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Attorney Negotiation Ethics: An Empirical Assessment

by

Art Hinshaw* and Jess K. Alberts**

Always do right. This will gratify some people, and astonish the rest.

-- Mark Twain¹

I. Introduction

One of the central tensions within the legal profession arises from lawyers' duties to promote their clients' interests and to promote the public's interest in justice.² The

* Clinical Professor of Law and Director of the Lodestar Dispute Resolution Program at the Sandra Day O'Connor College of Law, Arizona State University. A.B. Washington University (St. Louis) 1988; J.D. and LL.M. University of Missouri School of Law 1993 and 2000 respectively.

** President's Professor of Human Communication and Director of the Conflict Transformation Project at the Hugh Downs School of Human Communication, Arizona State University. B.S. and M.A. Abilene Christian University 1977 and 1978 respectively; Ph.D. University of Texas, Austin 1986.

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¹ THE WIT AND WISDOM OF MARK TWAIN 200 (Alex Ayers ed., 1987).

code of ethical conduct for lawyers - the ABA's Model Rules of Professional Conduct (the "Model Rules") - is infused with this tension which has spurred professionalism debates over the last several decades.³ Despite high-minded talk from bar leaders and academics, the economic realities of legal practice have pushed client results to the forefront, resulting in an ideology and ethos centered on a lawyer's total commitment to the client.⁴ In fact, many lawyers have become overly client-centric and now believe that loyalty to their clients is their "first and only" responsibility.⁵ This belief causes problems that play out again and again in the legal profession.⁶

The tension between a commitment to the client and a commitment to broader interests in justice often comes to a head in the negotiation realm where issues of honesty come to the fore.⁷ As leading negotiation scholar Roger Fisher observed, most attorney

² See GEOFFREY C. HAZARD, JR. AND W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.6 (3d ed. 2001).

³ See e.g., *id.* (summarizing the legal professionalism debates over the last twenty years); Roger C. Cramton, *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 7-8 (1996); Orrin K. Ames III, *Concerns About the Lack of Professionalism: Root Causes Rather than Symptoms Must Be Addressed*, 28 AM. J. TRIAL ADVOC. 531, 542-43 (2006).

⁴ HAZARD & HODES, *supra* note 2, § 1.6, at 1-14; Cramton, *supra* note 3, at 8.

⁵ See Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721 (2005); Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693 (2006).

⁶ 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); *In re Crossen*, 880 N.E.2d 352 (Mass. 2008) (misrepresenting nature of interviews with judge's law clerk and denying involvement in surveillance of clerk while tape recording "sham" interviews); *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962) (defense counsel failed to inform plaintiff of a life-threatening aneurysm defendant's neurologist found during examination of plaintiff).

⁷ The following passage captures this idea nicely.

If it is true that lawyers succeed in the degree to which they are effective in negotiations, it is equally true that one's effectiveness in negotiations depends in part upon one's willingness to lie.

negotiation ethics problems stem from a conflict between the lawyer's obligation to the client and the honorable treatment of other negotiators.⁸

When lawyers negotiate, they rely on their values and beliefs about lawyering and the lawyer's role in the negotiation process to make both conscious and unconscious strategy choices and moves.⁹ These views are shaped by two core tenets, also known as the lawyer's standard philosophical map: first, that disputants (including negotiation counterparts) are adversaries where if one wins, the other must lose; second, that disputes are resolved only through the application of law, so that a projected positive trial outcome provides bargaining leverage in a negotiation.¹⁰ As a result, lawyers tend to follow specific bargaining norms that resemble a form of advocacy – playing to win (or to not lose), sharing as little information as possible, and continuously demonstrating the strength of their positions.¹¹

Furthermore, a certain degree of dissembling and misdirection is to be expected in the negotiation realm.¹² Consistent with these expectations, Model Rule 4.1 legitimizes

Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219, 1220 (1990). See also Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 268 (2009) (“[T]he thorniest professional responsibility and liability issues to arise in negotiation are rooted in the soil of honesty.”).

⁸ Roger Fisher, *A Code of Negotiation Practices for Lawyers*, 1 NEGOTIATION J. 105 (1985); see also MODEL RULES OF PROF'L CONDUCT, PREAMBLE ¶ 9 (2007).

⁹ JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 75 (2008).

¹⁰ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–44 (1982).

¹¹ MACFARLANE, *supra* note 9, at 76–81; ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 167–171 (2000).

¹² Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 46 (1994) (noting that negotiation appears inherently deceptive); Barry R. Tempkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 180 (2005) (observing that half-truths, partial truths, misdirection, and omissions are common in legal negotiations).

some deceitful negotiation techniques and only prohibits fraudulent misrepresentations about material matters.¹³ Rule 4.1's truthfulness standard has been a fertile topic of discussion since its adoption. Most of the literature on this topic is normative or prescriptive in nature, discussing how to 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 Of the few empirical studies of attorney negotiation ethics in existence, most are limited in scope.¹⁷ Missing from the literature are rigorous empirical studies examining whether attorneys actually follow Rule 4.1's relatively meager requirements. Seeking to fill this void, this article empirically explores whether rule violation is a pervasive problem.

To do this, we surveyed 734 practicing lawyers and asked them what they would do if a client asked them to assist in a fraudulent pre-litigation settlement scheme. Nearly one-third indicated they would agree to one of the client's two requests to engage in the fraudulent scheme. Half of the respondents indicated that they would refuse both of the client's overtures. And the remaining twenty percent of respondents either indicated that

¹³ See *infra* Part II.A.1.a.

¹⁴ See, e.g., 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); Wetlaufer, *supra* note 7, at 1233 (arguing that it is wrong to harm others without justification, and that self-interest without more is insufficient justification for doing harm to others).

¹⁵ See, e.g., Richmond, *supra* note 7; HAZARD & HODES, *supra* note 2, §§ 37.1–37.6.

¹⁶ See, e.g., Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005) [hereinafter Peppet, *Pluralism*] (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. B. FOUND. RES. J. 926 (discussing which kinds of lying should be proscribed under the Model Rules).

¹⁷ The empirical studies of attorney negotiation ethics in existence are discussed *infra* in Part II.C.

they were not sure how to respond to both requests or refused one request and indicated that they were not sure how they would respond to the other request.¹⁸

In order to understand the lawyers' responses, the study explored the respondents' reasons for agreeing or disagreeing with the client's requests. The data lead to several important conclusions. First, there appears to be substantial misunderstanding as to what constitutes a misrepresentation, the standard that sets the boundary between acceptable and unacceptable negotiation behavior under the Rule. Second, the findings suggest substantial confusion surrounding the rule's operative term "material fact." Third, the respondents who agreed to the client's most egregious request appear to believe that other legal rules, including other portions of the Model Rules, either gave them permission or required them to engage in the fraudulent scheme. Fourth, lawyers believe violation of Rule 4.1 is widespread, and respondents' beliefs about negotiation norms are an indicator of whether attorneys will violate Rule 4.1.

The multiple failures surrounding the respondents' understanding and application of Rule 4.1 identified in this study is a cause for serious concern. They reveal a cultural and structural problem arising from the way lawyers think about negotiation. To address this problem, we propose a comprehensive and multifaceted approach to raise lawyer negotiation conduct to levels consistent with the Model Rules - rule clarification, education, and increased rule enforcement.

The remainder of this article proceeds as follows. Part II of this article describes Rule 4.1's requirements, the ongoing debate about the Rule's efficacy, and the few empirical studies of negotiation ethics that have been conducted to date. Part III describes the methodology of the present study, including a description of the survey respondents

¹⁸ These respondents either were unsure how to respond to both of the client's overtures or they refused one request and were not sure how to respond to a second one. *See infra* Part III.C.

and the negotiation hypothetical upon which the study is based. The next four sections are related to the study's data: Part IV presents the lawyers' responses to the client's requests to engage in the fraudulent negotiation acts; Part V presents the rationales and factors that may have been important to their decision to agree or refuse the client's overtures; Part VI dissects those rationales into groups for analysis based the pattern of respondent answers to the study's threshold questions; and Part VII discusses various limitations to the conclusions we can draw from the data. A summary to the key conclusions to be drawn from the data makes up Part VIII, and Part IX asserts three interdependent means to improve attorney negotiation ethics. To conclude, Part X calls for a back-to-basics approach to attorney negotiation ethics.

II. Negotiation and Attorney Ethical Requirements

The ethics of bargaining have long been recognized as morally complicated.¹⁹ Ethicists frequently decry the practice of lying to advance one's self-interests; nonetheless, in the legal arena some misleading and duplicitous tactics are considered legitimate and are even recommended and expected by clients.²⁰ The rules governing attorney negotiation practices reflect the difficulty of reconciling moral standards with accepted practices.

¹⁹ See generally Loder, *supra* note 13, at 85; Scott R. Peppet, *Dispute Resolution: Raising the Bar and Enlarging the Canon*, 54 J. LEGAL EDUC. 72, 72 (2004).

²⁰ Compare SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 146–64 (1978) (examining the moral implications of lying to protect client interests) and Wetlaufer, *supra* note 7, at 1272–73 (arguing against deceptive negotiating techniques as inimical to ethical behavior) with U.C.C. § 2-312(2) (2004) (permitting “puffing”), PROSSER ON TORTS, 739 (3d ed. 1964) (discussing the permissible practice of “puffing” as the bargainer’s “privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk!”) and Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 91–92 (2002) [hereinafter Peppet, *Saints*] (observing that “bluffing” and “puffing” are permissible negotiation tactics and the Model Rules of Professional Conduct allow certain kinds of misrepresentation).

A. The Model Rules of Professional Conduct

After several years of discussing a series of draft revisions to its heavily criticized Model Code of Professional Conduct, the ABA adopted the Model Rules in 1983 to provide a clear statement of professional responsibilities for lawyers.²¹ Since their promulgation, forty-nine states have adopted the Model Rules, or a version of them, as their professional code of conduct for lawyers, making them the “majority rule” in lawyer disciplinary matters.²²

The Model Rules’ regulation of attorney negotiation behavior emanates from Rule 4.1, although two other rules, Rules 3.3(b) and 8.4(c), reinforce the general principles embodied in Rule 4.1

²¹ See generally HAZARD & HODES, *supra* note 2, at §§ 1.11–1.13 (detailing the difficulties with the Model Code of Professional Conduct, the drafting of the Model Rules, and the Model Rules’ adoption).

²² California is currently the only state without a code of professional conduct patterned after the Model Rules. See *State Adoption of Model Rules*, Center for Professional Responsibility, American Bar Association, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited June 29, 2009); see also ALA. RULES OF PROF’L CONDUCT; ALASKA RULES OF PROF’L CONDUCT; ARIZ. SUP. CT. R. 42; ARK. RULES OF PROF’L CONDUCT; COLO. RULES OF PROF’L CONDUCT; CONN. RULES OF PROF’L CONDUCT; DEL. RULES OF PROF’L CONDUCT; FLA. STAT. ANN. BAR ch. 4 (West 2004); GA. R. BAR pt. IV (2009); HAW. RULES OF PROF’L CONDUCT; IDAHO RULES OF PROF’L CONDUCT; ILL. COMP. STAT. ANN. S. CT. RULES OF PROF’L CONDUCT, art. VIII (West 2009); IND. RULES OF PROF’L CONDUCT; IOWA CODE ANN. ch. 32 (West 2005); KAN. RULES OF PROF’L CONDUCT; KY. SUP. CT. R. 3.130; LA. REV. STAT. ANN. tit. 37, ch. 4, art. XVI (2009); ME. BAR RULE 3; MD. RULE 16-812; MASS. RULES OF PROF’L CONDUCT; MICH. RULES OF PROF’L CONDUCT; 52 MINN. STAT. ANN., RULES OF PROF’L CONDUCT (2006); MISS. RULES OF PROF’L CONDUCT; MO. SUP. CT. R. 4; MONT. RULES OF PROF’L CONDUCT; NEB. RULES OF PROF’L CONDUCT; NEV. RULES OF PROF’L CONDUCT; N.H. RULES OF PROF’L CONDUCT; N.J. RULES OF PROF’L CONDUCT; N.M. STATE CT. R. 16; N.Y. RULES OF PROF’L CONDUCT; N.C. STATE BAR R. ch. 2; N.D. RULES OF PROF’L CONDUCT; OHIO RULES OF PROF’L CONDUCT; OKLA. STAT. ANN. tit. 5, ch. 1, app. 3-A (2001); OR. RULES OF PROF’L CONDUCT; PA. RULES OF PROF’L CONDUCT; R.I. SUP. CT. R. art. V; S.C. APP. CT. R. 407; S.D. CODIFIED LAWS § 16–18, app. (2009); TENN. SUP. CT. R. 8; TEX. GOV’T CODE tit. 2, subd. G, app. A, art. X, § 9 (2009); UTAH RULES OF PROF’L CONDUCT; VT. RULES OF PROF’L CONDUCT; VA. RULES OF PROF’L CONDUCT; WASH. LTD. PRACTICE OFFICER RULES OF PROF’L CONDUCT; W. VA. RULES OF PROF’L CONDUCT; WIS. SUP. CT. R. 20; WYO. RULES OF PROF’L CONDUCT.

1. Rule 4.1

The Model Rules' drafters assumed that lawyers would act in the role of a partisan representative on behalf of their clients against the interests of third parties.²³ To keep their partisan ethos from crossing into unlawful territory, Rule 4.1 imposes limits on the deception lawyers can use in their statements to others.

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.

A simple proposition lies at the rule's core: lawyers may act as partisans for their clients, but they must draw the line at lying. Lying includes overt lies and active misrepresentations as well as misrepresentations by omission.²⁴ In this regard, the Rule supports one of the foundational propositions in the Model Rules contained in Rule 1.2(d) - that attorneys should not become participants in client criminal or fraudulent conduct.²⁵ All of this appears to be straightforward, but the Rule's application is not.

a. Rule 4.1(a)

First and foremost, Rule 4.1(a) indicates that the Rule applies only to "material" facts or law. However, the Model Rules fail to define the term "material," and, furthermore, the Rule's comments explain that what constitutes a material fact "depends

²³ Peppet, *Pluralism*, *supra* note 16, at 500; HAZARD & HODES, *supra* note 2, at 36-3.

²⁴ HAZARD & HODES, *supra* note 2, at 37-3; *see also* William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality and the Professional Reform Initiative*, 53 S.C. L. REV. 527 (2002).

²⁵ MODEL RULES OF PROF'L CONDUCT, R. 1.2(d) (2007). This rule specifically prohibits lawyers from assisting clients "in conduct the lawyer knows is criminal or fraudulent." *Id.*

on the circumstances.”²⁶ A statement of fact is generally material if it is significant or essential to the negotiation,²⁷ but Comment 2 explains:

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.²⁸

It then provides examples of statements that ordinarily fall into this non-material fact category, including estimates of price or value on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim, arguably the two most material matters during bargaining interactions.²⁹ The Comment’s phrasing also suggests that this is not an exclusive list, and many authorities have surmised that other types of statements must not be material facts because they fall into the “generally accepted negotiation conventions” category.³⁰ However, it is unclear what those other statements might be.³¹

Defining the Rule’s determinative principle in the negative (explaining what it is not) can lead to difficulties in interpretation. When grappling with this problem, only one

²⁶ MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 2.

²⁷ RESTATEMENT (SECOND) OF TORTS § 538 (1977); BLACK’S LAW DICTIONARY 998 (8th ed. 2004); Richmond, *supra* note 7, at 269.

²⁸ MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 2.

²⁹ *Id.*; CHARLES B. CRAVER, *SKILLS AND VALUES: LEGAL NEGOTIATING* 4 (2008). A third item that falls into the “non-material fact” category is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 2.

³⁰ *See, e.g.*, Eleanor Holmes Norton, *Bargaining and Ethics of Process*, 64 N.Y.U. L. REV. 493, 538 (1989); *More Tips for When Mediation Impasse Strikes. Also: Ethical Dilemmas at the Negotiating Table*, 23 ALTERNATIVES TO HIGH COST LITIGATION 179, 181 (Dec. 2005).

³¹ Carrie Menkel-Meadow, *Ethics, Morality, and Professional Responsibility in Negotiation*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 134–35 (Phyllis Bernard & Bryant Garth eds., 2002); *More Tips for When Mediation Impasse Strikes. Also: Ethical Dilemmas at the Negotiating Table*, 23 ALTERNATIVES TO HIGH COST LITIGATION 179, 181 (Dec. 2005) (quoting Professor Carrie Menkel-Meadow’s conclusion that the conventions and customs of negotiation have not been adequately documented). ABA ethics opinions, another source for potential clarification, are not helpful on this point.

court has defined the term “material fact” using verbiage other than what appears in the Rule’s Comments, and it did so in positive terms:

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].³²

This definition underscores the breadth of the term “material fact,” which explains why Comment 2 narrows it.

Besides prohibiting false statements of material facts, Rule 4.1(a) forbids false statements of material law as well. The Rule’s Comments do not address what constitutes “material law,” leaving lawyers with a dictionary definition - law that is either significant or essential to the negotiation.³³ Rule 4.1’s prohibition regarding material law is most often germane when a statement is addressed to a non-lawyer, but it applies to opposing counsel and judges as well.³⁴

Thus, when speaking to others about material issues, Rule 4.1(a) simply requires lawyers to speak the truth as they understand it without engaging in any misrepresentations.³⁵ However, a lawyer is *not* prohibited from making deliberate misrepresentations about non-material facts or law to anyone.³⁶

b. Rule 4.1(b)

Generally, lawyers have no duty to voluntarily inform an opposing party of relevant facts when negotiating.³⁷ Under the auspices of Rule 4.1(b), however, a duty to

³² *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 449 (D. Md. 2002).

³³ BLACK’S LAW DICTIONARY 998 (8th ed. 2004); Richmond, *supra* note 7, at 269.

³⁴ HAZARD & HODES, *supra* note 2, at 37-9.

³⁵ *See id.* at 37-6. For example, incorporating or adopting a statement by another that the lawyer knows to be untrue is a violation of Rule 4.1(a). MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 1 (2007).

³⁶ HAZARD & HODES, *supra* note 2, at 37-6.

³⁷ MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 1. But once a lawyer provides 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.2d 818, 825 (Iowa

disclose material facts or law arises only if doing so avoids assisting in a client's criminal conduct or fraud.³⁸ In other words, the lawyer's silence in the face of the client's prior conduct or statements, or a lawyer's prior conduct or statements on behalf of the client, may cause the lawyer to be complicit in a fraudulent misrepresentation by omission.³⁹ In instances where nondisclosure constitutes a fraudulent misrepresentation, such as when the lawyer finds that her work has unwittingly been used to further an ongoing fraud, the lawyer has a duty to correct the misapprehension.⁴⁰

Yet the rule provides that disclosure is proper only if it does not violate the duty of maintaining client confidences stated in Rule 1.6.⁴¹ This would appear to vitiate the duty of disclosure, thereby allowing lawyers to participate in a client's crime or fraud.

2001). Furthermore, when negotiating in the litigation context this duty may be affected by the parties' disclosure obligations under the applicable rules of civil procedure. *See, e.g.*, FED. R. CIV. P. 16.

³⁸ MODEL RULES OF PROF'L CONDUCT, R. 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." *Id.* R. 1.0(d). The basic common law definition of fraud is found in numerous sources including: *State v. Galioto*, 613 P.2d 852, 856 (Ariz. Ct. App. 1980) ("Fraud is an instance or act of trickery or deceit; an act of deluding; an intentional misrepresentation for the purpose of inducing another in reliance upon it to part with some valuable thing."); *Smile v. Lawson*, 435 S.W.2d 325, 327 (Mo. 1968) ("Fraud is defined as an instance or act of trickery or deceit especially when involving misrepresentation; an act of deluding."); RESTATEMENT (SECOND) TORTS §§ __ to __ (1977).

³⁹ MODEL RULES OF PROF'L CONDUCT, R. 4.1 cmt. 1; HAZARD & HODES, *supra* note 2, at 37-12. According to the Restatement (Second) of Torts:

One who, having made a representation which when made was true or believed to be so, remains silent after he has learned that it is untrue and that the person to whom it is made is relying upon it in a transaction with him, is morally and legally in the same position as if he knew that his statement was false when made.

RESTATEMENT (SECOND) OF TORTS § 551 cmt. h (1977).

⁴⁰ HAZARD & HODES, *supra* note 2, at 37-12. Nondisclosure constitutes a fraud when one is under a duty to disclose information to another and fails to disclose a fact that he knows may justifiably induce the other to act or refrain from acting. RESTATEMENT (SECOND) OF TORTS § 551.

⁴¹ MODEL RULES OF PROF'L CONDUCT, R. 4.1(b).

Reading Rule 4.1(b) with Rule 1.6 and the values behind the Model Rules negates such a conclusion. Rule 1.6 contains several discretionary exceptions permitting disclosure with respect to criminal or fraudulent conduct in order to prevent, mitigate or rectify injuries due to such conduct for which the lawyer's services have been unwittingly used.⁴² But these permissive reporting requirements become mandatory when the "shall not knowingly . . . fail to disclose" language of Rule 4.1(b) applies.⁴³ Furthermore, the general requirements of Rule 1.6 have always been subject to Rule 1.2(d)'s prohibition against knowingly participating in a client's criminal or fraudulent conduct.⁴⁴ Thus, the last clause of Rule 4.1(b) does not modify the duty to disclose material facts in order to avoid assisting in client criminal conduct or fraud.⁴⁵

It should be noted, however, that if a client asks an attorney to engage in criminal or fraudulent acts, the attorney and client should first discuss the consequences of the client's request and, if the client refuses to reconsider the action, the lawyer should withdraw from the representation.⁴⁶ If the lawyer does withdraw, she may still be required to disaffirm any fraudulent statement with which she might be deemed to be associated by reason of the prior representation.⁴⁷

⁴² MODEL RULES OF PROF'L CONDUCT, R. 1.6(b)(2), (3).

⁴³ THOMAS D. MORGAN & RONALD D. ROTUNDA, 2009 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 158–59 n.4 (2009); Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 293 (2006); *see also* MODEL RULES OF PROF'L CONDUCT, R. 1.2(d), 1.6 cmt. 12 (stating that "other law" may require a lawyer to disclose a client's information).

⁴⁴ *In re Potts*, 158 P.3d 418, 425 (Mont. 2007) (holding that Rule 1.6 does not shield a lawyer from the requirements of 1.2(d)); HAZARD & HODES, *supra* note 2, at 37-14; Green & Zacharias, *supra* note 47, at 293.

⁴⁵ HAZARD & HODES, *supra* note 2, at 37-15; Green & Zacharias, *supra* note 47, at 293.

⁴⁶ *In re Potts*, 158 P.3d at 425; MODEL RULES OF PROF'L CONDUCT, R. 1.4, 1.16(a)(1), 1.16(b)(3); ABA Formal Ethics Op. 92-366.

⁴⁷ MODEL RULES OF PROF'L CONDUCT, R. 1.16, 1.2(d) cmt. 10, 4.1 cmt. 1; HAZARD & HODES, *supra* note 2, at 20-16 to 20-18; MORGAN & ROTUNDA, *supra* note 43, at 158–59 n.4; ABA Formal Ethics Op. 93-375.

Absent its prohibition of fraudulent conduct, including assisting in a client's fraudulent conduct, Rule 4.1's regulation on attorney negotiation behavior is modest at best. The rule allows attorneys to be deceitful about opinions and non-material facts and law, which allows for puffing and bluffing.⁴⁸ Furthermore, technical violations of Rule 4.1 where no one is harmed are unlikely to be the subject of disciplinary proceedings or court sanction.⁴⁹ In practice, Rule 4.1 does little other than proscribe fraudulent misrepresentations in negotiation.⁵⁰

2. Rules 3.3(b) and Rule 8.4(c)

Unlike Rule 4.1, Rules 3.3, Candor Toward the Tribunal, and 8.4, Misconduct, are not specifically tailored to the negotiation process. However, both do affect the

⁴⁸ MNOOKIN ET AL., *supra* note 11, at 278; Peppet, *Pluralism*, *supra* note 16, at 499.

⁴⁹ See Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002) [hereinafter Zacharias, *What Lawyers Do*] (identifying several factors disciplinary authorities take into consideration when deciding whether to seek disciplinary action).

⁵⁰ 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); Peppet, *Pluralism*, *supra* note 16, at 499 (describing the Model Rules approach to negotiation ethics as "a fairly minimalist approach"). The term fraudulent misrepresentation is defined as follows:

A misrepresentation is fraudulent if the maker

- (a) knows or believes that the matter is not as he represents it to be,
- (b) does not have the confidence in the accuracy of his representation that he states or implies, or
- (c) knows that he does not have the basis for his representation that he states or implies.

RESTATEMENT (SECOND) OF TORTS § 526 (1977).

(1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker

- (a) knows or believes that the assertion is not in accord with the facts, or
- (b) does not have the confidence that he states or implies in the truth of the assertion, or
- (c) knows that he does not have the basis that he states or implies for the assertion.

RESTATEMENT (SECOND) OF CONTRACTS § 162 (2008).

negotiation arena. As one would expect, Rule 3.3 contains several relevant prohibitions in the litigation context including one in Rule 3.3(b) against engaging in criminal or fraudulent conduct related to the proceeding.⁵¹ This rule extends to settlement negotiations in a litigation context because the resolution of disputes short of trial is an integral part of the judicial process.⁵² Essentially Rule 3.3(b) gives courts another weapon to discipline lawyers when they participate in fraudulent settlement negotiations.

Unlike Rule 3.3., Rule 8.4 is a broad rule that applies in all lawyering contexts. Specifically it defines professional misconduct to include any violation of the professional norms set forth in the Model Rules, attempting to violate the Model Rules, aiding or abetting another in violating the Model Rules, or violating the Model Rules through the use of a surrogate or agent.⁵³ More importantly to the negotiation context, it defines misconduct as engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁵⁴ This puts it at odds with Rule 4.1, which legitimizes some misleading and deceptive negotiation tactics.⁵⁵ Since Rule 4.1 provides specific exceptions to the general rule of Rule 8.4, rules of statutory interpretation require the

⁵¹ Rule 3.3(b) states:

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

MODEL RULES OF PROF'L CONDUCT, R. 3.3(b).

⁵² See, e.g., *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974); *State v. Williams*, 877 A.2d 1258, 1263 (N.J. 2005).

⁵³ HAZARD & HODES, *supra* note 2, at 65-4.

⁵⁴ MODEL RULES OF PROF'L CONDUCT, R. 8.4(c).

⁵⁵ See *supra* notes 28-31 and accompanying text.

dictates of Rule 4.1 to take precedence.⁵⁶ However, Rule 8.4(c) often is used to bolster disciplinary claims against those who are charged with violating Rule 4.1.⁵⁷

B. Reaction to Rule 4.1

At a broad level, critics argue that Rule 4.1 has resulted in a tangle of rules, moral principles, and precedents that reflect little or no coherent system of legal ethics.⁵⁸ Its most controversial substantive aspect is that it permits certain misleading and deceptive tactics, and this point has been the subject of vigorous debate and commentary.

Specifically, critics contend that the Rule's truthfulness standard is too low to provide any protection not already provided in the law and that it promotes deceptive negotiation practices. In contrast to what one would expect from an ethical standard purporting to regulate "truthfulness to others," critics claim that the Rule encourages a shockingly large amount of deception and lying.⁵⁹ By adopting an "anything short of fraud is acceptable" standard as the ethical floor, critics question why an ethical standard was even enacted.⁶⁰ Lawyers are already required to comply with the lowest level of

⁵⁶ See LINDA D. JELLUM & DAVID CHARLES HRICIK, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* 173, 319 (2006) (stating that acts must be construed on the whole and that specific statutes trump general statutes).

⁵⁷ See, e.g., *In re Wentzell*, 656 N.W.2d 402, 404–05 (Minn. 2003); *State ex rel Neb. Bar Ass'n v. Addison*, 412 N.W. 2d 855, 587 (Neb. 1987); *In re Lowell*, 784 N.Y.S.2d 69, 73 (N.Y. App. Div. 2004).

⁵⁸ Menkel-Meadow, *supra* note 31, at 132 (bemoaning "how indeterminate and unhelpful the formal rules of professional responsibility are"); Tempkin, *supra* note 12 at 180.

⁵⁹ See, e.g., Menkel-Meadow, *supra* note 31, at 132; Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447, 453–54 (1995) (noting that fraudulent conduct is prohibited but everything else is acceptable negotiation strategy, including lying); Wetlaufer, *supra* note 7, at 1221, 1233–36 (specifically rejecting the use of Rule 4.1 to analyze the ethics of lying in legal negotiations).

⁶⁰ 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, *Pluralism*, *supra* note 16, at 504; Wetlaufer, *supra* note 7, at 1272 (noting that lying in negotiation is not the province of just a few lawyers at the margins of the profession).

legally acceptable behavior,⁶¹ thus the Rule requires nothing more than the law already provides.⁶² Furthermore, critics argue that this standard emphasizes a hyper-adversarial view of negotiation, thereby promoting deceptive tactics just short of fraud as a means of peremptory self-defense.⁶³ Finally, to the extent that the rule is designed to conform to negotiation practice, critics assert that if indeed most negotiators deceive those with whom they negotiate, that reality should not establish the practice as ethically appropriate behavior.⁶⁴

The Rule's defenders usually rely on one or more of three intertwined theories when responding to the Rule's critics—the necessities of an adversarial process, the idiosyncratic nature of the negotiation process, and the futility of more rigorous rules.⁶⁵ Proponents of adversarial necessity point out that as zealous advocates, lawyers must attempt to gain any advantage that best serves their clients' interests, particularly in negotiation.⁶⁶ Thus, lawyers must be well-versed in several time-tested deceptive bargaining tactics.⁶⁷ Additionally, the Rule's proponents point out that unlike any other lawyerly activity, negotiation has its own set of rules that legitimize deception short of

⁶¹ Loder, *supra* note 12, at 86; Lowenthal, *supra* note 60, at 446–47 (suggesting abandoning the pretense of regulating attorney bargaining behavior absent “a set of serious standards” on negotiation ethics).

⁶² Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 103 (1982) (noting the default standard for truthfulness in legal negotiation to be *caveat* lawyer).

⁶³ See Lowenthal, *supra* note 60, at 433.

⁶⁴ Loder, *supra* note 12, at 85; Wetlaufer, *supra* note 7, at 1233–34; Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1335 n.102 (1995).

⁶⁵ See Lowenthal, *supra* note 60, at 430.

⁶⁶ 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 30, at 512 (observing that partisan interests increase pressure on opponents to deviate from the ethical norms of truthfulness and fairness); see also Peppet, *Pluralism*, *supra* note 16, at 503. The idea that lying is the result of adversarial necessity 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).

⁶⁷ See generally Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325 (1996); see also Lowenthal, *supra* note 60, at 431–32.

fraud.⁶⁸ As one noted scholar has noted, “To conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation.”⁶⁹ Thus, any proscription of such tactics would bar lawyers from engaging in negotiation tactics that their clients legally use on a routine basis, thereby creating a disincentive to use lawyers when negotiating.⁷⁰ Moreover, such bargaining already is common in legal negotiation;⁷¹ thus the Rule’s defenders argue that any tougher standard would be futile because it would be routinely violated creating “a continuing hypocrisy” that could negatively impact other rules as well.⁷²

No matter where one falls on the merits of the rule, most commentators agree that a negotiator’s personal ethics provide more guidance than the Rule

⁶⁸ See Loder, *supra* note 12, at 46 (noting that negotiation appears to be inherently deceptive); Norton, *supra* note 30, at 508 (noting the legitimacy of at least some deception in bargaining makes it difficult to apply ordinary ethical notions of truthfulness in the negotiation context).

⁶⁹ White, *supra* note 16, at 928. 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.*

⁷⁰ See U.C.C. § 2-312(2) (2004) (permitting “puffing”); WILLIAM LLOYD PROSSER ET AL., PROSSER AND KEETON ON TORTS § 109, at 757 (5th ed. 1984) (discussing the permissible practice of “puffing” as the bargainer’s “privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk”); see also MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 2 (2007) (declaring certain deceptive actions to be “generally accepted conventions in negotiation” and therefore not prohibited under the rule).

⁷¹ See, e.g., Peppet, *Saints*, *supra* note 20, at 91. Professor White sums this up nicely: “Everyone 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 16, at 934.

⁷² Guernsey, *supra* note 62, at 125; White, *supra* note 16, at 937–38; see also Loder, *supra* note 12, at 84–85.

itself.⁷³ Unfortunately this fact allows for exploitation when negotiators have differing standards for appropriate negotiation behavior.⁷⁴

C. Empirical Studies of Attorney Negotiation Ethics

Although much has been written about attorney negotiation ethics, it has seldom been the subject of systematic empirical inquiry. Most studies of attorney negotiations touch only tangentially on ethics.⁷⁵ Those few studies that do focus on attorney negotiation ethics primarily are non-scientific or are based on surveys conducted at ethics or ADR continuing education programs, thereby alerting participants to think “ethically.”⁷⁶ Of all of the studies, only one unpublished study from the early 1980s,

⁷³ Norton, *supra* note 30, at 503, 529; *see also* 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”); MNOOKIN ET AL., *supra* note 11, at 282 (advising negotiators to follow their own moral convictions).

⁷⁴ G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 217 (1999) (stating that not everyone agrees to the rules of negotiation); Hazard, *supra* note 50, at 193 (describing a continuum of fairness among lawyers ranging from a “rural God-fearing standard” to “New York hardball”).

⁷⁵ *See, e.g.*, HAZEL GENN, HARD BARGAINING: OUT OF COURT SETTLEMENTS IN PERSONAL INJURY ACTIONS 131–32, 166 (1987) (finding that negotiators in a personal injury setting professed preferred a cooperative negotiation style); HERBERT M. KRITZER, LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 48, 55, 128 (1991) (finding that in a large proportion of the cases on file in five separate jurisdictions, practically no effort was made to engage in tactical bargaining); LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK 113–14, 127–30 (2001) (finding that negotiation practices of divorce lawyers in Maine were geared toward generating a cooperative, reasonable, and credible reputation with their peers); Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612, 613 (2006) (discussing negotiation styles of family law lawyers).

⁷⁶ *See, e.g.*, *Ethics by the Numbers*, 83 A.B.A. J. 97 (1997) (reporting the results of an “on-the-fly” survey of 100 lawyers attending the ABA Annual Meeting); Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119 (reporting on the findings of twenty-three questionnaires completed by attendees at an annual ADR workshop).

involves a rigorous analysis of whether attorneys complied with the dictates of their professional ethical standards.⁷⁷

The first systematic study in which the analysis of attorney negotiation ethics was central assessed the characteristics and traits of effective attorney negotiators.⁷⁸ In this study, 308 lawyers in Phoenix, Arizona were asked to think of the attorney in their most recently completed case or transaction and to describe that attorney according to a list of characteristics and then to rate that attorney's effectiveness.⁷⁹ Effective negotiators were seen as ethical regardless of whether their negotiation style was predominantly cooperative or competitive.⁸⁰ On the other hand, whether ineffective negotiators were seen as ethical depended on their negotiation style.⁸¹ Approximately twenty-five years later, this study was replicated with 727 lawyers from Milwaukee, Wisconsin and Chicago, Illinois.⁸² This study determined that ethical conduct appeared to be a goal of all

⁷⁷ Extensive research uncovered only one comprehensive study of attorney negotiation ethics—an unpublished study from the early 1980s that required significant digging to find. STEVEN D. PEPE, STANDARDS OF LEGAL NEGOTIATIONS: INTERIM REPORT AND PRELIMINARY FINDINGS 1 (1983) [hereinafter PEPE, INTERIM REPORT] (on file with author); STEVEN D. PEPE, SUMMARY OF SELECTED FINDINGS OF THE STUDY ON THE STANDARDS OF LEGAL NEGOTIATIONS 3, 4 (1983) [hereinafter PEPE, SUMMARY OF SELECTED FINDINGS] (on file with author). For a detailed discussion of the Pepe study, see *infra* notes 100–114 and accompanying text.

⁷⁸ GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 17 (1983) (studying negotiation styles).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*, at 26–27, 33. Negotiators who use the cooperative style were described as ethical, trustworthy, fair, and personable. *Id.* at 33, 39. Negotiators who used the competitive style were described as egotists who made unreasonable opening demands, but there were distinct differences between effective (realistic, rational, and analytical) and ineffective (hostile, intolerant, argumentative) competitive negotiators. *Id.* at 28, 39. The term ethical was the top characteristic for “ineffective/cooperative negotiators,” but term ethical was not among the characteristics used to describe “ineffective/competitive negotiators.” *Id.* at 39.

⁸² Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 158 (2002) (studying negotiation styles). Of the 727 survey respondents, 395 were from Milwaukee and 269 were from Chicago. *Id.*

effective negotiators, but ethical conduct was more associated with negotiation style rather than effectiveness.⁸³ While both studies' conclusions are limited because they are based solely on respondents' subjective assessments of effectiveness and ethicality, they do indicate that legal negotiators value negotiation ethics in their negotiating counterparts.

Studies focusing specifically on attorney negotiation ethics reveal disagreement surrounding Rule 4.1's requirements and suggest that attorneys are comfortable with a cursory knowledge of the Rule's operation. An early study demonstrated substantial disagreement among fifteen negotiation ethics authorities surrounding the truthfulness standard under Rule 4.1.⁸⁴ When asked what a lawyer ought to do with regard to four routine ethical choices in negotiation, only one of four negotiation scenarios produced anything close to a consensus response.⁸⁵ Another early study surveyed fourteen lawyers representing a diverse group of civil practice areas in Austin, Texas, and found that they were generally sensitive to ethical concerns but considered low-level deception to be part of the negotiation "game," and were quite comfortable having only a cursory knowledge

⁸³ The term "ethical" was used by participants to describe lawyers using a "problem-solving" style, whereas the term "adversarial" was not used to describe lawyers employing an "adversarial" style. *Id.* at 168–69, 175–77. In this study, Schneider identified three negotiation styles: problem-solving (upstanding, pleasant, flexible and prepared); cautious problem-solving (substantially the same as problem-solving); and adversarial (inflexible, self-centered, and enjoying the battle). *Id.* at 163, 171.

⁸⁴ Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?*, 2 *INSIDE LITIG.* 1, 15 (1988) (indicating confusion among attorneys regarding Rule 4.1's requirements). The respondents to this survey were eight law professors who had written on negotiation and/or ethical issues, five experienced practitioners, one U.S. Circuit Court Judge, and one U.S. Magistrate Judge. *Id.*

⁸⁵ *Id.* at 15. The hypothetical scenarios focused on: lying about authorized settlement limits, lying about an injury, exaggerating an injury, and a mistaken impression. *Id.* at 16–18. Recently this study was replicated with similar results. Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 *OHIO ST. J. ON DISP. RESOL.* 481, 517-20 (2009) (replicating Lempert's study with similar results).

of the operative ethical rules.⁸⁶ An “on-the-fly” survey of lawyers at an ABA Annual Meeting found that 73% of respondents admitted to engaging in “settlement puffery,”⁸⁷ and a survey of twenty-three Florida lawyers ascertained that they observed others lying about material facts in 25% of the joint mediation sessions in which they participated.⁸⁸

The most complete study of whether attorneys negotiate within the bounds of their professional ethical standards is an unpublished study from the early 1980s by Stephen D. Pepe.⁸⁹ The study was based on a litigation scenario where the client gave deposition testimony about the operative fact in the case, testimony which he later remembered was wrong. In fact, his newly remembered account of events supported the plaintiff’s version of the operative fact.⁹⁰ The fact that the client erred in his testimony was not problematic or fraudulent on its own; the important question is what the attorney would do upon learning that the testimony is false. In this situation, the client had a legal duty to correct the erroneous information as failing to do so acts as an affirmation of the false statement when the opposing party relies on the false statement.⁹¹ The operative ethical rules at that time prohibited attorneys from using or preserving false evidence or

⁸⁶ Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173, 194–95, 199 (1989). The areas of practice represented among the survey respondents included personal injury, solo-practitioners (generalists), insurance defense, litigation, general business, securities, corporate law, tax and estates, and administrative law. *Id.* at 180 n.53.

⁸⁷ *Ethics by the Numbers*, 83 A.B.A. J. 97 (1997). The term “settlement puffery” was not defined in the article. *Id.*

⁸⁸ Peters, *supra* note 83, at 124. Respondents also reported that lies about bargaining authority occurred in 36% of the mediations in which they participated, and lies about alternatives if there were no agreement occurred in 25% of the joint sessions in which they participated. *Id.* at 133.

⁸⁹ Pepe surveyed 3006 lawyers consisting of 1034 litigation attorneys from Michigan and 1513 large law firm litigators from throughout the country as well as 256 state judges, 75 federal judges, and 128 law professors. PEPE, *supra* note 77, at 1.

⁹⁰ STEVEN D. PEPE, STANDARDS OF LEGAL NEGOTIATIONS: SURVEY INSTRUMENT 4 (1983) [hereinafter PEPE, SURVEY INSTRUMENT] (on file with author).

⁹¹ See RESTATEMENT (SECOND) OF TORTS § 551(2)(c) and cmt. h (1977).

assisting a client in fraudulent conduct.⁹² While the ethical rules did not explicitly require disclosure, any settlement without disclosure would be tantamount to affirming the false deposition testimony and thereby attempting to induce a fraudulent settlement agreement in violation of the ethical rule.⁹³ Thus, in this situation, the law and the ethical rules required attorneys to disclose the error in the client's deposition testimony.⁹⁴

Pepe found that more than half of his study's respondents believed that it was permissible to *facilitate* a settlement agreement based on the false testimony if they found out about the misstatement after the deposition.⁹⁵ More specifically, almost half of the respondents thought it was acceptable to *enter* into a settlement agreement without disclosing the fact that the deposition testimony was erroneous.⁹⁶ Additionally, a smaller but still substantial minority thought it was permissible for an attorney to refer to the false deposition testimony as if it were true during the settlement negotiations.⁹⁷ When asked how an attorney should respond to a direct question about the false deposition testimony,

⁹² MODEL CODE OF PROF'L CONDUCT, DR 7-102(A) [hereinafter MODEL CODE]. At the time of the Pepe study, the Model Rules had yet to be finalized and enacted. *See* PEPE, INTERIM REPORT, *supra* note 77, at 4. If a client did engage in fraudulent conduct, the rules required attorneys to ask the client to rectify a fraud, and if the client refused, for the attorney to make the disclosure. MODEL CODE, DR 7-102(B)(1). However, since the client was honestly mistaken and did not ask the attorney to refrain from correcting the misinformation, the client is not attempting to commit a fraud, and this provision in the Model Code is inapplicable. *See* PEPE, SURVEY INSTRUMENT, *supra* note 90, at 4.

⁹³ MODEL CODE, DR 7-102(A); RESTATEMENT (SECOND) OF TORTS § 551.

⁹⁴ *See* PEPE, SUMMARY OF SELECTED FINDINGS, *supra* note 77, at 2 (citing to contract law, tort law, and the Federal Rules of Civil Procedure).

⁹⁵ *Id.* at 2 (reporting that 70.5% of the Michigan litigators and 50.5% of the national litigators held this belief). Pepe reported his findings in two data sets, Michigan litigators and National litigators, believing that the national data set consisted of "elite" lawyers when compared to the Michigan sample. STEPHEN D. PEPE, SUMMARY OF PRELIMINARY FINDINGS 2 (1983). Another difference between the two data sets is that the Michigan sample consisted primarily of plaintiff personal injury lawyers; whereas, the national sample consisted primarily of defense and corporate litigation. *Id.* at 1.

⁹⁶ PEPE, INTERIM REPORT *supra* note 77, at 4 (reporting that 50% of the Michigan litigators and 31% of the national litigators held this belief).

⁹⁷ *Id.* at 4–5 (reporting that 38% of the Michigan litigators and 26% of the national litigators held this belief).

approximately half thought it was acceptable to give a partially true but incomplete response that failed to reveal the false testimony.⁹⁸ Relatively few of the litigators thought it was acceptable for an attorney to reply to the direct inquiry by making a positive assertion of the known falsehood.⁹⁹

In mock negotiations involving this hypothetical case 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.¹⁰⁰ Furthermore, in more than 70% of the negotiations defense counsel made affirmative assertions of the client’s erroneous testimony or some other general assertion that was inconsistent with their knowledge of the client’s changed testimony.¹⁰¹

Together the studies focusing on attorney negotiation ethics reveal substantial disagreement surrounding the ethical rules’ requirements and regular use of deceptive negotiation tactics, including fraudulent tactics that would violate any set of professional ethical standards. Furthermore, most of the studies of attorney negotiation ethics were conducted a decade or two ago. More importantly, none of these studies investigates the reasons behind ethical and unethical negotiation practices.

III. The Present Study: Methodology and Respondents

Given the inherent conflict surrounding the Rule and the dearth of rigorous studies on the topic, there is a need to study lawyers’ application of Rule 4.1. Furthermore, given changing cultural mores, it is worthwhile to determine whether today’s attorneys are faring better or worse than they did twenty-five years ago, as

⁹⁸ PEPE, INTERIM REPORT, *supra* note 77, at 5 (reporting that 56% of the Michigan litigators and 46% of the national litigators held this belief).

⁹⁹ *Id.* (reporting that 11% of Michigan and 5% of the national litigators held this belief).

¹⁰⁰ PEPE, SUMMARY OF SELECTED FINDINGS, *supra* note 77, at 3–4.

¹⁰¹ *Id.* at 4, 9, 12.

revealed in the Pepe study. To pursue these questions, we wanted to find a problem that permitted respondents to unquestionably violate the Rule, but was also subtle enough to not “tip them off” to the ethical focus of the study. To achieve these goals, the study focuses on Rule 4.1(b) and is based upon a client’s suggestion to engage in the fraudulent omission of a material fact during settlement negotiations of a potential lawsuit.

A. The Survey Sample

The respondent group in the present study was 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 counties¹⁰² where the majority of the lawyers in metropolitan St. Louis practice).¹⁰³ The 528 Arizona respondents¹⁰⁴ consisted of 354 men (67%)¹⁰⁵ and 163 women (31%), with 11 respondents declining to identify their sex.¹⁰⁶ The Arizona respondents had been licensed for an average of 19 years.¹⁰⁷ The 206 Missouri respondents¹⁰⁸ consisted of 169 (82%)

¹⁰² The City of St. Louis acts as a county in the Missouri governmental system.

¹⁰³ Arizona and Missouri have adopted Rules 4.1 and 1.2(d) and their comments without material modification. ARIZ. SUP. CT. R. 42, ER 1.2(d), 4.1; MO. SUP. CT. R. 4-1.2(f) and 4.1. Arizona and Missouri have adopted slightly different version of Rule 1.6 as compared to the Model Rule. However, these deviations have no impact on the analysis of the interplay of Rules 4.1 and 1.6 in a negotiation context. *See* ARIZ. SUP. CT. R. 42, ER 1.6(d)(1), (2); MO. SUP. CT. R. 4-1.6(b)(4).

¹⁰⁴ From the rolls of the Arizona Bar, 2000 attorneys were randomly selected to receive a letter from the Dean of the Sandra Day O’Connor College of Law at Arizona State University, 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. Of the 1919 emails that presumably made it through to the intended recipient, 541 attorneys completed the survey, for a response rate of 28%. Thirteen lawyers were disqualified because they were familiar with the problem upon which the hypothetical negotiation scenario was based, which left a final group of 528 lawyers.

¹⁰⁵ All percentages in this article are rounded to the nearest whole number.

¹⁰⁶ The initial sample set of 2000 lawyers consisted of 69% men and 31% women.

¹⁰⁷ The median was 18 years since licensure and a range of 2 years to 65 years since licensure. Men had been licensed significantly longer than women, on average 21 versus 14 years, ($t(397.04) = -7.79, p < .001$).

men and 37 (18%) women.¹⁰⁹ The Missouri respondents had been licensed for an average of 24.75 years.¹¹⁰ Because there were few differences between the two data sets,¹¹¹ the two samples were merged together for analysis, resulting in a total of 734 respondents.¹¹²

B. Study Negotiation Scenario

The study was conducted using a web-based questionnaire that included a hypothetical negotiation adapted from the factual scenario presented in the DONS Negotiation.¹¹³ The hypothetical used in the study centers on a pre-litigation negotiation where the study participant represents a would-be plaintiff who thinks he has contracted the deadly DONS (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 which will result in death sometime in the next five years. Upon receiving a letter

¹⁰⁸ 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. Of the 1298 emails that presumably made it through to the intended recipient, 208 attorneys completed the survey for a response rate of 16%. Two lawyers were disqualified because they were familiar with the problem upon which the hypothetical negotiation scenario was based, which left a final group of 206 lawyers.

¹⁰⁹ The initial sample of 1665 lawyers consisted of 76% men and 24% women.

¹¹⁰ The median was 25 years with a range of 5 years to 60 years since licensure. Men had been licensed significantly longer than women, on average 26 versus 19 years, ($t(199) = -3.30, p < .01$).

¹¹¹ The primary differences in lawyer attributes were the number of women respondents (which largely reflected the underlying samples) and time since licensure. Participants responding from Arizona ($M = 19.22$ years) had been licensed significantly less than respondents from Missouri ($M = 24.75$) had, ($t(697) = -6.04, p < .001$).

¹¹² All data analyses reported from this point forward are using the single data set, for which the return rate was 23%. For each of the parametric procedures presented in this paper, a confidence interval of 95% was used.

¹¹³ The DONS Problem is a negotiation role-play scenario developed at the Program on Negotiation at Harvard Law School. The hypothetical scenario used for this study 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.

from his former girlfriend telling him that she was DONS positive for the duration of their relationship and suggesting that he get tested for the disease, the client took two DONS home tests, both of which indicated he had the disease.¹¹⁴ In an angry letter he informed his former girlfriend of his test results and threatened to sue her as a result. In response, she suggested having their respective attorneys meet to work out a financial settlement because her liability is clear.¹¹⁵ The only apparent issue for the negotiation is the appropriate amount of damages to be paid.

After giving the factual background of the negotiation, the scenario places the attorney in the moments before the settlement negotiations are about to begin. At that time 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.¹¹⁶ 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 begins.¹¹⁷

C. Questionnaire

The questionnaire was designed to determine how participant attorneys would respond to the hypothetical negotiation described above and to investigate the possible rationales for their decisions. The first set of questions examined whether the attorneys

¹¹⁴ In the hypothetical the home test kits are publicly known to be very reliable.

¹¹⁵ In the scenario, she had the disease during their relationship and never disclosed it to him at the time, 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 accepted responsibility for transmitting the virus to him.

¹¹⁶ And, 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.

¹¹⁷ A copy of the questionnaire is on file with the authors.

would follow the client's wishes and refrain from disclosing the client's actual DONS status in the negotiation, in violation of Rule 4.1. Follow-up questions focused on the reasons why the participant would or would not disclose the information. The next set of questions asked what respondents thought other attorneys would do if put in the same situation while representing the would-be plaintiff in the negotiation. The final set of substantive questions concentrated on the respondents' understanding of the elements of Rule 4.1 using the hypothetical scenario as a backdrop. Those questions were followed by questions to collect demographic information about the attorneys.

IV. Lawyers' Responses to Client's Requests to Withhold Information

The hypothetical scenario presents the respondent with an ethical dilemma: follow the client's wishes to engage in fraudulent behavior or follow the dictates of Rule 4.1? To determine if and to what extent responding lawyers report they would follow the mandates of the rule, the study approached the question in two separate ways—first, respondents were presented with the client's unconditional request, and for those who refused the unconditional request, a follow up conditional request was offered.

A. Client's Unconditional Request

The client's initial request to the attorney to refrain from disclosing his actual DONS status was a simple straightforward request to not to disclose his true DONS status. That is, it contained no reservations or conditions allowing for disclosure of his actual condition. The lawyers were asked whether they would or would not agree to this request.¹¹⁸

¹¹⁸ In situations where clients ask lawyers to engage in fraudulent conduct, withdrawing from the client's representation is a viable option. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.16(a)(1) (withdrawal when representation results in a violation of the rules of professional conduct or other law) and (b)(2) (withdrawal when client persists in course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent); ABA Formal Opinion 92-366 (stating that lawyers should

When analyzing what a lawyer should do in response to such a request, one begins by reviewing the client's duties to his former girlfriend vis-à-vis the initial negotiation posture of this potential lawsuit. Not surprisingly, the fact that he does not have the DONS virus dramatically changes his legal duties. Heading into the negotiation, the client has a duty to correct his former girlfriend's now mistaken belief that he is infected with the DONS virus.¹¹⁹ Failing to do so and going forward with the negotiation is tantamount to making fraudulent misrepresentation that he actually has DONS when he does not.¹²⁰ In short, the client's request to his lawyer to refrain from disclosing his actual DONS status to induce a negotiated settlement is a request to engage in a fraudulent settlement scheme on his behalf.¹²¹

Any attempt by the attorney to knowingly¹²² assist the client in the commission of a fraudulent settlement agreement is fraught with serious problems.¹²³ 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, the lawyer would violate Rule 4.1(a).¹²⁴ If no attempt is made to correct the former

withdraw from representation if they reasonably believe that their services are being used by a client to perpetuate a fraud). In an attempt to keep from prompting a socially desirable response, withdrawing from the representation as a response to the client's request was not given as an available option. *See infra* note 264. The withdrawal option is subsumed in a refusal of the client's request, and is further discussed *infra* in Part V.B.4.

¹¹⁹ *See supra* notes 38-42 and accompanying text; *see also* RESTATEMENT (SECOND) OF TORTS § 551(c) (1977).

¹²⁰ *See* RESTATEMENT (SECOND) OF TORTS §§ 551(1) cmt. h, 526.

¹²¹ *See* RESTATEMENT (SECOND) OF TORTS §§ 525, 526; *see also* Matter of Kersting, 726 P.2d 587, 592 (Ariz. 1986); *In re Cupples*, 979 S.W.2d 932, 936-37 (Mo. 1998).

¹²² To meet the scienter requirement the lawyer only need to know or believe the matter is not as s/he represents it to be. RESTATEMENT (SECOND) OF TORTS § 526.

¹²³ Agreeing to the client's request violates two other ethical rules: Rule 1.2(d), which prohibits lawyers from assisting clients in committing fraud, and Rule 8.4(c), which defines professional misconduct as "conduct involving dishonesty, fraud, deceit, or misrepresentation." MODEL RULES OF PROF'L CONDUCT, R. 1.2(d), 8.4(c).

¹²⁴ *See* ABA Formal Ops. 93-370 p.3, 93-375 p.4; *see also* *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 213 (3d Cir. 2002).

girlfriend's mistaken belief about the client's DONS status, that course of action would violate Rule 4.1 (b).¹²⁵ 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.

In response to the client's request, 62% of the respondents (452 respondents) said that they would *not* agree to such a request, while 19% (142 respondents) said they *would* agree with the client's request, and the remaining 19% (140 respondents) were *not sure* how they would respond. Thus, almost one-fifth of the respondents *would* agree to engage in the client's fraudulent settlement scheme in violation of Rule 4.1, and an equal number were *not sure* whether they would engage in the fraudulent scheme or not. The majority of the respondents would comply with the dictates of Rule 4.1 and would *not* agree to join in the fraudulent scheme.

B. Client's Conditional Follow-up Request

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 in which the hypothetical situation was changed slightly. In this instance, the client requested that the attorney disclose his true DONS status *only if directly asked about it*. Thus, if opposing counsel asked "does your client have DONS?" or something along those lines, the lawyer had the client's permission to disclose the client's actual DONS status.

While this condition allows for disclosure of the critical fact in a limited circumstance, it does not change the basic analysis of the appropriate course of conduct for the lawyer heading into the negotiation. The primary negotiation strategy still includes going forward without correcting the opposing party's mistaken belief that he is infected with the DONS virus. He still has a duty to correct his former girlfriend's

¹²⁵ See *supra* notes 38-40 and accompanying text (discussing fraud by omission).

mistaken belief.¹²⁶ As discussed earlier, doing otherwise is equivalent to continuing the negotiation fraudulently through misrepresenting that he actually has DONS when he does not.¹²⁷ As with the initial request, this also is a request to induce a negotiated settlement based on a false premise in violation of Rule 4.1.¹²⁸ Again, the only proper course of conduct in the conditional disclosure scenario is to refuse the client's request.¹²⁹

When the subset of 592 respondents who had declined the client's previous request was presented with the modified client request - to disclose the client's true DONS status *only if asked about it* - 64% (376 respondents) indicated they would *refuse* to do so, 13% (79 respondents) indicated that they would *agree* to the request, and 23% (137 respondents) replied that they were *not sure* what they would do. Thus, over one-third of the respondents in this subset either would definitely or potentially violate the Rule in this situation.

C. Summary

When faced with the opportunity to further a client's fraudulent settlement negotiation scheme, 30% of the entire set of respondents (221 respondents) agreed to do so in one of the two negotiation scenarios—a clear violation of Rule 4.1. Only 50% (366 respondents) followed the proper course of action and refused both client requests, and

¹²⁶ See *supra* notes 38-40; RESTATEMENT (SECOND) OF TORTS § 551(c).

¹²⁷ See *supra* notes 123-129 and accompanying text; see also RESTATEMENT (SECOND) OF TORTS §§ 551(1) cmt. h, 526 (stating what constitutes a fraudulent misrepresentation).

¹²⁸ This conduct may violate either Rule 4.1(a) or (b) depending on the lawyer's actions in the negotiation. See *supra* notes 123-129 and accompanying text. Furthermore, this conduct also violates Rules 1.2(d) and 8.4(c). See *supra* notes 44, 53-57 and accompanying text.

¹²⁹ See RESTATEMENT (SECOND) OF TORTS §§ 525, 526; see also *Matter of Kersting*, 726 P.2d 587, 592 (Ariz. 1986); *In re Cupples*, 979 S.W.2d 932, 936-37 (Mo. 1998).

the remaining 20% (147 respondents) were not sure how they would respond to one or both requests.¹³⁰

In comparison to the Pepe study's results, it appears that lawyers have improved their ethical compliance over the last twenty-five years.¹³¹ While this signals that some progress has been made, any violation of the Rules of Professional Conduct constitutes professional misconduct and is sanctionable,¹³² particularly when fraudulent conduct is involved. When compared to the zero tolerance policy of the Model Rules, the fact that only one-half of the respondents properly applied Rule 4.1 can only be described as disappointing. Furthermore, it is simply unacceptable that nearly one-third of the respondents agreed to engage in a fraudulent negotiation scheme.

More worrisome is the fact that this number might be dramatically higher. For several reasons our findings likely under-represent the number of attorneys who would violate the Rule during actual negotiations. First, if those respondents who fell into the Uncertain category had to make a choice, it is possible that a fair number of them would choose to violate the rule. Moreover, some of those who indicated that they would follow the rule might make a different choice in practice, where clients exert pressure and lawyers may be tempted to place their professional well-being over adherence to the rule.¹³³ It is unlikely, however, that those who agreed to join the client's scheme would

¹³⁰ The category of unsure respondents breaks down as follows: 11% (80 respondents) refused one of the client's requests but were not sure what they would do in response to the client's other request, suggesting they were leaning toward complying with Rule 4.1, and the remaining 9% (67 respondents) were not sure what they would do in response to both client requests.

¹³¹ See *supra* notes 90–105 and accompanying text.

¹³² See, e.g., *In re Raspanti*, 8 So. 3d 526, 538 (La. 2009), Attorney Grievance Comm'n v. Whitehead, 950 A.2d 798, 810–11 (Md. 2008).

¹³³ See, e.g., Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 915–20 (1999) (discussing various pressures that make it difficult to practice law ethically); Norton, *supra* note 30, at 512 (observing that partisan interests increase pressure on opponents to

do otherwise in actual negotiations; in the pressured world of practice, ethics tend to slide down rather than rise.¹³⁴

V. Potential Reasons and Explanations for Rule Violation

In order to better understand the data from the prior section, we were interested in discovering why the respondents answered the client's requests as they did. To do this, we asked several questions that focused on potential reasons for agreeing or disagreeing with the client's requests.

A. Understanding the Rule

One potential explanation for the high number of attorneys who are willing to agree to engage in the client's fraudulent scheme, or at least willing to seriously entertain the thought, is confusion among attorneys regarding the elements of Rule 4.1. In an attempt to determine more explicitly how well respondents understand Rule 4.1 and its operation, participants were asked questions about the elements of the rule and its comments in the context of the hypothetical negotiation. The questions focused on whether certain facts in the scenario were material facts to the negotiation, and whether failure to disclose the client's DONS status is a misrepresentation.¹³⁵

1. Material Fact

Rule 4.1 is based upon the premise that attorneys understand the phrase "material fact" as used in the Rule. To test whether respondents in fact understood the term, the

deviate from the ethical norms of truthfulness and fairness); *see also supra* notes 97–105 and accompanying text (discussing the Pepe study's results in survey form and in role-play form).

¹³⁴ SHELL, *supra* note 74, at 215.

¹³⁵ There is a limitation to the results of this Part based on the theory of cognitive dissonance. If after answering the first question a respondent may have realized that she answered it in a manner that conflicts with her belief system. Since she could not "correct" her earlier response, she may have tried to justify that response by saying that the key fact was not material to the negotiation or that such an omission is not a misrepresentation. *See* DAVID G. MYERS, SOCIAL PSYCHOLOGY 145–146 (5th ed. 1996).

questionnaire asked if certain facts were material to the hypothetical negotiation. Table 1 reports the percentage and number of respondents who believed whether two important facts were or were not material to the negotiation.

As discussed earlier, the term “material fact” is not defined in the Rules and is used in a different sense in several other contexts that may be more familiar to attorneys.¹³⁶ Thus, it is important to be clear what the phrase means in the context of Rule 4.1. The two keys are: (a) whether the fact has a reasonable effect on one party’s understanding of what is being negotiated, and (b) that the statement is neither an estimate of price or value on the subject of a transaction nor a party’s intentions as to an acceptable settlement of a claim.¹³⁷

Based on the criteria set out above, the client’s actual DONS status is easily determined to be material to the negotiation. It helps the former girlfriend understand that the negotiation is not about the fact that the client contracted DONS from her. While a clear majority of respondents (84%) identified this fact as material to the negotiation, it was thought not to be material by an astonishing 16% of the respondents.

Similarly, the girlfriend’s desire for a settlement is easily determined not to be material to the negotiation. While the fact of desiring a settlement may be critical to whether a settlement occurs, Rule 4.1’s comments specifically state that a party’s intentions as to an acceptable settlement of a claim are ordinarily not considered a

¹³⁶ One prime example that may confuse many litigators is the context of summary judgment where a “material fact” is defined as a “fact[] that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *see also* *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992) (“[T]he dispute must be outcome determinative under prevailing law.” (citations omitted)); *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 402 (8th Cir. 1995) (describing a “material fact” as one “material to the outcome of the case”).

¹³⁷ *See supra* Part II.A.1.

material fact.¹³⁸ Given that the hypothetical only said that the girlfriend was hoping to negotiate a settlement, it is difficult to argue that her underlying willingness to settle the claim can be a material fact. Nevertheless, 67% of the respondents improperly identified the former girlfriend’s desire to settle the claim as a fact that is material to the negotiation.

Table One
Respondents’ Determination of Material Facts

Item Name	Yes	No	χ^2
Girlfriend’s desire to resolve the situation out of court	67% (490)	33% (244)	84.45*
Client’s DONS negative status	84% (620)	16% (114)	348.82*

Notes: *df* = 1 for each test; * *p* < .001, ns = not statistically significant.

The forgoing data suggests considerable confusion or misunderstanding as to what constitutes a material fact in a negotiation under Rule 4.1. Without a basic understanding of what constitutes a material fact in a negotiation, however, lawyers are certain to make mistakes when it comes to following a rule centered on the term “material fact.”

2. Misrepresentation

Another assumption of Rule 4.1 is that attorneys understand what a misrepresentation is since the Rule’s comments warn lawyers “to avoid criminal and tortious misrepresentation.”¹³⁹ The basic elements of a fraudulent misrepresentation claim are: an intentional misrepresentation to induce an action or inaction, reasonable

¹³⁸ MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 2 (2007). *See also* ABA Formal Ethics Op. 06-439 p.2 (stating that a lawyer may downplay a client’s willingness to compromise).

¹³⁹ *Id.*

reliance on the misrepresentation, and resulting damages.¹⁴⁰ The comments also specifically state that “[m]isrepresentations can also occur [through] . . . omissions that are the equivalent of affirmative false statements.”¹⁴¹ This is especially true when one has made a representation about a fact and remains silent after learning that fact is not true.¹⁴²

In the hypothetical scenario, failing to inform the former girlfriend of the client’s true DONS status would lead her to continue to believe he has the disease, which is the equivalent of affirming his false statement.¹⁴³ To determine whether the respondents knew an omission could constitute 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, 61% (444 respondents), said that it was a misrepresentation while 26% (194 respondents) indicated that it was not. The remaining 13% (96 respondents) were not sure if it was a misrepresentation or not.¹⁴⁴ Thus, a majority of respondents correctly identified failing to disclose the client’s DONS status as a misrepresentation.

Yet, a sizeable minority of respondents (39%) failed to indicate that not disclosing the client’s actual DONS status, even when not asked about it, can constitute a misrepresentation. While studies show that people are more willing to lie by omission than by commission, this does not mean that such conduct is any more acceptable than any other type of lie.¹⁴⁵ Indeed, such a high degree of ignorance and uncertainty of such a

¹⁴⁰ See, e.g., *Dillion v. Zeneca Corp.*, 42 P.2d 598, 602-03 (Az. App. 2002); *White v. Bowman*, ___ SW3d ___, 2009 wl 3596053 at 4 (Mo. App. 2009); RESTATEMENT (SECOND) OF TORTS §§ 525, 526, 531 (1977).

¹⁴¹ MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 1.

¹⁴² RESTATEMENT (SECOND) OF TORTS § 551(2)(c) and cmt. h.

¹⁴³ See *supra* notes 130–132 and accompanying text.

¹⁴⁴ $\chi^2(2) = 263.12, p < .001$

¹⁴⁵ See generally Ilana Ritov & Jonathan Baron, *Reluctance to Vaccinate: Omission Bias and Ambiguity*, 3 J. BEHAV. DECISION MAKING 263 (1990) (finding empirical support for the view that it is more acceptable to lie by omission than by commission).

basic legal principle within the legal profession is problematic. That said, without a basic understanding of the law of misrepresentation, it should be no surprise that some respondents would unwittingly be drawn into fraudulent conduct on behalf of their clients in violation of Rule 4.1.

B. Reasons Lawyers Gave

There are a number of other potential explanations for why respondents agreed or refused the client's requests. To determine those reasons, participants were asked to rate the importance of a number of various legal principles and negotiation strategies that could have influenced their decision making.¹⁴⁶

1. Reasons for Agreeing with the Client's Initial Request

To determine the reasons why individuals reported they *would* agree to the client's initial request, respondents were asked to rate the importance of a set of potential rationales presented in random order that might support their decision. These individuals (142 respondents) were given a series of nine statements and asked to indicate each statement's importance in their decision making using a 10 point scale, with "1" being "not at all important" and "10" being "very important."

¹⁴⁶ A limitation to the results of this Section is that people can not always accurately describe the reasons why they do certain things. See Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 246–49 (1977) (noting that while people cannot observe their cognitive processes, sometimes they will report accurately about them); Timothy D. Wilson & Elizabeth W. Dunn, *Self Knowledge: Its Limits, Value, and Potential for Improvement*, 55 ANN. REV. PSYCHOL. 493, 505–06 (2003) (stating that people construct a temporary justification for attitudes and behaviors that comes to mind that might or might not correspond to their implicit attitudes).

Table Two

Ratings of the Importance of Potential Rationales for Agreeing to the Client's Initial Request

Item Name	M	SD
The information is protected by the professional rules of conduct regarding client confidences.	9.63	1.06
The information is protected by attorney-client privilege.	9.60	1.25
The client has specifically requested that this information not be disclosed.	8.19	2.55
Since the suit is not yet on file, there is no need to disclose anything at this time.	4.08	3.22
A lawyer has no affirmative duty to inform an opposing party of relevant facts.	3.91	3.20
Disclosing the information compromises my role as a zealous advocate.	3.75	3.03
The information is harmful to the client's claim.	3.52	2.88
Not disclosing the client's DONS status unless directly asked is typical negotiation behavior.	3.43	2.95
Failing to disclose client's DONS status at this time is typical negotiation behavior.	2.76	2.53

Notes: Rating scale ranged from 1 = "not at all important" to 10 = "very important."

As Table 2 indicates, two rationales stood out as most important in respondents' decision to agree with the client's initial request: the information is protected by the professional rules of conduct regarding client confidences, and the information is

protected by the attorney-client privilege. Additionally, these two rationales had relatively small standard deviations, meaning there was more consensus on their importance than for the other rationales. A third rationale, that the client has specifically requested that the information not be disclosed, was also rated as important. This rationale, however, was significantly less important than the client confidentiality and privilege rules,¹⁴⁷ indicating that these court-related confidentiality rules are more likely to be used as justifications for agreeing to the client's fraudulent request. The remaining six rationales were significantly less important,¹⁴⁸ and all were below the midpoint of the scale.

It is important to note that the highest rated rationale used to justify the respondents' fraudulent actions comes directly from the Model Rules' confidentiality requirements. The fact that this is a competing ethical principle suggests that respondents misunderstand how Rules 1.6 and 4.1 interact.¹⁴⁹ Similarly, the results suggest that attorneys do not understand how the attorney-client privilege, a court evidentiary rule, interacts with the Rule.

Another interesting fact about the three justifications rated as most important is that they embody the deep-seated legal value of promoting the client's interests and such justifications are often the basis for the overly-zealous lawyer's "total commitment to the client" ethos. Yet, the respondents rated the rationale of "disclosing the information compromises my role as a zealous advocate" quite low. This may be a case where lawyers give "good" or acceptable reasons (based in legal rules and client desires) for

¹⁴⁷ $t(140) = 6.12, p < .001$

¹⁴⁸ $t(139) = 12.68, p < .001$

¹⁴⁹ For discussion of the interplay of these two rules, *see supra* notes 41–45 and accompanying text.

their choices, even though zealous advocacy, an often criticized legal value,¹⁵⁰ may play a more important role than indicated. If lawyers believe that their clients are their “first and only responsibility,” it is easy to see why they would believe these three *post-hoc* justifications would absolve their fraudulent conduct.

In addition, the fact that rationales focusing on negotiation behavior all were rated below the neutral point indicates that the respondents may have been searching for what might be considered a legitimate justification instead of supplying their actual reasons for agreeing with the client’s request.¹⁵¹ In other words, they could have been looking for legal rules and other strong principles to serve as good or acceptable justifications for their decision. On the other hand, if taken at face value, negotiation strategies and tactics simply may not be important rationales compared to other legal values when it comes to making negotiation decisions.

2. Reasons for Disagreeing with the Client’s Initial Request

To determine the reasons why individuals reported that they would *refuse* the client’s request to withhold his true DONS status in the upcoming settlement negotiations, respondents were asked to rate the importance of a set of potential rationales that might support their decision to refuse the client’s request. These individuals (452 respondents) were given a series of seven statements in random order and asked to indicate each statement’s importance in their decision making using a 10 point scale, with “1” being “not at all important” and “10” being “very important.” The results appear in Table 3 below.

¹⁵⁰ See Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use of the Baston Challenge Procedure*, 31 L. & HUM. BEHAV. 261, 269 (2007) (finding that identified reasons for preemptory challenges based on race are often masked by acceptable race-neutral rationales).

¹⁵¹ See *id.*

Table Three

Ratings of the Importance of Potential Rationales for Refusing the Client's Initial Request

Item Name	M	SD
My integrity is too important.	9.65	1.19
To do so may violate the rules of professional conduct.	9.54	1.38
My moral compass will not allow me to do so.	9.18	2.00
If there is a lawsuit, the fact that he does not have the virus will come to light.	7.02	3.52
Client does not understand the consequences to <i>you</i> if you follow his request.	6.46	3.52
Client does not understand the consequences to <i>him</i> if you follow his request.	6.29	3.32
Negotiation strategy decisions should be made by lawyers, not their clients.	3.68	2.89

Notes: Rating scale ranged from 1 = "not at all important" to 10 = "very important."

As Table 3 shows, the three rationales rated as most important to the respondents' decision making were: my integrity is too important, to follow his request may violate the rules of professional conduct, and my moral compass will not allow me to do so. Each of these three received very high importance scores, and the fact that they had relatively small standard deviations, means there was more consensus on their importance than for the other rationales. There was, however, a statistically significant difference between the means of the two highest rated rationales and the third one.¹⁵² Since integrity is a behavioral aspect of morality and tends to be visible to others, it is not surprising that an

¹⁵² $t(451)=6.01, p<.001$ (comparing integrity and moral compass); $t(451) = 3.35, p<.01$ (comparing rules and moral compass).

external demonstration of morality that impacts how others view us would be a higher rated justification than an internal moral standard or a legal rule or value.

Concern that the truth might be discovered¹⁵³ and that negative consequences might arise from not disclosing the information were rated as moderately important.¹⁵⁴ Rated as the least important was that lawyers should control negotiation strategy decisions, and this difference was statistically significant.¹⁵⁵

Another interesting aspect of these responses is that rationales focusing on the respondent's conscience received high importance ratings - nearly an equal level as that of the Model Rules. This suggests that lawyers use their internal ethical standards and values as much as the Rules as a guide to their decision making. More interesting is the fact that while a desire to follow the Rules was rated quite high, the consequences of failing to follow them were only rated as only moderately important. This suggests an inherent value in the Rules themselves, but that the fear of their enforcement, or the enforcement of other legal rules, is not a strong motivator to act ethically.

3. Reasons for Agreeing with the Client's Conditional Follow-up Request

To determine the reasons why individuals reported they *would* agree to the client's conditional request to engage in a fraudulent settlement scheme in violation of Rule 4.1 after *not having agreed* to the client's initial unconditional request,¹⁵⁶ respondents were asked to rate the importance of a set of potential rationales that might

¹⁵³ This rationale was significantly less important than the following one's moral compass. $t(451) = 11.29, p < .001$.

¹⁵⁴ The rationale that the client does not know the consequences to "you" was significantly less important than the fact that the information would come to light if a lawsuit were filed. $t(451) = 3.13, p < .01$.

¹⁵⁵ $t(451) = 14.71, p < .001$ (comparing consequences to him with negotiation strategy).

¹⁵⁶ Those who were unsure how to respond to the client's first request were not probed for the reasons behind their choice.

support their decision to agree to the client’s request.¹⁵⁷ These individuals (79 respondents) were given a series of six statements similar to the rationales given to those who would agree to the client’s unconditional request¹⁵⁸ and were asked to indicate each statement’s importance in their decision making using a 10 point scale, with “1” being “not at all important” and “10” being “very important.” The results appear in Table 4 below.

Table Four
Ratings of the Importance of Potential Rationales for Agreeing to the Client’s Conditional (Second) Request

Item Name	Mean	SD
Disclosing the client’s DONS status without being asked about it compromises my role as a zealous advocate.	6.70	2.66
This is the manner in which the client wishes to proceed in the negotiation.	6.35	2.49
The information is harmful to the client’s claim.	6.15	2.74
Not disclosing the client’s DONS negative status unless directly asked about it is typical negotiation behavior.	5.90	2.77
Since the suit is not on file, there is no need to disclose anything at this time.	5.72	2.94
A lawyer has no affirmative duty to inform an opposing counsel of relevant facts.	5.44	3.02

Notes: Ratings scale ranged from 1 = "not at all important" to 10 = "very important;" since there was no strong support for any rationale, statistical significance tests were not run.

¹⁵⁷ The results in this portion of the study may be limited. *See supra* note 160.

¹⁵⁸ These rationales were taken from six rationales listed in Table 1. The top two rationales listed in Table 1 (based on confidentiality concerns) were not used here because we did not want the respondents to believe they had made a mistake in their earlier survey responses, which may have caused them either to try to change their earlier responses or to stop taking the survey altogether.

As Table 4 shows, all of the proffered rationales were rated of moderate importance at best, a bit above the midpoint of the scale. These results suggest that respondents may not have known why they agreed to this request, a conclusion that is supported by the relatively high standard deviations. Perhaps they followed a gut instinct or feeling that lacked any specific analytical decisional framework, or it could reflect that fact that the respondents did not possess a clear set of core values by which they could justify their choice. Maybe they simply wanted to be seen as somewhat relying on apparently sensible rationales for their choices when their actual reason for the agreement was not among the proffered rationales. Or, the potential rationales may have caused them some dissonance by signaling that maybe they should have answered the first question differently. The fact that 80% (63) of these respondents answered “not sure” to the client’s initial unconditional request lends credence to the hypothesis that the respondents did not have a framework for making this decision and had no clear rationale to justify having made it.

A comparison of the common rationales for agreeing with one of the client’s two requests shows that five of the six rationales received higher importance ratings from respondents who agreed to the conditional request than who agreed to the unconditional request.¹⁵⁹ Only the rationale that the client wanted to proceed in this manner received lower importance ratings from respondents who agreed to the conditional request than those who agreed to the unconditional request.¹⁶⁰ The results appear below in Table 5.

¹⁵⁹ All five of these differences were statistically significant as follows: zealous advocate - $t(219)=7.243, p<.001$; harmful to the claim - $t(218)=6.595, p<.001$; typical negotiation behavior - $t(211)=5.419, p<.001$; suit not on file, no need to disclose - $t(216) = 3.588, p<.001$; no affirmative duty to inform - $t(215)=3.320, p<.001$

¹⁶⁰ This difference was statistically significant. $t(219)=-5.166, p<.001$.

Table Five:

Comparison of Respondent Ratings of the Importance of Several Potential Rationales for Agreeing with the Client's Request

Item Name	Mean Unconditional	Mean Conditional
Compromises role as a zealous advocate	3.75	6.70
Client wishes to proceed in this manner	8.19	6.35
Information is harmful to the claim	3.52	6.15
Not disclosing unless directly asked is typical negotiation behavior	3.43	5.90
Suit not on file, no need to disclose	4.08	5.72
No affirmative duty to inform opposing counsel	3.91	5.44

Notes: Ratings scale ranged from 1 = "not important at all" to 10 = "very important."

It is not clear why five of the six rationales received higher importance ratings from respondents who agreed to the conditional request than who agreed to the unconditional request. It is possible that these items were more strongly endorsed by this group because the two rationales most favored by those who agreed to the unconditional request (attorney-client privilege and professional rules regarding client confidences) were not part of the set of rationales provided to the respondents.¹⁶¹ Or, our hypothesis

¹⁶¹ See *supra* Table 2. They were excluded to keep respondents from thinking that their earlier answer may have been wrong and trying go back to revise their earlier responses.

that these respondents lacked a decision making framework but want to be seen as relying on sensible rationales for their choices may account for these differences.

More striking, however, is the fact that the rationale relating to the client's wishes was the only one more important to the unconditional sample than to the conditional sample. The respondents who agreed to the unconditional request may be the more aggressive lawyers who hide their "zealousness" behind a devotion to their duty of loyalty as to the client, hence their high importance rating for this rationale. When this is coupled with the conditional sample's apparent lack of any specific analytical decisional framework or core set of values by which they could justify their choice, the directional difference makes sense.

C. Prediction of What Other Lawyers Would Do

In gauging what respondents believe other lawyers do when negotiating, we acquire a sense of what lawyers consider to be acceptable negotiation conduct. That is, respondents' perceptions of other attorneys are important because, like all people, lawyers take cues from the conduct of others to determine which behaviors are considered acceptable.¹⁶² Furthermore, observation and mimicry are methods by which lawyers learn professional norms and legal ethics.¹⁶³ When lawyers observe others' unethical behavior going unchallenged, they assume either that such behavior is acceptable or that the bar's failure to enforce the rules implies that the rules are unenforceable or that they mean something other than what they say.¹⁶⁴ These beliefs can

¹⁶² Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 *FORDHAM L. REV.* 1429, 1431 (2006) [hereinafter, Green, *Taking Cues*].

¹⁶³ *Id.*; *Negotiators: Guard Against Ethical Lapses*, 12 *NEGOTIATION* 5–6 (June 2009) [hereinafter *Negotiations: Guard Against*] (warning negotiators not to imitate "rule breakers" with whom they may be associated); *ABA REPORT OF THE PROFESSIONALISM COMMITTEE, TEACHING AND LEARNING PROFESSIONALISM* 25–34 (1996).

¹⁶⁴ Green, *Taking Cues*, *supra* note 162, at 1432; Zacharias, *What Lawyers Do*, *supra* note 49, at 1005 (discussing under enforcement of rules related to attorney advertising).

lead attorneys to treat legal negotiations like prisoners' dilemma games: even if they know the conduct violates the Rules, they may believe that they need to violate them simply to compete with other lawyers.¹⁶⁵

All participants were asked two questions regarding how they believed other attorneys would respond if faced with the two scenarios presented to the respondents.¹⁶⁶ First they were asked to indicate what percentage of practicing lawyers they believed would follow the client's unconditional request to avoid providing any information about the client's actual DONS status even if directly asked about it.¹⁶⁷ In response to this question, 53% of the respondents indicated that they thought 40% or fewer of practicing attorneys would agree with the request, 20% of the respondents thought 41-60% of practicing attorneys would agree with the request, and 28% of the respondents indicated that they thought more than 60% of practicing attorneys would agree with the client's request. (See Table 6). Then respondents 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; that is, if directly asked, the

¹⁶⁵ Zacharias, *What Lawyers Do*, *supra* note 49, at 1005 (discussing under enforcement of rules related to attorney advertising).

¹⁶⁶ This results and conclusions in this Part are tempered by two potential explanations for the results. The first is the false consensus effect. People tend to overestimate the commonality of their opinions and undesirable behaviors, but underestimate the commonality of their good behaviors. See David G. Myers, SOCIAL PSYCHOLOGY 54–55, 57–58 (5th ed. 1996); J. Suls et. al., *False Consensus and False Uniqueness in Estimating the Prevalence of Health-Protective Behaviors*, 18 J. APPLIED SOC. PSYCHOL. 66 (1988). Second is the self-serving bias. On any dimension that is subjective and socially desirable, most people see themselves as better than the average person. See V. Hoorens, *Self-Enhancement and Superiority Biases in Social Comparison*, in 4 EUROPEAN REVIEW OF SOCIAL PSYCHOLOGY (W. Stroebe & M. Hewstone eds., 1993); V. Hoorens, *Self-Favoring Biases, Self-Presentation, and the Self-Other Asymmetry in Social Comparison*, 63 J. OF PERSONALITY 793 (Dec. 1995); R. Rosenblatt, *The 11th Commandment*, FAM. CIRCLE 30–32 (Dec. 21, 1993) (reporting a national survey in which respondents said that most others were less likely to follow each of the ten commandments than they were).

¹⁶⁷ Respondents were asked to choose among the categories of percentages of listed in Table 8.

attorney then could reveal the information. In response to this scenario, 42% of the respondents indicated that 40% or fewer of practicing lawyers would agree with this request, 21% of the respondents indicated that 41-60% of practicing lawyers would agree with this request, and 38% of the respondents believed that more than 60% of practicing attorneys would agree to this request. (See Table 6). Thus respondents thought more practicing attorneys would agree to the conditional request than to the unconditional request.¹⁶⁸

Table Six
What Would Other Lawyers Do?

Percentage of Other Lawyers	Percentage of Respondents Who Believe Others Would Withhold Client's DONS Status Unconditionally	Percentage of Respondents Who Believe Others Would Withhold Client's DONS Status Unless Asked
0%	2%	2%
1-20%	29%	20%
21-40%	22%	20%
41-60%	20%	21%
61-80%	14%	20%
81-99%	12%	16%
100%	1%	2%

Notes: $t(733)=9.08, p<.001$.

Because legal negotiations tend to be competitive endeavors,¹⁶⁹ negotiators try to gather as much information as they can from the other side while disclosing as little

¹⁶⁸ $t(733)=9.08, p<.001$

¹⁶⁹ MACFARLANE, *supra* note 9, at 76–78; MNOOKIN ET AL., *supra* note 11, at 168–71.

information as possible.¹⁷⁰ Therefore, attorneys may resist disclosing the client's DONS status, especially if they believe other attorneys are likely to do the same. The data appear to support this interpretation, despite the fact that the respondents who agreed to the client's first request indicated that negotiation norms were unimportant in their decision making.¹⁷¹ This may be an instance where the norm of refusing to give away information is so ingrained into the respondents' negotiation behavior that they fail to see it and recognize its influence on their own behavior.

Additionally, it is not surprising that respondents believe other lawyers would be more likely to engage in an omission strategy than a commission strategy. Psychological studies routinely find that acts of omission are viewed as more acceptable than acts of commission.¹⁷² This was born out in the present study by the sizeable number of respondents who did not agree to the client's first request but did agree to the second. Omissions create blurred lines of responsibility such that responsibility may be seen as shifting from the actor to the target.¹⁷³ For example, the comments to Rule 4.1 indicate that lawyers generally "have no duty to inform an opposing party of relevant facts," which makes asking the right question the focus of inquiry.¹⁷⁴

Although only 19% of our respondents indicated they would agree to the client's initial unconditional request, 69% of our respondents believed that more than 20% of other lawyers would do so, and almost half (47%) believed that over 40% of the other

¹⁷⁰ LATZ *supra* note 73, at 47–66; Goodpaster, *supra* note 67, at 340–41.

¹⁷¹ See Table 2.

¹⁷² See generally Ritov & Baron, *supra* note 145, at 263 (finding empirical support for the view that it is more acceptable to lie by omission than by commission).

¹⁷³ Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 230 (2004). Tenbrunsel and Messick state that this shifting of responsibility to others "allows one to divorce oneself from the moral implications of their actions." *Id.*

¹⁷⁴ MODEL RULES OF PROF'L CONDUCT, R. 4.1 cmt. 1 (2007).

lawyers would do so.¹⁷⁵ More than one-fourth of respondents (27%) thought more than 60% of practicing lawyers would agree to this request. Similarly, 78% of the respondents believed that more than 20% of other lawyers would agree with the client's conditional request, and 59% believed that more than 40% of practicing lawyers would do so. Furthermore, more than one-third of the respondents (38%) thought more than 60% of practicing lawyers would agree to this request. These findings indicate that our respondents apparently believe that Rule violation is more common than our findings suggest.

D. Respondent Attributes

Once we examined how participants as a group responded to the questionnaire, we sought to determine if a relationship existed between attorney responses and attributes relating to gender and time since licensure.

1. Gender

Women attorneys are often thought to be more ethical than their male counterparts,¹⁷⁶ but existing empirical analyses of gender differences in negotiation find very few differences.¹⁷⁷ To explore this issue further, we examined whether attorney

¹⁷⁵ The fact that respondents would tend to believe others lie more than they themselves do is not surprising due to the self-serving bias. *See supra* note 179.

¹⁷⁶ *See generally* Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 799–800 (2004) (finding that based on their proportionality of the attorney population, less than half of the number of women attorneys that one would expect to be disciplined were actually disciplined in the year 2000); *see also* Muriel J. Bebeau & Mary Brabeck, *Ethical Sensitivity and Moral Reasoning Among Men and Women in the Professions*, in WHO CARES? THEORY, RESEARCH, AND EDUCATIONAL IMPLICATIONS OF THE ETHIC OF CARE 144, 155–56 (Mary M. Brabeck ed., 1989).

¹⁷⁷ CARRIE MENKEL-MEADOW ET AL., NEGOTIATION: PROCESSES FOR PROBLEM SOLVING 411–12 (2006); Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 347 (1999). To the extent that there are real differences between men and women negotiators, they are in the following areas: trust building, orientation of lying (to enhance self or others), level of comfort with competitive situations, language use, and views of appropriate bargaining outcomes. *See*

gender impacted the likelihood that respondents would engage in unethical negotiation practices as part of the two client request scenarios. (See Table 7.)

Table Seven
Agreement with Client's Requests by Gender

Response to Client's Request	Unconditional Request (first request)		Conditional Request (second request)	
	Female	Male	Female	Male
Yes	21%	19%	18%	11%
No	54%	64%	52%	68%
Not sure	25%	17%	30%	20%

There were significant differences between male and female attorneys in response to both of the client's requests.¹⁷⁸ The primary differences in responses to both client requests were in the "no" and "not sure" categories. Women were more likely than men to be unsure how to respond to the client's requests, whereas men were more likely than women to refuse the client's request. In contrast to the first request, women were more likely than men to agree with the client's second request. Thus, women attorneys equivocated more than men rather than refuse the client's request. These findings suggest that generalized findings about gender and attorney ethics¹⁷⁹ are not transferable to attorney negotiation ethics.

CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 238–41 (6th ed. 2009) (compiling the results of numerous gender and negotiation studies).

¹⁷⁸ First request: $\chi^2(2, N = 723) = 7.48, p < .05$; second request - $\chi^2(2, N = 583) = 14.26, p < .01$.

¹⁷⁹ See *supra* note 189.

2. Time Since Licensure

We anticipated that time since licensure might have an impact on whether an attorney follows the rule, but were unsure which direction that effect would point. More experienced attorneys might understand the rule better and therefore be more likely to apply it in practice; or they might be more jaded or conniving than newer lawyers and thus be more likely to violate it.

The data reveal that there were statistically significant, but small, differences in lawyers' responses to the client's requests depending on how long they had been in practice.¹⁸⁰ With regard to the client's unconditional request, lawyers who refused the request had been in practice the longest (M=22 years), and those who were not sure how to respond to this request had been in practice the shortest amount of time (M=19 years).¹⁸¹ Lawyers who agreed to the client's request did not differ from either of the other groups in terms of years in practice. With regard to the client's conditional request, lawyers who refused the request had been in practice longer (M=22 years) than either lawyers who were not sure (M=19 years) or those who agreed with the request.¹⁸² There was no difference between the respondents who agreed to this request and those who were unsure how to respond. Thus, more experienced lawyers were more likely to follow the requirements of Rule 4.1 in both request scenarios. Those with less experience trended more towards making wrong choices or being unsure how they would respond. The fact that the significant differences occur after approximately two decades of practice mitigates against drawing meaningful conclusions based on these findings.

¹⁸⁰ Unconditional request, $F(2, 696)=3.58, p<.05$; conditional request, $F(2, 565)=5.30, p<.01$.

¹⁸¹ $p<.01$

¹⁸² $p<.05$, and $p<.01$ respectively.

We also tested whether time since licensure had an impact on the respondents' ability to recognize certain facts as material to the negotiation. More experienced attorneys were more likely than less experienced attorneys to identify the client's girlfriend's desire to resolve the situation out of court¹⁸³ as a material fact when it was not. However, there was no relationship between time since licensure and the respondents' identification of the client's DONS negative status as material fact.

There also were statistically significant differences in respondents' ability to identify the failure to reveal the client's DONS negative status in response to a direct question as a misrepresentation.¹⁸⁴ Specifically, respondents who had been practicing law a shorter period of time were more likely to be unsure of whether this was a misrepresentation than those who correctly identified the client's request as a misrepresentation.¹⁸⁵

VI. Comparisons of Potential Reasons and Explanations by Violation Category

To gain more insight into why some lawyers would violate Rule 4.1 while others would not, we categorized the 734 participants in relation to Rule 4.1. That is, we grouped participants based on whether or not they agreed to violate Rule 4.1 in either of the two request scenarios. Those who agreed to the client's first request to withhold his DONS status were categorized as Unconditional Violators, indicating that they would violate Rule 4.1 without any conditions. Likewise, those who did not agree to the client's first request but agreed with his second request, disclosing his DONS status only upon the occurrence of a specific condition, were categorized as Conditional Violators,

¹⁸³ $F(1,697)=13.34, p < .001$; no (M=18.64), yes (M=21.90).

¹⁸⁴ Those who properly identified this as a misrepresentation had been in practice on average of 22 years, while those who thought it was not a misrepresentation had been in practice on average of 20 years, and those who were unsure had been in practice on average of 18 years.

¹⁸⁵ $F(2, 696)= 4.93, p < .01$.

indicating that they would violate of Rule 4.1 under specific conditions. Those respondents who refused both client requests, which indicated that they would follow Rule 4.1’s requirements, were categorized as Unconditional Non-Violators. Respondents who refused one of the client’s requests but responded that they did not know what they would do in response to the other request were categorized as Conditional Non-Violators because their responses indicated a tendency to comply with Rule 4.1. Respondents who answered that they did not know what their response would be to both client requests were placed in the Uncertain category. The number of respondents who fell into each category appears in Table 8.¹⁸⁶

Table Eight
Violation Categories and Frequencies

Violation Category	Frequency	%
Unconditional Violator	142	19%
Conditional Violator	79	11%
Uncertain	67	9%
Unconditional Non-violator	366	50%
Conditional Non-violator	80	11%

Using the respondents’ “violation category,” we assessed the association between these categories and their understanding of the elements of Rule 4.1, their responses regarding how other lawyers would respond to the client’s two requests, and their gender and time since licensure to see if violation category might help explain why respondents did or did not violate Rule 4.1.

¹⁸⁶ $\chi^2(4, N = 734) = 432.553, p < .001.$

A. Understanding the Rule

Once we examined respondents' understanding of Rule 4.1 and its operation, we sought to determine if respondents' violation status was associated with their understanding, or lack of understanding, of Rule 4.1's component parts in the context of the hypothetical negotiation.¹⁸⁷

1. Material Fact

First we assessed whether respondents' violation category as shown in Table Seven was associated with their beliefs regarding what constituted a material fact in the scenario. As stated above, the client's DONS negative status is a material fact, and the client's girlfriend's desire to resolve the case out of court is not a material fact to the negotiation.¹⁸⁸ The only comparison that differed significantly across violation categories was whether or not the client's DONS status was a material fact. In the two violator categories, only 71% and 73% of the respective respondents recognized this fact as material to the negotiation under Rule 4.1, compared to 90% and 93% of the respective respondents in the two Non-Violator categories and 87% in the Uncertain category. Since this is the only fact that is relevant to the respondents' violation status under the scenario, it is not surprising that this is the main difference among the respective categories. The results of the analysis are presented in Table 9.

¹⁸⁷ The conclusions we draw in this Section may be limited due to the theory of cognitive dissonance. *See supra* note 137.

¹⁸⁸ *See supra* notes 142–148 and accompanying text.

Table Nine

Respondents' Determination of Material Fact by Violation Category

Item Name	Material	UV	CV	UNC	CNV	UNV	χ^2
		Yes	Yes	Yes	Yes	Yes	
		(n = 142)	(n = 79)	(n = 67)	(n = 80)	(n = 366)	
Girlfriend's desire to resolve the situation out of court.	N	73%	70%	63%	69%	64%	4.14
Client's DONS negative status.	Y	71%	73%	87%	93%	90%	38.98*

Notes: $df = 4$ for each test, $* = p < .001$, UV = Unconditional Violator, CV = Conditional Violator, UNC = Uncertain, CNV = Conditional Non-Violator, UNV = Unconditional Non-Violator.

What is surprising is the fact that of the respondents who fell into the Unconditional Violator and Conditional Violator categories, only 28% (62) failed to recognize that the client's DONS status was material to the negotiation, yet all 221 agreed to the client's request to engage in the fraudulent negotiation scheme in violation of Rule 4.1. This result suggests a couple of hypotheses. Maybe the remaining 159 respondents who fell into the two violator categories thought other competing principles took precedence over Rule 4.1.¹⁸⁹ Perhaps the explanation is that they were more concerned with what other attorneys would do in this situation, or it may be that they do not understand what constitutes a misrepresentation.

¹⁸⁹ See *supra* Table 2.

2. Misrepresentation

Next we examined whether there were differences in lawyers' recognition that withholding the client's actual DONS status was a misrepresentation by omission by violation category. Indeed, respondents' apparent understanding of this facet of the ethical rule was significantly associated with their decision to reveal or not reveal the client's DONS status.¹⁹⁰ Only the Unconditional Non-Violators overwhelmingly recognized that withholding the client's DONS status in this situation constituted a misrepresentation by omission. The results are presented in Table 10.

Table Ten

Respondents' Determination of Omission as Misrepresentation by Violation Category

Omission of DONS status a misrepresentation?	UV	CV	UNC	CNV	UNV
Yes	29%	23%	43%	56%	85%
No	61%	62%	18%	18%	9%
Don't Know	10%	15%	39%	26%	6%

Notes: UV = Unconditional Violator, CV = Conditional Violator, UNC = Uncertain, CNV = Conditional Non-Violator, UNV = Unconditional Non-Violator, and DK = Don't Know.

These findings provide a clearer picture as to why respondents agreed or were not sure how to respond to the client's requests. Fewer than one-third of the Unconditional Violators, fewer than one-fourth of the Conditional Violators, and fewer than half of the Uncertains identified the omission in the negotiation scenario as a misrepresentation. Additionally just over half of the Conditional Non-Violators recognized the omission in

¹⁹⁰ $\chi^2(8) = 285.52, p < .001$

the negotiation scenario as a misrepresentation. Serious difficulties with the concept of misrepresentation by omission, either understanding it or applying it, cut across four of the five violation categories. Besides suggesting a reason why these respondents agreed with the client's request or were not sure how to respond, this finding also points to an emphasis area for educational efforts to increase compliance with rule 4.1.

The remaining 29% and 23% of the Unconditional and Conditional Violators recognized that failing to disclose the client's actual DONS status without a question from opposing counsel constituted a misrepresentation. Nevertheless, they agreed to participate in the client's fraudulent scheme anyway. This result may be partially due to the fact that those respondents who fell into these categories thought other legal principles took precedence over Rule 4.1.¹⁹¹

B. Prediction of What Other Lawyers Would Do

Assessing the association between respondents' violation categories and their predictions of what other lawyers would do required a different type of analysis than occurs in the rest of this paper.¹⁹² First, the percentage categories from Table 6 were coded into a seven point scale, and each response was assigned its respective point value.¹⁹³ The average scores for each violation category on this scale were then compared to determine if there were any significant differences.

¹⁹¹ See *supra* Table 2.

¹⁹² The results and conclusions in this Part are tempered by two potential explanations—the false consensus bias and the self serving bias. See *supra* note 179.

¹⁹³ The scale was structured so that 1 = 0%, 2 = 1-20, 3 = 21-40%, 4 = 41-60%, 5 = 61-80%, 6 = 81-99%, and 7=100%. Separate Analysis of Variance models with planned contrasts were computed for the two dependent variables based on the two request scenarios.

1. Client's Unconditional Request

There were significant differences among violation categories in respondents estimates of how many other lawyers would honor the client's first request to withhold information.¹⁹⁴ Specifically, lawyers who were Unconditional Violators felt that a higher number of other lawyers would withhold information about the client's DONS status than did respondents in the four other violation categories.¹⁹⁵ Conditional Violators believed that a larger percentage of lawyers would withhold this information than did respondents in the Conditional Non-Violator and Unconditional Non-Violator categories.¹⁹⁶ In turn, the Conditional Non-Violators believed that marginally more lawyers would withhold the information than did Unconditional Non-Violators.¹⁹⁷ The differences in responses between those respondents in the Uncertain category were significantly different from those in the Unconditional Violator and Unconditional Non-Violator¹⁹⁸ categories, but not from the Conditional Violators and Conditional Non-Violators. Thus, there was a strong relationship between how likely respondents were to violate Rule 4.1 and how likely they thought other lawyers would violate the Rule. The results appear in Figure One below.

¹⁹⁴ $F(4, 729) = 53.24, p < .001$.

¹⁹⁵ p 's $< .001$ respectively.

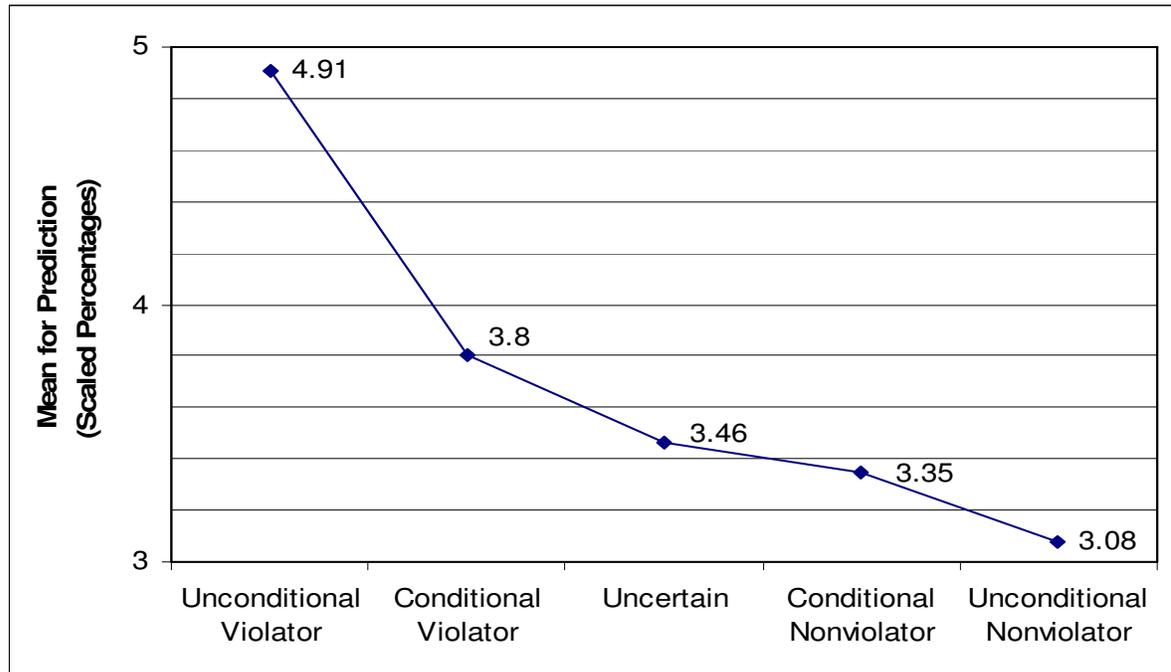
¹⁹⁶ $p < .05$ and $p < .001$, respectively

¹⁹⁷ $p = .091$

¹⁹⁸ $p < .001$ and $p < .05$, respectively

Figure One

How Other Lawyers Would Respond to Client's Unconditional Request



Translating the numbers from the seven-point scale used for this analysis back into percentages,¹⁹⁹ the Unconditional Violators thought 41 to 60% of other lawyers would agree to the request,²⁰⁰ which stands in stark contrast to the 19% of our respondents who indicated they would agree to the client's initial unconditional request.²⁰¹ These findings demonstrate how expectations of a counterpart's negotiation behavior influence one's own negotiation behavior. For example, Unconditional Violators may believe that such negotiation behavior is the norm and therefore is

¹⁹⁹ See *supra* note 193.

²⁰⁰ The Unconditional Violators' scaled 4.91 score falls in the 41-60% range. Based on the method in which this information was collected, it is impossible to translate the scaled score to a precise percentage. Furthermore, the ratings in this part of the questionnaire may be a manifestation of self-serving bias where the respondents see themselves as more ethical than others. See *supra* note 179.

²⁰¹ The fact that this number is higher than our findings is not surprising due to the false consensus and self serving biases. See *supra* note 179.

acceptable,²⁰² even though they rated the rationale of negotiation norms as unimportant in their decision to agree with the client's first request.²⁰³ Since observation and mimicry indeed are methods of learning professional norms, what one believes other attorneys do when negotiating is likely an important factor in determining whether an individual will violate Rule 4.1.²⁰⁴

2. Client's Conditional Request

There also were significant differences among violation categories in lawyers' estimates of how many other lawyers would respond to the client's conditional request.²⁰⁵ As with the client's unconditional request, the more likely respondents were to violate Rule 4.1, the more likely they thought other lawyers would be to violate the client's conditional request.

Specifically, Unconditional Violators believed that a larger number of other lawyers would withhold information about the client's DONS status unless directly asked than did all other violation categories,²⁰⁶ except the Conditional Violators. Although Conditional Violators did not differ from Unconditional Violators in this regard, Conditional Violators believed that more lawyers would withhold the information than did the Uncertains and the Conditional and Unconditional Non-Violators.²⁰⁷ At the other end, Unconditional Non-Violators thought fewer lawyers would agree with the client's conditional request than did all the other violation categories.²⁰⁸ Conditional Non-Violators thought more lawyers would agree to this request than Unconditional Non-

²⁰² Green, *Taking Cues*, *supra* note 162, at 1432 (2006).

²⁰³ See Table 2.

²⁰⁴ See Green, *Taking Cues*, *supra* note 162, at 1431; *Negotiators: Guard Against*, *supra* note 191, at 5–6 (warning negotiators not to imitate “rule breakers” with whom they may be associated).

²⁰⁵ $F(4,729) = 68.17, p < .001$.

²⁰⁶ p 's $< .001$.

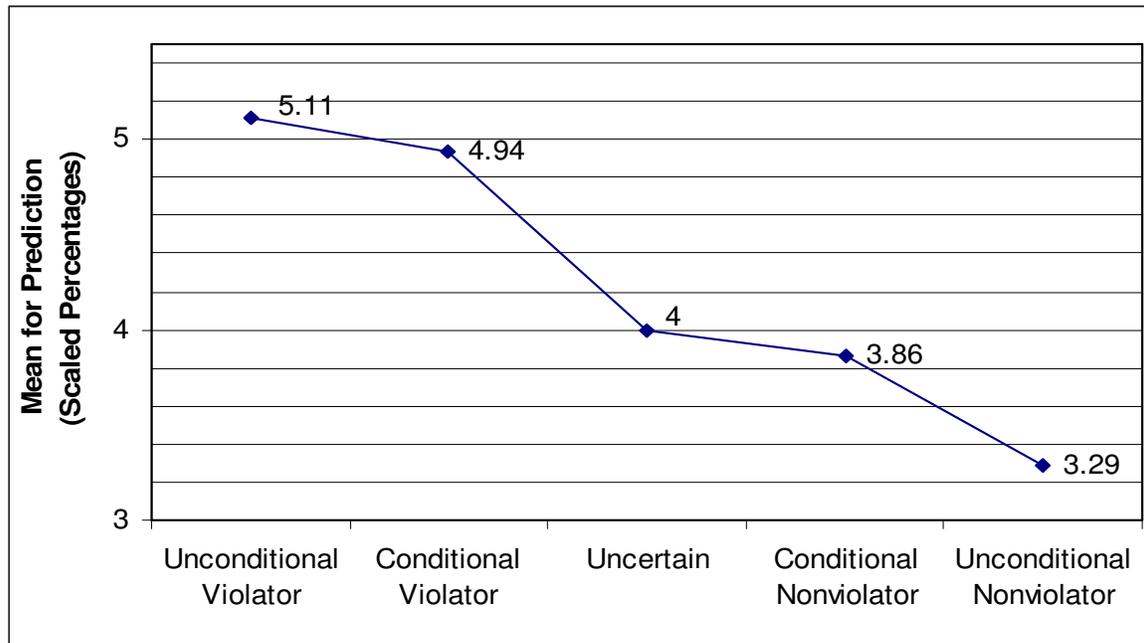
²⁰⁷ p 's $< .001$.

²⁰⁸ p 's $< .001$.

Violators, but fewer than all the Conditional and Unconditional Violators.²⁰⁹ There was no significant difference between the Conditional Non-Violators and Uncertains. While the difference between the Uncertains and the Conditional Non-Violators was not remarkable, the difference between the Uncertains and the Unconditional Non-Violators was.²¹⁰ And the difference between the number of Conditional Non-Violators who believed that lawyers would withhold the information and the Unconditional Non-Violators was significant.²¹¹ The results appear in Figure 2 below.

Figure Two

How Other Lawyers Would Respond to Client's Conditional Request



When these numbers are translated back from the seven-point scale used for this analysis,²¹² the Unconditional Violators thought 61 to 80% of the other lawyers would agree to this request while the Conditional Violators thought a range of 41 to 60% of the

²⁰⁹ p 's < .001.

²¹⁰ p < .001.

²¹¹ p < .001.

²¹² See *supra* note 178.

other lawyers would agree to this request.²¹³ These findings are in clear contrast to our finding that 30% would agree to violate the Rule.²¹⁴ As with our other findings related to the client's unconditional request, an association appears to exist between the respondents' actions in response to the client's conditional request and their beliefs concerning how other lawyers would respond to the client's conditional request. Those who believe other attorneys would withhold the information indicate that they also would withhold their client's DONS status, and those who believe others would not withhold the information indicate they also would not do so.

Despite indications that attorneys believe competitive norms do not play an active part in their negotiation decision-making processes,²¹⁵ these findings indicate that expectations of other negotiators act as a predictor of attorney negotiation behaviors.²¹⁶ The fact that a competitive activity would cause a number of lawyers, generally speaking a competitive group of people, to use competitive strategies to gain an advantage is not surprising.²¹⁷

C. Respondent Attributes

Finally, we also examined whether a relationship existed between the attorney attributes of gender and years in practice and their violation category.

²¹³ See *supra* Part IV.C.

²¹⁴ See Table 8. Presumably the Unconditional Violators would agree to the client's conditional request to engage in the fraudulent negotiation scheme.

²¹⁵ See Table 2.

²¹⁶ See Green, *Taking Cues*, *supra* note 162, at 1431; *Negotiators: Guard Against*, *supra* note 191, at 5–6.

²¹⁷ See *supra* notes 9–11, 65–73, and accompanying text (describing negotiation as an adversarial activity); see also SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 26–29, 40–41 (2004) (discussing several psychological studies of lawyers indicating that they are more competitive than the general public and other professionals).

1. Gender

Significant gender differences occurred across the violation categories.²¹⁸ The primary difference was for the Unconditional Non-Violator category: a higher percentage of men (54%) than women (40%) fell into this category. (See Table 11). This difference is accounted for by the fact that women were over-represented in the two conditional and Uncertain categories. Nearly three-fourths of the men, 73%, fell into the two unconditional categories compared to 60.5% of the women. This suggests that women may feel more equivocal or less certain of their positions when applying ethical principles in context.

Table Eleven
Gender by Violation Category

Violation Category	Female	Male
Unconditional Violator	20.5%	19%
Conditional Violator	14.5%	9%
Uncertain	12.5%	8%
Conditional Non-violator	12.5%	10%
Unconditional Non-violator	40%	54%

²¹⁸ $\chi^2(4, N = 723) = 13.82, p < .01$

2. Time Since Licensure

Second, we analyzed whether time since licensure was related to the likelihood that attorneys reported they would engage in unethical negotiation practices. (See Table 12.) Statistical analyses indicated that there was a significant difference between violation categories and time since respondent licensure.²¹⁹ Follow-up analyses revealed that the specific differences were that the Unconditional Non-Violators were in practice longer than both the Conditional Violators and the Uncertains,²²⁰ and that the Unconditional Violators were somewhat longer in practice than the Conditional Violators.²²¹ Thus, no clear pattern of relationships exists between years since licensure and respondents' propensity to violate the professional conduct rules.

Table Twelve

Means for Time since Licensure by Violation Category

Violation Category	Mean (yrs)
Unconditional Violator	20.59
Conditional Violator	17.89
Uncertain	18.23
Conditional Non-violator	20.80
Unconditional Non-violator	21.95

²¹⁹ $F(4,698) = 3.04, p < .05$.

²²⁰ $p < .01$ and $p < .05$, respectively.

²²¹ $p = .095$.

VII. Study Limitations²²²

Studying live negotiations in a systematic manner is difficult because negotiation is a private activity with numerous variables. Experimental simulations, however, offer a viable method of studying negotiation practices because they allow researchers to collect the reactions of a large number of people to the same factual scenario.²²³ But experimental simulations do have their limitations. One limitation is the degree to which they can reflect the relevant real world conditions, giving rise to questions about the study's external validity—the degree to which the research findings can be generalized to persons, times, and settings beyond those in which the research was conducted.²²⁴ However, a study need not mirror real world conditions to have high external validity; as long as it elicits responses similar to those in the real world, the study has high generalizability.²²⁵ The only manner in which we diverged from a “real world” negotiation, was limiting the number of options available to respond to the client's two requests. Instead of giving options of withdrawal, asking the client further questions, rescheduling the negotiation, etc., we only gave three options in response to the question would you agree to the client's request(s)—yes, no, or not sure. As a result, any option other than yes or not sure, was subsumed by the “no” response, which could have swayed respondents to the “not sure” response.

²²² This Part discusses only generalized limitations to the efforts undertaken in this study. Limitations with respect to interpretations of the data in Parts VI and VII are discussed in conjunction with the discussion of that particular data.

²²³ Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 482–83 (2003).

²²⁴ Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 80–81 (2002); Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 475 (2005); see generally THOMAS D. COOK & DONALD T. CAMPBELL, *QUASI-EXPERIMENTATION: DESIGN AND ANALYSIS ISSUES FOR FIELD SETTINGS* (1979).

²²⁵ Jennifer K. Robbennolt, *Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777, 787–88 (2002).

Another potential limitation in this method of research is that people's responses might be biased to reflect what they believe to be the socially desirable response, which can be especially problematic in ethics research.²²⁶ The use of confidential surveys helps minimize this effect;²²⁷ we promised respondents that their individual responses would remain both confidential and anonymous. Furthermore, none of the study materials available to participants referred to the study as a negotiation ethics study to ameliorate skewing or invalidating the study's results.²²⁸

VIII. Summary of Key Conclusions

In this study we sought to determine the likelihood that attorneys would agree to engage in unethical negotiation practices as well as to explore the reasons why they would do so. The data reveal that a substantial number would violate the requirements of Rule 4.1 governing legal negotiations and agree to engage in a blatantly fraudulent negotiation tactic. While these findings might be read to indicate that there are a large number of corrupt and/or morally misguided lawyers, this study suggests that other phenomenon are at work. Based on our findings, we draw the following key conclusions.

Conclusion 1 - An unacceptably high number of lawyers indicate they would be willing to engage in a fraudulent settlement negotiation scheme in violation of Rule 4.1 if asked to do so by their client.

As discussed throughout this paper, 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. Doing otherwise constitutes engaging in a

²²⁶ FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS 93–94 (1988); Donna M. Randall & Maria F. Fernandes, *The Social Desirability Response Bias in Ethics Research*, 10 J. BUS. ETHICS 805 (1991).

²²⁷ FOWLER, *supra* note 226, at 94–95.

²²⁸ See Donna Schestowsky, *Improving Summary Jury Trials: Insights from Psychology*, 18 OH. ST. J. ON DISP. RESOL. 469, 486–87 (2003).

fraudulent negotiation scheme in violation of Rule 4.1.²²⁹ All things considered, knowing what to do in this situation does not require intricate knowledge of the law or the ethical rules - by any moral or legal standard such behavior is wrong. Yet, 30% of the respondents indicated they would agree to participate in the client's fraudulent negotiation plan.²³⁰

The reason for agreeing with the client's requests, a simple misunderstanding of the rule or a deliberate attempt to commit fraud, is irrelevant to the basic analysis because the Model Rules have a zero tolerance for violators.²³¹ Some might reasonably argue that a zero violation rate is unrealistic and some de minimus violation rate of any particular Rule is to be expected. Even those who would make such an argument should be dismayed that almost one-third of respondents indicated a willingness to engage in patently fraudulent conduct. More worrisome is the fact that in the real world this number might be dramatically higher because our findings likely under-represent those who would violate the rule during actual negotiations.²³²

While our findings in this regard are disappointing, they are not inconsistent with those from prior studies.²³³ Therefore, our results lead us to ask: "Why are so many lawyers willing to violate rule 4.1 or are unsure how they should respond?" The remaining conclusions address that question.

Conclusion 2 – It appears there is considerable confusion surrounding the elements of Rule 4.1.

One possible explanation for the high number of attorneys who are willing to engage in fraud on behalf of the client, or at least willing to seriously entertain the

²²⁹ See *supra* notes 123–131 and accompanying text.

²³⁰ See *supra* Part IV.A.

²³¹ See, e.g., *In re Raspanti*, 8 So. 3d 526, 538 (La. 2009), Attorney Grievance Comm'n v. Whitehead, 950 A.2d 798, 810–11 (Md. 2008).

²³² See *supra* notes 136 and accompanying text.

²³³ See *supra* notes 85–105 and accompanying text.

thought, is the considerable confusion among some attorneys regarding the elements of the professional responsibility rule governing negotiation. A striking number of respondents, regardless of their violation category, appear to be unable to recognize an omission as a misrepresentation²³⁴ as well as what constitutes a material fact in a negotiation.

The law of misrepresentation is a key feature of Rule 4.1 as it sets the boundary of what constitutes acceptable negotiation behavior. More than one-third of the respondents demonstrated a misunderstanding of when an omission constitutes a fraudulent misrepresentation, but the results were significantly worse for those who indicated that they would violate Rule 4.1, with only 29% of the Unconditional Violators and only 23% of the Conditional Violators properly recognizing the requested omission as a misrepresentation.²³⁵

Additionally, the rule's operative term, material fact, appeared to be particularly confusing for the respondents as more than two-thirds improperly identified the girlfriend's desire to enter into a settlement as a material fact to the negotiation.²³⁶ Furthermore, when it came to the key fact, the client's DONS status, more than 16% of all respondents failed to identify it as material to the negotiation with 29% of the Unconditional Violators and 27% of the Conditional Violators failing to do so.²³⁷

Conclusion 3 - Lawyers may believe other legal principles take precedence over Rule 4.1.

Our research reveals that those respondents who agreed with the client's most egregious request say they did so because of other important legal principles - the professional rules of conduct regarding client confidences (Rule 1.6), the attorney-client

²³⁴ See *supra* Table 10.

²³⁵ See *supra* notes 207–208 and accompanying text, and Table 10.

²³⁶ See *supra* Table 9.

²³⁷ See *supra* Tables 1 and 9.

privilege, and client centered lawyering.²³⁸ While it is true that the competing ethical principal here is protecting client confidentiality, this principle does not take precedence over the dictates of Rule 4.1 in this situation. If indeed lawyers misunderstand the relationship between Rules 1.6 and 4.1 and the requirements of the attorney-client privilege, they need to be disabused of these notions because an honest mistake will not excuse conduct that violates the Model Rules.

This conclusion may help explain two curious results in the data: first, 29% of the Unconditional Violators and 23% of the Conditional Violators properly recognized the requested omission as a misrepresentation but still chose to violate the Rule;²³⁹ and 71% of the Unconditional Violators and 73% of the Conditional Violators were able to correctly identify the client's DONS status as a material fact but still chose to violate the Rule.²⁴⁰ Presumably, this shows that some respondents understood Rule 4.1, but were unable to apply it in context with other competing legal principles.

Conclusion 4 - Lawyers believe violation of Rule 4.1 is widespread.

This study's results provide a sense of what lawyers consider to be common negotiation conduct. Respondents' perceptions of other attorneys are important because, social science research indicates that an individual's actions are affected by expectations of how others will behave.²⁴¹ Like most people, lawyers take cues from the conduct of others to determine which behaviors are considered acceptable by the profession.²⁴²

²³⁸ See *supra* Table 2 and accompanying text.

²³⁹ See *supra* Table 9 and accompanying text.

²⁴⁰ See *supra* Table 9 and accompanying text.

²⁴¹ Varda Liberman, et al., *The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner's Dilemma Game Moves*, 30 PERSONALITY AND SOC. PSYCH. BULL. 1175, 1179-80 (2004).

²⁴² See *supra* notes 175–178 and accompanying text. While the Unconditional Violators rated legal negotiation norms as not important among the potential rationales justifying their decisions, it is likely that it is more of an unconscious factor in their decision making. See *supra* notes 218–220 and accompanying text.

This study reveals that many lawyers believe that the sort of attempted fraud that the client requested is common in settlement negotiations. For example, a large majority of respondents, 69%, thought more than one in five lawyers would agree to the client's first request, and 78%, thought that one in five lawyers would agree with the client's second request.²⁴³ More surprising is that a significant minority of respondents (28%) thought 61% to 80% of other lawyers would withhold the client's DONS status in compliance with the client's first request, while a larger minority (38%) thought that same number would withhold the client's status unless directly asked.²⁴⁴ Respondents' expectations of other lawyers' behavior lead to another key finding.

Additionally, we found a strong correlation between violation status and the prediction of the percentage of other lawyers who would agree to the clients' requests. Specifically, we found that those who agreed to one of the client's requests were more likely to expect a higher number of other lawyers who would agree to the client's requests.²⁴⁵ This finding confirms other findings that one's expectations of others has an impact on one's negotiation behavior, in both directions.²⁴⁶ Furthermore, it also provides insight into the competitive nature of legal negotiation. Research has found that people are willing to be pre-emptively competitive with others when a counterpart is perceived to be competitive.²⁴⁷ If one believes the negotiation norm is one of competitive behavior, our Violator respondents may have been acting in a pre-emptive manner.

²⁴³ See *supra* Figures 1 and 2 and accompanying text. Furthermore, almost half, 47%, thought more than 40% of other lawyers would agree to this request to the client's first request, and over half of the respondents, 59%, thought at least 40% of the other lawyers would agree with this request. *Id.*

²⁴⁴ See *supra* Table 6.

²⁴⁵ See *supra* note __

²⁴⁶ Liberman, et al., *supra* note 241 at 1181-82.

²⁴⁷ *Id.*, at 1179.

IX. Implications and Future Directions

In order to improve lawyer negotiation ethics we suggest three interdependent means—rule clarification, education, and enforcement. All three suggestions share a common theme, certain beliefs and attitudes about lawyer negotiation responsibilities need to be adjusted. In other words, we are asking the legal profession to examine and address its cultural norms and structural problems²⁴⁸ contributing to the fact that only half of our survey respondents correctly indicated they would follow Rule 4.1's requirements. We recognize that this is no simple request.²⁴⁹ It will take time and effort along multiple fronts to affect attorney negotiation practices in a significant way.

A. Clarify Rule 4.1's Requirements

²⁴⁸ See *supra* notes 4–7 and accompanying text (discussing the complete loyalty to the client theory of legal representation), 72–80 (discussing the reasons for supporting Rule 4.1 in its current form); see also HAZARD & HODES, *supra* note 2, at 37-7 (noting that many lawyers believe they are above the law's requirements); Hazard, *supra* note 50, at 189 (hypothesizing that lawyers believe the law does not apply to them); Lowenthal, *supra* note 60, at 443 (identifying lawyers' willingness to ignore societal standards when negotiating as a serious problem); White, *supra* note 16, at 937 (discussing lawyers' self interest in winning negotiations); .

²⁴⁹ Sissela Bok long ago recognized how difficult it is to change the societal pressures to deceive others:

The social incentives to deceit are at present very powerful; the controls, often weak. Many individuals feel caught up in practices they cannot change. It would be wishful thinking, therefore, to expect individuals to bring about major changes in the collective practices of deceit by themselves. Public and private institutions, with their enormous power to affect personal choice, must help alter the existing pressures and incentives.

BOK, *supra* note 20, at 244.

Many scholars have proposed strengthening the duty of candor in legal negotiation,²⁵⁰ yet Rule 4.1 and its comments have changed only minimally since their adoption in the early 1980s. Some of this undoubtedly is due to the general difficulty of getting a Model Rule changed, but it also reflects the unwillingness of the practicing bar to hold itself to an ethical standard that is higher than that of the general public.²⁵¹ From a business perspective, this makes sense - if lawyers have a higher duty of candor when negotiating than the general public, it creates a disincentive to hire lawyers to assist with negotiations. Furthermore, our findings suggest that lawyers are having enough difficulty complying with the present standard; a higher standard would likely be violated at a higher rate. Instead of suggesting a higher standard, we recommend revising Rule 4.1 and its comments to better explain how the Rule actually operates.

1. Comment 2 – Statement of Material Fact

As this study has demonstrated, it appears that lawyers are either confused or misunderstand the rule’s most crucial term, “material fact.”²⁵² Some of this may be due to

²⁵⁰ See, e.g., Lowenthal, *supra* note 60, at 430; Wetlaufer, *supra* note 7, at 1245–50; see generally Reilly, *supra* note 85 (organizing a large number of various proposals into eight categories).

²⁵¹ When the Model Rules were first proposed, the Rule governing negotiation required lawyers to be fair when negotiating. See ABA COMM’N ON EVALUATION OF PROF’L STANDARDS, MODEL RULES OF PROF’L CONDUCT, R. 4.2 (Discussion Draft, Jan. 1980). This proposal was vehemently rejected by the practicing bar, which led to the adoption of the fraud standard embodied in Rule 4.1 as it is now written. Hazard, *supra* note 50, at 192. More recently the ABA’s Commission on Evaluation of the Rules of Professional Conduct received many requests for clarification of the candor requirements of Rule 4.1. HAZARD & HODES, *supra* note 2, at 37-38; Menkel-Meadow, *supra* note 31, at 135. While the Commission declined any changes to the rule, its minimalist revisions to the rule’s comments were adopted. Another attempt at addressing ethical issues in legal negotiations resulted in the Ethical Guidelines for Settlement Negotiations, but they have not been approved by the ABA as a whole and have not been adopted by any state. JAY FOLBERG & DWIGHT GOLANN, LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW 281 (2006); ABA ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS <<http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf>> (last visited Aug. 5, 2009).

²⁵² See *supra* Tables 1 and 9 and accompanying text.

the fact that the term is prominent in other areas of law, most notably as part of the standard for summary judgment in civil cases.²⁵³ The primary difference between the two is that in the summary judgment context, the fact must be material to a legal claim, whereas in the negotiation context the fact must be material to the negotiation.²⁵⁴ While there is considerable overlap in these two standards, the negotiation standard is much broader as it could include facts surrounding the negotiation that are not material to a liability claim. An attorney who confuses these two standards could unintentionally violate Rule 4.1.

At present, Comment 2 confusingly defines “material fact” in negative terms by describing what is not a material fact.²⁵⁵ For example, the Comment states that a party’s estimates of price and value and a party’s intentions as to an acceptable settlement of a claim are ordinarily not considered material facts.²⁵⁶ Two areas where this has led to confusion are the intertwined areas of a lawyer’s authority with respect to a transaction and a negotiator’s “bottom-line.” Nearly half of the study’s respondents erroneously indicated that the girlfriend’s lawyer’s settlement authority was not material to the hypothetical negotiation,²⁵⁷ and citing the Comment’s language, several well respected commentators have asserted that the bottom-line falls outside the material fact purview.²⁵⁸ However, in two ethics opinions the ABA Standing Ethics Committee has

²⁵³ See FED. R. CIV. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

²⁵⁴ Compare *Anderson*, 477 U.S. at 247–48 with *Ausherman*, 212 F. Supp. 2d at 449; see *supra* notes 26–32 and accompanying text (discussing the materiality of specific facts are material in a negotiation context under Rule 4.1).

²⁵⁵ MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 2.

²⁵⁶ *Id.*

²⁵⁷ See *supra* Tables 1 and 9.

²⁵⁸ SHELL, *supra* note 74, at 210; Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1804 n.45 (2000).

unequivocally concluded that both a lawyer's settlement authority and a party's actual bottom-line are material to a negotiation.²⁵⁹ In fact, the Committee has warned that:

[C]are must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements 'of fact,' are not conveyed in language that converts them, even inadvertently, into false factual representations.²⁶⁰

Thus under Rule 4.1, lawyers should be able to reasonably rely on flat out declarations about settlement authority and a party's negotiation bottom line.²⁶¹ This may be contrary to most lawyers' understanding of the rule and should be made clear

Characterizing statements about a lawyer's negotiation authority as material to a negotiation does not necessarily mean that lawyers must disclose that fact during the course of a negotiation. Naturally when such information is requested lawyers can refuse to disclose it for a number of important and legitimate reasons.²⁶² However, simply

²⁵⁹ ABA Formal Ethics Ops. 93-370 p.3, 06-439 p.2. Although Opinion 93-370 discusses negotiations in a judicial settlement proceeding, Opinion 06-493 applies its conclusions about material facts to bilateral negotiations and mediation settings.

²⁶⁰ ABA Formal Ethics Op. 06-439 p.3.

²⁶¹ *Id.* The opinion gives the following example to make its point.

For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than \$50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of \$50, when authority had in fact been granted to settle for a larger sum.

Id. This is the view of noted legal ethicists Geofferey Hazard, Jr., author of the Model Rules, and David Luban. Lempert, *supra* note 84, at 16 (quoting legal ethics expert David Luban: "Outright lying [in negotiation] is always out of bounds People have to be able to rely on flat-out declarations."). Noted negotiation scholar Charles B. Craver disagrees with this conclusion on the basis that "the other side has no right to this information." *Id.*, at 16. Such reasoning, however, is roundly criticized. HAZARD & HODES, *supra* note 2, at 37-7 to 37-8; *see also* BOK, *supra* note 20, at 150.

²⁶² Furthermore, ABA Ethics Opinion 93-370 concludes that both the lawyer's settlement authority and the client's bottom line are confidential information under Rule 1.6 and their disclosure is not impliedly authorized in a negotiation setting simply by

because a third party is not entitled to this information does not mean that it is acceptable to lie in response to the question.²⁶³

To address the problems associated with the phrase “material fact,” the rule’s comments should be revised to include a positive definition of the term including examples of what constitutes a material fact.²⁶⁴ Our suggested revised Comment that incorporates these suggestions, with new language in italics, follows:

Statements of *Material Fact*

This Rule refers to statements of *material fact*. *A fact is material if a reasonable person would justifiably attach importance to its existence in determining whether or how to act after hearing the statement. Certain statements ordinarily are understood to be statements of material fact including: facts reasonably viewed as important to a fair understanding of what is being given up and gained in a transaction, facts related to the elements of and defenses to a claim, facts related to a client’s ability to perform the terms of a proposed transaction, facts related to a lawyer’s authority with regard to a transaction, and a client’s negotiation bottom line.* Certain statements ordinarily are not understood to be statements of material fact including: *statements constituting estimates of worth, price, or value placed on the subject of a transaction, statements indicating a party’s intentions as to an acceptable settlement of a claim, and statements about the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.* Lawyers should be mindful of their obligations under applicable law to avoid criminal and *fraudulent* misrepresentation. *See Restatement (Second) of Torts §§ 537-545 and Restatement (Third) of Agency §§ 2.01-2.03.*

One noteworthy deletion from the current version of Comment 2 is the phrase “under generally accepted conventions” which appears before the list of three statements that are usually not considered material facts.²⁶⁵ This language makes it sound like there might be other such conventions, but there is inadequate documentation of what those

virtue of the lawyer’s representation. ABA Formal Ethics Op. 93-370 p.1. *See also* HAZARD & HODES, *supra* note 2, at 37-7 to 37-8; Richmond, *supra* note 7, at 277.

²⁶³ BOK, *supra* note 20, at 150 (suggesting that responding with silence or turning down the request is appropriate); HAZARD & HODES, *supra* note 2, at 37-7 to 37-8.

²⁶⁴ *See* Zacharias, *What Lawyers Do*, *supra* note 49, at 978 (arguing that when a rule of professional conduct legislates particular behavior, the drafters must be as clear as possible about what is being legislated).

²⁶⁵ MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 2.

other generally accepted conventions are.²⁶⁶ To clear up any confusion, that language should be deleted.

2. Comment 1 – Misrepresentation

This study found that nearly 40% of respondents, including more than 70% of those in the two violator categories, appear to misunderstand or are unable to apply the law of misrepresentation in an omission context.²⁶⁷ Currently, the Comment correctly explains that “omissions that are the equivalent of affirmative false statements” are misrepresentations.²⁶⁸ Since the Comment specifically instructs that lawyers have “no affirmative duty to inform an opposing party of relevant facts,” it should spend more time discussing when omissions violate the Rule.

Furthermore, the Comment clearly delineates what types of statements can be misrepresentations, but the word misrepresentation is not strong enough. The Rule’s standard is a fraudulent misrepresentation standard,²⁶⁹ but omitting the word “fraudulent” fails to highlight the potential for civil and criminal liability if an attorney violates the Rule. Therefore, we suggest that the Comment be revised to introduce the term “fraudulent misrepresentation” everywhere the term “misrepresentation” is currently used.

Our suggested revised Comment incorporating these suggestions, placing the new language in italics, follows:

²⁶⁶ 23 ALTERNATIVES TO HIGH COST LITIGATION 179, 181 (Dec. 2005) (quoting Professor Carrie Menkel-Meadow).

²⁶⁷ See *supra* notes 165–168 and accompanying text; Table 10.

²⁶⁸ MODEL RULES OF PROF’L CONDUCT, R. 4.1 cmt. 1.

²⁶⁹ See *supra* notes 29–40 and accompanying text. It should be noted that the standard for violating the rule, simply making a fraudulent misrepresentation, is different than that of an actionable claim for fraud. Making a fraudulent misrepresentation is only one element in a claim for fraud. See RESTATEMENT (SECOND) OF TORTS § 525 (1977).

Fraudulent Misrepresentation

This Rule confirms that attorneys may not engage in fraudulent misrepresentations, including those by omission, in their dealings with others on a client's behalf. Fraudulent misrepresentations can occur when the lawyer incorporates or affirms a statement of another person that the lawyer knows to be false and when the lawyer makes partially true but misleading statements or through omissions that are the equivalent of affirmative false statements. Omissions rise to the level of false affirmative statements when the lawyer has a duty to the other person to disclose the matter in question such as when there is a fiduciary or other trusting relationship, when subsequently acquired information makes the lawyer's or the client's previous statements untrue, or when other legal practices require disclosure. Lawyers should be mindful of their obligations under these Rules and under state and federal law to avoid engaging in fraudulent misrepresentations and subjecting themselves to potential liability and professional discipline. See Rules 1.2(d) and 8.4, Restatement (Second) of Torts §§525 – 530, 537 - 551 , and Restatement of Contracts §§ 164 . For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4. (italics added)

One feature of this proposed comment is that it deletes the language from the current comment stating that lawyers have “no affirmative duty to inform an opposing party of relevant facts.”²⁷⁰ This truism adds little to the understanding of the Rule's operations and detracts from the Comment's main point, to describe conduct that violates the Rule.

3. Rule 4.1 (b) and Comment 3

Currently Rule 4.1(b) states:

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

- (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.

The “unless” clause in this section makes it appear that Rule 1.6, the rule requiring attorneys to maintain client confidences, supersedes the duty to disclose in Rule 4.1(b). In

²⁷⁰ MODEL RULES OF PROF'L CONDUCT, R. 4.1 cmt. 1.

other words, this phrase appears to allow attorneys to participate in a client's crime or fraud in violation of Rule 1.2(d) whenever client information protected by Rule 1.6 is at risk of disclosure.²⁷¹ Our findings indicate that this indeed may be an important rationale in why the Unconditional Violators agreed with the client's first request.²⁷²

As discussed earlier the "unless" clause is a meaningless exception to Rule 4.1(b) - Rule 1.6 does not forbid the client from speaking because that rule's exceptions make room for the lawyer to disclose fraudulent or criminal conduct.²⁷³ Thus, Rule 4.1's exception has an exception which makes the original language of Rule 4.1(b) controlling.²⁷⁴ To clear up any confusion about the interaction between Rule 4.1(b) and Rule 1.6, the "unless" clause in Rule 4.1(b) should be deleted,²⁷⁵ and the Rule should read as follows:

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

(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.

Comment 3 to Rule 4.1, entitled Crime or Fraud by Client, follows Rule 4.1(b)'s lead and makes it appear that the confidentiality restrictions in Rule 1.6 take precedence over Rule 4.1. Specifically this portion of the Comment states:

If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

As with the text of the Rule, the "unless" clause acts as a meaningless exception to Rule 4.1(b) for the reasons stated above.²⁷⁶ To ensure consistency between the Rule

²⁷¹ HAZARD & HODES, *supra* note 2, at 37-13.

²⁷² See *supra* Table 2 and accompanying text.

²⁷³ MODEL RULES OF PROF'L CONDUCT, R. 1.6(b)(1)-(3) (2007); HAZARD & HODES, *supra* note 2, at 37-14.

²⁷⁴ For an in-depth analysis of this issue see *supra* notes 41-45 and accompanying text.

²⁷⁵ See HAZARD & HODES, *supra* note 2, at 37-12.

²⁷⁶ See *supra* notes 41-45 and accompanying text.

and Comment 3, the “unless” clause referring to Rule 1.6 in Comment 3 should be deleted as well.

B. Education

Perhaps the most important method of addressing attorney negotiation conduct is through educational efforts. Education at both the law school and the continuing legal education levels serves to instill, promote, and maintain the profession’s values and norms.²⁷⁷ At both educational levels instructors need to spend time focusing on both the analytical and interpersonal nature of the problem by addressing the law of misrepresentation, the term material fact, legal negotiation norms, and the interplay of negotiation ethics with competing legal values. At present it is not clear how the variety of instructors and programs address these issues; one may reasonably expect the depth and treatment of them to be a mixed bag with some being quite good and others being quite cursory, particularly at the CLE level.²⁷⁸ Law school negotiation courses, where the topic of negotiation ethics receives substantial attention, are often limited-enrollment classes, thereby restricting students’ exposure to this material. Negotiation modules also

²⁷⁷ See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3–4 (2007) [hereinafter CARNAGIE REPORT] (noting that legal education is where the profession’s defining values are on display); TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM 207–12 (1992). Since law school is only a brief portion of most lawyers’ legal careers, continuing education around legal ethics is a critical to maintaining lawyers’ capacity to practice law ethically. Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L.J. 1091, 1091–92 (2007) [hereinafter Green, *Teaching Lawyers*]; see also ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 25 (1996) (noting that legal education helps provide the framework for professionalism but these ideals are tested in legal practice). “[P]racticing lawyers do have considerable knowledge about legal ethics. However, their knowledge is not always correct, comprehensive, or current.” Green, *Teaching Lawyers*, *supra* note 273 at 1097, 1115.

²⁷⁸ See Green, *Teaching Lawyers*, *supra* note 277, at 1096 (questioning the effectiveness of the evaluation of CLE programs); Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 409 (1998) (criticizing CLE programs in ethics as instruction simply calculated to protect attorneys from liability).

exist in other courses, such as clinical courses and ADR survey courses, and, most importantly, in Professional Responsibility courses.

Professional Responsibility courses, which are required at the vast majority of law schools, are the primary vehicle for law students to study legal ethics and the Model Rules.²⁷⁹ Yet the instructors of these classes have to make difficult trade-offs about what to teach and what to leave out of the course.²⁸⁰ Negotiation ethics may be one of those topics that get short shrift because many of these courses are geared towards preparing students for the Multistate Professional Responsibility Examination (MPRE).²⁸¹ Since the MPRE usually devotes no more than one question out of fifty to negotiation ethics,²⁸² some instructors may decide to spend only minimal time on the topic. Regardless of the MPRE, negotiation issues are bread-and-butter issues that affect lawyers on a regular basis. It is imperative, therefore, that lawyers understand them. If Professional Responsibility instructors need a reason to change the amount of emphasis on negotiation ethics in their classes, more emphasis on negotiation ethics on the MPRE would be a good start.

²⁷⁹ AM. BAR ASS'N, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS § 302(a)(iii); CARNAGIE REPORT, *supra* note 277, at 148–151 (criticizing the shortcomings of a narrow focus on the ethical rules in Professional Responsibility courses); Deborah L. Rhode, *The Professional Responsibilities of Professional Schools: Pervasive Ethics in Perspective*, in ABA SECTION OF LEGAL EDUCATION AND THE BAR ET AL., TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS 25–36 (1996) (arguing that legal ethics deserves discussion in all substantive law school courses).

²⁸⁰ Bruce A. Green, *Less Is More: Teaching Ethics in Context*, 39 WM. & MARY L. REV. 357, 367, 370 (1998) [hereinafter Green, *Less Is More*].

²⁸¹ CARNAGIE REPORT, *supra* note 277, at 148.

²⁸² According to the National Conference of Bar Examiners, the topic of “Truthfulness of Statements to Others” is one of four topics in the “Transactions and Communications with Persons Other than Clients” category that consists of approximately 2-8% of the MPRE’s exam questions. NATIONAL CONFERENCE OF BAR EXAMINERS, THE MPRE INFORMATION BOOKLET 38 (2009), available at http://www.ncbex.org/uploads/user_docrepos/MPRE_IB2009_02.pdf#page=38 (last visited Aug. 5, 2009).

When teaching the topic of negotiation ethics and law school CLE programs, the primary goal should be for students and program participants to learn the skills of identifying and resolving ethical problems.²⁸³ Adult learning theory tells us that the most effective method of doing this is through experiential learning with feedback followed by the use of various hypothetical examples.²⁸⁴ Instructors can then tailor their lessons and discussions around the areas where we found lawyers to be particularly weak: identifying material facts in context, understanding the law of misrepresentation, and applying Rule 4.1, particularly in conjunction with other competing rules and values. A number of excellent simulation problems are available to assist in teaching negotiation ethics, such as the DONS Negotiation used as the basis for this study. Additionally, several text books have multiple discussion problems that allow one to continue to hone in on salient points.²⁸⁵

Additionally, because of the emphasis on rules, laws and procedures, students in law school can come to believe that the law is the only yardstick by which they need to measure themselves.²⁸⁶ However, law students and lawyers need to be encouraged to evaluate their behavior not only as legal or illegal (*i.e.* ethical or unethical under the Rules) but on other levels as well. For example, a tactic may be ethical under Rule 4.1, but does the negotiator find it morally objectionable or just plain wrong? If so, that tactic

²⁸³ Green, *Less Is More*, *supra* note 280, at 359; Green, *Teaching Lawyers*, *supra* note 277, at 1099–1100; Morgan, *supra* note 278, at 409 (discussing using hypothetical fact scenarios as the centerpiece for ethics education).

²⁸⁴ MALCOLM S. KNOWLES ET AL., *THE ADULT LEARNER* 40 (6th ed. 2005); Green, *Less Is More*, *supra* note 280, at 359; *see also* ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* 149–157 (2007) (recommending law professors to give students opportunities to engage in problem solving activities to cultivate “practical wisdom”).

²⁸⁵ *See e.g.* NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 407–08 (2d ed. 2000); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 394–97 (2d ed. 2009).

²⁸⁶ CARNAGIE REPORT, *supra* note 277, at 54–55.

should never be used.²⁸⁷ Consequently, negotiators should be reminded of their personal ethical values and to have those values expanded and reinforced - not erased. Moreover, a negotiator's counterpart also brings personal values to the negotiation, and if that person believes certain tactics to be objectionable, one's reputation and subsequent effectiveness may be harmed.²⁸⁸

One way to expand and reinforce individuals' ethical behavior is to frame such behavior as both forming and reflecting who they are. That is, people who engage in morally suspect behavior often try to distance themselves from those actions by claiming that "that is not who I really am" or that "I am doing it to help someone who needs it." It can be useful and perhaps corrective, therefore, to persuade lawyers to accept that their behavior *is* who they are and that engaging in any repetitive set of behaviors ultimately shapes their identities and self-concepts.²⁸⁹ Each decision and act needs to be an ethical one, because each will ultimately influence one's reputation and even how one views oneself.²⁹⁰ Encouraging students and practitioners to think of themselves as moral beings, as well as lawyers, can encourage them to make ethical decisions, to value their own and others' integrity.²⁹¹

In conjunction with focusing on individual behavior, instructors should emphasize that following Rule 4.1 is the dominant negotiation norm. Norms are very powerful as they help create one's expectations of others' conduct, in turn, affects one's own

²⁸⁷ LATZ, *supra* note 73, at 250.

²⁸⁸ *Id.*, at 250 and 252.

²⁸⁹ SHELL, *supra* note 74, at 205.

²⁹⁰ JESS K. ALBERTS ET AL., HUMAN COMMUNICATION IN SOCIETY 25–31 (2007).

²⁹¹ *See* Pounds, *supra* note 14, at 205–25 (suggesting that legal negotiators become more truthful by using mindfulness practices to focus on their interconnectedness with others and to enhance their self-awareness); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 8–9 (2002) (suggesting mindfulness meditation as a means of addressing a variety of ills in the legal profession).

behavior. For example, one study found that merely labeling a prisoner's dilemma game as either "The Wall Street Game" or "The Community Game" shaped subjects' expectations of other game players, and thereby altered their decisions to compete or cooperate with their fellow game players.²⁹² Furthermore, when a game-playing counterpart had a competitive reputation, individuals made competitive preemptive moves.²⁹³ Our findings confirm that expectations of others are an important indicator in predicting ethical negotiation behavior. We found a strong correlation between violator status and the respondents' prediction of the percentage of other lawyers who would agree with the clients' requests.²⁹⁴

Legal negotiation, which is easily couched in a framework of adversarialism, practically begs instructors to reinforce competitive norms. With that backdrop students may believe that the rule requires misrepresentations about non-material facts, that everyone lies when negotiating, and that legal negotiations are a free-for-all where you can lie about anything, including material facts, as long as you do not get caught.²⁹⁵ Instead of focusing on a norm of extreme competition, instructors should focus on a norm of compliance with Rule 4.1. Unprecedented focus on this "ethical norm" should encourage more compliance.²⁹⁶

While changing the norm is a difficult task, doing so in a law school setting is less difficult than one might expect. Guest lecturers who discuss the importance of ethical norms are particularly effective in this regard as are the findings of several studies of

²⁹² Liberman, et al., *supra* note 241 at 1181-82 (finding subjects to be more cooperative in "the Community Game" and more competitive in "the Wall Street Game").

²⁹³ *Id.*, at 1180.

²⁹⁴ See Sections ____

²⁹⁵ Rebecca Hollander-Blumoff, *The Challenges of Teaching Negotiation Ethics: Rules and Reality*, AALS Annual Meeting, January 8, 2010.

²⁹⁶ See Liberman et al., *supra* note 241 at 1183.

negotiation behavior.²⁹⁷ One particularly strong way to get the point across in negotiation courses is to make one's negotiation reputation an integral part of the course – either in grading criteria and/or in discussions whether certain student negotiation behaviors are ethical, moral, or effective in the long run.²⁹⁸ Doing this should help establish an in-class norm of ethical behavior, which can then be extrapolated into the world of legal practice.

C. Increased Rule Enforcement

Failure to enforce the Model Rules, among other things, promotes a general distrust of the entire regulatory scheme of the profession.²⁹⁹ Although enforcement is no easy task, without it the Rules will not be taken seriously. More specifically, without enforcement, rules that are designed to produce behavioral controls, such as Rule 4.1, will be out of step with day-to-day lawyering practices resulting in their further marginalization.³⁰⁰ According to Professor Fred C. Zacharias:

The bar's apparent failure to enforce the rules suggests that noncompliance is appropriate, either because nonenforcement implies that the rules are unenforceable . . . or because it implies the rules mean something other than what they seem to say. Moreover, even if the lawyer accepts that it is wrong to violate the rules, she may believe that she needs [to violate them] in order to compete with lawyers who breach the code with impunity.³⁰¹

The results of our study suggest that many lawyers believe noncompliance with Rule 4.1 when negotiating is commonplace, which may create an environment where

²⁹⁷ See Williams *supra* note 78 at __; Schneider *supra* note 82 at __.

²⁹⁸ Charles B. Craver, *Teaching Negotiation Ethics*, AALS Annual Meeting, January 8, 2010 (discussing the creation of an ethical norm in negotiation courses through formal trials and class-room discussions which affect students' reputations).

²⁹⁹ See Zacharias, *What Lawyers Do*, *supra* note 49, at 1014 (discussing a lack of enforcement of advertising rules). Other effects on practicing lawyers include perceiving nonenforcement as an invitation to violate the rule, discouraging reports of future professional misconduct, and questioning the professional regulation system as a whole. *Id.* Additionally, failure to enforce the rule may promote legal observers' distrust of the regulatory system. *Id.*

³⁰⁰ *Id.*, at 1017–18.

³⁰¹ *Id.* at 1005 (discussing rules related to attorney advertising).

others who might otherwise comply with the Rule are tempted to violate the Rule's requirements. Non-enforcement also may be viewed by unprincipled lawyers as an invitation to ignore the Rule altogether.³⁰² But enforcing Rule 4.1 may be more difficult than enforcing other rules because most negotiations are conducted in private settings.³⁰³ As a result, enforcement of Rule 4.1 is virtually impossible without assistance from attorneys.³⁰⁴

The Model Rules require attorneys to report to the bar's disciplinary authorities any known professional misconduct they observe.³⁰⁵ Failing to do so is an ethical violation on its own, but attorneys are widely reported to refrain from reporting other attorneys to the disciplinary authorities.³⁰⁶ Some of this reluctance is due to a lack of enforcement of the Model Rules, which encourages lawyers with knowledge of professional misconduct to refrain from reporting that conduct because doing so is perceived as pointless.³⁰⁷ However, fraudulent conduct by attorneys is an affront to the practice of law and the failure to report such conduct seriously undermines the argument for self-regulation of the legal profession.³⁰⁸ More importantly, it allows for unprofessional and criminal conduct to go on unabated. When convinced another has

³⁰² *Id.* at 1013 (discussing advertising).

³⁰³ Peppet, *Pluralism*, *supra* note 16, at 528.

³⁰⁴ See Donald R. Lundberg, *Divided Duty: Reporting Misconduct (Part I)*, 29 RES GESTAE 29, 29 (Oct. 2008) (stating that most reports of misconduct come from lawyers and judges).

³⁰⁵ MODEL RULES OF PROF'L CONDUCT, R. 8.3(a) (2007) (requiring a report for conduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, and fitness to practice law . . .").

³⁰⁶ See, e.g., Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 538 (1986) (calling the duty to report a "distasteful obligation"); Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 475 (2007) (concluding that lawyers are willing to take their chances of prosecution by not reporting fellow attorneys under Rule 8.3).

³⁰⁷ Zacharias, *What Lawyers Do*, *supra* note 49, at 1014.

³⁰⁸ Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap to Reform*, 16 GEO. J. LEGAL ETHICS 259, 263-64 (2003).

attempted to commit fraud in violation of Rule 4.1, an attorney should not hesitate to report it to the disciplinary authorities.³⁰⁹

Rather than discovering fraudulent conduct by happenstance after a negotiation, attorneys are well advised to negotiate in a manner to protect themselves and their clients. Attorneys should, to the extent possible, independently verify any information they consider material to the negotiation and they should maintain a healthy skepticism of statements that cannot be independently confirmed.³¹⁰ Attorneys should document and confirm in writing any material representations and incorporate them into any agreement.³¹¹ Most importantly, attorneys should not risk their own reputations by lowering their conduct to the other's (suspected) level.³¹² Any confirmed attempted fraudulent conduct should be reported to the bar's disciplinary authority.

Once enforcement matters make it to disciplinary counsel, tough choices must be made regarding which cases to take. These decisions often are based on factors such as the severity of the offense, the deterrent effect of the prosecution, the nature of the offender, the effect of enforcement or lack of enforcement on the image of the bar, and the enforcement agency's resources or lack thereof.³¹³ Based on this study's findings the potential for actual violations of Rule 4.1 is quite high. Even though increased enforcement of Rule 4.1 will be difficult, it should become a priority for state bar disciplinary authorities as it directly affects the image of the legal profession. But disciplinary authorities should do more than simply prosecute violators. They should

³⁰⁹ *But see* MNOOKIN ET AL., *supra* note 11, at 290 (suggesting determining if that will best serve one's client's interests first).

³¹⁰ *Id.*, at 288; LATZ, *supra* note 73, at 253;

³¹¹ LATZ, *supra* note 73, at 253–54; MNOOKIN ET AL., *supra* note 11, at 289.

³¹² LATZ, *supra* note 73, at 254.

³¹³ Zacharias, *What Lawyers Do*, *supra* note 49, at 997–98.

publicize their focus on enforcing the rule and engage in outreach about the Rule's parameters through CLE programming and articles in local bar journals.

X. Conclusion

When the Model Rules were first being formulated and discussed, the topic of negotiation ethics received considerable attention. In response to a proposed negotiation ethics rule requiring attorney negotiators to be “fair” and to correct another party’s “manifest misapprehension,” Professor James J. White famously said:

It is my hypothesis that it is better to have no [negotiation ethics] rule than to have one so widely violated as to be a continuing hypocrisy that may poison the application of the remaining rules.³¹⁴

Professor White’s argument won the day and resulted in a scaled-back Rule 4.1 based on the lowest level of legally acceptable conduct, avoiding fraudulent misrepresentations.³¹⁵

This study confirms anecdotal reports and the findings of prior research that even that low standard is likely to be violated by a substantial number of lawyers.

Because the negotiation problem upon which this study is based is not a particularly difficult moral dilemma, the fact that only half of the participants would address the situation properly indicates that the legal profession has a serious problem. More troubling is that these numbers would likely be worse in the “real world,” as the study did not attempt to replicate any of the professional pressures that could influence the respondents’ answers. While Professor White’s quote suggests elimination of Rule 4.1 if it is not followed, doing so fails to address the deeper systemic problem in the culture of legal negotiation. A more useful approach is to place an unprecedented focus on the rule and its requirements.

³¹⁴ White, *supra* note 16, at 937.

³¹⁵ See *supra* note 253 (discussing the rejection of the proposed Rule 4.1 in the original draft of the Model Rules).

Many of the respondents in this study demonstrated an apparent lack of understanding of the requirements the Model Rules place on legal negotiators. The failure to understand the Rule's foundational concepts is a serious matter. Without even with just a cursory understanding, legal negotiators can only intuit the bounds of acceptable negotiation behavior and only hope that their intuition is right.³¹⁶ This causes a two-part problem for legal negotiators. First, the negotiator who unwittingly violates the rule risks disciplinary action from the bar, including disbarment, in addition to civil and criminal penalties for misrepresentation and fraud, not to mention any accompanying reputational harms and the nullification of any negotiated agreement.³¹⁷ Second, and equally important, such behavior creates the potential for hyper competitive negotiations where a prisoner's dilemma environment is the norm.³¹⁸

Correcting the problems associated with attorney negotiation ethics is dependent on the legal profession's willingness to take a serious look at the various reasons attorney violate Rule 4.1, a standard that asks little more of attorney negotiators than to refrain from attempting to commit fraudulent misrepresentations. A back-to-basics focus on the Rule's requirements and the law of fraudulent misrepresentation is necessary if the legal profession is to have any real integrity in the negotiation realm. Bar leaders, disciplinary authorities and the judiciary need to head up the charge to raise the "ethical negotiator" as the norm, but they can only do so much to help change the culture of legal negotiation.

³¹⁶ MNOOKIN ET AL., *supra* note 11, at 282 (advising negotiators to follow their own moral convictions); *see also* Dahl, *supra* note 94, at 194–95 (finding that lawyers are comfortable with a cursory knowledge of Rule 4.1's parameters).

³¹⁷ Penalties for violations of Rule 4.1 range from monetary penalties, *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 13 (1st Cir. 2005), to suspension, *Mississippi Bar v. Mathis*, 620 So. 2d 1213, 1222 (Miss. 1993), to disbarment, *In re Crossen*, 880 N.E.2d 352, 388 (Mass. 2008). The lawyer also may experience serious injuries to his or her reputation. . *See, e.g.*, MNOOKIN ET AL., *supra* note 11, at 284–86; LATZ, *supra* note 73, at 6–7.

³¹⁸ *See* Lempert, *supra* note 84, at 16 (quoting David Luban).

Practicing lawyers also must take responsibility to ensure that they understand what the Rule requires of them, act in accordance with those requirements. Furthermore, they must be willing to report to the state bar association disciplinary authorities those who fail to do so. Revisiting, declaring and enforcing ethical negotiation norms will help reinforce the profession's sense of personal, professional and social responsibilities in the negotiation arena.