peter H, 'How Improving Decision-Making and Mindfulness Can Improve Legal Ethics and Professionalism' (2015) 21 *Journal of Law, Business & Ethics* 35

Hughes, Rhidian and Meg Huby, 'The Construction and Interpretation of Vignettes in Social Research' (2004) 11(1) *Social Work & Social Sciences Review* 36

Hutchinson, Terry and Duncan, Nigel 'Defining and Describing What We Do: Doctrinal Legal Research' (2013) 21(3) *Legal Education Digest* 83

Ingleby, Richard, *Matrimonial Breakdown and the Legal Process: The Limitations of No-Fault Divorce* (1989)

Ipp, David A, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63

Irlenbusch, Bernd and Marie Claire Villeval, 'Behavioral Ethics: How Psychology Influenced Economics and How Economics Might Inform Psychology?' (2015) 6 *Current Opinion in Psychology* 87 <<http://www.sciencedirect.com/science/article/pii/S2352250X15001517>>

James, Amberley, 'Alternative Dispute Resolution Annotated Bibliography ( 2011 )' Working Paper

Jarvis, Peter R and Bradley F Tellam, 'A Negotiation Ethics Primer for Lawyers' (2012) 31(3) *Gonzaga Law Review* 549

Jehn, Karen, 'A Global Adventure' (2014) 29(1) *Signal (Journal of International Association for Conflict Management)* 1

Johnstone, Ian and Mary Patricia Treuthart, 'Doing the Right Thing: An Overview of Teaching Professional Responsibility' (1991) 41 *Journal of Legal Education* 75

Jones, Thomas M, 'Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model' (1991) 16(2) *The Academy of Management Review* 366

Kang, Polly et al, 'Journal of Experimental Social Psychology Insincere Negotiation: Using the Negotiation Process to Pursue Non- Agreement Motives' (2020) 89(November 2019) *Journal of Experimental Social Psychology* 103981  
<<https://doi.org/10.1016/j.jesp.2020.103981>>

Kaptein, Muel, 'Toward Effective Codes: Testing the Relationship with Unethical Behavior' (2011) 99(2) *Journal of Business Ethics* 233

Katz, Neil H and Adriana Sosa, 'The Emotional Advantage: The Added Value of the Emotionally Intelligent Negotiator' (2015) 33(1) *Conflict Resolution Quarterly* 57

Kaufman, Sanda, Roy J Lewicki and James Coben, 'Teaching Wickedness to Students: Planning and Public Policy, Business, and Law' in Christopher Honeyman, James Coben and Andrew Wei-min Lee (eds), *Educating Negotiators for a Connected World* (2013) 25

Kaynak, Ramazan and Tuba Sert, 'The Impact of Service Supplier's Unethical Behavior to Buyer's Satisfaction: An Empirical Study' (2012) 109(2) *Journal of Business Ethics* 219

Kelley, Kate et al, 'Good Practice in the Conduct and Reporting of Survey Research' (2003) 15(3) *International Journal for Quality in Health Care* 261

Kennedy, Jessica A and Laura J Kray, 'A Pawn in Someone Else's Game?: The Cognitive, Motivational, and Paradigmatic Barriers to Women's Excelling in Negotiation' (2015) 35 *Research in Organizational Behavior* 3 <<http://dx.doi.org/10.1016/j.riob.2015.09.002>>

Kern, Mary C and Dolly Chugh, 'Bounded Ethicality: The Perils of Loss Framing' (2009) 20(3) *Psychological Science* 378

Kildoff, Galvin et al, 'Whatever It Takes: Rivalry and Unethical Behavior' in *International Association for Conflict Management, IACM 25th Annual Conference* (2012)

Kilmann, Thomas, Blair Trippe and Douglas Baumel, 'In Practice Into Extreme Conflict' [2015] (April) *Negotiation Journal* 89

Kim, Yon Mi and Kyung Hyo Chun, 'Do You Want an Efficient Negotiator or an Ethical One: Goal of the Negotiation Teaching in Law School' (2014) 11 *The Asian Business Lawyer* 125

Kimmel, Melvin J and Et Al, 'Effects of Trust, Aspiration, and Gender on Negotiation Tactics'. (1980) 38(1) *Journal of Personality and Social Psychology* 9

Kirby, Michael, 'The St James Ethics Centre Forum on Ethical Issues' in *Forum on Ethical Issues* (1996) 1

Kirgis, Paul F, 'Bargaining with Consequences: Leverage and Coercion in Negotiation' (2014) 19 *Harvard Negotiation Law Review* 69

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2247645](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247645)>

Kirgis, Paul F, 'Hard Bargaining in the Classroom: Realistic Simulated Negotiations and Student Values' (2012) 28(1) *Negotiation Journal* 93

Kleefeld, John C, 'Book Reviews : Three Negotiation Books' (2010) 73(1) *Saskatchewan Law Review* 145

Kolk, Ans, Willemijn van Dolen and Marlene Vock, 'Trickle Effects of Cross-Sector Social Partnerships' (2010) 94(SUPPL. 1) *Journal of Business Ethics* 123

Korobkin, Russell B, 'Law of Bargaining: The Law of Bargaining' (2004) 87(4) *Marquette Law Review* 839

Korobkin, Russell B and Chris Guthrie, 'Heuristics and Biases at the Bargaining Table' (2004) 87(04) *Marquette Law Review* 795

Korobkin, Russell B and Thomas S Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88(4) *California Law Review* 1051

Kovach, Kimberlee, 'Lawyer Ethics Must Keep Pace With Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards' (2003) 39 *Idaho Law Review* 400

Kovach, Kimberlee K, 'Symposium: New Wine Requires New Wineskins: Transforming Lawyer Ethics For Effective Representation In A Non Adversarial Approach To Problem Solving ( Except )' (2001) 28(April) *Fordham Urban Law Journal* 935

Kovach, KK, 'The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice'. (2005) 7(2002) *Cardozo Journal of Conflict Resolution* 27

- Kraut, Richard, *The Stanford Encyclopedia of Philosophy* 'Aristotle's Ethics' (2018 ed)
- Kray, Laura, *Gender Bias in Negotiators' Ethical Decision Making* (2011)  
<<https://escholarship.org/uc/item/1639379n%0AKeywords:>>
- Kray, Laura J and Michael P Haselhuhn, 'Male Pragmatism in Negotiators ' Ethical Reasoning' (2012) 48(5) *Journal of Experimental Social Psychology* 1124  
<<http://dx.doi.org/10.1016/j.jesp.2012.04.006>>
- Kray, Laura J, Jessica A Kennedy and Alex B Van Zant, 'Not Competent Enough to Know the Difference? Gender Stereotypes about Women ' s Ease of Being Misled Predict Negotiator Deception' (2014) 125(2) *Organizational Behavior and Human Decision Processes* 61  
<<http://dx.doi.org/10.1016/j.obhdp.2014.06.002>>
- Kritzer, Herbert M, *The Arts of Persuasion in Science and Law: Conflicting Norms in the Courtroom* (2007)
- Krivis, Jeffrey, 'The Truth about Deception in Mediation' (2004) 4(2) *Pepperdine Dispute Resolution Law Journal* 251
- Kronzon, Shirrit and John Darley, 'Is This Tactic Ethical? Biased Judgments of Ethics in Negotiation' (1999) 21(1) *Basic and Applied Social Psychology* 49
- Krosnick, Jon A and Stanley Presser, 'Question and Questionnaire Design' in *Handbook of Survey Research (2nd Ed)* (2009)
- Kyl-Heku, Liisa M and David M Buss, 'Tactics as Units of Analysis in Personality Psychology: An Illustration Using Tactics of Hierarchy Negotiation' (1996) 21(4) *Personality and Individual Differences* 497
- Lakhani, Avnita, 'The Truth about Lying as a Negotiation Tactic : Where Business , Ethics , and Law Collide ... or Do They ?' (2007) 9(6) *ADR Bulletin* 101
- Lamb, Debra, 'Chapter 10: Ethical Dilemmas: What Australian Lawyers Say About Them' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford University Press, 1995)
- Lamb, Debra, 'Ethical Dilemmas: What Australian Lawyers Say About Them' in *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 217
- Lande, John, 'Escaping from Lawyers' Prison of Fear' (2014) 82(2) *UMKC Law Review* 485
- Lande, John et al, 'Principles for Designing Negotiation Instruction' (2012) 33 *Hamline*

*Journal of Public Law and Policy* 299

Lande, John, 'Taming the Jungle of Negotiation Theories' [2015] *Negotiation Desk Reference* (Christopher Honeyman & Andrea Schneider, eds., forthcoming) 1

Lande, John, 'Teaching Students to Negotiate Like a Lawyer' (2012) 39 *Washington University Journal of Law and Policy* 109 <<http://ssrn.com/paper=2086871>>

Lande, John, 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' (2014) 50 *UCLA Law Review* 69

Lande, John, 'What Do Litigators Do? Getting Trapped in a Prison of Fear Planned Early Negotiation Processes Escaping the Prison of Fear' in *Lawyering with Planned Early Negotiation (2nd Ed)* (2<sup>nd</sup> ed, 2016) 1

Lande, John M, 'A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation' (2014) 16 *Cardozo Journal of Conflict Resolution* 1

Lande, John M, 'Getting Good Results for Clients by Building Good Working Relationships with ' Opposing Counsel'' (2011) 33 *University of La Verne Law Review* 107

Lande, John M, 'Good Pretrial Lawyering : Planning to Get to Yes Sooner, Cheaper, and Better' (2014) 16 *Cardozo Journal of Conflict Resolution* 63

Lande, John M, 'Lessons from Mediators ' Stories' (2013) 34(August) *Cardozo Law Review* 1

Lande, John M, 'Lessons from Teaching Students to Negotiate Like a Lawyer' [2013] (forthcoming) *Cardozo Journal of Conflict Resolution*

Langdon-Down, Grania, 'Shifting Values', *UK Law Society Gazette* (online at 2004) <<https://www.lawgazette.co.uk/analysis/shifting-values/1678.article>>

Langevoort, Donald C, 'Cultures of Compliance' [2016] *Georgetown Law Faculty Publications and Other Works* 1

Lapakko, David, 'Three Cheers for Language: A Closer Examination of a Widely Cited Study of Nonverbal Communication' (1997) 46(1) *Communication Education* 63

Lauchland, Kay, 'Secrets, Half-Truths and Deceit in Mediation and Negotiation — Lawyers Beware!' (2007) 9(6) *ADR Bulletin* 1

Law Council of Australia, 'Australian Solicitors' Conduct Rules 2011 and Commentary' (2013) <<https://www.lawcouncil.asn.au/files/web->

pdf/SolicitorsConductRulesHandbook\_Ver3.pdf>

Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules* (2018)

Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* (1999)

Law Society of New South Wales, *2018 National Profile of Solicitors* (2019)

<[https://www.lawsociety.com.au/sites/default/files/2019-07/2018 National Profile of Solicitors\\_final report\\_190619.pdf](https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors_final%20report_190619.pdf)>

Law Society of New South Wales, 'ASCR Comparison to Model Rules' (2013)

Lee, Soojin et al, 'How Do I Get My Way ? A Meta-Analytic Review of Research on Influence Tactics' (2017) 28(1) *The Leadership Quarterly* 210

<<http://dx.doi.org/10.1016/j.leaqua.2016.11.001>>

Legg, Michael (ed), *Resolving Civil Disputes* (2016)

Lehnert, Kevin et al, 'The Human Experience of Ethics: A Review of a Decade of Qualitative Ethical Decision-Making Research' (2016) 25(4) *Business Ethics* 498

Lehnert, Kevin, Yung hwal Park and Nitish Singh, 'Research Note and Review of the Empirical Ethical Decision-Making Literature: Boundary Conditions and Extensions' (2015) 129(1) *Journal of Business Ethics* 195 <<http://dx.doi.org/10.1007/s10551-014-2147-2>>

Lempert, Larry, 'In Settlement Talks, Does Telling the Truth Have Its Limits?' (1988) 2 *Inside Litigation* 1

Leonard, Elizabeth Weeks, 'Teaching Health Law'. (2009) 37(1) *The Journal of law, medicine & ethics : a journal of the American Society of Law, Medicine & Ethics* 139

Levin, Leslie C, 'Building a Better Lawyer Discipline System: The Queensland Experience' (2006) 9(2) *Legal Ethics* 187

Levine, Emma E and Maurice E Schweitzer, 'Are Liars Ethical? On the Tension between Benevolence and Honesty' (2014) 53(July) *Journal of Experimental Social Psychology* 107

Lewicki, Roy J and Beth Polin, 'Trust and Negotiation' in *Handbook of Research on Negotiation* (2013) 161

Lewicki, Roy J and Robert J Robinson, 'Ethical and Unethical Bargaining Tactics: An Empirical Study' (1998) 17 *Journal of Business Ethics* 665

- Lewicki, Roy J and Neil Stark, 'What Is Ethically Appropriate in Negotiations: An Empirical Examination of Bargaining Tactics' (1996) 9(1) *Social Justice Research* 69  
<<http://link.springer.com/10.1007/BF02197657>>
- Lewis, Richard, 'Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action' [2018] (2) *Journal of Personal Injury Law* 113
- Lewis, Richard, 'Tort Tactics: An Empirical Study of Personal Injury Litigation Strategies' (2017) 37(1) *Legal Studies* 162 <<http://doi.wiley.com/10.1111/lest.12138>>
- Li, Shu and Michael E Roloff, 'Strategic Emotion in Negotiation: Cognition, Emotion, and Culture' [2006] (c) *Communication to Presence. Cognition, Emotions and Culture towards the Ultimate Communicative Experience* 169  
<<http://scholar.google.com/scholar?hl=en&btnG=Search&q=intitle:Strategic+Emotion+in+Negotiation+:+Cognition+,+Emotion+,+and+Culture#0>>
- Limbury, Alan L, 'Should Mediation Be an Evidentiary "Black Hole"?' (2012) 35(3) *UNSW Law Journal* 914
- Lincoln, Sarah Hope, 'A Need to Know: An Ethical Decision-Making Model for Research Administrators' (2008) 39(1) *The Journal of Research Administration* 41
- Loder, Reed Elizabeth, 'Moral Truthseeking and the Virtuous Negotiator' (2014) 8 *Georgetown Journal of Legal Ethics* 45
- Lodge, Martin and Kai Wegrich, 'The Rationality Paradox of Nudge: Rational Tools of Government in a World of Bounded Rationality' (2016) 38(3) *Law and Policy* 250
- Loe, Terry W et al, 'A Review of Empirical Studies Assessing Ethical Decision Making in Business' (2000) 25(3) *Journal of Business Ethics* 185  
<<http://www.jstor.org/stable/25074310><http://www.jstor.org/page/info/about/policies/terms.jsp><http://www.jstor.org>>
- Longworth, Kelli, *National Legal Profession Reform* (2011)
- Loughrey, Joan, 'Accountability and the Regulation of the Large Law Firm Lawyer' (2014) 77(5) *Modern Law Review* 732
- Lowenthal, Gary T, 'A General Theory of Negotiation Process, Strategy, and Behavior' (1982) 31 *University of Kansas Law Review* 69
- Lund, Ole Christer H et al, 'Tactics of Hierarchy Negotiation' (2007) 41(1) *Journal of Research in Personality* 25

- Ma, Li and Judi McLean Parks, 'Your Good Name: The Relationship Between Perceived Reputational Risk and Acceptability of Negotiation Tactics' (2012) 106(2) *Journal of Business Ethics* 161
- Ma, Zhenzhong, 'The SINS in Business Negotiations: Explore the Cross-Cultural Differences in Business Ethics Between Canada and China' (2010) 91(SUPPL. 1) *Journal of Business Ethics* 123
- Maaravi, Yossi, Asya Pazy and Yoav Ganzach, 'Winning a Battle but Losing the War: On the Drawbacks of Using the Anchoring Tactic in Distributive Negotiations' (2014) 9(6) *Judgment and Decision Making* 548
- Macaulay, Cameron, 'Fit and Proper Person & Duty of Disclosure under the Legal Profession Act 2004' in *Professional Standards Education Committee* (2004)
- Mahoney, Richard, 'Lawyers' Statements of Personal Opinion to the Court' (2013) 17(d) 147
- Malhotra, Deepak and Max H Bazerman, 'Psychological Influence in Negotiation: An Introduction Long Overdue' (2008) 34(3) *Journal of Management* 509
- Martin, Wayne, 'Alternative Dispute Resolution - A Misnomer?' (Australian Disputes Centre ADR Address 2018)
- Martin, Wayne, 'The Future of Regulating the Legal Profession: Is the Profession Over Regulated?' in *Conference of Regulatory Officers, Perth* (2009)
- Mason, Anthony Sir, 'The Role of the Courts at the Turn of the Century' (1993) 3(November) *Journal of Judicial Administration* 158
- Mason, Jim, 'How Might the Adversarial Imperative Be Effectively Tempered in Mediation?' (2012) 15(1) *Legal Ethics* 111
- Materne-Smith, Henry, 'All Is Fair in Love and Remote Indigenous Communities? *ASIC v Kobelt* (2019) 368 Alr 1' (2020) 41(1) *Adelaide Law Review* 325
- May, Wed and Heinonline Pdf, 'Negotiating on Behalf of Low-Income Clients: The Distorting Effects of Model Rule 4.1' (2016) 1 *South Carolina Law Review* 1
- Mazar, Nina, On Amir and Dan Ariely, 'The Dishonesty of Honest People: A Theory of Self-Concept Maintenance' (2008) 45(6) *Journal of Marketing Research* 633
- McClendon, B, DD Burke and Lorrie Willey, 'The Art of Negotiation: What the Twenty-First Century Business Student Should Know' (2010) 27(2) *Journal of Legal Studies ...* 277

<<http://onlinelibrary.wiley.com/doi/10.1111/j.1744-1722.2010.01078.x/full>>

McDonald, Annabelle, 'Patel Case Lawyer Fined for Deception' [2006] (24/11/2006) *The Australian* 10

McElwaine, Shaun, 'Ethical Conduct at Mediation (2015) <<http://shaun-mcelwaine-romi.squarespace.com/s/ETHICAL-CONDUCT-AT-MEDIATION.pdf>>

McGinniss, Michael s, 'Breaking Faith: Machiavelli and Moral Risks in Lawyer Negotiation' (2015) 91 *North Dakota Law Review* 247

McKinney, Joseph A, Tisha L Emerson and Mitchell J Neubert, 'The Effects of Ethical Codes on Ethical Perceptions of Actions Toward Stakeholders' (2010) 97(4) *Journal of Business Ethics* 505

McMurdo, Philip, 'Civility and Professional Courtesy' in *Queensland Law Society Symposium 2014* (2014)

McNair, Damian, *What Is 'Gross Negligence'?* (2016)

Mell, Johnathan, Gale Lucas and Jonathan Gratch, 'An Effective Conversation Tactic for Creating Value over Repeated Negotiations' in *Proceedings of the 14th International Conference on Autonomous Agents and Multiagent Systems (AAMAS 2015)* (2015) 1567

Melli, Marygold S, 'Constructing a Social Problem: The Post-Divorce Plight of Women and Children' [1986] *American Bar Foundation Research Journal* 759

Melli, Marygold S, 'Review Symposium on Weitzman's Divorce Revolution Constructing a Social Problem: The Post-Divorce Plight of Women and Children' (1986) 1 *American Bar Foundation Research Journal* 759

Meltsner, Michael and Philip G Schrag, 'Negotiating Tactics for Legal Services Lawyers' (1989) 23 *Clearinghouse Review* 858 <[http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clear23&section=112](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clear23&section=112)>

Menkel-Meadow, Carrie, 'Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts' (2009) 14 *Harvard Negotiation Law Review* 195

Menkel-Meadow, Carrie, 'Chronicling the Complexification of Negotiation Theory and Practice' (2010) 25(October 2009) *Negotiation Journal* 415

Menkel-Meadow, Carrie, 'Ethics and the Settlement of Mass Torts: When the Rules Meet the

Road' (1995) 80 *Cornell Law Review* 1159

Menkel-Meadow, Carrie, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities' (1997) 38(2) *Texas Law Review Law Review* 243

Menkel-Meadow, Carrie, 'Legal Negotiation: A Study of Strategies in Search of a Theory' (1983) 8(4) *American Bar Foundation Research Journal* 905

Menkel-Meadow, Carrie, 'Measuring Both the Art and Science of Mediation' (1993) 9(4) *Negotiation Journal* 321

Menkel-Meadow, Carrie, 'Mothers and Fathers of Invention: The Intellectual Founders of ADR' (2000) 16(1) *Ohio State Journal on Dispute Resolution* 8

Menkel-Meadow, Carrie, 'The Evolving Complexity of Dispute Resolution Ethics' (2017) 30 *The Georgetown Journal of Legal Ethics* 389

Menkel-Meadow, Carrie, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38 *William and Mary Law Review* 5

Menkel-Meadow, Carrie, 'Theories and Realities Lawyer Negotiations : What We Learn From Mediation' (2013) 56(3) 361

Menkel-Meadow, Carrie, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1984) 31 *UCLA Law Review* 754

Menkel-Meadow, Carrie and Michael Wheeler, *What's Fair Ethics for Negotiators* (2004) <<http://ebookcentral.proquest.com.ezproxy.library.uwa.edu.au/lib/uwa/detail.action?docID=176880>>

Metcalf, Lynn E et al, 'Cultural Tendencies in Negotiation: A Comparison of Finland, India, Mexico, Turkey, and the United States' (2006) 41(4) *Journal of World Business* 382

Michael C Sloan, 'Aristotle's Nicomachean Ethics as the Original Locus for the Septem Circumstantiae' (2010) 3 *Classical Philology* 236

Middleton, John, 'Statutory Interpretation: Mostly Common Sense?' (2017) 40(2) *Melbourne University Law Review* 626

Miles, Edward W, 'In Practice Developing Strategies for Asking Questions in Negotiation' [2013] (October) *Negotiation Journal* 383

Millemann, Michael and Sheldon Krantz, 'Legal Education in Transition: Trends and Their

Implications' (2014) 24 1

Miller, Arthur G, 'The Explanatory Value of Milgram ' s Obedience Experiments : A Contemporary Appraisal' (2014) 70(3) *Journal of Social Issues* 558

Minson, Julia A et al, 'Eliciting the Truth, the Whole Truth, and Nothing but the Truth: The Effect of Question Phrasing on Deception' (2018) 147(August 2016) *Organizational Behavior and Human Decision Processes* 76

Misyak, Jennifer B et al, 'Unwritten Rules: Virtual Bargaining Underpins Social Interaction, Culture, and Society' (2014) 18(10) *Trends in Cognitive Sciences* 512  
<<http://dx.doi.org/10.1016/j.tics.2014.05.010>>

Moore, Celia and Francesca Gino, 'Ethically Adrift: How Others Pull Our Moral Compass from True North, and How We Can Fix It' (2013) 33 *Research in Organizational Behavior* 53

Moore, Nancy J, 'The Usefulness of Ethical Codes' (1989) 7(1) *Annual Survey of American Law* 7

Moorehead, Richard, 'Precarious Professionalism: Some Empirical and Behavioural Perspectives on Lawyers' (2014) 67 *Current Legal Problems* 447

Moran, Simone and Maurice E Schweitzer, *When Better Is Worse: Envy and the Use of Deception in Negotiations* (2005)

Morris, Anthony, 'The Duty to Promote Efficiency: A Contrarian Viewpoint' [2019] (55) *Hearsay* 1

Murray, John S, 'Book Review: Legal Negotiation: Theory and Applications' (1990) 40 *Journal of Legal Education* 393

Muston, Lynda, 'Civility and Professionalism - Standards of Courtesy' in *Conference of Regulatory Officers* (2006) 1

Nagorcka, Felicity, Michael Stanton and Michael Wilson, 'Stranded between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) 29(2) *Melbourne University Law Review* 448  
<<http://search.ebscohost.com/login.aspx?direct=true&db=eda&AN=19446477&site=eds-live>>

National Alternative Dispute Resolution Advisory Council, *Published Statistics on Alternative Dispute Resolution in Australia* (2003)

- Neale, Margaret a and Max H Bazerman, 'Negotiating Rationally: The Power and Impact of the Negotiator's Frame'. (1992) 6(3) *The Executive* 42
- Nelken, Melissa L, 'The Myth of the Gladiator and Law Students ' Negotiation Styles' (2004) 152(2002) *Conflict* 1
- Nemerofsky, Jeff, 'What Is a " Trifle " Anyway ?' (1993) 37(2) *Gonzaga Law Review* 315
- Neuberger, David, 'Ethics and Advocacy in the Twenty-First Century' in *The Lord Slynn Memorial Lecture 2016* (2016) 1
- Neumann Jr., Richard, Tina Stark and Howard Katz, 'What We Don't Know About Deal Negotiation by Lawyers' (2011) 12 *Transactions: The Tennessee Journal of Business Law* 153
- Neville, Lukas and Glenda M Fisk, 'Getting to Excess: Psychological Entitlement and Negotiation Attitudes' (2006) 5975(919) *CHECK*
- New South Wales Law Reform Commission, *Second Report on the Legal Profession: Complaints, Discipline and Professional Standards*, vol Report 32 (1982)  
<<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-32.pdf>>
- New South Wales Law Reform Commmission, *Scrutiny of the Legal Profession: Complaints against Lawyers*, vol 70 (1993)
- Newton, Brent E By Brent E By Brent E, 'The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure' (2012) 35(Fall) *South Carolina Law Review* 55
- Nicolson, Donald, 'Making Lawyers Moral? Ethical Codes and Moral Character' (2005) 25(4) *Legal Studies* 601
- Nolan-Haley, Jacqueline and Ewa Gmurzynska, *Culture – The Body/Soul Connector in Negotiation Ethics* (No 1336722, 2008)  
<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1336722](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1336722)>
- Norton, Eleanor Holmes, 'Bargaining and the Ethic of Process' (1989) 64(3) *New York University Law Review* 493
- Nourse, Victoria and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory' (2009) 95 *Cornell Law Review* 61
- Nowell, Lorelli S et al, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria'

(2017) 16(1) *International Journal of Qualitative Methods* 1

NSW Law Reform Commission, *Discussion Paper 26: Scrutiny of the Legal Profession* (1992)

O'Connor, Kathleen M, 'Motives and Cognitions in Negotiation: A Theoretical Integration and an Empirical Test' (1997) 8(2) *International Journal of Conflict Management* 114

O'Fallon, Michael J and Kenneth D Butterfield, 'A Review of the Empirical Ethical Decision-Making Literature: 1996–2003' (2005) 59 *Journal of Business Ethics* 213

O'Grady, Catherine Gage, 'Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective' (2015) 15 *Nevada Law Journal* 671

Ogden, Judith Stilz, 'When Do Negotiation Tactics Become Unethical? Honesty in Reframing 1' (2018) 10(1986) *Southern Journal of Business and Ethics* 98

<[Olekalns, Mara, Carol T Kulik and Lin Chew, 'Sweet Little Lies: Social Context and the Use of Deception in Negotiation' \(2014\) 120 \*Journal of Business Ethics\* 13](https://search.proquest.com/docview/2228578716?accountid=14744%0Ahttps://cbua-us.primo.exlibrisgroup.com/discovery/openurl?institution=34CBUA_US&vid=34CBUA_US:VU1&lang=es?url_ver=Z39.88-2004&rft_val_fmt=info:ofi/fmt:kev:mtx:journal&genre=article&sid=ProQ:></a></p></div><div data-bbox=)

De Oliveira Carvalho, Fernando and Felipe Sobral, 'The Importance of Communication Skills in Negotiation: An Empirical Study' in *16th Annual IACM Conference Melbourne, Australia* (2003) 1

Orland, Lewis H, 'Book Reviews: Lawyers' Work by Jeffrey Hartje and Mark E Wilson' (1984) 20(1) *Gonzaga Law Review* 1984

Parke, Jim, 'Lawyers as Negotiators: Time for a Code of Ethics?' [1993] *Australian Dispute Resolution Journal* 216

Parker, Christine, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30(1) *Monash University Law Review* 49

Parker, Christine, 'Competing Images of the Legal Profession: Competing Regulatory Strategies' (1997) 25 *International Journal of the Sociology of Law* 385

Parker, Christine, 'Converting the Lawyers: The Dynamics of Competition and Accountability Reform' (1997) 33(1) *Australia and New Zealand Journal of Sociology* 39

- Parker, Christine, 'Introduction to Special Issue on Nudge' (2016) 38(3) *Law and Policy* 181
- Parker, Christine, 'Justifying the New South Wales Legal Profession 1976 to 1997' (1997) 2(2) *Newcastle Law Review* 1
- Parker, Christine, 'Lawyer Deregulation via Business Deregulation: Compliance Professionalism and Legal Professionalism' (1999) 6(2) *International Journal of the Legal Profession* 175
- Parker, Christine, *Philosophical Legal Ethics: Ethics, Morals and Jurisprudence*, vol 13 (2010)
- Parker, Christine, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25(3) *UNSW Law Journal Volume* 676
- Parker, Christine et al, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 3(1) *UNSW Law Journal* 158
- Parker, Christine and Lyn Aitken, 'The Queensland "Workplace Culture Check": Learning from Reflection on Ethics Inside Law Firms' (2011) 24 *Georgetown Journal of Legal Ethics* 399
- Parker, Christine and Adrian Evans, *Inside Lawyers' Ethics* (2nd ed, 2013)
- Parker, Christine, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37(3) *Journal of Law and Society* 466
- Parker, Christine, Suzanne Le Mire and Anita Mackay, 'Lawyers, Confidentiality and Whistleblowing: Lessons from the McCabe Tobacco Litigation' (2017) 40(3) *Melbourne University Law Review* 1
- Parks, Judi Mclean and Li Ma, 'Power Corrupts... or Does It? The Influence of Power and Gender on the Acceptability of Negotiation Tactics' [2004] *SSRN Electronic Journal* 1
- Parlami, Jennifer D and Ingmar Geiger, 'Mind the Medium : A Qualitative Analysis of Email Negotiation' (2015) 24 *Group Decision and Negotiation* 359
- Parley, Louis, 'A Brief History of Legal Ethics' (1999) 33(3) *Family Law Quarterly* 637
- Peleckis, Kęstutis, Valentina Peleckienė and Kęstutis Peleckis, 'Nonverbal Communication in Business Negotiations and Business Meetings' (2015) 62 *International Letters of Social and Humanistic Sciences* 62

Pengilley, Warren, "But You Can't Do That Any More!"-The Effect of Section 52 on Common Negotiating Techniques' (1993) 1 *Trade Practices Law Journal* 113

Penglis, 'Ethics in Litigation - How Far Can You Go for Your Client?' (The Law Society of WA CPD 2 September 2009)

Pepe, Stephen D, *Interim Report and Preliminary Findings for Submission to the American Bar Association Commission on Evaluation of Professional Standards and the American Bar Association House of Delegates at Their February 1983 Meeting* (1983)

Pepe, Stephen D, *Standards of Legal Negotiations* (1983)

Pepe, Stephen D, *Summary of Selected Findings of the Study of the Standards of Legal Negotiations* (1983)

Peppet, Scott R, 'Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining' (2002) 83(7) *Harvard Negotiation Law Review* 83

Peppet, Scott R, 'Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism' (2005) 90(2) *Iowa Law Review* 475

Perlman, Andrew M, 'A Behavioral Theory of Legal Ethics' (2015) 90 *Indiana Law Journal* 1639

Perlman, Andrew M, 'Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology' (2008) 2 *Hofstra Law Review* 451

Perneger, Thomas V, 'What's Wrong with Bonferroni Adjustment' (1998) 316(7139) *British Medical Journal* 1236

Perreault, Stephen and Thomas Kida, 'The Relative Effectiveness of Persuasion Tactics in Auditor-Client Negotiations' (2011) 36(8) *Accounting, Organizations and Society* 534  
<<http://dx.doi.org/10.1016/j.aos.2011.09.001>>

Perry, Gregory M et al, 'An Exploration of Factors Influencing Ethical and Unethical Behavior in Negotiations' (2005) 37(1) *Journal of Agricultural and Applied Economics* 1

Perry, Gregory M et al, 'Ethical Negotiation Tactics Among Students at Land Grant Universities' [2002] *Agricultural Economics* 1

Perschbacher, Rex R, 'Regulating Lawyers' Negotiations' (1985) 27 *Arizona Law Review* 75

Pessu, Toritseju Rita, 'Understanding Research Paradigms: An Ontological Perspective to Business Research' (2019) 9(4) *IOSR Journal of Research & Method in Education* 38 <[www.iosrjournals.org](http://www.iosrjournals.org)>.

Peters, Don, 'When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal' (2007) 2007 *Journal of Dispute Resolution* 119

Peters, Geoffrey M, 'The Use of Lies in Negotiation' (1987) 48 *Ohio State Law Journal* 1

Peters Jr, Philip G, 'Hindsight Bias and Tort Liability: Avoiding Premature Conclusions' (1999) 31 *Arizona State Law Journal* 1277

Pierce, Jason R and Leigh Thompson, 'Explaining Differences in Men and Women's Use of Unethical Tactics in Negotiations' (2018) 11(4) *Negotiation and Conflict Management Research* 278

Pietroni, Davide et al, 'Emotions as Strategic Information: Effects of Other's Emotional Expressions on Fixed-Pie Perception, Demands, and Integrative Behavior in Negotiation' (2008) 44(6) *Journal of Experimental Social Psychology* 1444

Plater, David, 'The Development of the Prosecutor's Role in England and Australia with Respect to Its Duty of Disclosure : Partisan Advocate or Minister of Justice ?' (2008) 25(2) *The University of Tasmania Law Review* 112

Poitras, Jean, Arnaud Stimec and Kevin Hill, 'Student Engagement in Negotiation Role Plays' (2013) October *Negotiation Journal* 439

Prentice, Ra, 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves?' (2015) 29(1) *Notre Dame Journal of Law, Ethics and Public Policy* 35 <[http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2424249](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2424249)>

Queensland Law Society, 'Comparing the Australian Solicitors Conduct Rules 2012 to the Legal Profession (Solicitors) Rule 2007' (2012)

Rankin, Mark J, 'Legal Ethics in the Negotiation Environment: A Synopsis' (2016) 18 *Flinders Law Journal* 77

Rapoport, Nancy B, "'Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms' (2014) 4 *St. Mary's Journal on Legal Malpractice & Ethics* 42

Rares, Steven, 'Striking the Balance between Freedom of Contract and Consumer Rights' in *14th International Association of Consumer Law Conference* (2013)

- Rees, McKenzie R, Ann E Tenbrunsel and Max H Bazerman, 'Bounded Ethicality and Ethical Fading in Negotiations: Understanding Unintended Unethical Behavior' (2019) 33(1) *Academy of Management Perspectives* 26
- Reilly, Peter, 'Resistance Is Not Futile: Harnessing the Power of Counter-Offensive Tactics in Legal Persuasion' (2013) 64(4) *Hastings Law Journal* 1171
- Reilly, Peter, 'Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help' (2009) 24(3) *Ohio State Journal on Dispute Resolution* 481
- Reisel, William et al, 'The Influence of Job Insecurity, Trust, and Ethical Ideology on Negotiation Tactics' in *Proceedings of the Institute of Behavioral and Applied Management's 2011 Annual Conference Cheating in Online Environments* (2011) 322
- Relis, Tamara, 'Civil Litigation from Litigants' Perspectives: What We Know and What We Don't Know about the Litigation Experience of Individual Litigants' (2002) 25 *Science* 151
- Report of the ABA Business Law Education Committee Task Force, *Defining Key Competencies for Business Lawyers*, vol 72 (2017)
- Reuben, Richard C, 'Rethinking the Law of Negotiation : Confidentiality Undernederal Rule of Evidence and Related State Laws' (2013) 59(2) 525
- Reynolds, Jennifer W, 'Breaking Batnas: Negotiation Lessons From Walter White' (2015) 45 *New Mexico Law Review* 611
- Rhode, Alexander; and Jacobus Schönbohm, van Vliet, Jacobus *The Tactical Utilization of Cognitive Biases in Negotiations* (No 80, 2014)
- Ribbink, Dina and Curtis M Grimm, 'The Impact of Cultural Differences on Buyer-Supplier Negotiations: An Experimental Study' (2014) 32(3) *Journal of Operations Management* 114 <<http://dx.doi.org/10.1016/j.jom.2014.01.004>>
- Richards, Stephen, 'Should The Rules Be Simpler?' in *Gray's Inn Reading* (2015)
- Richmond, Douglas R, 'Lawyers' Professional Responsibilities and Liabilities in Negotiations' (2009) 22 *The Georgetown Journal of Legal Ethics* 249
- Rickett, Charles, 'Legal Ethics in General Practice' in *Legal Ethics: Papers Presented at a Seminar Held by the Legal Research Foundation at the Centra Hotel, Auckland* (1994)
- Riskin, Leonard, 'Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior' (2009) 50 *South Texas Law Review* 493

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1464935](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1464935)>

Riskin, Leonard L, 'Beginning With Yes : A Review Essay on Michael Wheeler ' s The Art Of Negotiation : How To Improvise Agreement In A Chaotic World' (2015) 16 *Cardozo Journal of Conflict Resolution* 605

Rivers, Cheryl, 'Negotiating with the Chinese: EANTs and All' (2009) 51(5) *Thunderbird International Business Review* 473

Rivers, Cheryl and Anne Louise Lytle, 'Lying, Cheating Foreigners!! Negotiation Ethics across Cultures' (2007) 12(1) *International Negotiation* 1

Rivers, Cheryl, Anne Louise Lytle and Michael JV Hudson, 'Ethical Marginal Tactics and Developing the Sins Scale: Incorporating an Australian Perspective' [2003] (July) *SSRN Electronic Journal* 206 <<http://www.ssrn.com/abstract=400700>>

Rivers, Cheryl and George Street, 'What Are They Thinking? Considerations Underlying Negotiators' Ethical Decisions' in 2004 *Annual Meeting Academy of International Business Conference , Stockholm Sweden "Bridging with the Other: the Importance of Dialogue in International Business"* (2004) 1

Rivers, Cheryl and Roger J Volkema, 'East-West Differences in "Tricky" Tactics: A Comparison of the Tactical Preferences of Chinese and Australian Negotiators' (2013) 115(1) *Journal of Business Ethics* 17

Robbennolt, Jennifer K, 'Behavioral Ethics Meets Legal Ethics' (2015) 11 *Annual Review of Law and Social Science* 75 <<http://www.annualreviews.org/doi/abs/10.1146/annurev-lawsocsci-120814-121631>>

Robertson, DW, 'A Note on the Classical Origin of ' Circumstances ' in the Medieval Confessional' (1946) 43 (1) *Studies in Philology* 9.

Robinson, Robert J, Roy J Lewicki and Eileen M Donahue, 'Extending and Testing a Five Factor Model of Ethical and Unethical Bargaining Tactics: Introducing the SINS Scale' (2000) 21(6) *Journal of Organizational Behavior* 649  
<<http://course.sdu.edu.cn/Download/37560d4e-dd98-477f-acd0-99db309f92ef.pdf>>

Roemer, Christina and Joyce Neu, 'A Comparison of American and Russian Patterns of Behavior in Buyer-Seller Negotiations Using Observational Measures' (1999) 4(1) *International Negotiation* 37  
<<http://booksandjournals.brillonline.com/content/10.1163/15718069920848363>>

- Rogers, Catherine A, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' (2002) 23 *Michigan Journal of International Law* 341
- Rogers, Todd et al, *Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others* (No RWP14-045, 2014)
- Rosette, Ashleigh Shelby, Shirli Kopelman and JeAnna Lanza Abbott, 'Good Grief! Anxiety Sours the Economic Benefits of First Offers' [2013] *Group Decision and Negotiation* 1
- Ross, Ysaiah, 'Ethics in Law Lawyers' Responsibility and Accountability in Australia 5th Edition'
- Ross, Ysaiah, 'Lawyers' Tactics - New Ethics' (2000) (June) *Law Institute Journal* 37
- Roy Morgan, *Roy Morgan Image of Professions Survey 2017: Health Professionals Continue Domination* (2017) <<http://www.roymorgan.com/findings/7244-roy-morgan-image-of-professions-may-2017-201706051543>>
- Rubin, Alvin B, 'A Causerie of Lawyers' Ethics in Negotiation' (1975) 35(3) *Louisiana Law Review* 577
- Rubin, Michael H, 'The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties' (2006) 26 *The Construction Lawyer* 12
- Rubin, Michael H, 'The Ethics of Negotiations: Are There Any?' (1995) 56 *Louisiana Law Review* 447
- Ruedy, Nicole E et al, 'The Cheater's High: The Unexpected Affective Benefits of Unethical Behavior' (2013) 105(4) *Journal of Personality and Social Psychology* 531
- Ruedy, Nicole E and Maurice E Schweitzer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, vol 95 (No # 2010-07-02, 2010)
- Ruth Wilson, Elizabeth and Leigh L. Thompson, 'Creativity and Negotiation Research: The Integrative Potential' (2014) 25(4) *International Journal of Conflict Management* 359 <<http://www.emeraldinsight.com/doi/abs/10.1108/IJCMA-05-2014-0033>>
- Saito, Hiroharu, 'Do Professional Ethics Make Negotiators Unethical? An Empirical Study with Scenarios of Divorce Settlement' 325
- Sampford, Charles and Christine Parker, 'Legal Regulation, Ethical Standard-Setting, and Institutional Design' in *Legal Ethics and Legal Practice: Contemporary Issues*. (1995) 11
- Scattini, Damian, 'Gerard Mullins' (2003) April(56) *Plaintiff: Journal of Australian Plaintiff*

*Lawyers Association* 54

Schauer, Frederick and Richard Zeckhauser, *Paltering* (No RWPO7-006, 2007)

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=832634](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=832634)>

Scheffer, Thomas, 'File Work, Legal Care, and Professional Habitus—An Ethnographic Reflection on Different Styles of Advocacy' (2007) 14(1) *International Journal of the Legal Profession* 57

Schei, Vidar, Jørn K Rognes and Solfrid Mykland, 'Thinking Deeply May Sometimes Help: Cognitive Motivation and Role Effects in Negotiation' (2006) 55(1) *Applied Psychology: an International Review* 73

Schelling, Thomas C, 'An Essay on Bargaining' (1956) 46(3) *American Economic Association* 281

Schmedemann, Deborah, 'Navigating the Murky Waters of Untruth in Negotiation: Lessons for Ethical Lawyers' (2015) 12(October) *Cardozo Journal of Conflict Resolution* 83

Schneider, Andrea Kupfer, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143

Schneider, Andrea Kupfer, 'Teaching a New Negotiation Skills Paradigm' (2012) 39 *Washington University Journal of Law & Policy* 13 <<http://digitalcommons.law.wustl.edu>>

Schneider, Andrea Kupfer and Jennifer Gerarda Brown, 'Negotiation Barometry: A Dynamic Measure of Conflict Management Style' (2013) 28 *Ohio State Journal on Dispute Resolution* 557 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2243624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243624)>

Schneider, Andrea Kupfer, Ellen Deason and Dawn Chen, 'Ethics in Legal Negotiation: A Cross-Cultural Perspective' in *Educating Negotiators for a Connected World* (2011) 247

Schoenfeld, Mark, 'Strategies and Techniques for Successful Negotiations' (1983) 69 *American Bar Association Journal* 1226

Schroth, Holly, 'Some like It Hot: Teaching Strategies for Managing Tactical versus Genuine Anger in Negotiations' (2008) 1(4) *Negotiation and Conflict Management Research* 315 <<http://doi.wiley.com/10.1111/j.1750-4716.2008.00019.x>>

Schwartz, Mark S, 'Ethical Decision-Making Theory: An Integrated Approach' (2016) 139(4) *Journal of Business Ethics* 755

Seltzer, Joe, 'Riverton Press: An Exercise in Principled Negotiation' (2013) 10 *Organization*

*Management Journal* 173

<<http://www.tandfonline.com/doi/abs/10.1080/15416518.2013.831703>>

Shaffer, Gregory, 'New Legal Realism's Rejoinder' (2015) 28(3) *Leiden Journal of International Law* 479

Sharma, Sudeep, William Bottom and Hillary Anger Elfenbein, *On the Role of Personality, Cognitive Ability, and Emotional Intelligence in Predicting Negotiation Outcomes: A Meta-Analysis Organizational Psychology Review*, vol 3 (2013)

Sharpe, Michelle and Christine Parker, 'A Bang or a Whimper? The Impact of ACCC Unconscionable Conduct Enforcement' (2007) 15 *Trade Practices Law Journal* 139

Shaw, David and Bernice Elger, 'Evidence-Based Persuasion: An Ethical Imperative' (2013) 309(16) *Journal of the American Medical Association*

Sheldon, Oliver J and Ayelet Fishbach, 'Anticipating and Resisting the Temptation to Behave Unethically' [2015] *Personality and Social Psychology Bulletin*

<<http://psp.sagepub.com/cgi/doi/10.1177/0146167215586196>>

Shell, G Richard, *Bargaining for Advantage: Negotiation Strategies for Reasonable People*, vol 37 (1999)

Shell, G Richard, 'Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action' (1991) 44(2) *Vanderbilt Law Review* 221

<[http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr44&section=19](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr44&section=19)>

Sher, Julian, "'My Final Offer!': The Ethics of Negotiation' [2015] (August) *Brief* 4

Shinnick, Edward, Fred Bruinsma and Christine Parker, *Aspects of Regulatory Reform in the Legal Profession: Australia, Ireland and the Netherlands - When Culture of (Stilted) Cooperation Prevails over Competition*, vol 10 (2003)

Shirvington, Virginia, *Professional Conduct and Advocacy – Avoiding a Breach of the Professional Conduct and Practice Rules* (2006)

<[https://www.lawsociety.com.au/sites/default/files/2018-03/avoiding\\_breach\\_of\\_pro\\_conduct.pdf](https://www.lawsociety.com.au/sites/default/files/2018-03/avoiding_breach_of_pro_conduct.pdf)>

Siedel, George, 'Leadership Competencies for Disruptive Innovation' [2017] (May) *Business Law Today* 1 <<http://www.amanet.org/training/articles/leadership-competencies-for-disruptive-innovation.aspx>>

Sinaceur, Marwan and Larissa Z Tiedens, 'Get Mad and Get More than Even: When and Why Anger Expression Is Effective in Negotiations' (2006) 42(3) *Journal of Experimental Social Psychology* 314

Skiba, Łukasz, 'Ethical Aspects of Negotiations' [2016] *The role of management functions in successful enterprise performance* 115 <<http://real.mtak.hu/37866/>>

Sklar, Tara et al, 'Characteristics of Lawyers Who Are Subject to Complaints and Misconduct Findings' (2019) 16(2) *Journal of Empirical Legal Studies* 318

Sklar, Tara et al, 'Vulnerability to Legal Misconduct: A Profile of Problem Lawyers in Victoria, Australia' (2020) 0(0) *International Journal of the Legal Profession* 1 <<https://doi.org/10.1080/09695958.2020.1751166>>

Slobogin, Christopher, 'Deceit, Pretext, and Trickery: Investigative Lies by the Police' (1997) 76(4) *Oregon Law Review* 775

Smythe, Vanya, 'Chapter 4 Codes of Ethics' in *Applied Ethics* (2012) 47

Sobral, Filipe and Gazi Islam, 'Ethically Questionable Negotiating: The Interactive Effects of Trust, Competitiveness, and Situation Favorability on Ethical Decision Making' (2013) 117(2) *Journal of Business Ethics* 281

Sourdin, Tania, 'Good Faith, Bad Faith? Making an Effort in Dispute Resolution' (2012) 2(1) *DICTUM - Victoria Law School Journal* 4

Sourdin, Tania and Naomi Burstyner, 'Justice Delayed Is Justice Denied' (2014) 4 *Victoria University Law and Justice Journal* 46 <<http://www.localcourt.justice.nsw.gov.au/localcourts/tmestandards>>

Spegel, Nadja M, Bernadette Rogers and Ross P Buckley, *Negotiation – Theory and Techniques* (1998)

Spencer, David, 'The Phenomenon of the Vanishing Civil Trial' (2005) 8(2) *ADR Bulletin* 1

Spencer, David and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (3rd ed, 2014)

Sperling, Carrie, 'Priming Legal Negotiations Through Written Demands' (2010) 60(1) *Catholic University Law Review* 107 <<http://papers.ssrn.com/abstract=1661145>>

Spigelman, James, 'Are Lawyers Lemons? Competition Principles and Professional Regulation' (2003) 77(1970) *Australian Law Journal* 44

Standing Committee on Ethics and Professional Responsibility (ABA), *Formal Opinion on Threats*, vol 92 (1992)

Standing, Steven, 'Ethical and Legal Obligations in Mediations and Other Negotiations' [2015] (August) *Brief*

Steele, Walter W, 'Deceptive Negotiating and High-Toned Morality' (1986) 39 *Vanderbilt Law Review* 1387

Stefanidis, Abraham and Moshe Banai, 'Ethno-Cultural Considerations in Negotiation: Pretense, Deception and Lies in the Greek Workplace'. (2014) 23(2) *Business Ethics: A European Review* 197

<10.1111/beer.12047%5Cn<http://ezproxy.net.ucf.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=ssf&AN=94743075&site=ehost-live>>

Stefanidis, Abraham, Moshe Banai and Ulf Henning Richter, 'Employee Attitudes toward Questionable Negotiation Tactics: Empirical Evidence from Peru' [2012] (January 2015) *The International Journal of Human Resource Management* 1

Stein, GB, 'Practice Management'. (1965) 36(9) *Journal of the American Optometric Association* 829

Steiner, Peter M, Christiane Atzmüller and Dan Su, 'Designing Valid and Reliable Vignette Experiments for Survey Research: A Case Study on the Fair Gender Income Gap' (2016) 7(2) *Journal of Methods and Measurement in the Social Sciences* 52

Sternlight, Jean R and Jennifer K Robbennolt, 'Behavioral Legal Ethics' (2013) 45 *Arizona State Law Journal* 1107

Sternlight, Jean R and Jennifer K Robbennolt, 'Psychology and Effective Lawyering : Insights for Legal Educators' (2015) 64(3) *Journal of Legal Education* 365

Stewart, Andrew and Leanne McClurg, 'Playing Your Cards Right: Obligations of Disclosure in Commercial Negotiations' in *AMPLA YEARBOOK 2007* (2007) 36

Suchman, Mark C and Elizabeth Mertz, 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) 6(1) *Annual Review of Law and Social Science* 555

Tang, Stephen and Tony Foley, 'The Practice of Law and the Intolerance of Certainty' (2010) 37(3) *UNSW Law Journal* 1198

Temkin, Barry R, 'Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?' (2004) 18(1) *The Georgetown Journal of Legal Ethics* 179

<<http://search.proquest.com/docview/227374761?accountid=14549%5Chttp://hl5yy6xn2p.search.serialssolutions.com/?genre=article&sid=ProQ:&atitle=Misrepresentation+by+Omission+in+Settlement+Negotiations:+Should+There+Be+a+Silent+Safe+Harbor?&title=The+Georget>>

The Law Society of Western Australia, *Ethical & Practice Guidelines* (2019)

Thomas-Hawthorne, Luanda, 'The Core Ethic of Contract Law in the Anglo-American Common Law' (2010) 11 *Common Law Review* 54

Timmermann, Felix and Emanuel Viebahn, 'To Lie or to Mislead ?'

Tompos, Anikó and Livia Ablonczy-mihályka, 'Tactics, Contextual-Situational Factors and Business Negotiators' Choices' [2016] (9) *Lingua et vita* 47

Trushell, Ian, 'Dispute Resolution' in *The Oxford Handbook of Empirical Legal Research* (2010) 597

VanWynsberghe, Rob and Samia Khan, 'Redefining Case Study' (2007) 6(2) *International Journal of Qualitative Methods* 80

Vetschera, Rudolf, 'Negotiation Processes: An Integrated Perspective' (2013) 1(1–2) *EURO Journal on Decision Processes* 135 <<http://link.springer.com/10.1007/s40070-013-0006-5>>

Victorian Law Reform Commission, *Report 14:n Civil Justice Review* (2008)

Volkema, Roger J, 'Demographic, Cultural, and Economic Predictors of Perceived Ethicality of Negotiation Behavior: A Nine-Country Analysis' (2004) 57(1) *Journal of Business Research* 69

Volkema, Roger J, *The Negotiation Toolkit* (1999)

Volkema, Roger J, Denise Fleck and Agnes Hofmeister, 'Getting Off on the Right Foot: The Effects of Initial Email' (2011) 54(3) *IEEE Transactions on professional communication* 299

Volkema, Roger J, Denise Fleck and Agnes Hofmeister, 'Predicting Competitive-Unethical Negotiating Behavior and Its Consequences' (2010) 26(3) *Negotiation Journal* 263

Volkema, Roger J and Maria Tereza Leme Fleury, 'Alternative Negotiating Conditions and the Choice of Negotiation Tactics: A Cross-Cultural Comparison' (2002) 36(4) *Journal of Business Ethics* 381

Volkema, Roger J and Ronald H Gorman, 'The Influence of Cognitive-Based Group

- Composition on Decision-Making Process and Outcome' (1998) 35(1) *Journal of Management Studies* 105
- Volkema, Roger J and Cheryl Rivers, 'Beyond Frogs and Scorpions: A Risk-Based Framework for Understanding Negotiating Counterparts' Ethical Motivations' (2012) 28(4) *Negotiation Journal* 379
- Van Waarden, Frans and Youri Hildebrand, 'From Corporatism to Lawyocracy? On Liberalization and Juridification' (2009) 3(3) *Regulation and Governance* 259
- Wade, John, 'Ethically Ambiguous Negotiation Tactics (EANTS): What Are the Rules behind the Rules?' in *12 and 14 May Law Society of Saskatchewan CPD Conferences* (2014)
- Wade, John, 'Persuasion in Negotiation and Mediation' (2007) 8(2) *ADR Bulletin* 253  
<<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1414&context=adr>>
- Wanasika, Isaac and Terry Adler, 'Deception as Strategy: Context and Dynamics' (2011) 23(3) *Journal of Managerial Issues* 364  
<<http://ezproxy.library.capella.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=69651146&site=ehost-live&scope=site>>
- Wang, Ning, David V. Pynadath and Stacy C Marsella, 'Subjective Perceptions in Wartime Negotiation' in *Proceedings of the Conference on Affective Computing and Intelligent Interaction* (2013) 118
- Warren, Marilyn, 'The Duty Owed to the Court: The Overarching Purpose of Dispute Resolution in Australia' in *The Bar Association of Queensland Annual Conference, Gold Coast* (2011) 1
- Warren, Marilyn, 'The Duty Owed to the Court - Sometimes Forgotten' in *Judicial Conference of Australia Colloquium* (2009) 1
- Warren, Marilyn, 'What Is Justice?' in *Remarks of the Hon. Marilyn Warren AC Chief Justice of Victoria* (2014) 1
- Wasserstein, Ron, 'American Statistical Association Releases Statement on Statistical Significance and P -Values' [2016] *ASA News* 1
- Wasserstein, Ronald L and Nicole A Lazar, 'The ASA's Statement on p-Values: Context, Process, and Purpose' (2016) 70(2) *American Statistician* 129  
<<http://dx.doi.org/10.1080/00031305.2016.1154108>>
- Watt, Neil, 'Lawyers in the Witness Box', *Justinian* (online at 2012)

<<https://justinian.com.au/archive/lawyers-in-the-witness-box.html>>

Watt, Neil, 'The Mad Dash to Mediocrity' (2011) *Justinian* online

<<https://justinian.com.au/archive/the-mad-dash-to-mediocrity.html>>

Webb, Duncan and Christine Parker, 'Editorial: The Politics and Everyday Practice of Legal Ethics' [2009] *Legal Ethics*

Weinstein, Ian, 'Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making' (2003) 9(Spring 2003) *Clinical Law Review* 783

Welsh, Nancy A, 'Making Reputation Salient : Using the Reputation Index with Law Students' in Noam Ebner, James Coben and Christopher Honeyman (eds), *Assessing Our Students, Assessing Ourselves: Volume 3 in the Rethinking Negotiation Teaching Series* (2012) 173

Welsh, Nancy A, 'Perceptions of Fairness' in Andrea Kupfer Schneider and Christopher Honeyman (eds), *The Negotiator's Fieldbook* (American Bar Association, Section of Dispute Resolution, 2006) 165

Wendel, W Bradley, 'The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations' (2017) 30(2) *Canadian Journal of Law and Jurisprudence* 443

Westbrook, Kevin W, C Steven Arendall and Walton M Padelford, 'Gender, Competitiveness, and Unethical Negotiation Strategies' (2011) 26(4) *Gender in Management: An International Journal* 289

Wetlaufer, Gerald B, 'The Ethics of Lying in Negotiations' (1990) 75 *Iowa Law Review* 1219

White, James J, 'Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation' (1980) 5(4) *American Bar Foundation Research Journal* 926

White, James J, 'The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation' (1967) 19(3) *Journal of Legal Education* 337

Wilkins, Roger, 'Agenda for Reform: National Regulation of the Legal Profession' [2009] (August) *Law Society Journal* 50

Wilkinson, Margaret Ann, Christa Walker and Peter Mercer, 'Do Codes of Ethics Actually Shape Legal Practice?' (2000) 45 *McGill Law Journal* 645

Williams, Gerald R, *Legal Negotiation and Settlement* (1983)

Williams, Gerald R, 'Negotiation as a Healing Process' (1996) 1996(1) *Journal of Dispute*

Resolution 1 <[http://heinonlinebackup.com/hol/cgi-bin/get\\_pdf.cgi?handle=hein.journals/jdisres1996&section=6](http://heinonlinebackup.com/hol/cgi-bin/get_pdf.cgi?handle=hein.journals/jdisres1996&section=6)>

Wissler, Roselle, 'Representation in Mediation: What We Know From Empirical Research' (2009) 37(1) *Fordham Urban LJ* 419

Wohlin, Claes 'Guidelines for snowballing in systematic literature studies and a replication in software engineering' (May 2014) DOI:10.1145/2601248.2601268 available at SSRN

Wolski, Bobette, 'An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason' (2013) 16(1) *Legal Ethics* 182

Wolski, Bobette, 'On Mediation , Legal Representatives and Advocates' (2015) 38(1) *UNSW Law Journal* 5

Wolski, Bobette, 'The Truth About Honesty and Candour in Mediation: What the Tribunal Left Unsaid in Mullins' Case' (2012) 36 *Melbourne University Law Review* 706  
<<https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=36+Melbourne+U.+L.R.+706&srctype=smi&srcid=3B15&key=881649294964b09bdd1274c8b77bcc9f>>

Yager, Mark et al, *Nonverbal Communication in the Contemporary Operating Environment* (2009)

Yap, Andy J et al, 'The Ergonomics of Dishonesty: The Effect of Incidental Posture on Stealing, Cheating, and Traffic Violations'. (2013) 24(11) *Psychological science* 2281  
<<http://www.ncbi.nlm.nih.gov/pubmed/24068113>>

Yu-Te, Tu, 'The Relationships between Trust and Unethical Negotiation Department of Business Administration' (2013) 3(3) *International Journal of Business, Humanities and Technology* 45

Zacks, Eric, 'Contract Review: Cognitive Bias, Moral Hazard, and Situational Pressure' (2015) 9(2) *The Ohio State Entrepreneurial Business Law Journal*

Zander, Michael, 'Zander on Woolf' (2009) 159(7360) *New Law Journal* 1

Van Zant, Alex B and Laura J Kray, '*I Can't Lie to Your Face*': *Minimal Face-to-Face Interaction Promotes Honesty* (2013)

Zelevnikow, John et al, 'Bargaining in the Shadow of the Law - Using Utility Functions to

Support Legal Negotiation' in *11th International Conference on Artificial Intelligence and Law* (Association for Computing Machinery, 2007) 237

Zhang, Ting, Francesca Gino and Max H Bazerman, 'Morality Rebooted: Exploring Simple Fixes to Our Moral Bugs' [2014] (November) *Research in Organizational Behavior* <<http://papers.ssrn.com/abstract=2427259>>

## B Cases

*Better Living, Inc et al*, 54 F.T.C. 648 (1957), aff'd, 259 F.2d 271 (3rd Cir. 1958)

*Caboolture Park Shopping Centre Pty Ltd (In Liquidation) and White Industries (Qld) Pty Ltd v Flower and Hart (A Firm)* [1993] FCA 471; (1993) 117 ALR 253 (22 September 1993) ('*Flower & Hart*')

*Chamberlain v the Law Society of the Australian Capital Territory* (1993) 43 FCR 148 'Chamberlain'

*Clyne v New South Wales Bar Association* [1960] HCA 40; 104 CLR 186 ('Clyne')

*Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55

*Council of the Law Society of New South Wales v Searle* [2019] NSWCATOD 70 'Searle'

*Davies v Nyland* (1975) 10 SASR 76

*D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12

*Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63

*Farnell Electronic Components v Collector of Customs* (1135 FCA, 1996)

*Fleming* [2006] WASAT 352

*Giannarelli v Wraith* (1988) 165 CLR 543

*Hoghton v Hoghton* (1852) 15 Beav. 278

*Keating v La Trobe University* (2011) VCAT 1564 (16 August, 2012) 2

*Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56

*Legal Practitioners Complaints Committee and Segler* [2009] WASAT 91

*Legal Profession Complaints Committee and Amsden* [2014] WASAT 57 ‘Amsden’

*Legal Services Commissioner v Garrett* [2009] LPT 12 ‘Garrett’

*Legal Services Commissioner v Mullins* [2006] LPT 012 ‘Mullins’

*Legal Services Commissioner v Orchard* [2012] QCAT 583

*Legal Services Commissioner v Sampson (Legal Practice)* [2013] VCAT 1177 ‘Sampson’

*Legal Services Commissioner v Sampson (Correction) (Legal Practice)* [2013] VCAT 1439

*Legal Services Commissioner v Sing* [2007] LPT 004 ‘Sing’

*Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352; 48 SR (WA) 29 ‘Fleming’

*Maitland-Hudson v Solicitors Regulation Authority* (2019) 67 (EWHC, 2019)

*Martin v Norton Rose Fulbright Australia (No 11)* [2020] FCA 1641

*Martin v Norton Rose Fulbright Australia (25 November 2021)* [2021] FCAFC 216

*McMahon v the Medical Protective Co* (2016) 367(2015) (13-991. Civil Action No. and United States District Court W.D. Pennsylvania., 2016) 13

*Meek v Fleming* [1961] 2 QB 366; [1961] 3 All ER 148

*Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* [2010] HCA 31

*Minkin v Landsberg* [2016] 1 WLR 1489

*Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44

*Pearce v Paskov* (WAR, 1968) 66

*Poseidon Ltd v Adelaide Petroleum NL* [1991] FCA 848

*R v Succarieh* [2017] QCA 282 [2017] QCA 282

*R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256

*Rush & Tompkins Ltd -v- Greater London Council* [1989] AC 1280Sing [2008] Burns

*Susan McMAHON, Plaintiff, v The MEDICAL PROTECTIVE CO, Defendant* (2016) 367(2015) (13-991. Civil Action No. and United States District Court W.D. Pennsylvania.,

2016) 13

*Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289

*Tuckiar v the King* [1934] HCA 49; (1934) 52 CLR 335 at 346

*Unilever plc v Procter & Gamble Co* (1999) 2 All ER 691

*Victorian Legal Services Commissioner v Davey (Legal Practice)* [2018] VCAT 1629

*Victorian Legal Services Commissioner v Low (Legal Practice)* [2016] VCAT 1584 'Low'

*Western Australia v Taylor* (1996) 134 FLR 211

*White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* - [1998] FCA 806 'Flower & Hart'

*Williams v Commonwealth Bank of Australia* [1999] NSWCA 345

*Williams v Spautz* [1992] HCA 34; 174 CLR 509

*Williams v The Queen* [1978] (49 HCA, 1978)

*Yara Australia Pty Ltd v Oswal* [2013] 41 VR 302

*Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279;  
[1957] HCA 46 at [298]

## C      *Legislation/Rules*

*ABA Model Rules of Professional Conduct* (2009)

*Aon Risk Services Ltd v Australian National University* [2009] HCA 27

*Australian Solicitors' Conduct Rules 2011* (Qld)

*Civil Dispute Resolution Act 2011* (Cth)

*Civil Procedure Act 2010* (Vic)

*Competition and Consumer Act 2010* (Cth)

*Criminal Code 1913* (WA)

*Legal Profession Conduct Rules 2010* (WA)

*Legal Profession Act 2004* (Qld)

*Legal Profession (Barristers) Rule 2007* (Qld)

*Legal Profession (Solicitors) Rule 2007* (Qld)

*Native Title Act 1993* (Cth)

*Personal Injuries Proceedings Act 2002* (Qld)

*Professional Conduct and Practice Rules 2005* (Vic)

*Rules of Professional Conduct 2012* (WA)

*Solicitors Rules Revised Professional Conduct and Practice Rules 1995* (NSW)

*Trade Practices Act 1974* (Cth)

*Uniform Civil Procedure Rules 1999* (Qld)

## D *Other*

Besch, Thomas M, 'Identification of Negotiation Tactics and Strategies of Army Negotiators' (Master's Thesis, Naval Postgraduate School, 1992)

Dimant, Eugen, 'Economics of Corruption and Crime: An Interdisciplinary Approach to Behavioral Ethics' (Doctor Thesis, University of Paderborn, 2015)

Hashim, Hishamuddin Mohd, 'International Negotiation Styles: A Perspective of Malaysian Diplomats' (PhD Thesis, Auckland University of Technology, 2010)

Kiel, Jakob, 'Emotional Intelligence in Negotiation: Strategic Use of Emotion' (BA Thesis, Institut for Ledelse, 2010)

Lakhani, Avnita, 'Deception as a Legal Negotiation Strategy: A Cross-Jurisdictional, Multidisciplinary Analysis Towards an Integrated Policy Reforms Agenda' (PhD Thesis, Bond University, 2010)

Law Council of Australia, *Submission DR 25 to the Australian Law Reform Commission inquiry 'Managing Discovery: Discovery of Documents in Federal Courts'*, 31 January 2011

Law Council of Australia, *Submission 375 to the Australian Law Reform Commission inquiry 'Review of the Federal Civil Justice System'*, 1999

Law Society of New South Wales, *Submission to the Legal Profession Advisory Council, following its review of the Solicitors Professional Conduct and Practice Rules* (Adopted on 15 August 1997)

Law Society of New South Wales, *Submission t to the Legal Profession Advisory Council and Law Council Submission 375*

Oh, Se Hyung, 'Does Content of Concessions Matter in Negotiation? Match between Concession Strategy and Target's Regulatory Focus' (PhD Thesis, Vanderbilt University, 2012)

Queensland Law Society, *Submission on Discovery in Federal Courts Consultation Paper* (2011)

Rivers, Cheryl, 'Ethical Decision Making in Negotiation: A Sino-Australian Study of the Influence of Culture' (PhD Thesis, Queensland University of Technology, 2003)

Stokke, Raymond Andreas, 'An Investigation of Culture and Creativity on Negotiation' (Masters Thesis, Queensland University of Technology, 2011)

Swift, Samuel A, 'Talking the Value out of the Deal: Self-Perception and the Subjective Value of Negotiated Outcomes' (Dissertation, Carnegie Mellon University, 2012)

'Table of " Very High " or " High " Ratings for Ethics and Honesty : Occupations Nurses Doctors Pharmacists School Teachers Engineers Dentists Police High Court Judges State Supreme Court Judges University Lecturers Accountants Public Servants Lawyers', Roy Morgan Image of Professions (2017) 5 <<http://www.roymorgan.com/~media/files/findings/pdf/2017/june/7244-image-of-professions-2017-professions-table-may-2017.pdf>>

Walker, Kent R, 'Examining Ethics from a Moral Point of View Framework: A Longitudinal Analysis' (Masters Thesis, University of Manitoba, 2006)

Wolski, Bobette, 'An Evaluation of the Current Rules of Professional Conduct Governing Legal Representatives in Mediation in Australia and the United States and of a Range of Proposed Alternative "Non-Adversarial" Ethics Systems for Lawyers' (PhD Thesis, Bond University, 2011)

Zhang, Ke, 'Exploring the Effects of Situational Factors on Deception: From the Forming of Intentions to the Exhibition of Nonverbal Behaviours' (PhD Thesis, University of Warwick, 2014)