2008

Representative Negotiation

Trevor C. W. Farrow
Osgoode Hall Law School of York University, tfarrow@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

Recommended Citation

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.
CHAPTER 2

Representative Negotiation

Trevor C.W. Farrow

Introduction

The Unique Role of Representative Negotiators

While much of the literature on negotiation deals with the tools and strategies of negotiation in general, this book deals with those tools and strategies in a specific context: representative negotiation. The role of representative negotiator is different from the role of direct negotiator, and brings with it a significant number of additional opportunities and challenges that need to be considered in order to understand its potential fully.

This chapter will introduce some of the unique and defining aspects of the role of representative negotiator. It will also set out some of the challenges that representative negotiators face—challenges that are discussed in detail elsewhere in this book. The introductory section of this chapter discusses various contexts of representative negotiation, with a particular emphasis on legal negotiation. The next section of this chapter examines various merits and drawbacks of the representative's role, and looks at the threshold question of whether to engage a representative to assist with a negotiation. The following section of this chapter looks at the nature of representative negotiation, with a particular focus on the role of the representative and the competing interests that are potentially involved in a representative negotiation. Finally, for readers interested in pursuing these and related issues further, a list of selected sources is included in the last section of this chapter.

CHAPTER OUTLINE

Introduction, 11
Deciding on When to Use Representative Negotiation, 13
Notes and Questions, 18
Nature of Representative Negotiation, 19
Notes and Questions, 34
Selected Further Reading, 35
Various Contexts of Representative Negotiation

We see the role of representative negotiator in all aspects of human interchange. Put simply, it is “everywhere.” Starting with intimate or personal relations, sometimes family members or friends are asked to help deal with particularly important, thorny, or sensitive issues. More publicly, representatives are engaged to assist with the creation or transition of relationships and the resolution of disputes in almost all sectors of society involving almost all types of issues: commercial transactions, investment decisions, real estate deals, labour disputes, plea bargaining in criminal law, family disputes, immigration issues, education issues, etc. Finally, representatives are almost always used when relationships and disputes require a negotiated arrangement or settlement at government, regulatory, and international levels as well.

Legal Representatives

The relevance of representative negotiation in the context of law cannot be overstated. Because lawyers are often significantly involved in many if not most negotiated arrangements, negotiation plays a significant part in almost every lawyer’s career. Put simply, it is a lawyer’s “bread and butter.” As Charles Wiggins and L. Randolph Lowry have commented,

Lawyers are a distinctive subclass of negotiators. They are members of a profession that exists to act as an intermediary between others involved in activities requiring bargaining. As such, they should be experts in managing the negotiation process. Virtually all transaction planning activities require lawyers to negotiate on behalf of clients. Likewise, over ninety five per cent of all adjudicated disputes are resolved by some process other than courtroom proceedings.

As such, this chapter largely examines the role of the representative negotiator in the specific context of legal representation.

Figure 2.1

Source: CartoonStock.com, cartoonist-Baldwin.


Deciding on When to Use Representative Negotiation

Direct Versus Representative Negotiation

In the context of a negotiation, a threshold decision is whether to use a representative. To make this decision, clients should weigh the various merits and drawbacks of hiring a representative for a specific negotiation. The following article by Jeffrey Rubin and Frank Sander takes a closer look at some of the considerations involved in choosing direct vs. representative negotiation.

Jeffrey Z. Rubin and Frank E.A. Sander
"When Should We Use Agents? Direct vs. Representative Negotiation" (1988) 4 Negotiation Journal at 395-401, footnotes omitted

Although we typically conceive of negotiations occurring directly between two or more principals, often neglected in a thoughtful analysis are the many situations where negotiations take place indirectly, through the use of representatives or surrogates of the principals. A father who speaks to his child’s teacher (at the child’s request), two lawyers meeting on behalf of their respective clients, the foreign service officers of different nations meeting to negotiate the settlement of a border dispute, a real estate agent informing would-be buyers of the seller’s latest offer—each is an instance of negotiation through representatives.

In this brief essay, we wish to build on previous analyses of representative negotiation to consider several key distinctions between direct and representative negotiations, and to indicate the circumstances under which we believe negotiators should go out of their way either to choose or to avoid negotiation through agents.

The most obvious effect of using agents—an effect that must be kept in mind in any analysis of representative negotiation—is complication of the transaction. If we begin with a straightforward negotiation between two individuals, then the addition of two agents transforms this simple one-on-one deal into a complex matrix involving at least four primary negotiations, as well as two subsidiary ones. In addition, either of the agents may readily serve as a mediator between the client and the other agent or principal. Or the two agents might act as co-mediators between the principals. At a minimum, such a complex structure necessitates effective coordination. Beyond that, this structural complexity has implications—both positive and negative—for representative negotiation in general. Let us now review these respective benefits and liabilities.

Expertise
One of the primary reasons that principals choose to negotiate through agents is that the latter possess expertise that makes agreement—particularly favorable agreement—more likely. This expertise is likely to be of three different stripes:

Substantive knowledge. A tax attorney or accountant knows things about the current tax code that make it more likely that negotiations with an IRS auditor will benefit the client as much as possible. Similarly, a divorce lawyer, an engineering consultant, and a
real estate agent may have substantive knowledge in a rather narrow domain of expertise, and this expertise may redound to the client's benefit.

*Process expertise.* Quite apart from the specific expertise they may have in particular content areas, agents may have skill at the negotiation process, per se, thereby enhancing the prospects of a favorable agreement. A skillful negotiator—someone who understands how to obtain and reveal information about preferences, who is inventive, resourceful, firm on goals but flexible on means, etc.—is a valuable resource. Wise principals would do well to utilize the services of such skilled negotiators, unless they can find ways of developing such process skills themselves.

*Special influence.* A Washington lobbyist is paid to know the “right” people, to have access to the “corridors of power” that the principals themselves are unlikely to possess. Such “pull” can certainly help immensely, and is yet another form of expertise that agents may possess, although the lure of this “access” often outweighs in promise the special benefits that are confirmed in reality.

Note that the line separating these three forms of expertise is often a thin one, as in the case of a supplier who wishes to negotiate a sales contract with a prospective purchaser, and employs a former employee of the purchaser to handle the transaction; the former employee, as agent, may be a source of both substantive expertise and influence.

Note also that principals may not always know what expertise they need. Thus, a person who has a dispute that seems headed for the courts may automatically seek out a litigator, not realizing that the vast preponderance of cases are settled by negotiation, requiring very different skills that the litigator may not possess. So, although agents do indeed possess different forms of expertise that may enhance the prospects of a favorable settlement, clients do not necessarily know what they need; it's a bit like the problem of looking up the proper spelling of a word in the dictionary when you haven't got a clue about how to spell the word in question.

**Detachment**

Another important reason for using an agent to do the actual negotiation is that the principals may be too emotionally entangled in the subject of the dispute. A classic example is divorce. A husband and wife, caught in the throes of a bitter fight over the end of their marriage, may benefit from the “buffering” that agents can provide. Rather than confront each other with the depth of their anger and bitterness, the principals may do far better by communicating only indirectly, via their respective representatives. Stated most generally, when the negotiating climate is adversarial—when the disputants are confrontational rather than collaborative—it may be wiser to manage the conflict through intermediaries than run the risk of an impasse or explosion resulting from direct exchange.

Sometimes, however, it is the agents who are too intensely entangled. What is needed then is the detachment and rationality that only the principals can bring to the exchange. For example, lawyers may get too caught up in the adversary game and lose sight of the underlying problem that is dividing the principals (e.g., how to resolve a dispute about the quality of goods delivered as part of a long-term supply contract). The lawyers may be more concerned about who would win in court, while the clients simply want to get their derailed relationship back on track. Hence the thrust of some modern dispute resolution mechanisms (such as the mini-trial) is precisely to take the dispute out of the hands of the technicians and give it back to the primary parties.
Note, however, that the very "detachment" we are touting as a virtue of negotiation through agents can also be a liability. For example, in some interpersonal negotiations, apology and reconciliation may be an important ingredient of any resolution (see, e.g., Goldberg, Green, and Sander, 1987). Surrogates who are primarily technicians may not be able to bring to bear these emphatic qualities.

Tactical Flexibility
The use of agents allows various gambits to be played out by the principals, in an effort to ratchet as much as possible from the other side. For example, if a seller asserts that the bottom line is $100,000, the buyer can try to haggle, albeit at the risk of losing the deal. If the buyer employs an agent, however, the agent can profess willingness to pay that sum but plead lack of authority, thereby gaining valuable time and opportunity for fuller consideration of the situation together with the principal. Or an agent for the seller who senses that the buyer may be especially eager to buy the property can claim that it is necessary to go back to the seller for ratification of the deal, only to return and up the price, profusely apologizing all the while for the behavior of an "unreasonable" client. The client and agent can thus together play the hard-hearted partner game.

Conversely, an agent may be used in order to push the other side in tough, even obnoxious fashion, making it possible—in the best tradition of the "good cop/bad cop" ploy—for the client to intercede at last, and seem the essence of sweet reason in comparison with the agent. Or the agent may be used as a "stalking horse," to gather as much information about the adversary as possible, opening the way to proposals by the client that exploit the intelligence gathered.

Note that the tactical flexibility conferred by representative negotiations presupposes a competitive negotiating climate, a zero-sum contest in which each negotiator wishes to outsmart the other. It is the stuff of traditional statecraft, and the interested reader can do no better than study the writings of Schelling (1960) and Potter (1948), as well as Lax and Sebenius (1986). To repeat, the assumption behind this line of analysis is that effective negotiation requires some measure of artifice and duplicity, and that this is often best accomplished through the use of some sort of foil or alter ego—in the form of the agent. But the converse is not necessarily true: Where the negotiation is conducted in a problem-solving manner (cf. Fisher and Ury, 1981), agents may still be helpful, not because they resort to strategic ruses, but because they can help articulate interests, options, and alternatives. Four heads are clearly better than two, for example, when it comes to brainstorming about possible ways of reconciling the parties' interests.

Offsetting—indeed, typically more than offsetting—the three above apparent virtues of representative negotiation are several sources of difficulty. Each is sufficiently important and potentially problematic that we believe caution is necessary before entering into negotiation through agents.

Extra "Moving Parts"
Representative negotiations entail greater structural complexity, additional moving parts in the negotiation machinery that—given a need for expertise, detachment, or tactical flexibility—can help move parties toward a favorable agreement. Additional moving parts, however, can also mean additional expense, in the form of the time required in the finding, evaluating, and engaging of agents, as well as the financial cost of retaining their
services. And it can mean additional problems, more things that can go wrong. For instance, a message intended by a client may not be the message transmitted by that client's agent to the other party. Or the message received by that agent from the other party may be very different from the one that that agent (either deliberately or inadvertently) manages to convey to his or her client.

At one level, then, the introduction of additional links in the communication system increases the risk of distortion in the information conveyed back and forth between the principals. Beyond that lies a second difficulty: the possibility that eventually the principals will come to rely so extensively on their respective agents that they no longer communicate directly—even though they could, and even though they might well benefit from doing so ... Consider, for example, the case of a divorcing couple who, in explicit compliance with the advice of their adversary lawyers, have avoided any direct contact with each other during the divorce proceedings. Once the divorce has been obtained, will the parties' ability to communicate effectively with each other (e.g., over support and custody issues) be adversely affected by their excessive prior reliance on their attorneys?

Yet another potentially problematic implication of this increasingly complex social machinery is that unwanted coalitions may arise that apply undue pressure on individual negotiators ... Greater number does not necessarily mean greater wisdom, however, and the pressures toward uniformity of opinion that result from coalition formation may adversely affect the quality of the decisions reached.

In sum, the introduction of agents increases the complexity of the social apparatus of negotiation, and in so doing increases the chances of unwanted side effects. A related problem should be briefly noted here: the difficulty of asymmetry, as when an agent negotiates not with another agent but directly with the other principal. In effect, this was the case in 1978 when Egypt's Sadat negotiated with Israel's Begin at Camp David. Sadat considered himself empowered to make binding decisions for Egypt, while—at least partly for tactical purposes—Begin represented himself as ultimately accountable to his cabinet and to the Israeli parliament. While this "mismatched" negotiation between a principal (Sadat) and an agent (Begin) did result in agreement (thanks in good measure to President Carter's intercession as a mediator), it was not easy. The asymmetry of role meant that the two sides differed in their readiness to move forward toward an agreement, their ability to be shielded by a representative, and their willingness/ability to guarantee that any agreement reached would "stick."

Different dynamics will characterize the negotiation depending on whether it is between clients, between lawyers, or with both present. If just the clients are there, the dealings will be more direct and forthright, and issues of authority and ratification disappear. With just the lawyers present, there may be less direct factual information, but concomitantly more candor about delicate topics. Suppose, for example, that an aging soprano seeks to persuade an opera company to sign her for the lead role in an upcoming opera. If she is not present, the opera's agent may try to lower the price, contending that the singer is passed her prime. Such candor is not recommended if the singer is present at the negotiation!

**Problems of "Ownership" and Conflicting Interests**

In theory, it is clear that the principal calls the shots. Imagine, however, an agent who is intent on applying the *Getting to Yes* (Fisher and Ury, 1981) approach by searching for objective criteria and a fair outcome. Suppose the client simply wants the best possible
outcome, perhaps because it is a one-shot deal not involving a future relationship with the other party. What if the agent (a lawyer, perhaps) does care about his future relationship with the other agent, and wants to be remembered as a fair and scrupulous bargainer? How should this conflict get resolved and how, in the absence of explicit discussion, will it be resolved, if at all? Conversely, the client, because of a valuable long-term relationship, may want to maintain good relations with the other side. But if the client simply looks for an agent who is renowned for an ability to pull out all the stops, the client’s overall objectives may suffer as the result of an overzealous advocate.

This issue may arise in a number of contexts. Suppose that, in the course of a dispute settlement negotiation, a lawyer who is intent on getting the best possible deal for a client turns down an offer that was within the client’s acceptable range. Is this proper behavior by the agent? The Model Rules of Professional Conduct for attorneys explicitly require (see Rules 1.2(a), 1.4) that every offer must be communicated to the principal, and perhaps a failure to do so might lead to a successful malpractice action against the attorney if the deal finally fell through.

Another illustration involves the situation where the agent and principal have divergent ethical norms. Suppose that a seller of a house has just learned that the dwelling is infested with termites, but instructs the agent not to reveal this fact, even in response to specific inquiry from the buyer. How should these tensions be fairly resolved, keeping in mind the fact that the agent may be subject to a professional code of conduct that gives directions that may conflict with the ethical values of the client? There may, of course, be artful ways of dealing with such dilemmas, as, for example, slyly deflecting any relevant inquiry by the buyer. But preferably these problems should be explicitly addressed in the course of the initial discussion between agent and principal. To some extent, the problem may be resolved by the principal’s tendency to pick an agent who is congenial and compatible. But, as we pointed out before, principals are not always aware of and knowledgeable about the relevant considerations that go into the choice of an agent. Hence, if these issues are not addressed explicitly at the outset, termination of the relationship midstream in egregious cases may be the only alternative.

Differing goals and standards of agent and principal may create conflicting pulls. For example, the buyer’s agent may be compensated as a percentage of the purchase price, thus creating an incentive to have the price as high as possible. The buyer, of course, wants the lowest possible price. Similarly, where a lawyer is paid by the hour, there may be an incentive to draw out the negotiation, whereas the client prefers an expeditious negotiation at the lowest possible cost.

While these are not insoluble problems, to be sure, they do constitute yet another example of the difficulties that may arise as one moves to representative negotiations. Although in theory the principals are in command, once agents have been introduced the chemistry changes, and new actors—with agenda, incentives, and constraints of their own—are part of the picture. Short of an abrupt firing of the agents, principals may find themselves less in control of the situation once agents have come on the scene.

**Encouragement of Artifice and Duplicity**

Finally, as already noted, the introduction of agents often seems to invite clients to devise stratagems (with or without these agents) to outwit the other side. Admittedly, there is nothing intrinsic to the presence of representatives that dictates a move in this direction;
still, perhaps because of the additional expense incurred, the seductive lure of a “killing”
with the help of one’s “hired gun,” or the introduction of new, sometimes perverse incentives,
representative negotiations often seem to instill (or reflect) a more adversarial climate.

Conclusion
It follows from the preceding analysis that, ordinarily, negotiations conducted directly
between the principals are preferable to negotiation through representatives. When the
principals’ relationship is fundamentally cooperative or informed by enlightened self-
interest, agents may often be unnecessary; since there is little or no antagonism in the
relationship, there is no need for the buffering detachment afforded by agents. Moreover,
by negotiating directly, there is reduced risk of miscoordination, misrepresentation, and
miscommunication.

On the other hand, representative negotiation does have an important and necessary
place. When special expertise is required, when tactical flexibility is deemed important
and—most importantly—when direct contact is likely to produce confrontation rather
than collaboration, agents can render an important service.

Above all, the choice of whether to negotiate directly or through surrogates is an
important one, with significant ramifications. It therefore should be addressed explicitly
by weighing some of the considerations advanced above. And if an agent is selected, careful
advance canvassing of issues such as those discussed here (e.g., authority and ethical
standards) is essential.

Figure 2.2 sets out a number of factors—including those discussed above by Rubin and
Sander—that should be considered when deciding whether to engage a representative for
a given negotiation.

Notes and Questions
1. In addition to the list of merits and drawbacks set out in figure 2.2, can you think of
other factors that should be considered when deciding whether to engage a repre-
sentative in a given negotiation? Could any of the factors listed as merits also be
listed as potential drawbacks, or vice versa? In what circumstances?
2. The factors discussed by Rubin and Sander—as identified and added to in figure 2.2—
contemplate a relatively dichotomous approach to choosing whether to engage a
representative. It may be, however—particularly for more complex negotiations—
that this either/or approach to representation is inadequate as both a descriptive and
normative approach. Clients may want to be involved in a very engaged way for all
or part of the negotiation process, even one that involves the active participation of
a representative. For an approach that challenges the dichotomous approach of Rubin
and Sander—one that contemplates more of a continuum of authority between
principal and agent—see Neil E. Fassina, “Direct and Representative Negotiation: A
Principal-Agent Authority Continuum” (Paper presented at the IACM 15th Annual
Conference, June 2002) online: SSRN <http://ssrn.com/abstract=304973> or
DOI: 10.2139/ssrn.304973. See also the additional considerations regarding the
interests of representatives discussed in the next section of this chapter.
Figure 2.2  Some Potential Merits and Drawbacks of Using Representative Negotiators

<table>
<thead>
<tr>
<th>Some Potential Merits</th>
<th>Some Potential Drawbacks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Expertise</td>
<td>1. Complexity</td>
</tr>
<tr>
<td>• Knowledge</td>
<td>2. Conflicts</td>
</tr>
<tr>
<td>• Process Skill</td>
<td>• Ownership</td>
</tr>
<tr>
<td>• Special Influence</td>
<td>• Conflicting Interests</td>
</tr>
<tr>
<td>• Experience</td>
<td>• Different Incentives</td>
</tr>
<tr>
<td>• Resources</td>
<td>3. Escalation</td>
</tr>
<tr>
<td>2. Detachment</td>
<td>• Encouragement of Client Artifice</td>
</tr>
<tr>
<td>• Clear Thinking</td>
<td>• Encouragement of Duplicity</td>
</tr>
<tr>
<td>• Protection of Relationships</td>
<td>• Encouragement of Competition</td>
</tr>
<tr>
<td>• Encouragement of Cooperation</td>
<td>4. Loss of Control</td>
</tr>
<tr>
<td>3. Tactical Flexibility</td>
<td>• Lack of Client Engagement</td>
</tr>
<tr>
<td>4. Validation/Support</td>
<td>• Lack of Accountability</td>
</tr>
<tr>
<td></td>
<td>5. Lack of Shared/Perfect Information</td>
</tr>
<tr>
<td></td>
<td>6. Cost (Time and Money)</td>
</tr>
<tr>
<td></td>
<td>• Retaining an Agent</td>
</tr>
<tr>
<td></td>
<td>• Monitoring an Agent</td>
</tr>
</tbody>
</table>


3. Does a lawyer’s ethical obligation to “advise and encourage the client to compromise or settle a dispute ... and ... discourage the client from commencing or continuing useless legal proceedings”\(^3\) include an obligation to consider whether such compromise is done directly or with the services of a lawyer? What, if any, conflict-of-interest issues does this question raise? For further ethical discussions of representative negotiation, see the following section of this chapter as well as chapter 5.

Nature of Representative Negotiation

Let’s assume that the decision is made to retain a representative negotiator. What is the representative’s role in a negotiation? What potentially competing considerations must a representative face? We look at the models that seek to answer these questions next.

\(^3\) See e.g. Canadian Bar Association, Code of Professional Conduct, c. III. 6.
The Basic Role of the Representative Negotiator*

The basic role of the lawyer is “to do something on behalf of someone else: typically the client.”5 In the context of a representative negotiation, “what is typically being sought is a negotiated deal or settlement that is to the benefit of the client, not the representative lawyer.”6 The resulting lawyer–client relationship is one that is often characterized—like the typical lawyer–client relationship—as one located in principals of agency. As a starting point, this characterization is helpful. The negotiator’s reason for being, in the eyes of her client, is largely to negotiate a deal that is seen as favourable based on a calculus of the client’s specific positions and interests, often (although certainly not always) as they relate to positions and interests of the other side.

The problem with this binary principal–agent vision of the role of the representative negotiator is that it almost invariably provides an inadequate understanding of what is actually going on, and what potentially could or should be going on, in the mind of the representative negotiator and between the representative and her client.

A more nuanced description of representative negotiators starts to build on this agency vision by proposing that the representative’s role is largely (or almost exclusively) characterized by two interests: those of her client and those of her bargaining opposite. For example, according to Wiggins and Lowry, “As representative negotiators, attorneys always have two negotiations occurring simultaneously: One with their bargaining opposite and one with their own client.”7

According to this more nuanced view, representative negotiators are said to occupy a “boundary-role position,” in which they, as Dean Pruitt comments, “can be thought of as intermediaries whose job is to reconcile the interests of their own and the opposing organization. They must represent the interests of their constituents to the opposing representative and represent the views of the opposing representative to their constituents.”8

An expanded description of the interests at stake in representative negotiation—beyond the agency model that focuses almost exclusively on the interests of the representative’s client—helps to articulate more accurately the role of the representative negotiator. However, by primarily focusing on two interests—those of the client and those of the representative’s bargaining opposite—the boundary-role position model still fails to account fully for what is typically going on inside the representative’s mind. As such, although an improvement

---

* This section of this chapter is largely based on arguments presented in T.C.W. Farrow, “The Negotiator-as-Professional: Understanding the Competing Interests of a Representative Negotiator” (2007) 7:3 Pepperdine Dispute Resolution Law Journal (forthcoming), part of which is excerpted below.

5 Ibid. at 3.

6 Ibid.

7 Wiggins & Lowry, supra note 2 at 498 (commenting on arguments presented in “When Should We Use Agents?”). But see also ibid. at 497.

over the simple agency model, the boundary-role position model still does not provide an adequate view of the role of the representative negotiator, both in terms of the role's responsibilities, challenges, and potential opportunities. The next section of this chapter expands on these models.

**Competing Strategic, Ethical, and Societal Considerations**

This section of this chapter—through the following article excerpt—provides a more expansive view of the role of the representative negotiator that attempts to address potential deficiencies in the agency and boundary-role position models. To appreciate fully the role of the representative negotiator, it's important to have a broad understanding of the competing interests and considerations it must manage.

Trevor C.W. Farrow

"The Negotiator-as-Professional: Understanding the Competing Interests of a Representative Negotiator"

(2007) 7:3 Pepperdine Dispute Resolution Law Journal (forthcoming), footnotes omitted

...  

**III. Negotiator-as-Professional**

To address these deficiencies, I advance an alternative, expansive model of the representative negotiator that I call the "negotiator-as-professional" model. It is a model that sees the role of the representative negotiator as being defined not simply by the client's interests or by the two interests that are identified by the boundary-role position models, but rather by at least four sets of interests: client interests, a broad understanding of the representative's self-interests (that may include, but are not limited to, interests vis-à-vis the representative negotiator's bargaining opposite), ethical interests, and the public's interests.

**A. Client Interests**

1. Interests of the Representative's Client

In any lawyering model, the representative's client maintains one of, and typically the primary set of interests in the relationship. This is the defining characteristic of the lawyer-client relationship in the adversary system. In the context of negotiation, as Rubin and Sander point out, lawyer representatives bring to the table a particular "expertise" and a "tactical flexibility" to be used to the benefit of the client. Further, according to Pruitt, the "essence of the representative effect" under the boundary-role position in negotiation

---

9 Many of the sources noted in the omitted footnotes for the following article can be found in the list of selected further reading at the end of this chapter.
"is trying to please one's constituent" (a task that is obviously directly dependent on the client's interests). Therefore, as Pruitt further argues, "It follows that bargainers who are representatives will usually be less conciliatory than those who are negotiating on their own behalf" and, subject to contrary instructions from the client, "representatives tend to view their constituents as desiring a tough, nonconciliatory approach to bargaining of the kind that is produced by a win/lose orientation." Here we see ourselves largely back to the "zealous advocate" tendency that foregrounds the interests of the client typically to the exclusion of essentially everything else.

This model is further articulated in the negotiation context by Robert Cochran, who argues that not only should representatives tend to "please" the client, they should also afford a significant amount of deference to the client's choices in all aspects of the lawyering process. When looking at the question of "what choices the client should make," Cochran answers by advocating that "courts [should] require lawyers to allow clients to make those choices which a reasonable person, in what the lawyer knows or should know to be the position of the client, would want to make." Here again we see a strong preference for the client's interest as the keystone to the relationship.

So any model of the role of lawyer-as-negotiator must find a central position for the client's interests. However, the problem with models that focus essentially exclusively on the client's interests is that they are not accurate or honest in their description of what is in reality actually at play in the minds of representative negotiators, nor do they account for the fact that representative negotiators do not, and often should not, necessarily align their interests with those of their clients (or forgo their or other interests) in the spirit of zealous advocacy. I can say with first-hand experience—as a litigator and negotiator turned academic—that as a conceptual matter, there are more interests at play than only those of the client. And as a practical matter, privileging the interests of the client does not always sit well with representative negotiators.

An example from a recent negotiation class illustrates these concerns. In an animated debrief portion of an in-class mock negotiation that I recently conducted involving the intellectual property rights to artistic materials of the negotiating parties, a student of mine—after reflecting on the difficulty of maintaining a negotiation relationship with the other side as well as maintaining any sense of personal integrity vis-à-vis a very difficult position she was being asked to advance on behalf of her client—stated in sheer frustration: "we started from a ridiculous position: our client simply wanted too much. Her position was [...] crazy." The student's frustration resulted in a significant discussion about the role of the lawyer generally, and the lawyer-as-negotiator in particular. The easy response to her concerns was that she was her client's agent, and she could either conduct the negotiation or get off the file. However, that model—the simple agency model of lawyering that essentially backgrounds all other interests in favour of strong client autonomy—did not sit at all well with her. Advancing instructions that in her view were "ridiculous" and "crazy" did not leave my student with either a good feeling about the specific case or about her general role as a representative negotiator. For her, notwithstanding her role as a lawyer-negotiator, there was clearly more at stake.

Overly client-centric visions of the role of representative negotiator, like the model advanced by Cochran, do not help with this frustration, which belies interests at play other than those of the client. So the question then becomes: Do we need to live with that
frustration? Is the zealous advocate view of the world the right (or only) one, particularly in light of concerns that leave the representative feeling frustrated, inadequate and perhaps hamstrung regarding potential alternative approaches and solutions? Because there are clearly interests other than those of the client that need to be recognized, the answer to this question, must be no. Before getting to some objections to this position, and further, to a set of interests involving the various potential self-interests of the representative negotiator that were at stake in my student’s role-play example, I briefly (below) identify another set of client interests: those of the opposing client.

2. Other Client’s Interests
Because this article deals with the mindset of the representative negotiator (and not specifically the mindset of principles), I do not spend much time here on the interests of the other side. Thinking about the interests of negotiation principals—by identifying, maximizing and/or minimizing mutual interests, creating space for mutual gains, value creating and value claiming, etc.—are important tools that are discussed elsewhere. However, it is obviously important—when thinking about the competing interests at stake in the mind of the representative lawyer—to make sure that the other side’s interests, in addition to interests vis-à-vis the bargaining opposite, are on the table.

The typical lawyer-client relationship militates against any responsibility of the lawyer for the interests of the other side. Further, zealous advocacy models expressly reject such concerns. And my point here is not at all to say that the lawyer negotiator is now responsible for the other side’s interests, particularly when he is also represented. However, to the extent that alternative negotiation models are considered—for example strong cooperative models that actively include the other side’s interests in the spirit of maintaining future relationships and mutual gains or hybrid models that contemplate the balance of value creation and value claiming—consideration for the other side’s interests must at least be considered and discussed with the representative’s client. And in any event, regardless of which negotiation model one follows, modern ethical codes are increasingly mandating consideration of the other side in the context of truth-telling and fair play.

B. Representative Negotiator’s Self-Interests
Separate from client interests, there are a number of potential sets of self-interests at play for the representative in the negotiation process. When thinking about these interests, it seems to me that there are two questions that need to be addressed: What kind of negotiator is the representative (hard, soft, principled, etc.)? And what pecuniary and other self-interests are at stake? While the representative’s ethical interests could also be considered here, they are instead treated in a separate part of this article.

1. Representative Negotiation Style
On the first question, negotiators must decide if they have the interest and skill to proceed with one or more negotiation styles, and if so, whether negotiation style is a topic open for discussion with his or her client. Some negotiators are of the view that they are unable to wear different negotiation “faces.” Again turning to examples from my teaching, several students have recently indicated to me—in the context of role-plays that require experimentation with different negotiation styles—that they feel very uncomfortable putting
on a face or playing a role (the competitive negotiator, the cooperative negotiator, the bad cop, the tough guy, etc.) and that, in their view, their skills are maximized when they present themselves as an authentic and principled representative in all cases. Drawing on personal practical experiences as a litigator and settlement counsel, these concerns resonate not only in the classroom but also amongst practicing representatives.

These threshold concerns are typically and ultimately dealt with on a calculus of competence and context. To the extent that the lawyer representative and the client think that the lawyer's chosen approach renders them competent for the negotiation, then all is well: proceeding on the basis of the lawyer's preferred style, as discussed with the client, is the chosen course of instruction. To the extent that is not the case, codes of conduct typically require the lawyer to get off the case and recommend another representative. Further, in line with scholars who argue that some contexts—typically including one-off personal injury cases—often lend themselves better to one negotiating style over another (competitive negotiation for example), it may be that the context of a certain case determines the required level of competency with a given style. Again, choices will be made at this threshold stage regarding the approach and the continued retainer.

If the representative is competent to proceed with one or more of a variety of different styles, the issue then becomes one of ownership. Who gets to choose with which style to proceed: the representative or the client? Here we see the potential of an obvious conflict. As Rubin and Sander discuss, there is often a potential conflict with a client's instruction (for example to achieve the best possible outcome in a one-off negotiation through the use of a competitive approach) and the interest of a representative negotiator (who would prefer, for example, to retain a relationship with the negotiator's bargaining opposite by using a cooperative approach). Similarly, Gifford and Pruitt's descriptions of both the "boundary role position" and the lawyer-as-negotiator position result in the same potential competing interests between the representative and the client.

Now before I get into further discussion of this potential conflict, it should be recognized that even though the potential of competing interests exists, there does not necessarily need to be a conflict. Clearly a good relationship between the representative negotiator and the bargaining opposite can militate to the benefit of both the representative lawyer and the client. As Gifford recognizes, negotiating fairly with the other side does not mean a "selling-out" of the client's interests. Similarly, Pruitt argues that developing relationships with the other side can help both with the client's immediate outcome as well as potentially with future negotiations: "Because they communicate with one another over a period of time and share similar organizational positions, representatives often develop ties to one another. These ties can contribute to the reconciliation of conflicts that would otherwise be intractable."

However, when interests do not align, the potential of conflict between the representative and the client is real and very typical. In these circumstances, the client-centered "zealous advocate" model advocates for the backgrounding of the representative's interests in favor of the client's preferences. This view of the negotiator's role fits Robert Cochran's model. For Cochran, if the representative lawyer viewed that a cooperative approach was appropriate, but the client preferred a competitive approach (perhaps in the context of a one-off real estate purchase for the client who does not anticipate being in a similar market position again), the client's preferences should prevail. According to Cochran,
regardless of the lawyer’s preference vis-à-vis the bargaining opposite, the client has a “right to choose the negotiating style.”

On the traditional lawyer-client relationship model, this view is not controversial. In fact, it is still largely the dominant view. The lawyer’s role is to carry out the wishes of the client—period. As the argument goes, any other view of the role of the lawyer usurps a meaningful sense of client autonomy; and further, particularly given the virtual monopoly of power that lawyers have over the provision of increasingly essential legal services, any other view would essentially create an all-powerful oligarchy of lawyers. The problem with this unsubtle view of legal representation, however, is that it is not fully supported in the literature or in codes of conduct, and further, it ignores the daily reality of the negotiation process. Of course representatives will have interests. And so the question becomes: Why should those interests always take a back seat, particularly in cases—like the one involving my student—in which a client’s position is “ridiculous”? In these circumstances, should a lawyer be obligated to ignore their own views and interests and advance a “ridiculous” position? My view is that such an argument disingenuously ignores the reality of what actually goes on in the world of negotiations. Such an argument conveys an impoverished view of lawyering that does not make room for a representative’s own views, interests and experiences in a given situation that may, at the end of the day, work to the benefit of the client’s cause. This ultimately cheapens the overall negotiation process to one that alienates negotiators—like my student—who are looking for a meaningful place to practice their skills in a professional, reasonable and fulfilling way. Further, to the extent that codes of conduct prohibit the advancement of “frivolous” or “useless legal proceedings,” query whether advancing a “ridiculous” position amounts to unprofessional conduct.

The boundary-role position approach described by scholars like Pruitt and Gifford allows for the reality of potentially competing interests in the mind of the representative negotiator that zealous advocacy models tend to ignore. So when thinking about the potential interests at stake when preparing for a negotiation, the boundary-role position approach paints a more realistic landscape for the representative negotiator. At least now the tension in my student’s mind has a voice and a place in the dialogue of negotiation preparation. And by actively recognizing these potentially competing interests, the lawyer can strategize about how to resolve them. In a purely zealous advocacy model, these considerations are left off the table (or are at least the elephants in the room that no one is meant to talk about).

So far we have identified the client’s interests and the representative’s self-interests largely relating to negotiation styles vis-à-vis the bargaining opposite. It is with these interests that the current boundary role position schools of thought leave us. And because they consider all of these interests, and not simply the client’s interests, they are an improvement on the typically one-dimensional client-centered views of the zealous advocate. However, there are other interests at stake that still need to be considered as part of the representative’s self-interests as well as other interests involving ethics and the public.

2. Pecuniary and Other Self-Interests
In addition to style and the representative’s reputation vis-à-vis the bargaining opposite, there are other potentially thorny self-interests at stake—particularly when negotiating
settlements in the context of litigation—that should be identified and put on the table as issues to be acknowledged and considered when preparing for a representative negotiation. So the second question that needs to be asked under this discussion of the representative negotiator’s self-interests is: What pecuniary and other self-interests are at stake and what is the client willing to do about them?

Wiggins and Lowry have articulated that negotiating attorneys and their clients “are like allies in warfare. Outwardly they may have an identity of goals and are bound together by professional obligations; yet internally they may have divergent interests and inconsistent long term objectives.” A number of potential conflicting interests arise in these circumstances. For example, to the extent that a piece of litigation is worth much more to the lawyer as a going concern as opposed to a settled case, there are incentives to keep the case alive and advise against settlement. Along these lines, the lawyer-as-potential-settlement-negotiator may also be much less risk averse when it comes to recommending trial over settlement, given potential desires for trial experience, exposure to the press, significant contingency fee rewards (which admittedly can cut both ways), and internal firm or community respect for being a tough, court-ready litigator (that also may be based, at least in tournament discourse, on the desire to be thought of as “partnership material”). The choice of payment structures—for example percentage of outcome vs. hourly rate—may also impact a representative’s interests vis-à-vis approaching a negotiation.

The underlying interests that raise these concerns are real and should be put on the table and considered in the context of full, sophisticated negotiation preparations. And typically there are solutions. Unlike self-interests based on the representative’s reputation, purely financial self-interests are relatively easy to deal with. Codes of conduct typically paint rather bright conflict of interest lines in these areas that allow (or require) the lawyer, after recognizing the issues, to background his or her financial interests in the spirit of the very notion of lawyering itself. When it comes to some of the other, more personal or subtle concerns—undiluted focus on the trial process, a need to maintain a tough and ready litigation pose, etc.—there are other solutions, in addition to codes of conduct that require attorneys to consider settlement, which assist with potentially competing interests. For example, the use of parallel settlement counsel as a way not to distract the focused litigator from his or her endgame is a process—based on the literature and on my first-hand experience with the use of settlement counsel in complex civil litigation settlements—that can work quite effectively.

Complicating (and clouding) these potential conflicting interests is the lawyer’s inability to understand, or willful blindness to, what the client’s interests (and other interests) actually are at the outset, as opposed to what the lawyer assumes (or wants) them to be. As Leonard Riskin recognized, the traditional zealous advocate tendency—based on the “lawyer’s standard philosophical map”—blinds the lawyer to a number of things including the potential needs of the client that may not be “legally meaningful,” including many non-financial issues relating to “honor, respect, dignity, security, and love ...” To assist with this impoverished tendency of the traditional advocate, particularly in favor of promoting the benefits of mediation, Riskin argues in favor of expanding the traditional map. All interests, and not simply those located on the adversarial map, need to be taken into account and understood as part of the lawyer’s role as a representative. As I have recently argued elsewhere, education, an open-mindset, and a shift in the adversarial culture are all already leading to these ideals becoming more of a reality.
C. Representative Lawyer’s Ethical Interests

According to a March 2006 statement by Brian A. Tabor, Q.C., President of the CBA: “Standards of professional ethics form the backdrop for everything lawyers do.” As such, any model of lawyering—including lawyers as negotiators—must actively embrace interests of an ethical nature. Therefore, in addition to reputational, pecuniary, and other self-interests, there are also significant (potentially related) ethical interests of the representative negotiator that need to be carefully considered in the context of developing the negotiator-as-professional model. There are two points of discussion here. The first, fundamental point deals with the relevance of the representative negotiator’s own moral code. The second point deals with other ethical interests at play in a representative negotiation.

1. What Kind of Lawyer Is the Representative Negotiator?

The basic question that I am interested in here is: What kind of lawyer is the representative negotiator? Is the negotiator a zealous advocate driven solely by the client’s self-interest; or is the negotiator an agent whose moral outlook also counts in the calculus of the principal-agent relationship, particularly regarding the kinds of cases taken, the results sought, and the tools used? This question—that goes to the heart of professionalism itself—has been nicely framed by Rob Atkinson:

Should a professional always do all that the law allows, or should the professional recognize other constraints, particularly concerns for the welfare of third parties? This question divides scholars of legal ethics and thoughtful practitioners into two schools: those who recognize constraints other than law’s outer limit, and those who do not.

Because I have written elsewhere on this topic relating to lawyers generally, I will only briefly develop the basic issues here as they relate specifically to the representative negotiator. As a preliminary matter, there continue to be strong arguments for following Atkinson’s second school: what counts is what is legal, and non-legal considerations—including a lawyer’s personal ethical interests—are not relevant in terms of the lawyer’s representation of his or her client. Traditional and still dominant views of the lawyer’s role as a zealous advocate—as reinforced by codes of conduct and academic literature regarding the lawyer’s role in general and the negotiator’s role in particular—support this school of thought.

The problem is that, notwithstanding this dominant school of thought, some representative negotiators, as a practical matter, are persuaded by Atkinson’s other school of thought: that non-legal considerations—again including a lawyer’s personal ethical interests—should not be irrelevant. Again drawing on examples from my teaching, many students are uncomfortable with the notion of negotiating deals, the underlying ethical consequences of which they fundamentally disagree with. For instance, going back to my original example of the negotiation student who was representing a client with ridiculous and crazy instructions in an hypothetical role-play, when pushed in the de-brief session on whether she would take that case, she responded: “I’m not sure, if I had a choice, that I would work for someone like my client in the negotiation … she’s an egomaniac.”

Fortunately, representative negotiators do have a choice. So the question then becomes: Why should we pursue a model of professionalism that requires representative negotiators...
Part II  Representative Negotiation

to negotiate deals on behalf of their clients that they would never negotiate for themselves or in any event that they think are ridiculous? The answer in my view is that we should not. Clearly there are times, particularly after a retainer has been accepted and negotiations are under way, when the lawyer may be asked to take positions professionally that s/he would not take personally. But these situations aside, there are many occasions when the lawyer’s interests and views should be voiced in the spirit of improving the underlying cause as well as the overall system, notwithstanding an individual client’s initial desires. In this spirit, Allan Hutchinson, for example, argues for a model that does not require lawyers “to forgo moral judgment,” for to do otherwise reduces them to “amoral technicians with significant drawbacks and limitations .” What this looks like in practice is making choices about what negotiations a representative takes, and what tools and negotiation styles they are willing to use once a client is taken on. Of course this is all done with the client’s knowledge and instructions. And if instructions are not forthcoming, the lawyer should get off the file.

Before we dismiss all of this as moral meandering without a sound basis in legal policy, we should also recognize that professional codes of conduct—as supported by competing academic literature—support the relevance of a lawyer’s morality, sense of justice, honour, and ethics. For example, according to the preamble and scope of the Model Rules: “... The Rules do not ... exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.” The CPC states: the “lawyer should not hesitate to speak out against an injustice.” Similar considerations regarding the relevance of broad notions of morality and honour obtain in various regional jurisdictions. For example, according to The Lawyer’s Code of Professional Responsibility (LCPR) of the New York State Bar Association (“NYSBA”), “A lawyer should be temperate and dignified, and refrain from all illegal and morally reprehensible conduct.” Further, according to the preface of the Code of Professional Conduct of the Law Society of Alberta (“LSA”): “… the rules and regulations ... cannot exhaustively cover all situations that may confront a lawyer, who may find it necessary to also consider ... general moral principles in determining an appropriate course of action.”

Although not uncontroversial, there is therefore a tension even within the various codes of conduct between the responsibility to zealously represent a client and the potential role for the lawyer’s own ethical interests, whether based on morality, a sense of honour or some other social norm. Regardless, there is clearly a basis for the relevance of—and in my view an overriding professional obligation at least to consider—the lawyer’s own ethical interests in the context of his or her role as a representative negotiator.

As such, these interests—which are not recognized by either the simple client-centered models or the more expanded boundary role position models of representative negotiation—should be recognized as interests that influence the lawyering and negotiation processes and, as such, need to be on the table for discussion when the negotiator-as-professional sits down to prepare for the representative negotiation process. The end calculus becomes a discussion between the representative lawyer and the client. The final decision of whether to stay with the representative always rests with the client. But the fundamental decisions regarding whether and how the negotiation is handled are also decisions regarding which the lawyer should have determining input. Any other model, not only turns a blind eye to reality, but also impoverishes the responsibilities and possibilities of the representative’s role.
2. Other Ethical Interests of the Representative Negotiator

In addition to the fundamental question of the relevance of the representative negotiator's personal moral compass, there are other ethical issues that come up all the time in representative negotiations that need to be considered and discussed with the client. Gifford, when discussing the boundary role position model, does contemplate the notion of professional responsibility in passing:

When negotiating on behalf of the client ... the lawyer is drawn in conflicting directions. On the one hand, she is obligated professionally to obtain the most favorable settlement possible during the negotiations ... On the other hand ... he must respond to pressures from his negotiating counterparts ... and pursue settlements that are fair and just to both parties. The pressure on the lawyer to accommodate these tensions ... results in part from the expectations of future contact with the other lawyers and in part from the traditional courtesy and fair play among lawyers [emphasis added].

While this is right, ethical considerations involve more than simply "courtesy and fair play among lawyers." Terms like "courtesy," "fair play," and—as Silver articulates, the "duty of "good faith" towards other counsel"—are unlikely to be precise enough, or wide-reaching enough, to place adequate limits on "dishonest bargaining practices" and other such negotiation tactics. What we are therefore talking about, in addition to "fair play," etc., is a full range of ethical and professional considerations, including obligations of confidentiality, truth-telling, the avoidance of conflicts of interest, and the like. Neither the client-centered model nor the boundary role position model adequately and expressly embraces a full consideration of the representative negotiator's ethical considerations and interests.

That is because, surprisingly, the consideration of ethics continues to be a relatively new issue in negotiation theory. As Eleanor Norton comments, "[t]here has been little evidence of or interest in coherent standards or express norms for appropriate behavior in negotiations." Similarly, as Lynn Epstein comments: "[n]egotiations have always enjoyed a certain amount of protection from ethical constraints. This protection is due to a longstanding tradition of allowing parties to negotiate freely, and without restrictions that encompass other aspects of legal representation. Historically, this freedom surrounded most negotiations in a shroud of secrecy." Although there is starting to be more focus recently on ethics and negotiation, Epstein's description still largely obtains. Often when ethics are raised, it is typically done in passing, as an afterthought, or at least as a separate discussion that does not form part of the central make-up of the representative negotiator's very being as a professional.

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

In my view, this ethically questionable state of affairs in representative negotiation should not be tolerated, particularly for representative negotiators who are also members of the bar and subject to professional obligations. The negotiator-as-professional must actively embrace ethical problems, both in preparation with the client and then during the negotiation process itself. And to the extent that a client seeks to foreground her personal interests over the ethical concerns and interests of the representative negotiator, that move must be either rejected through active discussions with the client—which often in any event work to the benefit of the client’s case—or the lawyer must get off the file in accordance with principles of professionalism. In my view there is no middle ground. James White has argued that much of the difficulty in regulating negotiation behavior comes from the fact that “negotiation is a non-public behavior.” That may be right as a descriptive matter. However, we do not seem to have an appetite for accepting borderline ethical behavior in law’s public sphere. We should be even less accommodating of such behavior in the private sphere.

D. The Public’s Interests
The fourth general set of interests at play in representative negotiations includes considerations of interests to the public. While notions of personal morality and ethical considerations are bound up with notions of the public good, particularly in the context of the regulation of lawyers, a further question also needs to be considered: should a representative negotiator consider, during deliberations with the client, the public worth of a given outcome of the negotiation process? In my view, the answer is yes for the negotiator-as-professional.

Here again traditional models of representative negotiation are either actively against these sorts of public-welfare considerations (based in zealous advocacy principles) or essentially silent. A typical example of this opposition is the following statement by Abe Krash: a lawyer’s “views of the public interest are immaterial to his [or her] professional responsibility.” For Riskin, the basic reason for this opposition or silence is that models of lawyering that celebrate the zealous advocate blind the lawyer to, or mandate against, a number of considerations including “the overall social effect of a given result.”

In opposition to this indifference, Duncan Kennedy—on the theory that lawyers should “[t]ry ... [their] best ... to avoid doing harm with ... [their] lawyer skills”—argues that lawyers “shouldn’t take the case if ... [they] think it would be better for society, or more moral, for the client to lose.” Similarly, Allan Hutchinson argues for a “fresh account of legal ethics [that] would ... encourage lawyers to develop a critical morality that encompasses such pressing issues as ‘what kind of lawyer do I want to be?’ and ‘what interests am
I going to spend my life serving as a lawyer?" Finally, at the 1971 "Excellence in Advocacy" program of the Advocacy Institute, held in Ann Arbor, Michigan, the celebrated author Martin Mayer argued that:

[1]If lawyers cannot look at the society as a whole and say that certain aspects of their work ... represent a plus for this society and for the world of our children, then they had better look to last-ditch defenses. Better yet, lawyers should try to find a way to salvage what is worth doing out of their work and be influential in the production of what is going to happen next.

Again, these are certainly not uncontroversial positions, particularly given the underpinnings of the dominant zealous advocate model located in strong notions of a freedom-seeking adversary system. But they are positions, again, that certainly find support in current codes of conduct. For example, the CBA states that the "primary concern" of the CPC is "the protection of the public interest." Accordingly, "the lawyer should not hesitate to speak out against an injustice." So to the extent that a representative negotiator is being asked to take a position that he considers not to be in the "public interest" or that amounts to an "injustice" (terms that are not typically defined in codes of conduct), then he is professionally encouraged to seek alternative solutions and/or to "speak out." In my view these alternatives specifically include speaking out during negotiation preparation sessions with a client who is trying to advance a cause that amounts, in the eyes of the lawyer, to an "injustice"; or in the eyes of my negotiation student, to something that is "ridiculous." This will obviously be context and lawyer specific. But that is OK. And it is certainly not a reason to shy away from the opportunity to do good, or at least to avoid doing harm, with a representative’s negotiation skills. That is the opportunity and the responsibility, in my view, of the negotiator-as-professional.

E. Other Interests
I have raised four basic sets of interests that I think must be considered by representative negotiators when approaching any given client’s retainer. In addition, there may be other interests, including competing interests of various constituencies within a representative’s own client (like, for example, when negotiating labor issues on behalf of a trade union or land claim rights on behalf of a group of native bands), or competing public interests (like, for example, when negotiating on behalf of a coalition of community groups or public-interest NGOs) that are not easily reconciled during a representative’s contemplation of a given course of conduct. Often traditional conflict of interest rules will assist with these considerations. However, in situations in which equally valid public interests are at stake, bona fide contextual and individual reflection may be the only available tool. Further, client or representative interests regarding race, gender, culture, and power may, and often do, significantly influence the negotiation process. Regardless of the interest or choice, the point here is that active consideration of and deliberation about all interests must occur.

IV. Potential Objections: Zealous Advocacy and Conflicting Interests
Perhaps the two biggest obstacles to my vision of the negotiator-as-professional are both the dominant zealous advocate model itself and the potential of irreconcilably competing interests. Because I have already taken up objections from the zealous advocacy model in
the context of representative negotiations, I do not address them further here, other than briefly to say the following. There is no doubt that the arguments and considerations that I am advancing in this article are not supported by the still-dominant model of the zealous advocate. They are therefore neither uncontroversial nor unproblematic. However, because my vision of the lawyer-as-negotiator is supported, at least in part, from a theoretical perspective by both the literature and aspects of current codes of conduct; and further, as a practical matter, by the intuitions and experiences of both experienced and novice negotiators, there is clearly both something lacking about the current models and something appealing about my alternative model. So while I acknowledge the continued hurdles that dominant, zealous advocacy models put in the way of my arguments, because of their own problems, my view is that we need to continue to search for alternative models. The negotiator-as-professional is one such alternative model that, in my view, does a better job of capturing both theoretical opportunities and practical realities of the representative negotiation process.

Equally challenging to my arguments is a further question: what if the representative is not able to reconcile the competing interests in her mind in any given negotiation? The simple answer to this question is: just because the calculus is difficult does not mean that the lawyer should not engage in it. Resorting to the zealous advocate model for expediency reasons does not do justice either to it or to alternative models. A slightly more compelling answer comes from the realm of professional responsibility: lawyers are bound to consider a broad conception of the competing interests at stake in a negotiation, both as a competence matter and as an ethical matter. So professionally, the issue is likely closed. However, this again does not really deal with the practical—and typical—situation of competing interests. What should the lawyer do?

A typical situation involves a conflict between the interests of the representative’s client and interests vis-à-vis the representative’s bargaining opposite. This conflict—discussed above—is what Gifford and others identify as a “boundary-role conflict.” The obvious answer is to try to work out with the representative’s client—during the preparation stage—a solution that maximizes the potential of both interests. For example, clients often do not appreciate the power of a good relationship between negotiators. Alternatively, they often do not realize, as generally discussed above, that a good relationship between negotiators does not mean that their interests are being somehow inadequately protected. This initial hard work with a representative’s client, with full disclosure of the representative’s views and interests, will typically resolve many of these conflicts. However, if a solution cannot be worked out, one option—that I have argued against—is Cochran’s preference for dominant client control. The alternative vision that I am suggesting is leaving significant control with the lawyer that may ultimately lead, in particularly tough situations, to a lawyer’s withdrawal from a case. While an imperfect solution, it is a preferable solution to preferring a model that impoverishes the importance of other interests (a model that potentially forces the lawyer to check him or herself—and his or her moral compass—at the door on arrival at work every morning).

Again, the point of my model is not necessarily to solve all potentially thorny circumstances with a one-size-fits-all approach (that is one of the dangerously attractive features of the zealous advocate model). No nuanced model or code, in my view, provides such a solution. For example, as the CPC recognizes, “[i]nevitably, the practical application of the Code to the diverse situations that confront an active profession in a changing society will
reveal gaps, ambiguities and apparent inconsistencies." The lawyer-as-professional model does not necessarily offer further comfort. What it does offer, however, is a forced nod to reality that takes into account all that is going on in the representative's mind. It also—in a real way—takes seriously ethical, public and other interests that current representative negotiation models do not. And when conflicts do arise, the negotiator-as-professional is not apologetic, when appropriate, in preferring (with full disclosure to the client) ethical and public interests over those of his or her client. This again can align with the spirit of the professional obligations of lawyers generally. As the CPC provides, in situations of conflict or competing ethical considerations: “the principle of protection of the public interest will serve to guide the practitioner to the applicable principles of ethical conduct ...” Again, far from irrelevant, a lawyer’s “personal conscience” and “sensitive professional and moral judgment” will animate a lawyer’s thinking in applying and resolving competing ethical obligations.

At the end of the day, what the model offers is hopefully a nuanced calculus of all interests that are on the table. This account should assist in situating the representative’s role vis-à-vis the client and others potentially involved or interested in a negotiation. In tough cases—when representative and client interests appear to collide—the model will assist in the difficult work that is done in advance of the negotiation in the context of discussions between the representative and his or her client when contemplating a retainer or, later, when preparing for a negotiation. And finally, if conflicts persist, it is acknowledged—in these tough cases—that the model may not ultimately assist with the resolution of those conflicts. However, even then, the model will succeed in giving adequate authority and support to the representative who is trying—vis-à-vis the competing interests that are still at play—to work out what he should do, with knowledge of the client, including potentially declining to accept or continue with a retainer.

V. Conclusion
What I have tried to argue is that representative negotiation models advanced to-date, like the zealous advocacy model or the “boundary role position” model lose sight of, or only pay passing lip service to, the many (and potentially competing) interests that make up the mindset of a representative negotiator. The negotiator-as-professional model takes seriously a much more expansive view of potentially competing interests in the mind of the representative negotiator. Because the different interests will come up in different ways and may or may not compete in any given situation, the importance of this model is not that it paints bright lines in terms of resolving all tensions at all times; but rather that it assists in identifying the competing interests at play and thereby forces the representative negotiator to address and potentially resolve competing interests and conflicts ahead of time rather than simply ignoring them, being unaware of them, or being trapped by them.

At the end of the day, choices need to be made in the negotiation process. And they need to be made with the client. Should different negotiation styles be considered? If so, who has the final say? Based on whose interests, etc.? What is the desired outcome? Again, whose interests should drive this calculus? Etc. And these choices may also lead to representatives declining a given client’s brief. This is all a healthy part of the negotiation process. And as I have argued, the alternative—ignoring these interests and tying the representative’s hands in favor of blind zealous representation—is not a healthy (or professional) way to proceed.
Further, and in any event, representative negotiators should care about this discussion because the client's case, while clearly central to the representative's mental calculus, is only one case. The lawyer's approach and reputation as a representative negotiator in the legal community follow him or her for an entire career. And while it takes years to develop a solid reputation as a lawyer and negotiator, it takes about five minutes to destroy one. So the lawyer clearly has a personal, professional and financial stake in his or her reputation as a lawyer and negotiator—indeed, the client—vis-à-vis negotiation style and the bargaining opposite. These same interests will also likely be at stake for the representative's bargaining opposite. They therefore need to be considered as meaningful aspects of the processes when preparing for a negotiation.

In my view, the negotiator-as-professional model should find favor in, or at least be potentially beneficial to, all layers of the legal community. In terms of clients, to the extent that lawyers are hired to provide expertise, not only regarding the substance of a given problem, but also the process of how that problem should be resolved, resting significant control over that process in the hands of lawyers should, as a systemic matter, work to the benefit of clients and their causes. It is also of benefit to clients on the theory that full communication is not only professionally required but is also beneficial to their interests. The model will benefit lawyer representatives individually and the profession generally, not only in giving lawyers significant control over how they negotiate, but also in how they feel about themselves as empowered agents in the building of their client's cases and their own careers. Finally, this model will also potentially benefit society as a whole, both through increased general professional behavior as well as specific lawyering conduct that takes seriously social welfare considerations in the calculus of competing courses of conduct.

As I have readily acknowledged, there may be some cases in which competing interests do not lend themselves well to resolution, and in those cases, lawyers will need to think seriously about withdrawal from the case. But as I have argued, what we are talking about is not simply learning how to negotiate one case for one client, but rather what a lawyer—and certainly a representative legal negotiator—does during a significant portion of his day for a significant portion of his or her career. Without taking seriously all of these potentially competing interests, my view is that we proceed with a very impoverished sense of what that career has, does, can and should look like. Without taking seriously all of these interests, we do not have an adequate answer to my student who is otherwise dissatisfied and disillusioned with the potential of a career as a representative negotiator. The negotiator-as-professional model, in my view, provides us with a better sense of the lawyer's role that will help to address some of the theoretical and practical challenges and opportunities of the representative negotiation process.

Notes and Questions

1. The following excerpt is from the "The Negotiator-as-Professional" article (at p. 28): "Clearly there are times, particularly after a retainer has been accepted and negotiations are under way, when the lawyer may be asked to take positions professionally that s/he would not take personally. But these situations aside, there are many occasions when the lawyer's interests and views should be voiced in the spirit of improving the underlying cause as well as the overall system, notwithstanding an
individual client's initial desires." Do you agree, and if so, in what circumstances would you take a position that you wouldn't otherwise take? Alternatively, when might you prefer your own interests over those of your client? How and why? Does your view of the lawyer's role in the adversary system influence your views on these issues?

2. Murray L. Schwartz, in his article "The Professionalism and Accountability of Lawyers" (1978) 66 Cal. L. Rev. 669 at 671, argues, among other things, that in lawyering situations in which arbiters are not present—expressly invoking the lawyer's role as a "negotiator" or "counsellor"—the "non-advocate lawyer should be held morally accountable for assistance rendered the client even though the lawyer is neither legally nor professionally accountable." Do you agree?

3. Does the excerpt from "The Negotiator-as-Professional" article or the Schwartz quotation (above) animate how you might respond to the following two hypothetical examples (which are also excerpted from "The Negotiator-as-Professional" article at n. 62)?

(1) A rich, speculative, private land developer asks you to negotiate a deal with a slum landlord over the purchase of a fully-functioning low income rental facility that currently houses 80 families in favour of its demolition and replacement with a high-end multi-use condo facility that would house 8 high income families. (I have been influenced by Duncan Kennedy regarding this hypothetical. See Duncan Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes" (1987) 18 Tex. Tech. L. Rev. 1157 ...)

(2) The CEO of a large privately-held downsizing transnational security firm asks you to negotiate a deal that would result in the termination of all employees of the Jewish or Muslim faith, based on your client's unfounded occupational requirement theory that these employees, while "good people," simply pose too much of a reputational and security risk (in terms of attacks against security officers in the field) and therefore are too costly to the firm.

In each case, what would you do? Why?


Selected Further Reading
American Bar Association, Standing Committee on Ethics and Professional Responsibility, "Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation" (Formal Ethics Opinion 06-439, 12 April 2006).


S. Levmore, “Commissions and Conflict in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents’ Rewards” (1993) 36 J.L. & Econ. 503.


