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Doing the Right Thing: A Study of Attorney Negotiation Ethics

by

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*Do the right thing. It will gratify some people and astonish the rest.*³

Part I – Introduction

One of the central tensions in the legal profession is a lawyer’s duty to promote the client’s interests and the lawyer’s duty to promote the public interest in justice.⁴ This

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³ MARK TWAIN (**get source**)

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tension infuses the ABA’s Model Rules of Professional Conduct (the “Model Rules”) where the principle of client confidentiality through partisanship⁵ competes with moral responsibilities to further justice, the rule of law, and honorable conduct.⁶

Over the last two decades this tension has been favoring the former over the latter. The dominant ideology and ethos in the practice of law is a lawyer’s total commitment to the client as many lawyers have come to believe that loyalty to their clients as their “first and only” responsibility.⁷ Critics of the total commitment ideology have accused lawyers of simply serving the short term interests of their clients at the expense of the justice system and third parties, forgetting that they are supposed to represent their clients within the boundaries of the law.⁸ This concern has leads to public worry that lawyers are failing to meet their responsibilities under the code of ethical conduct. As a result, several committees have spent time looking at the problem and issued calls for revamping professionalism training in law schools.⁹ Law schools,

⁴ See GEOFFREY C. HAZARD, JR. AND W. WILLIAM HODES, *THE LAW OF LAWYERING*, §1.6 (3rd ed. 2001) (summarizing the legal professionalism debates over the last twenty years).

⁵ See MODEL RULES OF PROFESSIONAL CONDUCT §§ [get citations]

⁶ See MODEL RULES OF PROFESSIONAL CONDUCT §§ 1.2(d) (prohibiting lawyers from counseling clients to commit criminal or fraudulent conduct), 1.6 (stating the general rule of confidentiality with regard to client information with certain exceptions), 1.16(a) prohibiting lawyers from representing clients when the representation will result in a violation of law, 3.3(a) (requiring candor towards tribunals), and 4.1 (requiring truthfulness in statements to others).

⁷ HAZARD & HODES, *supra* note 1 at §1.6, p. 1-14; Roger C. Cramston, *On Giving Meaning to “Professionalism,”* in AMERICAN BAR ASSOCIATION SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, REPORT OF THE PROFESSIONALISM SECTION: TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS, 8 (1996). See also Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693 (2006); Debra Lyn Bassett, *Redefining the “Public” Profession*, 36 RUTGERS L.J. 721 (2005).

⁸ *Id.*, at 19.

⁹ See generally, CARNAGIE FOUNDATION, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (forthcoming 2007); AM. BAR ASSOC. SECTION ON LEGAL

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however, are slow to lead the charge because educators have not agreed about the nature of the problem when they have thought about it, have little idea what to do about it if they could agree, and students are resistant to the topic.¹⁰

The tension between the profession’s total commitment to the client and the commitment to broader public mores is most visible in the negotiation realm because a lawyer’s duty to satisfy the client’s interests while maintaining the confidentiality of client information can directly conflict with the lawyer’s duty to represent the client within the bounds of the law. While a certain amount of dissembling and misdirection are to be expected in negotiaton,¹¹ the Model Rules prohibit engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and define such actions as professional misconduct.¹² More specifically, these competing mores are written into Rule 4.1, the rule governing negotiation. Lying about material facts either by omission or commission is explicitly prohibited in the rule’s text, but the rule’s comments recognize various exceptions to the rule due to generally accepted negotiation conventions.¹³

The requirements of Rule 4.1 have been a fertile topic of discussion for many years. The literature is mostly normative or prescriptive in nature, discussing how to

EDUCATION AND ADMISSION TO THE BAR, AND THE ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, TEACHING AND LEARNING PROFESSIONALISM (1996); ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM (1992) (popularly known as the MacCrate Report).

¹⁰ See e.g., Orrin K. Ames III, *Concerns about the Lack of Professionalism: Root Causes Rather than Symptoms Must Be Addressed*, 28 AM. J. TR. ADVOCACY 531, 542-43 (2006); Stephen H. Goldberg, *Bringing the Practice to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL ED. 414 (2000).

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¹² MODEL RULE PROF. CONDUCT (hereinafter “RULE”) 8.4. See also RULES 1.2(d) and 1.16(a).

¹³ RULE 4.1 and comment (b). For a detailed analysis of Rule 4.1 see *supra* notes ___ to ___ and accompanying text.

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reason about ethical negotiation conduct from a moral perspective,¹⁴ what the Model Rules require when negotiating,¹⁵ or how the Model Rules should be revised.¹⁶

However, the literature surrounding the rule is missing one critical component - empirical studies examining whether attorneys meet or fail to meet the rule's requirements. To fill this void, the current study explores the extent to which practicing lawyers indicate they would act in certain negotiation situations and whether such conduct would violate the requirements of Rule 4.1. This research suggests that a good majority of attorneys comply with the dictates of Rule 4.1 when negotiating, but that a sizeable minority of attorneys do not.

Part II of this article describes the requirements of Rule 4.1 and details the discussions about the rule and its requirements from the time of its drafting. Part III describes this study and presents its results. In addition, this Part describes what a lawyer's duties are under the rule when a lawyer is presented with the hypothetical situation presented in the study. Part IV discusses the conclusions we can make from the data, and Part V examines the implications of these results for lawyers, legal educators

¹⁴ See e.g., Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219, 1233 (1990) (arguing that it is wrong to harm others without justification, and that self-interest without more is insufficient justification for doing harm to others); Van Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, WILLAMETTE L. REV. 181, 204 (2004) (discussing how mindfulness meditation practices can help attorneys make a commitment to higher ethical standards); MARTIN E. LATZ, GAIN THE EDGE! NEGOTIATING TO GET WHAT YOU WANT, 250 (2004) (stating "don't use a tactic if you find it morally objectionable or just plain wrong.").

¹⁵ See e.g., HAZARD & HODES, *supra* note 1 at §§ 37.1 - 37.6.

¹⁶ See e.g., Scott Peppet, 90 IOWA L. REV. 475 (2005) (arguing for a contractual "opt-in" model of legal negotiation ethics instead of the current "one size fits all" approach); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. BAR FOUND. RES. J. 926 (discussing which kinds of lying should be proscribed under the Model Rules).

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and bar associations and suggests several methods to address the issues arising from the data.

Part II – Negotiation and Attorney Ethical Requirements

A. The Model Rules of Professional Conduct

The Model Rules Model Rules operate under the assumption that lawyers will act in the role of a partisan representative on behalf of their clients against the interests of third parties.¹⁷ In order to keep the partisan ethos from going too far, Rule 4.1 imposes limits to the degree of deception lawyers can use in their statements to third persons.

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

At the rule's core is a simple proposition – while lawyers are partisans for their clients, they must draw the line at lying including lying by omission.¹⁸ While that seems easy enough, understanding the workings and parameters of the rule requires some unpacking.

First of all, the rule only applies to material facts or law. The term material fact is not defined in the rule or its comments, but has been defined in case law as follows:

¹⁷ Scott Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: the End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 500 (2005) (describing partisan professionalism as part of the standard conception of the lawyer's role in the Model Rules); HAZARD & HODES, *supra* note __ at 36-3.

¹⁸ HAZARD & HODES, *supra* note __ at 37-3; **authorities listed in Peppet**. See also William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality and the Professional Reform Initiative*, 53 S.C. L. REV. 527 (2002).

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A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the [deal].¹⁹

This broad definition, however, is dramatically narrowed by the comments to the rule. Comment 2 asserts that certain types of statements, such as estimates of price or value and a party’s intentions as to an acceptable settlement, typically are not statements of material fact under generally accepted conventions of negotiation.²⁰ However, it is not clear what other generally accepted negotiation practices might fall under this rubric.²¹ ABA ethics opinions, another source for potential clarification on this point, are not helpful on this point either.²²

Besides prohibiting misstatements of material facts, Rule 4.1(a) also applies to misstatements of law, even when speaking with opposing counsel.²³ Thus, when speaking to others, Rule 4.1(a) simply requires lawyers to speak the truth as they understand it without engaging in any misrepresentations.²⁴

Generally speaking lawyers have no duty to voluntarily inform an opposing party of relevant facts when negotiating.²⁵ Under the auspices of Rule 4.1(b), however, a duty to disclose a material fact arises if doing so avoids assisting in a client’s emerging

¹⁹ *Ausherman v. Bank of America Corp.*, 212 F.Supp.2d 435, 449 (D.Md. 2002). The court goes on to further state, “[I]t seldom is a difficult task to determine whether a fact is material to a particular negotiation.” *Id.* See *contra* HAZARD & HODES, *supra* note ___ at 37-8 (indicating that “representations that do not go to the heart of the matter may be considered ‘not material’.” Italics added.)

²⁰ RULE 4.1, Comment 2.

²¹ Eleanor Holmes Norton, *Bargaining and Ethics of Process*, 64 N.Y.U. L. REV.493, 538 (1989); [Statement from Carrie Menkel-Meadow \(?\)](#)

²² [ABA Ethics Opinions – get them](#)

²³ HAZARD & HODES, *supra* note ___ at 37-9.

²⁴ See *id.* For example, knowingly incorporating or adopting a statement by another that the lawyer knows to be untrue is a violation of Rule 4.1(a). RULE 4.1 Comment 1

²⁵ RULE 4.1 Comment 1. But once a lawyer undertakes to provide information, the lawyer has a duty to provide the information truthfully under Rule 4.1(a). *Hansen v. Andersen, Wilmarth & Van Der Maaten*, 630 N.W.2nd 818, 825 (Iowa 2001).

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criminal conduct or fraud.²⁶ Yet there is a caveat in the rule stating that disclosure is only allowed if such disclosure does not violate the duty of maintaining client confidences stated in Rule 1.6, which appears to vitiate the duty of disclosure. Reading Rule 4.1(b) in context with the Rule 1.6 and other rules negates such a conclusion.

The general requirement of Rule 1.6 is for lawyers to maintain the confidence of their clients' information unless the client gives informed consent for the disclosure or the disclosure is impliedly authorized in order to carry out the representation.²⁷ The rule also contains several exceptions permitting disclosure with respect to criminal or fraudulent conduct such as preventing, mitigating and rectifying injuries for fraudulent conduct for which the lawyer's services have been unwittingly used.²⁸ Additionally, the rule allows for disclosure in order to comply with other laws.²⁹ Such other laws include Rule 1.2(d) which prohibits attorneys from knowingly participating in a client's criminal or fraudulent conduct along with state substantive law regarding criminal endeavors, fraud.³⁰ Moreover, attorney misconduct includes engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.³¹ With the Model Rules' clear edict to keep from becoming participants in client wrongdoing, the last clause of Rule 4.1(b) does

²⁶ RULE 4.1(b). The Model Rules define fraud as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." RULE 1.0(d). (get restatement definition of fraud)

²⁷ RULE 1.6(a).

²⁸ RULE 1.6(b)(2) and (3).

²⁹ RULE 1.6(b)(6).

³⁰ RULES 1.0(d), 1.2(d), and 4.1, Comment 3. *See also* HAZARD & HODES, *supra* note ___ at 37-13. The fraud related prohibitions in Rules 1.6(b)(2) and (3) were incorporated into the rule in 2003, but the prohibition in assisting a client's fraudulent conduct in Rule 1.2(d) has always superseded the confidentiality requirements of Rule 1.6. *See id.* at 37-14 and 15.

³¹ RULE 8.4(c). *See also* RULE 4.1, Comment 1.

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not modify the duty to disclose material facts to avoid assisting in client fraud.³² It should be noted, however, that even if the information may be disclosable under 4.1, the lawyer may simply withdraw from the representation if the lawyer were unable to convince the client to disclose the information.³³

Rule 4.1’s regulation on attorney negotiation behavior is modest at best. The rule allows attorneys to be deceitful about non-material facts and law and about opinions, which allows for unmitigated puffing and bluffing.³⁴ In short, Rule 4.1 does little other than proscribe fraudulent negotiation practices.³⁵

B. Reaction to the Rule

Because a certain amount of deception in legal negotiation has standing under Rule 4.1, it has been the subject of vigorous debate and commentary. Critics to the rule trivialize its impact because, unlike what one would expect from an ethical standard purporting to regulate “truthfulness to others,” it does not encourage truthfulness or fairness.³⁶ They argue the rule actually does the opposite because it suggests that the official standard of negotiation practice is a “no-holds-barred” or *caveat emptor* approach to deception, thus promoting

³² HAZARD & HODES, *supra* note __ at 37-15.

³³ RULE 1.16(a)(1) and (b)(3); MNOOKIN, PEPPET & TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES*, 280 (2000).

³⁴ Peppet, *supra* note __ at 499; MNOOKIN ET AL., *supra* note __ at 278. In attorney discipline cases, many lawyers use puffing and bluffing as their primary defense. **cases**

³⁵ See e.g., Geoffrey C. Hazard, Jr., *The Lawyer’s Obligation to Be Trustworthy when Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 196 (1981); Scott Peppet, *Lawyers’ Bargaining Ethics, Contract, and Collaboration: the End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 499 (2005) (describing the Model Rules approach to negotiation ethics as “a fairly minimalist approach”).

³⁶ See e.g. Wetlaufer, *supra* note __ at 1221 and 1233-36 (specifically rejecting the use of Rule 4.1 to analyze the ethics of lying in legal negotiations); Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447, 453 (1995).

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deceitful negotiation as a means of self-defense.³⁷ They point out that it makes no sense to craft ethical standards requiring attorneys to comply with only the lowest level of acceptable behavior.³⁸ Furthermore, they assert that if indeed most negotiators deceive their opponents, that fact does not establish the practice as ethically appropriate behavior.³⁹

Defenders of the rule usually do so using one or more of three basic and intertwined grounds – the necessities of an adversarial process, the idiosyncratic nature of the negotiation process, and the futility of more rigorous rules.⁴⁰ Proponents of adversarial necessity point out that the deep-seeded agency relationship between lawyers and clients that requires lawyers to gain any advantage that best serves their clients’ interests, particularly in negotiation.⁴¹ In the pursuit of an advantage in negotiation, many legal negotiators use several well tested deception based hard bargaining tactics.⁴² They argue that such tactics are

³⁷ Gary Tobias Lowenthal, *The Bar’s Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J LEGAL ETHICS 411, 445 (1988) (opining that the rule embraces “New York hardball” as the official standard of legal negotiation practice). *See also* Peppet, *supra* note __ at 504; Wetlaufer, *supra* note __ at 1272 (noting that lying in negotiation is not the province of just a few lawyers at the margins of the profession).

³⁸ Loder, *supra* note __ at 86; Lowenthal, *supra* note __ at 446-47 (suggesting abandoning the pretense of regulating attorney bargaining behavior absent “a set of serious standards” on negotiation ethics).

³⁹ Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 85 (1994); Wetlaufer, *supra* note __ at __.

⁴⁰ *See* Lowenthal, *supra* note __ at 430.

⁴¹ Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV.1, 71 (1992); Norton, *supra* note __ at 512 (observing that partisan interests increase pressure on opponents to deviate from the ethical norms of truthfulness and fairness). *See also* Peppet, *supra* note __ at 503. This idea is deeply engrained in the legal profession. *See e.g.*, Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 7-9 (1951) (stating that lawyers sometimes have a duty to lie for their clients).

⁴² *See generally* Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RES. 325.

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not only acceptable but expected because they are a necessary part of the negotiation process.⁴³ As one noted scholar has said, “to conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation”.⁴⁴ Since such bargaining is common in legal negotiations,⁴⁵ they argue that any tougher standard would be routinely violated creating “a continuing hypocrisy” that could negatively impact other Rules as well.⁴⁶

No matter where one falls on the merits of the rule, most commentators recognize that a negotiator’s personal ethics provide more ethical guidance than the rule itself.⁴⁷ This fact, unfortunately, allows for exploitation when the negotiators have unspoken but differing expectations on these factors.⁴⁸

⁴³ See Loder, *supra* note __ at 46 (noting that negotiation appears to be inherently deceptive); Norton, *supra* note __ at 508 (noting that the legitimacy of at least some deception in many traditional modes of bargaining makes it difficult to apply ordinary ethical notions of truthfulness in a systematic fashion). See also RULE 4.1, Comment 2 (declaring certain deceptive actions to be “generally accepted conventions in negotiation” and therefore are not prohibited.)

⁴⁴ James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 4 AM. B. FOUND. RES. J. 926, 928 (1980). He further states that “the critical difference between those who are successful negotiators and those who are not lies in [the] capacity to both mislead and not be misled.” *Id.*

⁴⁵ Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEG. L. REV. 83, 91 (2002); Andrea Kupfer Schneider, _____, __ HARV. NEG. L. REV. __, __ (____). Professor White sums this up nicely “[e]veryone expects a lawyer to distort the value of his own case, of his own facts and arguments, and to deprecate those of his opponent.” White, *supra* note __ at ____.

⁴⁶ White, *supra* note __ at 937-38. See also Loder, *supra* note __ at 84-85.

⁴⁷ Norton, *supra* note __ at 503 and 529. See also MNOOKIN, ET AL., *supra* note __ at 282 (advising negotiators to follow their own moral convictions); LATZ, *supra* note __ at 250 (stating “don’t use a tactic if you find it morally objectionable or just plain wrong.”); G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE, .

⁴⁸ See Hazard, *supra* note __ at 193 (describing a continuum of fairness among lawyers ranging from a “rural God-fearing standard” to “New York hardball”); SHELL, *supra* note __ at 217 (stating that not everyone agrees to the rules of negotiation); White, *supra* note __ at ____ (p94 of What’s Fair).

C. Empirical Studies of Negotiation Ethics

While numerous commentators discuss negotiation ethics in a normative or prescriptive nature, empirical studies of negotiation ethics are few.⁴⁹ Studies in non-legal contexts have focused on a continuum of appropriate (ethical and normatively acceptable) to inappropriate (unethical and normatively unacceptable) to evaluate negotiation conduct.⁵⁰ Of the studies in legal contexts, only one unpublished study focuses upon ethical negotiation behavior.

Constructing a number of hypothetical negotiation scenarios depicting various degrees of untrue statements,⁵¹ Ronald J. Anton asked non-lawyer subjects to rate each scenario on a scale of one to five where one was completely ethical, three was neutral, and five was completely unethical.⁵² Outright false statements were unanimously found to be unethical with a value of 4.9, while deceptive statements were judged to be unethical, but not so strongly at a value of 3.8.⁵³ Bluffing fell on the ethical side of

⁴⁹ This may be due in part to the relative paucity of empirical studies of legal negotiation. *See generally* Hazel Genn (get cite); Mather, McEwen, and Maiman, (get cite); Gerry Williams; Andrea Schneider. *See also infra* notes ___ to ___ and accompanying text.

⁵⁰ Despite the non-legal context of these studies, they do help us understand the requirements of Rule 4.1 as they shed light on the “generally accepted conventions in negotiation” discussed in Comment 2 to Rule 4.1. *See supra* note ___ and accompanying text.

⁵¹ The categories were: misrepresenting the importance of an outcome to the negotiator, deception, bluffing, and falsification. Ronald J. Anton, *Drawing the Line: An Exploratory Test of Ethical Behavior in Negotiations*, 1 INT’L J. CONFL. MGMT. 265, ___ (1990).

⁵² Ronald J. Anton, *Drawing the Line: An Exploratory Test of Ethical Behavior in Negotiations*, 1 INT’L J. CONFL. MGMT. 265, 271 (1990). Anton’s subjects included several different groups of MBA students (full-time, part-time, and executive MBAs) and a group of clergy. *Id.* at 269-271.

⁵³ *Id.* at 274.

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neutral with a value of 2.8 and misrepresentations related to importance of an outcome fell between ethical and neutral at 2.0.⁵⁴

Following up on Anton’s study, Roy Lewicki and Neil Stark compiled a list of eighteen negotiation tactics, all of which required some form of less than complete candor and honesty, and asked MBA students to label their appropriateness (“acceptable” or “unacceptable”) and the likelihood that they would use that tactic (“likely” or “unlikely”).⁵⁵ Four tactics were found to be ethically “appropriate”⁵⁶ twelve were found to be ethically “inappropriate,”⁵⁷ and two were determined to be “marginal.”⁵⁸ The more

⁵⁴ *Id.*

⁵⁵ Roy J. Lewicki and Neil Stark, *What Is Ethically Appropriate in Negotiations: An Empirical Examination of Bargaining Tactics*, 9 SOCIAL JUST. RESEARCH 69, 79-82 (1996).

⁵⁶ The following tactics were found to be both acceptable and likely to be used:

- asking around for information about an opponent’s negotiating position from friends and associates,
- hiding your real bottom line,
- making an opening demand far greater than what you hope to settle for, and
- conveying a false impression that time is not an issue to put pressure on your opponent.

Id. at 81.

⁵⁷ The following tactics were found to be both unacceptable and unlikely to be used:

- intentionally misrepresent the nature of the negotiations to third parties to protect delicate discussions,
- talk to your opponent’s superiors in an attempt to get them to defect,
- intentionally misrepresent factual information even though the opponent has done this to you,
- gain information from your opponent by attempting to curry favor through friendship or gifts,
- intentionally misrepresent the progress of the negotiations to third parties to make your point of view or position look better,
- threaten to make your opponent look weak or foolish in front of superiors,
- talk directly to your opponents supervisor in order to undermine their confidence in your negotiating opponent,
- promise good things will happen to your opponent if s/he gives you what you want when you know you can’t or won’t deliver those things,
- threaten to harm your opponent if s/he doesn’t give you what you want, even though you know you will never follow through on those threats,

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honest the tactic, the more appropriate and acceptable the respondents found it to be.⁵⁹

Tactics at the more dishonest end of the spectrum were viewed as ethically wrong.⁶⁰

Lewicki and Robinson replicated this study with MBA students at a different university with nearly identical results.⁶¹

Turning to studies of lawyers, in 1976 Gerald R. Williams asked lawyers in Phoenix, Arizona to rate the effectiveness of the attorney with whom they had their most recent negotiation experience.⁶² Williams identified two predominant styles of attorney negotiation, cooperative and competitive, and found that the perception of ethical conduct was an important quality in effective negotiators regardless of their negotiation style.⁶³ Twenty-five years later Andrea Kupfer Schneider updated the Williams study and found the adjective “ethical” to be the top descriptor of effective “problem-solving” negotiators

-
- gain information about an opponent’s negotiating position by recruiting or hiring one of your opponent’s key subordinates with an express understanding that such information will be delivered, and
 - intentionally misrepresent factual information to support your negotiating arguments or positions.

Id. at 84.

⁵⁸ The following two tactics were seen neither as highly appropriate/likely or highly inappropriate/unlikely:

- leading the other to believe they can only get what they want by negotiating with you, when in fact they could go elsewhere and get it cheaper or faster, and
- make an opening offer so extreme in an attempt to undermine your opponent’s confidence in his/her ability to negotiate a satisfactory settlement.

Id. at 84-85.

⁵⁹ Lewicki and Stark, *supra* note ___ at 81-85 and 92.

⁶⁰ Lewicki and Stark, *supra* note ___ at 81-85 and 92.

⁶¹ Roy J. Lewicki and Robert J. Robinson, *Ethical and Unethical Bargaining Tactics: An Empirical Study*, 17 J. BUS. ETHICS 665, 673 (1998). In fact, the authors combined the results of the two studies into one data set for analysis with almost no change in the judgments of each tactic. *Compare Id.* at 669 with Lewicki and Stark, *supra* note ___ at 81-85.

⁶² GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 17 (1983).

⁶³ *Id.* at 27. Being an ethical negotiator was the most important concern for “effective/cooperative negotiators.” *Id.* at 20.

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and for “problem-solving” negotiators in general.⁶⁴ In contrast to Williams’ study, the term “ethical” was not among the top 20 adjectives used to describe “effective adversarial” negotiators.⁶⁵

The only study to look at whether attorneys negotiate within the bounds of professional ethical standards is an unpublished study from the early 1980s by Stephen D. Pepe.⁶⁶ Using a litigation hypothetical scenario where the client gave deposition testimony about the existence of a material fact which he later remembered was false,⁶⁷ Pepe found that 50% of the Michigan litigators and 31% of the national litigators surveyed thought it acceptable to enter into a settlement agreement without disclosing the fact that the deposition testimony was erroneous.⁶⁸ Additionally, 38% of the Michigan

⁶⁴ Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEG. L. REV. 143, 163-64, 166, and 170 (2002). Schneider changed Williams’ terminology for negotiation styles to “problem-solving” and “adversarial” because they reflect the labels currently used in the negotiation literature. *Id.* at ____.

⁶⁵ *Id.* at 186.

⁶⁶ Pepe surveyed 3006 lawyers consisting of 1034 litigation attorneys from the State of Michigan and 1513 from large law firm litigators throughout the country as well as 256 state judges, 75 federal judges, and 128 law professors. STEVEN D. PEPE, STANDARDS OF LEGAL NEGOTIATIONS: INTERIM REPORT AND PRELIMINARY FINDINGS 1 (1983) (hereinafter PEPE, INTERIM REPORT).

At the time of the Pepe study, the Model Rules had yet to be finalized and enacted. The operative attorney ethical rules at that time prohibited attorneys from using or preserving false evidence or assisting a client in fraudulent conduct. MODEL CODE OF PROFESSIONAL CONDUCT, DR 7-102(A). The rules also required attorneys to ask the client to rectify a fraud, and if the client refused, for the attorney to make the disclosure. MODEL CODE OF PROFESSIONAL CONDUCT, DR 7-102(B)(1). However, there was an exception to attorney disclosure of the fraud if the attorney found about the fraud through a privileged or confidential communication. *Id.* At the time of the survey, only 14 states had adopted this exception. PEPE, INTERIM REPORT *supra* note __ at 4.

⁶⁷ In the study’s hypothetical, after the deposition the client told the attorney that “he now ‘remembers’ that Valdez did, in fact, ask him to check the brakes,” contrary to his prior testimony. STEVEN D. PEPE, STANDARDS OF LEGAL NEGOTIATIONS: SURVEY INSTRUMENT 4 (1983).

⁶⁸ *Id.* at 4.

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litigators and 26% of the national litigators thought it permissible for an attorney to refer to the false deposition testimony as if it were true during settlement negotiations.⁶⁹ When asked how an attorney should respond to a direct question about the false deposition testimony, 56% of the Michigan litigators and 46% of the national litigators thought it acceptable to give a partially true but incomplete response that failed to reveal the false testimony.⁷⁰ Of the Michigan litigators 11% thought an attorney could reply to the inquiry by making a positive assertion of the known falsehood; whereas only 5% of the national litigators thought such conduct to be acceptable.⁷¹ Finally, in mock negotiations of the hypothetical, Pepe reported that “nearly 98% of the defendants tried to settle the case without disclosing the fact that the testimony was false,” and in “only three of the 124 role plays did defense counsel acknowledge” that the deposition testimony was incorrect.⁷²

The Pepe study shows that twenty-five years ago attorneys regularly used deceptive negotiation tactics, including fraudulent tactics that would violate any set of professional ethical standards. While this point is important, the study raises numerous questions and leaves others unanswered. For example, with the widely perceived loss of civility in the profession over the last 25 years, do Pepe’s findings accurately describe the climate of legal negotiations today? In particular, with the changing demographics of the legal profession over the last 25 years, might the findings be different? Just as important,

⁶⁹ *Id.* at 4-5.

⁷⁰ PEPE, INTERIM REPORT *supra* note ___ at. Forty-four percent of the Michigan litigators and 49% of the national litigators said the response had to be truthful and complete. *Id.* at 25_.

⁷¹ *Id.* at 25_.

⁷² STEVEN D. PEPE, SUMMARY OF SELECTED FINDINGS OF THE STUDY ON THE STANDARDS OF LEGAL NEGOTIATIONS 3 and 4 (1983) (hereinafter PEPE, SUMMARY OF SELECTED FINDINGS).

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the reasons behind both ethical and unethical negotiation practices are unclear. For example, do the Rules of Professional Conduct act as a deterrent to unethical practices? Or, is ethical conduct more a construct of an attorney's internal moral compass? Might attorneys engage in unethical practices because of a lack of understanding of the requirements of the negotiation ethics rules? Or might the explanation be that they are acting in ways that they believe their counterparts would act? The answers to these questions are particularly important if attorneys regularly violate the requirements of the negotiation ethics rules because any attempt to address unethical behavior must focus on the reasons why attorneys believe such behavior is acceptable.

Part III – The Present Study

As can be seen from the literature review above, there is a dearth of published empirical studies investigating the ethical facets of attorney negotiation practices. While there are some reported cases in which attorneys have been disciplined for violating the negotiation ethics rules, the number of such cases is limited.⁷³ Since negotiation is a private activity with numerous variables, there are inherent challenges in attempting to study live negotiations in a systematic manner. Experimental simulations, however, offer a viable method of studying negotiation practices as they allow researchers to collect the

⁷³ See e.g., *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1 (1st Cir. 2005) (misrepresenting the terms of a settlement agreement in a companion case); *Ausherman v. Band of America Corp.*, 212 F.Supp.2d 435 (D. Md. 2002) (offering to provide the identity of a “kingpin” witness as part of settlement offer, when attorney did not know the identity of the witness); *Kingsdorf v. Kingsdorf*, 797 A.2d 206 (N.J. Super. Ct. 2002) (voiding land transaction between divorcing spouses when attorney failed to disclose husband's death to wife before wife signed transaction papers); *Mississippi Bar v. Mathis*, 620 So.2d 1213 (Miss. 1993) (suspending lawyer from practicing law when lawyer refused defendant's autopsy demands because they would be “invasive” after autopsy already occurred at lawyer's insistence).

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reactions of a large number of people to the same factual scenario.⁷⁴ This section describes the parameters of the present study and its results.

A. The Survey Sample

The participants in the study were comprised of two sets of practicing lawyers, one from Maricopa County, Arizona (metropolitan Phoenix) and the other drawn from St. Louis City and St. Louis County, Missouri (the two counties⁷⁵ where the majority of the lawyers in metropolitan St. Louis are located). The Arizona sample consisted of 528 attorneys,⁷⁶ of which 354 were men and 163 were women with 11 refusing to identify their sex. The Arizona respondents had been licensed for an average of 19.22 years.⁷⁷ The Missouri sample consisted of 206 attorneys,⁷⁸ of which 169 were men and 37 were

⁷⁴ Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 482-83 (2003).

⁷⁵ The City of St. Louis acts as a county in the Missouri governmental system.

⁷⁶ From the rolls of the Arizona Bar, 2000 attorneys were randomly selected to receive letters from the Dean of the Sandra Day O'Connor College of Law advising them that they had been selected to participate in the study and would be receiving an email directing them to a web site to participate in the study. Of the 2000 lawyers contacted via letter, 81 emails directing them to the web site bounced back as undelivered, and of the 1919 emails that presumably made it through to the intended recipient, 541 attorneys completed the survey equating to a return rate of 28.2%. Of the 541 responses 13 were disqualified because they were familiar with the DONS Problem, which left a sample size of 528 valid responses.

⁷⁷ The median was 18 years since licensure with a standard deviation of 10.82 and a range of 2 years since licensure to 65 years since licensure. The men had been licensed an average of 21.39 years while the women had been licensed for an average of 14.44 years. The results of an independent samples *t*-test indicated that men ($M = 21.39$ years, $SD = 11.22$) had been licensed significantly longer than women ($M = 14.44$ years, $SD = 8.13$) had, $t(397.04) = -7.79, p < .001$.

⁷⁸ A vendor supplied the names of the lawyers in St. Louis City and St. Louis County, and of that group 1665 were selected to receive a letter from the Assistant Dean of the University of Missouri School of Law advising them that they had been selected to participate in the study and would be receiving an email directing them to a web site to participate in the study. Of the 1665 lawyers contacted via letter, 367 emails directing them to the web site bounced back as undelivered, and of the 1298 emails that presumably made it through to the intended recipient, 208 attorneys completed the survey. Based on the number of emails presumably received and the number of qualified

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women.⁷⁹ The Missouri respondents had been licensed for an average of 24.75 years.⁸⁰ Because of the few remarkable differences between the two data sets [is this correct? Justin’s original language says “between the two regions”],⁸¹ the two samples were merged together for analysis giving a total number of 734 respondents.⁸²

B. Study Design

The study was conducted using a web based questionnaire based on a hypothetical negotiation adapted from the factual scenario presented in the DONS Negotiation, a negotiation role-play scenario developed at the Program on Negotiation at Harvard Law School.⁸³ The hypothetical used in the study centers on a pre-litigation negotiation where the study participant represents a would-be plaintiff who has contracted the deadly DONS

completed questionnaires, the return rate for this data set equated to 16%. Of the 208 responses 2 were disqualified because they were familiar with the DONS Problem, which left a sample size of 206 valid responses.

⁷⁹ No one in the Missouri sample refused to indicate their sex. It is not clear as to why so few women responded to the questionnaire. [double check the initial database to see if it leans heavily to men]

⁸⁰ The median was 25 years with a standard deviation of 11.25 and a range of 5 years since licensure to 60 years since licensure. The results of an independent samples *t*-test indicated that men ($M = 25.95$ years, $SD = 11.42$) had been licensed significantly longer than women ($M = 19.28$ years, $SD = 8.63$) had, $t(199) = -3.30, p < .01$.

⁸¹ The primary differences were the number of women respondents and time since licensure. Participants responding from Arizona ($M = 19.22$ years, $SD = 10.82$) had been licensed significantly less than respondents from Missouri ($M = 24.75$, $SD = 11.25$) had, $t(697) = -6.04, p < .001$. The lack of remarkable differences also extends to each set of attorneys’ responses to the survey questions. Statistically significant differences are reported *infra*.

⁸² All data analyses reported from this point forward are using the entire sample as a singular data set. The return rate for the entire sample was 23.3%, and for each of the parametric procedures presented in this paper, a confidence interval of 95% was used. Comparisons were made of certain subsets of the sample based upon non-identifiable characteristics such as sex and years since licensure, and there were very few remarkable differences among these subsets. Any statistically significant differences are reported *infra*.

⁸³ The scenario was adapted with permission from the DONS Negotiation, written by Robert C. Bordone and Jonathan Cohen based on another simulation by Nevan Elam and Whitney Fox. Copies of the DONS Negotiation simulation are available from the Program on Negotiation Clearinghouse at www.pon.org or 800-258-4406.

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(Deficiency of the Nervous System) virus from his former girlfriend. The DONS virus is a hypothetical sexually transmitted disease for which there is no cure and will result in death anytime in the next five years. Upon receiving a letter from his former girlfriend, the client took two DONS home tests, both of which indicated he had the disease.⁸⁴ In an angry letter he informed her of the test results and threatened to sue her as a result. In response, she suggested getting their respective attorneys together to work out a financial settlement because her liability is clear.⁸⁵ The only apparent issue for the negotiation is the appropriate amount of damages to be paid.

Moments before the negotiation is to begin, however, the client reveals a critical new fact to his lawyer. The results of his two earlier DONS tests turned out to be false positives, and he does not have the disease after all. While this is a relief, he is still angry with his former girlfriend and wants to punish her for her reckless behavior which caused him the agony of believing the DONS virus was going to kill him. As a result, he asks his attorney to refrain from revealing the fact that he does not have the disease during the negotiation. At this point the questionnaire began.⁸⁶

The hypothetical presents the respondent with a classic example of whether to engage in a misrepresentation by omission due to a change in circumstances. The client told his former girlfriend that he had the DONS virus believing it to be true at the time, but now he knows he does not have the disease. Because the lawyer cannot assist the

⁸⁴ The home test kits are publicly known to be very reliable. Thinking he was going to die from DONS, the client quit his job as a teacher, sold most of his possessions, and sought professional counseling.

⁸⁵ In the scenario she had the disease during their relationship and never disclosed it to him, even though they had unprotected sex on numerous occasions. Additionally, he has not had any other sexual partners from whom he could have contracted the disease, and she has admitted having transmitted the virus to him.

⁸⁶ A copy of the questionnaire is on file with _____. (an appendix?)

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client in fraudulent conduct,⁸⁷ and because confirming the untrue fact would constitute an attempt to defraud the former girlfriend,⁸⁸ the lawyer must correct her understanding of the facts if the representation is to continue.⁸⁹ Since the questionnaire was written in a way that required the representation to continue, a passive course of action which allows the former girlfriend to continue in her misapprehension of the facts would be an attempt to commit fraud and an ethical violation under Rule 4.1(b).⁹⁰ If in the negotiation the lawyer were to make an actual misrepresentation of the client's DONS status or request money as reimbursement for any future DONS related symptoms, such conduct would violate Rule 4.1(a). Thus the only proper course of conduct in the hypothetical scenario is to refuse the client's request to refrain from disclosing his true DONS status.

C. Study Results

The first set of questions focused on whether the respondents would follow the client's wishes and refrain from disclosing the client's actual DONS status in the negotiation. Follow up questions focused on the reason why the participant would or would not disclose the information. The next set of questions asked what the respondents thought other attorneys would do if put in the same situation representing the would-be plaintiff in the negotiation. The final set of substantive questions concentrated on the elements of the Model Rules regarding negotiation using the hypothetical scenario as a backdrop.

⁸⁷ RULE 1.2(d).

⁸⁸ **Insert restatement definition of fraud here**

⁸⁹ HAZARD & HODES, *supra* note __ at 37-12.

⁹⁰ *See supra* notes __ to __ and accompanying text. *See also* HAZARD & HODES, *supra* note __ at 37-14.

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1. Responses to Requests to Refrain from Disclosing the Critical Fact

The questionnaire started off by asking respondents whether they would agree to the client’s request to withhold the client’s actual DONS status during the negotiation. In response to the question 61.6% of the respondents (452 respondents) said that they would not agree to such a request while 19.3% (142 respondents) said they would agree with the client’s request and the remaining 19.1% (140 respondents) were not sure how they would respond.

The respondents who answered that they would agree to the client’s request and would not disclose his actual DONS status (142 respondents) were asked to rank the importance of certain rationales in supporting their decision to agree to the client’s request.⁹¹ As Table __ indicates, three rationales stood out as very important in their decision making: the information is protected by the professional rules of conduct regarding client confidences,⁹² the information is protected by the attorney-client privilege,⁹³ and the client has specifically requested that the information not be disclosed.⁹⁴

[insert table]

Of the remaining rationales, a few were on the “not important” side of the scale but closer to neutral: since the suit is not yet on file, there is no need to disclose anything at this

⁹¹ The ranking was done on a Likert scale of 1 to 10 where 1 meant “Not Important at All” and 10 meant “Very Important.”

⁹² On the Likert scale this rationale had a 9.63 mean and a standard deviation of 1.06.

⁹³ On the Likert scale this rationale had a 9.61 mean and a standard deviation of 1.25.

⁹⁴ On the Likert scale this rationale had a 8.19 mean and a standard deviation of 2.55.

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time,⁹⁵ and a lawyer has no affirmative duty to inform an opposing party of relevant facts.⁹⁶ Three rationales were rated closer to “not important at all” than neutral: disclosing the information compromises my role as a zealous advocate,⁹⁷ not disclosing the client’s DONS status unless directly asked is typical negotiation behavior,⁹⁸ the information is harmful to the client’s claim.⁹⁹ And one clocked in at not important - failing to disclose the client’s DONS status at this time is typical negotiation behavior.¹⁰⁰

The respondents who answered that they would not agree to the client’s request to refrain from disclosing his actual DONS status (592 respondents) were asked to rank the importance of certain rationales in supporting their decision to refuse the client’s request.¹⁰¹ As Table __ indicates, three rationales stood out as very important in their decision making: my integrity is too important,¹⁰² to follow his request may violate the rules of professional conduct,¹⁰³ and my moral compass will not allow me to do so.¹⁰⁴ Others rationales that the respondents considered to be important to their decision included: the information will come to light if there is a lawsuit,¹⁰⁵ the client does not understand the consequences of such conduct to the attorney,¹⁰⁶ and the client does not understand the consequences of such conduct to him.¹⁰⁷

⁹⁵ On the Likert scale this rationale had a 4.18 mean and a standard deviation of 3.3.

⁹⁶ On the Likert scale this rationale had a 4.06 mean and a standard deviation of 3.33.

⁹⁷ On the Likert scale this rationale had a 3.75 mean and a standard deviation of 3.03.

⁹⁸ On the Likert scale this rationale had a 3.65 mean and a standard deviation of 3.17.

⁹⁹ On the Likert scale this rationale had a 3.58 mean and a standard deviation of 2.94

¹⁰⁰ On the Likert scale this rationale had a 2.99 mean and a standard deviation of 2.85.

¹⁰¹ The ranking was done on a Likert scale of 1 to 10 where 1 meant “Not Important at All” and 10 meant “Very Important.”

¹⁰² On the Likert scale this rationale had a 9.65 mean and a standard deviation of 1.19.

¹⁰³ On the Likert scale this rationale had a 9.54 mean and a standard deviation of 1.38.

¹⁰⁴ On the Likert scale this rationale had a 9.18 mean and a standard deviation of 2.0.

¹⁰⁵ On the Likert scale this rationale had a 7.02 mean and a standard deviation of 3.52.

¹⁰⁶ On the Likert scale this rationale had a 6.46 mean and a standard deviation of 3.52.

¹⁰⁷ On the Likert scale this rationale had a 6.29 mean and a standard deviation of 3.32.

[insert table]

The lowest rated rationale, with a rating closer to “not important at all” than neutral, was that lawyers and not clients should make negotiation strategy decisions.¹⁰⁸

The lawyers who either refused to follow the client’s initial request or were not sure what they would do in response to the client’s request (a total of 592 respondents) were asked a follow up question with the hypothetical situation slightly changed. In this instance, the client said that the attorney could disclose his true DONS status only if directly asked about it. When asked if they would agree to this request, 63.5% of this subset (376 respondents) indicated they would refuse to do so, 13.3% of this subset (79 respondents) indicated that they would agree to the request, and 23.1% of this subset (137 respondents) replied that they were not sure what they would do.

To better compare and study how the respondents reacted to the remainder of the questionnaire, we categorized them in relation to Rule 4.1 based on their responses to the client’s request to withhold his actual DONS status..

Response to C's 1st Req.	Response to C's 2nd Req	Frequency	Percent	Descriptor
Yes	n/a	142	19.3	Unconditional Violator
Don't know	Yes	63	8.6	Conditional Violator
No	Yes	16	2.2	Conditional Violator
No	No	366	49.9	Unconditional Nonviolation
No	Don't know	70	9.5	Conditional Nonviolation
Don't know	No	10	1.4	Conditional Nonviolation
Don't know	Don't know	67	9.1	Uncertain

¹⁰⁸ On the Likert scale this rationale had a 3.68 mean and a standard deviation of 2.89.

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To summarize, 30.1% of the respondents (221 respondents) fell into a violator category (unconditional or conditional) because they would agree with one of the client’s requests to keep from disclosing the information about his true DONS status while 49.9% (366 respondents) fall into the Unconditional Nonviolator category because they would not agree with the either of the client’s requests. Another 9.1% (67 respondents) fell into the Uncertain category because they were not sure what they would do in response to either client request while the remaining 10.9% (80 respondents) fell into the Conditional Nonviolator category because they would refuse one of the client’s requests but were not sure what they would do in response to the client’s other request.¹⁰⁹

Aggregating the respondents in each category listed in Table __, we arrive at the following respondents in each category:

Category	Frequency	Percent
Unconditional Violator	142	19.30%
Conditional Violator	79	10.80%
Unconditional Nonviolator	366	49.90%
Conditional Nonviolator	80	10.90%
Uncertain	67	9.10%

[add transitional sentence or paragraph]

2. What Other Lawyers Would Do

All participants were asked two questions about how other attorneys would respond if they faced the requests the questionnaire posed to the respondents. First they

¹⁰⁹ The remaining 1.4% (10 respondents) were not sure what they would do in response to the client’s first request, but would refuse the second request. *See supra* Table __ .

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were asked what percentage of all lawyers they believed would follow the client’s request to avoid providing any information about the client’s actual DONS status even if directly asked about it. Then they were asked what percentage of attorneys they believed would agree to withhold information about the client’s actual DONS status as long as the other attorney did not directly ask about it. The results of the entire sample appear in Table aa

[insert table]

The differences responses between the two questions is statistically significant.¹¹⁰

[true?]

[insert data and tables related to various subgroups]

3. Understanding the Ethical Rule

In an attempt to determine how well respondents understand Rule 4.1 and its operation,¹¹¹ they were asked questions about the elements of the rule and its comments in the context of the hypothetical negotiation.¹¹² The questions focused on whether certain facts in the scenario were material facts to the negotiation,¹¹³ whether failure to disclose the client’s DONS status is misrepresentation,¹¹⁴ and whether the failure to disclose the client’s DONS status is a generally acceptable negotiation practice.¹¹⁵ A question about client confidences with regard to the factual scenario was disqualified.¹¹⁶

¹¹⁰ [Justin – formula for statistical significance]

¹¹¹ See *supra* notes __ to __ and accompanying text.

¹¹² See *supra* Section __.

¹¹³ See RULE 4.1.

¹¹⁴ See RULE 4.1, Comment 1

¹¹⁵ See RULE 4.1, Comment 2

¹¹⁶ The question was disqualified because both yes and no answers could be correct depending on the circumstances. The question asked whether the client’s DONS status was a client confidence protected from disclosure under the rules of professional conduct. If the attorney is to continue in the representation, it is not protected information. See *supra* notes __ to __ and accompanying text. If the attorney withdraws from the client’s

representation, the information may still be protected. *See* Rule __ **[Is this how we should do it? Wording? Not mention this at all?]**

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a. Material Facts

Rule 4.1 is based upon the premise that attorneys understand the phrase “material fact” as used in the rule.¹¹⁷ To test whether the respondents understood the term, the questionnaire presented them with several facts from the hypothetical scenario and asked if these facts were material facts to the negotiation. Specifically the questionnaire asked: “Which of the following do you think are material facts in [the client’s] negotiation with [his former girlfriend]? Please check all of the facts that you believe are material to the negotiation.” The results are illustrated in Table __ below.

The first set of facts related to the client’s former girlfriend. Her financial situation was identified as a material fact by 53.4% of the respondents (392 respondents) while 46.6% (342 respondents) said that it was not a material fact. Just over two-thirds of the respondents, 66.8% (490 respondents), indicated that her desire to resolve the situation out of court was a material fact and the remaining 33.2% (244 respondents) replied that it was not. When asked about her settlement authority (i.e. reservation price), 38% (455 respondents) designated it as a material fact with the remaining 62% (455 respondents) replying that it was not.

The second set of facts related to the client. His initial (but inaccurate) DONS home test kit diagnosis was identified as a material fact by 69.8% of the respondents (512 respondents) while 30.2% (222 respondents) said that it was not. A large majority of respondents, 84.5% (620 respondents), indicated that his DONS status was a material fact, whereas 15.5% (114 respondents) replied that it was not. When asked about his

¹¹⁷ See RULE 4.1 and Comment 2 to the rule. See also MRCP, Preamble: A Lawyer’s Responsibilities, para. 16 (stating that compliance with the Rules relies on understanding).

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actions in response to his initial (but inaccurate) DONS diagnosis,¹¹⁸ 73.6% (540 respondents) replied that these were material facts and the remaining 26.4% (26.4%) indicating that they were not.

Table __

Is the following a material fact to the negotiation?	Y	N
• Girlfriend’s financial situation	53.4%	46.6%
• Girlfriend’s desire for resolution	66.8%	33.2%
• Girlfriend’s atty’s settlement auth	38%	62%
• Client’s home test kit results	69.8%	30.2%
• Client’s actions after initial test results	73.6%	26.4%
• Client’s DONS negative status	84.5%	15.5%

[transition]

b. Failure to Disclose - A Misrepresentation?

Another basic to Rule 4.1 is that attorneys understand what a misrepresentation is. In fact, the comments to the rule warn lawyers “to avoid criminal and tortuous misrepresentation,”¹¹⁹ and specifically state that “[m]isrepresentations can also occur [through] . . . omissions that are the equivalent of affirmative false statements.”¹²⁰ In the hypothetical scenario, failing to inform the former girlfriend of the client’s DONS status would lead her to continue to believe he has the disease, which is the equivalent of

¹¹⁸ In response to his belief that he did have DONS, the client . . . [. . . **did these actions**].

¹¹⁹ RULE 4.1, Comment 2.

¹²⁰ RULE 4.1, Comment 1. Furthermore, the comments specifically state that “Lawyers should be mindful of their obligations . . . to avoid criminal and tortuous misrepresentation.”

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affirming her false statement. To determine if the respondents knew an omission could be a misrepresentation, the questionnaire asked respondents if it was a misrepresentation to refrain from disclosing the client’s actual DONS status if opposing counsel failed to ask about it. A majority of respondents, 60.5% (444 respondents), said that it was a misrepresentation while 26.4% (194 respondents) indicated that it was not. The remaining 13.1% (96 respondents) were not sure if it was a misrepresentation or not.

[insert comparisons of subgroups]

c. Failure to Disclose - A Generally Accepted Negotiation Practice?

The comments to Rule 4.1 uses the phrase “generally accepted negotiation practice” to describe certain facts that ordinarily are not considered to be material facts. Instead of using this phrase to describe facts, the questionnaire used it in terms of a negotiation maneuver. Specifically the questionnaire asked if failing to disclose the client’s actual DONS status in response to a direct question from opposing counsel is a generally acceptable negotiation practice. A distinct minority of respondents, 11.8% (87 respondents), indicated that it was a generally accepted negotiation practice while a large majority, 78.5% (576 respondents), indicated that it was not. The remaining 9.7% (71 respondents) were not sure if it was or not.

[insert comparisons of subgroups]

Part IV - Data Analysis and Findings

As indicated above, the only proper course of action in the hypothetical scenario is to refuse the client’s requests to refrain from disclosing the fact that he does not have the DONS virus. Any attempt to enter into a settlement agreement based on the former

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girlfriend's belief that he still has the disease is an attempt to commit fraud on behalf of the client and violates Rule 4.1.¹²¹

The results of this study indicate that 30.1% of the respondents were willing to agree to engage in attempted fraud in the settlement negotiations when the client asked them to do so and another 20% were not sure whether they would or would not agree to engage in such conduct. Only 49.9% of the respondents followed the proper course of action and refused the client's request(s). While this number represents some improvement when compared to the amount of unbridled attorney negotiation deception found in the Pepe study from 25 years ago (get percentages), the problem is still widespread. For a profession that is based on integrity and the rule of law but is widely thought to be corrupt, these findings are troublesome at best.

Before being able to address the problem on the whole, the specific problem with the either the Rule or the legal negotiation culture needs to be identified. It is not clear why more than 50% of the respondents failed to immediately recognize that their client was asking them to engage in patently improper conduct. However, it is clear that those who were willing to commit an unconditional attempted fraud (19.1%) believed that they were either allowed or required to do so under the Rules of Professional Conduct or the strong ethos of commitment to the client's interests.¹²² These lawyers may fall into the category of those who believe that loyalty to their clients as their "first and only"

¹²¹ See *supra* notes ___ to ___ and ___ to ___ and accompanying text.

¹²² Those who agreed to the client's first request to commit an attempted fraud identified three reasons that were very important in their decision – the rules of professional conduct with respect to client confidences, the attorney-client privilege, and the fact that the client had requested them to do so. See *supra* notes ___ to ___ and Table ___.

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responsibility,¹²³ but there may be more subtle issues working in conjunction with this belief.

One potential explanation for the high number of attorneys who are willing to attempting to commit fraud on behalf of the client or at least willing to seriously entertain the thought is the considerable confusion among attorneys regarding the elements of the professional responsibility rule governing negotiation. A striking number of attorneys appear to misunderstand what constitutes a material fact in negotiations. [note – check how unconditional violators answered these questions] Because the term “material fact” is not defined in the Rules and used in several other contexts that may be more familiar to attorneys,¹²⁴ it is important to be clear what the phrase means in the context of Rule 4.1.

The clearest definition of the term “material fact” in the negotiation context is:

A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the [deal].¹²⁵

They key here is simply whether the fact has an impact on one party’s understanding of what is being negotiated. It is, however, important to note that estimates of price or value and a party’s intentions as to an acceptable settlement ordinarily are not considered material facts.¹²⁶

Based on this definition, all of the facts about the client that the questionnaire identified - the client’s DONS home test kit results, the client’s DONS negative status,

¹²³ See *supra* notes ___ to ___ and accompanying text. In comparison, those who refused the client’s first request (61.6%) did so because of moral principles and the rules of professional conduct. See *supra* notes ___ to ___ and Table ___.

¹²⁴ Two prime examples of its use are in the elements of fraud where “material fact” is defined as ___ and in the context of summary judgment where a “material fact” is defined similarly as ___.

¹²⁵ *Ausherman*, 212 F.Supp.2d at 449.

¹²⁶ See *supra* notes ___ to ___ and accompanying text.

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and the client’s actions in response to his DONS home test kit results - are easily determined to be material to the negotiation. They help the former girlfriend understand what is at the heart of the negotiation, the client’s actions in response to her reckless conduct, which will determine the compensation she will be paying him. Yet, a substantial minority of respondents thought these facts were not material to the negotiation.¹²⁷ Astonishingly the key fact that will determine the amount of the monetary settlement in the negotiation, the client’s actual DONS status,¹²⁸ was thought not material by 15.5% of the respondents.

Analyzing the former the facts about the former girlfriend that the questionnaire identified – her financial situation, her desire to resolve the situation out of court, and her attorney’s settlement authority – is not as simple. None of these facts concern the substance of the client’s claim,¹²⁹ but her financial situation and the attorney’s settlement authority help determine the negotiation’s monetary parameters and the parties’ final settlement threshold, items that help the client understand what might be gained in the negotiation. It appears that they are material facts.

Some might argue that these two facts are not material to the negotiation because the requestor is not entitled to such information¹³⁰ It may be true that the requestor is not entitled to this information, but that does not mean that such requests are morally

¹²⁷ When asked whether the client’s home test kit results were a material fact, 30.2 % responded no. Additionally, when asked if the client’s actions in response to the results of his home test kit results, 26.4% said no. *See supra* notes ___ to ___ and Table ___.

¹²⁸ This is because the client has already led her to believe that the impact is much more dramatic than it actually is.

¹²⁹ As a result, they may not be material facts in other contexts, such as in summary judgment. *See* ____

¹³⁰ Lawyer negotiators generally have no affirmative duty to inform an opposing party of relevant facts. RULE 4.1, Comment 1.

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illegitimate and therefore deserving of outright lies in response.¹³¹ Furthermore, lawyers can easily avoid lying in this instance. Since they have no affirmative duty to inform an opposing party of relevant facts,¹³² instead of answering these questions they should simply redirect the conversation, parry the question, or otherwise refuse to answer.¹³³ Giving false information in response to questions for this information would be a violation of Rule 4.1(a).¹³⁴

As for the former girlfriend’s desire to settle the case, it’s difficult to make an argument that an inchoate fact like that is material to a negotiation. While the fact of desiring or not desiring a settlement may be critical to whether a settlement occurs, attorney negotiators who say they are not interested in settling a claim often settle if the price is right. Why? Because negotiators make offers despite the statement and if the price is right a deal may still occur. This kind of a statement clearly is a generally accepted negotiation convention that falls outside of the definition of a material fact.¹³⁵ Nevertheless, more than two-thirds of the respondents (66.8%) improperly identified the former girlfriend’s desire to settle the claim as a material fact to the negotiation.¹³⁶ [add conclusions based on data subgroups]

Without the basic understanding of what constitutes a material fact to a negotiation, lawyers are certain to make mistakes when it comes to following a rule centered on material facts. But there are deeper aspects of Rule 4.1 and its intersection

¹³¹ HAZARD & HODES, *supra* note ___ at 37-7 – 37-8.

¹³² RULE 4.1, Comment 1.

¹³³ HAZARD & HODES, *supra* note ___ at 37-8.

¹³⁴ HAZARD & HODES, *supra* note ___ at 37-__.

¹³⁵ See RULE 4.1, Comment 2. This conclusion is consistent with the comment to the rule specifies that “a party’s intentions as to an acceptable settlement of a claim” is ordinarily not a material fact. *Id.*

¹³⁶ See *supra* notes ___ to ___ and accompanying text and Table ___.

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with the law of misrepresentation that are disconcerting as well. Much of the commentary to Rule 4.1 discusses what constitutes a misrepresentation and what to do when a client makes a misrepresentation.¹³⁷ Comment 2 even goes so far as including this warning: “Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.”¹³⁸ **[insert Loder info about lying by omission]** Yet, a sizeable minority of respondents (39.5%) failed to understand that non-disclosure of a fact, even when not asked a question about that fact, can constitute a misrepresentation.¹³⁹ **[compare to violation status]** Without a basic understanding of the law of misrepresentation, it should be no surprise that lawyers unwittingly make potentially fraudulent misrepresentations to others on behalf of their clients in violation of Rule 4.1.

The failure to understand the foundational concepts of Rule 4.1, term material fact as it is used in Rule 4.1 and the law of misrepresentation, is a serious matter. Without that understanding, legal negotiators are unlikely to know the bounds of acceptable negotiation behavior. This causes a two part problem for legal negotiators. The most straightforward issue rests on the negotiator who violates the rule. That lawyer is risking disciplinary action from the bar, including disbarment, in addition to civil and criminal penalties for misrepresentation and fraud.¹⁴⁰ The more dispersed or diffuse issue is the affect on the culture of legal negotiations.

¹³⁷ See RULE 4.1, Comments 1, 2, and 3.

¹³⁸ RULE 4.1, Comment 2.

¹³⁹ See *supra* notes ___ to ___ and accompanying text; [cite to Restatement and cases]; RULE 4.1, Comment 2.

¹⁴⁰ Cite cases

[next paragraph needs some work]

At its essence negotiation is an exercise in the exchange of information. Naturally, the higher the stakes, the more strategic the information exchange becomes as exchanges of offers and counter-offers, their accompanying explanations, and any subsequent concessions convey signals that are intended to shape perceptions as to what is and is not possible in the negotiation.¹⁴¹ This informational interdependence requires a certain degree of truthfulness to make the information exchange worthwhile and to make a deceptive negotiation tactic believable.¹⁴² Balancing this tension between expected truthfulness and expected misdirection is a difficult task for any negotiator. Rule 4.1 and the law of misrepresentation helps lawyers with this balancing task by setting the limits for what is unacceptable negotiation behavior. When this limit is routinely and casually crossed, the task can become all but impossible.

Part V – Suggestions for Moving Forward

The need to make clear the limits to deception in legal negotiation

Outline

- A. Education – law schools and CLE programming
 - a. More than a few minutes in one class
 - b. Focusing on material fact and law of misrepresentation
 - c. Use of lots of examples
 - d. Issues with transfer of training, especially in culture that may not be receptive
 - e. Study regarding Short-lived effects of ethics training

- B. Clarify Rule 4.1
 - a. make clear material fact means material to the negotiation

¹⁴¹ Shell at 154; MNOOKIN, et al., at 23.

¹⁴² BOK, LYING, 18-19; MNOOKIN, et al., at 23.

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- b. give more examples in the comments to the rule
- C. Attorneys to be more vigilant during negotiations
 - a. Contract drafting
 - b. Making no assumptions
- D. Increase enforcement
 - a. Put this on the radar
 - b. Inherent difficulties
 - i. Private conduct
 - ii. Ratting out lawyers

Conclusion

- A. Review theoretical and practical implications
- B. Purpose of this study was to find out if part of the problem is failing to understand the consequences of conduct
- C. Lack of understanding not the only factor here - others
 - a. Some bad apples – suggestions from data
 - b. Ethical fading
 - c. further studies for these and others.
- D. Wrap up