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Teaching Negotiation Ethics
by

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I. Introduction

Practicing lawyers are involved in a variety of negotiations on a regular basis, and as a result, are expected to have mastered the art and skill of negotiating. Furthermore, they are rightfully expected to understand the ethical issues and rules surrounding the negotiation process. Recent studies, however, show that a significant number of practicing lawyers are unable to apply the negotiation ethics requirements - refraining from making fraudulent misrepresentations - when other competing legal values are in the mix. In one study nearly one-third of the attorney respondents indicated that they would agree to engage in a fraudulent settlement scheme if a client asked them to do so.² Two other studies showed that approximately one-quarter of attorney respondents were unable to correctly identify the proper ethical response in run-of-the-mill negotiation situations.³

When such a large percentage of practicing attorneys routinely violate the ethical rules in such a basic lawyering activity, there's a problem. Moreover, when the

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² Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Negotiation Ethics*, 16 HARV. NEGOT. L. REV. (forthcoming 2011).

³ Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481 (2010); Andrea Schneider, Professor of Law, Marquette University, Am. Bar Assoc. Disp. Res. Section Annual Conference, Attorney Negotiation Ethics and the Real World (April 8, 2010).

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

behavioral standard they're violating is so low, the problem truly is serious and needs to be addressed on many fronts. One such front is the teaching of negotiation ethics in law schools.

The teaching of negotiation ethics, however, is not necessarily a happy endeavor. Many who teach it leave the topic feeling unsettled because students find the take home lesson to be that deceit, misdirection, dissembling, and lying are “ethical.” Disturbingly Orwellian as that sounds, it is true in many instances. However, if we simply focus on the bare essentials without putting negotiations in a broader context of interpersonal interactions and procedural justice, we set our students up for hard lessons once they are in practice. This article presents several methods of helping professors teach negotiation ethics with greater depth and sensitivity, focusing on approaches that are more likely to resonate with students and instructors – even those instructors who have difficulty understanding what it is about routine bargaining that some find so troubling. No matter which method(s) are chosen to teach the topic, our primary goal as instructors should be for students to learn the skills of identifying and resolving negotiation ethics problems in context.⁴

This article unfolds as follows. Part II focuses on the black letter law that instructors should be teaching their students – the law of fraud and Rule 4.1 of the Model Rules of Professional Conduct and its state counterparts. The emphasis on black letter law here should help instructors impart the standards' respective simplicity. But this simplicity leads to a problem, the disconnect between the black letter law we are teaching and the lessons the students actually learn. Part III describes this problem, one that

⁴ See Bruce A. Green, *Less Is More: Teaching Ethics in Context*, 39 WM. & MARY L. REV. 357, 359 (1998) [hereinafter *Less is More*]; Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L.J. 1091, 1099–1100 (2007) [hereinafter *Teaching Lawyers*].

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

conflates ethical and legal behavior with negotiation tactics, which may encourage students to push closer to the edge of the ethical standard, or even over it, when they otherwise would not. Part IV provides several methods of breathing life into the negotiation ethics standards thereby making them tangible. Not only will these tools help students to internalize the ethical standard, they help the students appreciate that there is more to the ethics equation than simply the standards itself. The article concludes with a simple proposition – returning the profession’s ethical sensibilities in the negotiation realm starts in the classroom. Why the classroom? Because it’s the only place where communal norms can be openly discussed and students can make mistakes as they try to get a feel for the norms without too much of a penalty if they overreach.

II. The Black Letter Law of Negotiation Ethics

There are many aspects of the law that have an impact on negotiations. For instance, under the Model Rules lawyers have a duty to consult with their clients regarding the objectives of their representation and the means to be employed (Rule 1.2(a)), which dramatically affects lawyers’ negotiation duties because a client’s objectives may change during the course of a negotiation.⁵ Another example is when negotiations occur in a litigation setting. In that environment, issues of candor to a tribunal come into play (Rule 3.3), particularly in judicial settlement conferences.⁶ Furthermore, Rule 8.4 defines professional misconduct as engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁷ While these principles are important, this

⁵ Douglas R. Richmond, *Lawyers’ Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 260 (2009).

⁶ *See, e.g., In re Fee*, 898 P.2d 975 (Ariz. 1995).

⁷ MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2009).

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

section’s focus is on the primary legal rules governing attorney negotiation ethics, the law of fraud and Rule 4.1.

A. The Law of Fraud

All bargaining interactions are governed by the law of fraud, which appears as both part of the law of contracts and of torts. For the most part the rules for claims in these two areas are the same, the primary differences are (1) a representation need be material to rescind a contract, and (b) the available remedies.⁸ One can receive damages in a tort claim; whereas, a contract may not have been formed in the first place or it may simply be voidable.⁹

To state a claim for fraudulent misrepresentation, a plaintiff must show that there was a knowing misrepresentation of a material fact upon which the plaintiff reasonably relied causing an injury or damages.¹⁰ A misrepresentation is “knowing” if the maker (a) knows or believes the matter is not as she represents it to be, (b) does not have the confidence in the accuracy of the representation, or (c) knows that there is no basis for the representation.¹¹ A misrepresentation is material if it would influence a reasonable person’s actions in the transaction in question,¹² but certain statements are not considered to be material. For example, statements as to quality, value, or price are considered

⁸ RESTATEMENT (SECOND) OF CONTRACTS §§ 161, 425 (1981); MICHAEL L. MOFFIT & ANDREA KUPFER SCHNEIDER, DISPUTE RESOLUTION: EXAMPLES AND EXPLANATIONS 23 (2008).

⁹ RESTATEMENT (SECOND) OF CONTRACTS §§ 163, 164; RESTATEMENT (SECOND) OF TORTS § 525 (1977). The remainder of this section will be based primarily on the tort action of fraud.

¹⁰ See, e.g., Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 131 (Mo. 2010); Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709, 712 (Ohio 1987); RESTATEMENT (SECOND) OF TORTS § 525.

¹¹ RESTATEMENT (SECOND) OF CONTRACTS § 162; RESTATEMENT (SECOND) OF TORTS § 526.

¹² Motorola, Inc. v. Amkor Technology, Inc., 849 A.2d 931, 937 (Del. 2004); Defendant A v. Idaho State Bar, 2 P.3d 147, 152 (Idaho 2000); RESTATEMENT (SECOND) OF TORTS § 538.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

matters where opinions may be expected to differ, although they may be material statements in limited circumstances.¹³

Typically a party to a transaction is not liable for harm caused by failing to disclose information of which the other party is ignorant, even if she knows the other would regard them as material to the transaction. However, the other may be able to rescind the transaction if the information is basic (i.e., goes to the basis or essence of the transaction) and be entitled to restitution for any monies paid.¹⁴ Furthermore, an omission may be equivalent to an affirmative statement when one is under a duty to disclose that fact.¹⁵ Such a duty arises when there is a fiduciary relationship or other relationship of trust and when disclosure would either correct a prior misstatement that was believed to be true when made or would be necessary to prevent a partial or ambiguous statement from being misleading.¹⁶ Other situations where the duty arises includes making a false representation with no expectation that it will be relied upon and learning that the other is relying on that statement and when one knows another is about to enter into a transaction with a mistaken understanding about basic information and because of the parties' relationship, trade customs or some other objective circumstances.¹⁷

B. Rule 4.1

¹³ RESTATEMENT (SECOND) OF TORTS § 538A cmts. b, g.

¹⁴ Shwartz v. Morgan, 776 N.W.2d 827, 831 (S.D. 2009); Pearson v. Simmonds Precision Products, Inc., 624 A.2d 1134, 1136 (Vt. 1993); RESTATEMENT OF RESTITUTION §§ 8, 28 (Tentative Draft No. 1, 2001); RESTATEMENT (SECOND) OF CONTRACTS §§ 164, 303(b); RESTATEMENT (SECOND) OF TORTS § 551 cmts. a, b.

¹⁵ Bossuyt v. Osage Farmers Nat'l Bank, 360 N.W.2d 769, 774 (Iowa 1985); Kessel v. Leavitt, 511 S.E.2d 720, 753 (W. Va. 1998); RESTATEMENT (SECOND) OF CONTRACTS § 161; RESTATEMENT (SECOND) OF TORTS § 551.

¹⁶ Wal-Mart Stores, Inc. v. Coughlin, 255 S.W.3d 424, 428–30 (Ark. 2007); Wright v. Brooke Grp. Ltd., 652 N.W.2d 159, 174–75 (Iowa 2002); RESTATEMENT (SECOND) OF CONTRACTS § 161(a), (d); RESTATEMENT (SECOND) OF TORTS § 551(2).

¹⁷ NOLM, LLC v. County of Clark, 100 P.3d 658, 661–62 (Nev. 2004); Ollerman v. O'Rourke Co., Inc., 288 N.W.2d 95, 99–100 (Wis. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 161(b)–(c); RESTATEMENT (SECOND) OF TORTS § 551(2).

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

Outside of the law of bargaining to which all negotiators are subject, attorneys are also subject to the dictates of Rule 4.1 which states:

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.

The Rule’s operative term is the word “material,” which means the fact or law in question must reasonably be viewed as important, significant, or essential to the terms of the finalized deal.¹⁸ However, Comment Two specifically narrows what constitutes a material fact by stating that estimates of price or value and a party’s intentions as to an acceptable settlement of a claim “ordinarily are not taken as statements of material fact.”¹⁹ The use of the word ordinarily indicates there are times when these kinds of statements can be material facts.²⁰ In fact, the ABA Ethics Committee has concluded that both a lawyer’s settlement authority and a client’s actual bottom-line can be material to a negotiation.²¹

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

¹⁸ See, *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 449 (D. Md. 2002) (defining material fact); BLACK’S LAW DICTIONARY 998 (8th ed. 2004); Richmond, *supra* note 5, at 269. See also RESTATEMENT (SECOND) OF CONTRACTS § 162(b); RESTATEMENT (SECOND) OF TORTS § 538.

¹⁹ MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 2.

²⁰ See RESTATEMENT (SECOND) OF TORTS § 538A cmt. g (describing when price is a material fact).

²¹ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-370 (1993); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-439 (2006). Specifically the committee has stated:

[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.

ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-439 (2006). 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.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

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.²²

Thus under Rule 4.1, the more specific a declaration is about one's settlement authority, the more likely it is for another attorney to reasonably rely on that statement.²³

Rule 4.1 not only addresses affirmative statements, it also addresses omissions as well. Generally, lawyers have no duty voluntarily to inform an opposing party of relevant facts when negotiating; however, the rule creates a duty to disclose material information only if doing so avoids assisting in a client's criminal conduct or fraud.²⁴ The second sentence in Rule 4.1(b) makes it appear that Rule 1.6, the rule requiring attorneys to maintain client confidences, supersedes this section. When read in conjunction with (a) Rule 1.2(a) prohibiting attorneys from knowingly participating in a client's criminal or fraudulent conduct, (b) the exceptions to Rule 1.6 permitting disclosure with respect to criminal or fraudulent conduct, and (c) the "shall not knowingly . . . fail to disclose" language in Rule 4.1(b), it is clear that the clause invoking Rule 1.6 is superfluous.²⁵

Rule 4.1(a) simply requires lawyers to speak the truth as they understand it without engaging in any misrepresentations.²⁶ However, a lawyer is *not* prohibited from making deliberate misrepresentations about non-material facts or law to anyone.²⁷ Rule 4.1 (b) prohibits omissions that assist clients in criminal or fraudulent conduct. Thus, the scope of Rule 4.1 generally parallels the law of fraud, except that there is no requirement

²² ABA Formal Op. 06-439.

²³ Hinshaw & Alberts, *supra* note 1.

²⁴ MODEL RULES OF PROF'L CONDUCT R. 4.1(b).

²⁵ Hinshaw & Alberts, *supra* note 1.

²⁶ *See id.* at _____. 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).

²⁷ GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING 37-6 (3d ed. 2004).

for reliance or damages for the bar’s regulatory authorities to institute disciplinary action.²⁸

III. What Students Learn

Law school is a highly competitive individualistic endeavor. The competition begins during the application process and continues through the grading process, which acts as the gatekeeper to the law school rewards system including employment.²⁹ As the Carnegie Report recently stated, “the intensely competitive atmosphere militates against a cooperative learning environment.”³⁰ Negotiation courses are simply another forum appealing to students’ competitiveness. Within every negotiation there is a distribution of goods, money or other item of value where negotiators must decide how to maximize their gains. The distributive portion of negotiation causes many people, including a good number of our students, to see competition as the essence of negotiation.

It is in this competitive environment where we teach students negotiation ethics, and we do so like most topics taught in the legal academy – focus on the operative rule and then focus on the exceptions to the rule. Noting that this standard simply requires lawyers to refrain from engaging in fraudulent misrepresentations, the lowest level of legally acceptable conduct, we have essentially told students that anything they do short of fraud is “ethical.”³¹ Professors whose goal is to imbue in their students professional

²⁸ Russell Korobkin et al., *The Law of Bargaining*, 87 MARQ. L. REV. 839, 844 (2004).

²⁹ Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 78, 81–82 (2002).

³⁰ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 166 (2007).

³¹ This oddity has led some to argue that the Model Rules’ approach to negotiation ethics reflects little or no coherent ethical system. Carrie Menkel-Meadow, *Ethics, Morality, and Professional Responsibility in Negotiation*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 119, 132 (Phyllis Bernard & Bryant Garth eds., 2002) (bemoaning “how indeterminate and unhelpful the formal rules of professional responsibility are”); Barry R. Tempkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO J. LEGAL ETHICS 179, 180 (2004).

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

norms higher than the floor of acceptable conduct attempt to rehabilitate that goal by cautioning students that:

- The rules are a floor, not a ceiling
- The exceptions don't include everything
- You don't always want to take advantage of the exceptions
- There are ways that lying – even if it's okay under the rule – will hurt your credibility, reputation, and future negotiations.³²

Because students pay little attention to sanctimonious lectures about ethics,³³ it's easy for the black letter law to seduce them into hearing something very different:

- The exception swallows the rule;
- The rule *requires* misrepresentation about all non-material facts;
- Everyone lies in negotiation; and
- You can lie about anything – even material facts – as long as you can't, or don't, get caught³⁴

Certainly not every student is cynical enough to come away with these lessons, but for those who do, teaching them negotiation ethics may do more harm than good. This is what causes many instructors to feel uneasy when they teach negotiation ethics.³⁵

Professor Rebecca Hollander-Blumoff suggests a method for handling this precise situation – adopting a defensive driving approach. In essence, she suggests that negotiators follow the rules of the road, but keep a watchful eye on others for transgressions to be ready to respond quickly.³⁶ Furthermore, she suggests giving students affirmative reasons to behave ethically beyond the minimal requirements of the

³² Rebecca Hollander-Blumoff, Assoc. Professor of Law, Wash. Univ., AALS Presentation, *The Challenges of Teaching Negotiation Ethics: Rules and Reality* (January 8, 2010).

³³ Charles B. Craver, Professor of Law, George Wash. Univ., AALS Presentation, *Overcoming the Difficulties of Teaching Negotiation Ethics* (January 8, 2010).

³⁴ Hollander-Blumoff, *supra* note 32.

³⁵ Another potential problem comes into focus when teaching negotiation ethics - either the rules fail to reflect reality or our aspirations for honesty in negotiation are unattainable. Rebecca Hollander-Blumoff, *Just Negotiation*, 88 Wash U. L. Rev. (forthcoming 2011).

³⁶ Hollander-Blumoff, *supra* note 32.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

rules.³⁷ Instead of treating negotiation ethics as an esoteric philosophical topic of class discussion make them tangible and real. Tie rewards, recognition, and punishment to them. Show them the tangible benefits of negotiating ethically beyond the minimal requirements of the rules and the consequences of negotiating unethically or minimally ethically.

IV. Making Negotiation Ethics Real

Without connecting ethical interactions to real world issues, students will simply lull themselves into a false sense of security.³⁸ They believe that they will negotiate ethically and that they will be able to recognize ethical issues and problems when they appear and that they will be able to act ethically in the moment. To dispel this naiveté and make negotiation ethics lessons stick, the class should be a reflection of the real world where penalties exist for unethical behavior.³⁹ And only by reflecting the real world will students come to appreciate the importance of reputation and trust in negotiation.

A. Simulation Exercises

The most basic method of making the standards come alive is using simulation exercises geared towards teaching the standard. The benefits of simulation learning in law schools has long been known – the simulations provide useful models of situations that might confront a practicing lawyer, but they also provide a controlled classroom environment where there is relatively little at risk for the student and the public.⁴⁰

Furthermore, simulations integrate theory and practice while having positive effects on

³⁷ *Id.*

³⁸ Craver, *supra* note 33.

³⁹ *Id.*

⁴⁰ *See, e.g.,* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 170 (2007); Jay M. Feinman, *Simulations, An Introduction*, 45 J. LEGAL EDUC. 469 (1995); Gerald R. Williams, *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 J. LEGAL EDUC. 307 (1984).

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

student motivation and attitudes towards learning.⁴¹ This is likely because law students, like all adult learners, learn best through experience followed by feedback and discussion of the experience with subsequent correction.⁴² As a result, simulations exercises provide the opportunity to appeal to student learning preferences while demonstrating the ethical demands of negotiation practice.

Negotiation courses, like many skill courses, have routinely been taught using simulations for these very reasons.⁴³ As a result, they are often quite popular with students. On the other hand, Professional Responsibility courses, where the majority of students are exposed to the topic of negotiation ethics, are commonly regarded as dull and unnecessary. Student resentment of these courses is legendary, spawning a number of suggestions for making the classes more engaging.⁴⁴ Using simulation exercises is frequently suggested as one method of addressing this problem.⁴⁵

As with any lesson plan, instructors should have specific goals when using simulation exercises in teaching negotiation ethics. With respect to negotiation ethics, research has found that practicing lawyers are particularly weak at applying Rule 4.1 when it is in tension with competing legal rules and values, identifying what constitutes a material fact under Rule 4.1, and understanding the law of misrepresentation.⁴⁶ In negotiation courses particular ethical issues, what constitutes a material fact for instance,

⁴¹ STUCKEY ET AL., *supra* note 40, at 167.

⁴² MALCOLM S. KNOWLES ET AL., *THE ADULT LEARNER* 40 (6th ed. 2005); Green, *Less Is More*, *supra* note 4, at 359; *see also* STUCKEY ET AL., *supra* note 40, at 149–57 (recommending law professors to give students opportunities to engage in problem solving activities to cultivate “practical wisdom”).

⁴³ *See, e.g.*, Williams, *supra* note 40 at 307 (noting this truism in 1984).

⁴⁴ *See, e.g.*, Green, *Less Is More*, *supra* note 4, at 377–91; Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U L.J. 1043, 1047–48, 1052–55 (2007).

⁴⁵ *See, e.g.*, David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 59 (1995); James P. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 107–17 (1996).

⁴⁶ Hinshaw & Alberts, *supra* note 2.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

can be incorporated into the debrief portion of any or every negotiation simulation. In professional responsibility courses where there is typically time for only one negotiation simulation, instructors should use one scenario that is particularly good for all of these lessons - the DONS Negotiation developed at the Harvard Program on Negotiation.⁴⁷

In the DONS Negotiation the claim at issue is based on the transmission of a deadly hypothetical sexually transmitted disease for which there is no cure. The students play the roles of attorneys and clients in the settlement of the claim, which has yet to be filed, and they are instructed that attorneys will meet with their clients to complete their negotiation preparation. The negotiation looks like a straight forward discussion about the amount of damages to settle the claim, but both clients have information which they ask their respective attorneys not to disclose in the negotiation. For the putative defendant, the critical information is the fact that she will be receiving a substantial inheritance, which means she would be able to pay substantially more money to resolve the claim in the near future. For the claimant, it turns out that his positive tests for the disease were false positives. He does not have the disease after all but wants to punish his former girlfriend for causing him to think he was going to die.⁴⁸

What makes this exercise so good is that it puts the Rule 4.1 standard is its focus, bringing to life the tension between Rule 4.1 and other important legal values of client confidentiality, client centered representation, and zealous advocacy. While the presenting ethical questions embedded in this problem are straight forward - the claimant's attorney cannot agree to her client's request and the would-be-defendant's

⁴⁷ The DONS Negotiation, written by Robert C. Bordone and Jonathan Cohen based on another simulation by Nevan Elam and Whitney Fox is available from the Program on Negotiation Clearinghouse at www.pon.org or 800-258-4406.

⁴⁸ In response to his positive DONS test the claimant quit his job, gave away his worldly possessions, and started going to counseling.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

information can remain confidential for now⁴⁹ - students on both sides of the negotiation routinely make errors applying the ethical standard.⁵⁰ These results naturally result in interesting and sometimes heated class discussions as students attempt to defend their respective deceptions and others complain about being deceived, giving an instructor the raw material to bring Rule 4.1 to life. There are other good simulation exercises that illustrate issues relating to deceit in negotiation, but I am not aware of one where Rule 4.1 is thrust to the forefront as in the DONS Negotiation.⁵¹

B. Ethics Trials and Open Class Discussions

One method of imparting the importance of negotiation ethics, which is more suited to negotiation courses than professional responsibility courses, is to have the ethical standards enforced throughout the class. To do this, the ethics rules can be enforced as they are in practice – through official complaints to an ethics arbiter to decide whether the rules have been violated. This is precisely what Professor Charles Craver does in his negotiation course.⁵²

In his course, Professor Craver creates a course rule, in force from day one, that mimics Rule 4.1 and its comments regarding actual representations.⁵³ To bring forward a

⁴⁹ The putative defendant's attorney has to be careful when answering questions about her client's assets, as a false response may violate Rule 4.1.

⁵⁰ Practicing lawyers made similar mistakes when given this hypothetical. See Hinshaw & Alberts, *supra* note 2.

⁵¹ Mossyback Lane, written by Professor Russell Korobkin, falls into this category as Rule 4.1 may explicitly come into play during the negotiation or it might not. Prisoners' dilemma games, group negotiation exercises where negotiators are tempted by vast rewards for deceiving fellow negotiators, are good introductions for a number of negotiation issues including ethics. Such games are best used in this introductory capacity, as a large number of negotiation instructors currently do.

⁵² Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299, 308 (2010).

⁵³ The rule in its entirety states:

You may *not* make any *intentional misrepresentation* of any *material law or fact* during your negotiations. However, representations concerning one side's *value system* or what one is *willing to accept* shall *not* be considered representations concerning "*material*"

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

claim of rule violation, a student must file a formal charge by the end of the week so that Prof. Craver can prepare his next class to include the trial. The trial proceeds much as any reader of this article would anticipate. Professor Craver presides as the judge and the non-involved class members comprise the jury.⁵⁴ The accusing party presents evidence and witnesses are subject to cross examination; the accused party has the opportunity to present rebuttal evidence and witnesses are also subject to cross examination.⁵⁵ Once the evidence has been presented, both parties have the opportunity to make closing arguments, and the jury votes by secret ballot on each charged violation.⁵⁶ In his class a super-majority of three-fourths (3/4) is required to support any finding of improper conduct. If found guilty of unethical conduct, that student's grade is dramatically negatively affected.⁵⁷

This method may be too draconian for some, as evidenced by the fact that Professor Craver has never received a request for an ethics trial in his years of teaching.⁵⁸ Rather than creating a high stakes system of raising ethics issues, another way to make the same points is to encourage students who believe there has been an ethics infraction to raise the issue in class for discussion. Instead of the potential for public punishment the accusations can serve as teaching points illustrating appropriate and inappropriate

information. Statements that one side could do better by not settling are to be considered statements regarding client settlement intentions (*i.e.*, permissible "puffing").
Charles B. Craver, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT, REVISED TEACHER'S MANUAL* 14 (6th ed. 2010).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* Two-thirds of the grade in Professor Craver's course is based on the outcome of in-class negotiation exercises, and the grade for the exercise in question is dramatically impacted. *Id.* Faculty who adopt this method will have to adjust the penalty to fit their respective courses.

⁵⁸ Craver, *supra* note 52, at 308.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

negotiation conduct. This open discussion method is typically how these issues are handled in Professor Craver's class.⁵⁹

Whether the conduct in question results in trial or open discussion, the resulting conversation is likely to flag the accused as someone who may not be trustworthy in subsequent negotiations. This is the overarching lesson of this pedagogical method – one's actions when negotiating result in reputational consequences. That said, students already have reputations among their classmates by the time they take upper level courses⁶⁰ and students cultivate their in-class reputations through their actions every exercise in a simulation-based course. Even though the individual may indeed be untrustworthy, the public labeling of someone as untrustworthy can be problematic, particularly so if the aberrant conduct was because of a simple error in judgment or misunderstanding. Properly balancing the pedagogical concerns of discussing allegations of unethical conduct with student welfare is critical.

The most important factor in achieving this balance is creating a positive and healthy learning environment. In this kind of environment students and the instructor have mutual respect for each other, which allows for discussions of conflicting ideas and values, hard work, and constructive criticism.⁶¹ To forge this atmosphere, instructors should know their students, value them as individuals, have high expectations for them, and be concerned, caring, encouraging, and helpful.⁶² Furthermore, if students respect and trust their instructors, having difficult conversations about potentially unethical negotiation conduct becomes conducive to learning. With the goal of creating a class-

⁵⁹ *Id.*

⁶⁰ Negotiation is an upper-level elective course at most law schools although there are noted exceptions such as Harvard Law School.

⁶¹ STUCKEY ET AL., *supra* note 40, at 114.

⁶² *Id.* at 114–18.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

wide learning conversation, it may be instructive to reconceptualize the goals of such a conversation using principles of restorative justice.

Restorative justice is forward-looking, concerned with meeting the needs of victims and reforming offenders while restoring balance to the community through dialogue.⁶³ Thus, through the discussion the classroom community can be involved in holding an offender accountable and responding to the needs of the victimized student.⁶⁴ In some cases the accused may not have violated the legal standard, but may have violated a class norm, in which case the restorative principles still apply. In either case, the instructor should make part of the conversation focus on reintegrating the purported offender back into the classroom community.⁶⁵ The first method of doing this is not treating the potential violator with contempt, but with respect despite her potential faux-pas. Additionally, the subject of the discussion should be the conduct at issue such as the specific language at issue, not whether the student is ethical. More direct ways of facilitating the student's reintegration in the class include:

- discussing the number of times the issue has come up in prior classes,
- discussing the instructor's gratitude that this happened in the learning environment of class rather than in the real world where the consequences could be much more heavy,
- thanking the student for providing a learning opportunity for himself and the rest of the class by recognizing that students including the accused are now much less likely to make such a mistake,
- referring to the results of studies of attorney negotiation conduct, and
- discussing how to one regains trust from others once an action like this occurs, and
- discussing the issue of trust in future negotiation simulations.

⁶³ CHRISTOPHER BENNETT, *THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT* 21–22 (2008); MARK S. UMBRIET ET AL., *FACING VIOLENCE: THE PATH OF RESTORATIVE JUSTICE AND DIALOGUE* 8 (2003).

⁶⁴ MARK S. UMBRIET, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION*, xxviii–xxix (2001).

⁶⁵ See BENNETT, *supra* note 63, at 21.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

Undoubtedly there are many other methods of setting the tone for reintegrating the student into the class. The key here is that the instructor sets the tone of how this student will be treated in the classroom from here on out, and if the instructor sends the message that this person is now an “outsider” in terms of the class community, the students will treat the person accordingly the rest of the semester.

No matter whether an instructor decides to use the trial method or the open discussion method, the potential for reputational injury is there. This danger can be mitigated not only by creating the proper classroom environment, but also by covering the issue of negotiation ethics early in the semester, as opposed to its traditional later in the semester coverage.⁶⁶ And after this class, an instructor can institute the ethics trial or open discussion systems. At this point students should be clear about Rule 4.1’s dictates, and as adults, they can be responsible for their negotiation conduct. An interesting side benefit of this change is elevating ethics to a foundational issue in the students’ eyes.

C. Reputational Index

A negotiator’s reputation is based on the memory of others’ negotiation experience and their memory of the negotiation - the negotiator’s demonstrated behavior, the negotiator’s treatment of them, and the fairness of the outcome and the process.⁶⁷ Without question reputations are highly subjective and the actions that create them can be observed directly or reported from other sources.⁶⁸ Additionally, first impressions and early experiences carry immense influence in reputation formation.⁶⁹

⁶⁶ This includes doing an experiential exercise like the DONS Negotiation.

⁶⁷ ROY J. LEWICKI ET AL., NEGOTIATION 286 (5th ed. 2006); G.R. Ferris et al., *Personal Reputation in Organizations*, in ORGANIZATIONAL BEHAVIOR: THE STATE OF THE SCIENCE 201, 215 (Jerald Greenberg ed., 2005); Hollander-Blumoff, *supra* note 35, at n.163.

⁶⁸ LEWICKI ET AL., *supra* note 66, at 286.

⁶⁹ *Id.*; Ferris et al., *supra* note 676 at ____.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

Negotiators are wise to cultivate good reputations for credibility and trustworthiness because one's reputation is a critical factor in a negotiation counterpart's negotiation tactics. Negotiators tend to use more competitive negotiation tactics with those who, through dishonest or overly competitive behavior, have a negative reputation⁷⁰ and are more forthcoming with those who have good reputations.⁷¹ Thus, a "bad" reputation can undermine one's ability to be successful in negotiations and a "good" reputation can enhance a negotiator's ability to be successful in negotiations.⁷² Furthermore, having a good experience with another has a direct correlation with one's desire to have future negotiations with that person.⁷³

These results illustrate the close connection between reputation and trust in negotiations. A basic level of trust in one's counterpart is essential because negotiators must trade information to determine if a deal is possible. If one cannot trust the fundamental information being conveyed, that person will be hesitant to disclose any non-obvious information, and a negotiated deal becomes unlikely.⁷⁴ And even when agreements are achieved, a lack of trust can inhibit the creation of mutually efficient arrangements.

In order to make these lessons take - that reputation constitutes an important component of the ethics, professionalism, and outcomes in negotiation – students need to

⁷⁰ Steven Glick & Rachel Croson, *Reputations in Negotiation*, in WHARTON ON MAKING DECISIONS 177, ___ (2001); Roger J. Volkema et al., *Alternative Negotiating Conditions and the Choice of Negotiation Tactics: A Cross-Cultural Comparison*, 36 J. BUS. ETHICS 381, 388–92, 394 (2002) (finding that negotiators believed it more appropriate to engage in competitive and unethical behaviors with those who have a reputation as an unethical negotiator).

⁷¹ Glick & Croson, *supra* note 70, at ___; Mara Olekalns & Philip L. Smith, *Loose with the Truth: Predicting Deception in Negotiation*, 76 J. BUS. ETHICS 225, 227 (2007) (noting that individuals who believe others will not exploit them feel less need to engage in self-protective behavior such as withholding information).

⁷² LEWICKI ET AL., *supra* note 67, at 287.

⁷³ See also Joel Brockner et al., *Culture and Procedural Fairness: When the Effects of What You Do Depends on How You Do It*, 45 ADMIN. SCI. Q. 138, 138 (2000).

⁷⁴ Craver, *supra* note 52, at 308–09.

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

experience the influence of their reputations first hand. One mechanism for doing so in negotiation courses is suggesting that students speak with those who their negotiation counterparts have already negotiated with to research the counterparts' reputations. The most effective way, however, is through the use of a Reputation Index, which is sure to drive the point home.

The Reputation Index is a grading tool created by Professor Roy Lewicki for use in his MBA negotiation courses which has successfully made the leap to law school negotiation courses. In his syllabus, Lewicki describes the index as follows:

The Index is a proxy for the long-term effects of reputations created by negotiation activities in organizations, where the negotiations you conduct today affect the perceptions and expectations of others tomorrow. The index recognizes that those individuals who have reputations as trustworthy and effective negotiators will have an advantage in future negotiations, and those who have reputations as untrustworthy and ineffective will have a disadvantage.⁷⁵

According to Professor Nancy Welsh, one of the first law school professors to adopt the index, it works simply by polling the students at the end of the semester. She asks each student to identify up to six classmates “you think have developed positive reputations as negotiators” and suggests that “[n]egotiators earn positive reputations by displaying - or being perceived as displaying - competence, effectiveness, trustworthiness, integrity and so on.”⁷⁶ She also asks each student to identify up to six classmates “you think have developed negative reputations as negotiators” and suggests that “[n]egotiators develop negative reputations as negotiators by displaying - or being

⁷⁵ Course Syllabus, MHR 802, Roy J. Lewicki, Fisher Coll. of Bus., Ohio St. Univ. (2007), <http://fisher.osu.edu/departments/management-and-hr/faculty-info/faculty-homepages/roy-j.-lewicki/teaching/> (follow “Class Documents” link); *see also* Course Syllabus, Negotiation/Mediation, Nancy Welsh, Dickinson Sch. of Law, Penn St. Univ. (Spring 2010) (on file with author).

⁷⁶ E-mail from Nancy Welsh, Professor of Law, Dickinson Sch. of Law, Penn St. Univ., to author (July 2, 2010, 1:57pm PDT) (on file with author); E-mail from Nancy Welsh, Professor of Law, Dickinson Sch. of Law, Penn St. Univ., to author (Jan. 24, 2011, 1:58pm MST) (on file with author).

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

perceived as displaying - dishonesty, incompetence, ineffectiveness, lack of trustworthiness, lack of integrity, and so on.”⁷⁷ Besides simply identifying students in response to the question, Welsh asks for specific examples, which she gives to the identified students for feedback purposes.⁷⁸

The index is a small percentage of a student’s final grade in both Lewicki’s (10%) and Welsh’s (5%) respective courses.⁷⁹ Keeping the percentage relatively small is important because there is always a worry that it could turn into a “popularity contest” or a student could try to bribe others for a good reputation. On a more substantive note, social science research has found that a number of irrelevant factors (e.g., race, gender) influence our assessments of others, including people’s general preference for those like themselves.⁸⁰ Despite the small percentage of the final grade that the index constitutes, the index signals the importance of reputation to students.

V. Conclusion

When teaching negotiation ethics the instructor’s primary goal should be for students to learn the skills of identifying and resolving ethical problems. The most effective method of doing so is by employing negotiation roleplay exercises followed by

⁷⁷ E-mail from Nancy Welsh, Professor of Law, Dickinson Sch. of Law, Penn St. Univ., to author (July 2, 2010, 1:57pm PDT) (on file with author); E-mail from Nancy Welsh, Professor of Law, Dickinson Sch. of Law, Penn St. Univ., to author (Jan. 24, 2011, 1:58pm MST) (on file with author).

⁷⁸ E-mail from Nancy Welsh, Professor of Law, Dickinson Sch. of Law, Penn St. Univ., to author (July 2, 2010, 1:57pm PDT) (on file with author). Welsh also rewards class participation in this way as well by asking which students have significantly contributed to their learning. E-mail from Nancy Welsh, Professor of Law, Dickinson Sch. of Law, Penn St. Univ., to author (July 1, 2010, 1:02pm PDT) (on file with author).

⁷⁹ E-mail from Nancy Welsh, Professor of Law, Dickinson Sch. of Law, Penn St. Univ., to author (July 1, 2010, 1:02pm PDT) (on file with author); Lewicki Syllabus, *supra* note 75.

⁸⁰ Debra Friedman & Carol Diem, *Feminism and the Pro-(Rational-) Choice Movement: Rational-Choice Theory, Feminist Critiques, and Gender Inequality*, in *THEORY ON GENDER, FEMINISM ON THEORY* 91, 109 (Paula England ed., 1993).

61/62 Journal of Legal Education (forthcoming 2012)
Draft – Do Not Cite Without Permission

a discussion of the experience and various hypothetical examples.⁸¹ Particular emphasis should be placed on areas where practicing lawyers are particularly weak: identifying material facts in context, understanding the law of misrepresentation, and applying Rule 4.1, particularly in conjunction with other competing ethical rules and values.⁸²

But focusing on whether negotiation behavior is legal or illegal (*i.e.* ethical or unethical under the Rules) is not enough. Law school's emphasis on rules, laws and procedures causes students come to believe that the law is the only yardstick by which they need to measure themselves.⁸³ Negotiators evaluate their counterparts' actions and behaviors on interpersonal dimensions based on values such respect and fairness, regardless of the ethics rules. Behavior that is acceptable under the Rules may violate notions of fairness or respect resulting in a poor or bad reputation, which can have moral and personal consequences, not to mention a dramatic effect on subsequent negotiations. Therefore, it can be useful and corrective to persuade students to accept that their behavior is the external manifestation of who they are and that adding an ethical dimension their actions will ultimately influence their reputation and self-image.⁸⁴

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

⁸¹ KNOWLES ET AL., *supra* note 42, at 40; *see also* STUCKEY ET AL., *supra* note 40, at 149–57 (2007) (recommending law professors to give students opportunities to engage in problem solving activities to cultivate “practical wisdom”).

⁸² Hinshaw & Alberts, *supra* note 2.

⁸³ SULLIVAN ET AL., *supra* note 30, at 54–55.

⁸⁴ Hinshaw & Alberts, *supra* note 2.

into the world of legal practice in a number of ways including the use of guest lectures by practitioners.

This discussion of teaching negotiation ethics brings a larger point about legal negotiation to the fore. Lawyers rely on their beliefs about lawyering and the lawyer's role in the negotiation process to make both conscious and unconscious strategic choices.⁸⁵ One such notion is a belief that loyalty to their clients is their "first and only" responsibility.⁸⁶ Another is that lawyers are comfortable with having only a cursory knowledge of the negotiation ethics rules.⁸⁷ When this is the norm, it's no wonder that lawyers perform poorly when asked to put their knowledge of negotiation ethics to task. In fact, when asked whether they would agree with a client's request to engage in blatantly fraudulent negotiation conduct, only half of the attorneys in a recent survey said they would refuse the request.⁸⁸ Returning the legal culture to a place where this kind of behavior is unquestionably unacceptable is critical to the profession, and it begins with us, in the classroom, where we teach negotiation ethics to the next generation of lawyers.

⁸⁵ JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 75 (2008).

⁸⁶ See Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721, 754–55 (2005); Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693, 695 (2006).

⁸⁷ Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173, 194–95, 199 (1989).

⁸⁸ Hinshaw & Alberts, *supra* note 2 at ____.