

NAVIGATING THE MURKY WATERS OF UNTRUTH IN NEGOTIATION: LESSONS FOR ETHICAL LAWYERS

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INTRODUCTION

Verbena Gardens had been working for months on its new product in its offices at Kost Properties' Southwest Suites when the burglary occurred, sometime between 8:00 and 10:00 at night. The case was never solved; Verbena's property was never recovered. While the burglary pushed the project back by months, the market moved on, and the promising new product was scuttled.

The burglars made it past two doors that should have been secured: an exterior door to the building and an interior door to the Verbena offices. Kost had been having trouble with the exterior door for several weeks. When Gabe Sadat, Verbena's director, left the office, he was the last employee to leave that evening, and the exterior door did not lock behind him. Somewhat concerned, Sadat called Kost, who assured him that a repairman would be there shortly. Sadat was not unduly concerned—he had locked the interior door and armed its security system.

When the Kost repairman arrived nearly two hours later, he found the exterior door open. To his surprise, he also found the interior door to Verbena's offices open, the office vandalized, and considerable property missing. Neither Kost nor the police had re-

* This article grew out of a lesson aimed at developing students' professional identity and personal integrity situated in William Mitchell College of Law's first-year skills course, Writing & Representation: Advice & Persuasion (WRAP). WRAP is designed to achieve William Mitchell's mission of developing our students' practical wisdom. Although I have written the article, WRAP is a village-sized program, and I thank all members of the village for their contributions to the essay. In particular, my very talented co-coordinator Mehmet Konar-Steenberg teamed with me on this project. Our course is carried out by a talented and devoted staff of adjunct professors, which permits us to have each homeroom of twelve students taught by two practicing lawyers. WRAP is ably administered by Darlene Finch. In teaching negotiation in WRAP, we have relied on the insights of our colleagues Roger Haydock, Ann Juergens, and Peter Knapp, who taught negotiation in a predecessor course where they developed the Verbena Gardens case, and Ken Kirwin, one of the original WRAP co-coordinators. Thanks to the William Mitchell College of Law's administration for supporting this project and to the participants in the Works-in-Progress Conference of the AALS Alternative Dispute Resolution Section, held in Eugene, Oregon in October 2010.

ceived an alarm. It appeared that the burglars had somehow disarmed the interior door's security system. No one knew exactly how, as Verbena's and Kost's lawyers prepared to negotiate a resolution to the dispute.

The legal issues in the negotiation were not particularly thorny: liability in tort (a long shot) and contract (a surer bet), as well as the speculativeness of lost-profit damages for an untested product. From a factual standpoint, neither side was blame-free: Kost did not provide a secure exterior door, and Verbena could have secured back-up materials off-site. Hanging over the negotiation was the mystery: why did the interior door security system fail to operate?

Shortly before negotiations to settle the case commenced, Verbena's lawyers learned the answer to that question. Sadat left a message for his lawyers that he had been contacted by a Verbena freelancer who had been at the office the night of the burglary. She was quite sure that in her haste to leave, she had neglected to arm the system as she left. She left the country the next day for some time. When she returned to town and heard of the burglary, she realized her role and contacted Sadat.

If you were representing Verbena, would you reveal this information to Kost's lawyers? This article does not answer that question, of course, but it does answer the following questions: What does the law—both general principles applicable to truthfulness in negotiation and professional responsibility rules—say about this dilemma (Part I)? What do we know about the practice of truthfulness in lawyer negotiations? More specifically, how did 300 first-year law students at the school where I teach negotiate this dilemma? (Part II) What have social scientists learned about deception in negotiations over the last few decades (Part III)? Finally, what lessons can be drawn for lawyers seeking to behave ethically, as well as for those interested in assisting lawyers navigate what one of the first-year students described as the “murky waters of untruth” (Part IV)? In keeping with the empirical research on deception and the self-policing obligation of lawyers, the lessons are directed at those who could be deceived as well as those who might deceive. The goal of the article is to give lawyers, charged with the responsibility of resolving others' disputes and making others' deals, the capacity to do so in a way that honors the Shakespearean

injunction: “[T]o thine own self be true, / And it must follow, as the night the day, / Thou canst not then be false to any man.”¹

I. THE LAW OF TRUTH IN NEGOTIATION

In simple terms, lawyers negotiate for clients to assist them in making deals for the future or to assist them in resolving disputes arising out of past events.² As to both, the law proscribes deception, both by the parties and by their lawyers. I use the term “deception” here in its standard dictionary sense: causing another to accept as true or valid what is false or invalid. In some situations, the law proscribes not only affirmative misrepresentations, but also non-disclosure of key information, the category of deception explored in this article.

A. General Rules

Deception in the making of a contract may render the contract voidable. The Restatement (Second) of Contracts defines “misrepresentation” as “an assertion that is not in accord with the facts.”³ If the recipient justifiably relies on a fraudulent or material misrepresentation in assenting to a contract, she⁴ may void the contract.⁵ A misrepresentation is fraudulent if the maker intends that the recipient will assent and he knows that the assertion is not true or lacks a sound basis for its truth. A misrepresentation is material if it would induce a reasonable person to assent or the maker knows it likely would induce the recipient to assent.⁶ Non-disclosure may be an assertion when disclosure is necessary to prevent a previous

¹ WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 3, lines 78–82 (Norton Shakespeare, Stephen Goldblatt ed. 1997). Polonius speaks these lines to his son Laertes, as he departs for Paris. So too my father spoke these lines to me.

² This is a bit of a false dichotomy. That is, resolution of a dispute may involve a future relationship, as in the Verbena Gardens case, where the parties wanted to stay in the lease despite the burglary and its consequences.

³ RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981).

⁴ For ease of reading, the deceiver is male, and the deceived is female throughout this article. See Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 800 (2004) (discussing that women were less frequently disciplined than one would expect based on their proportion of the bar).

⁵ RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

⁶ *Id.* § 162.

assertion from being a misrepresentation, to correct a significant mistake, or to fulfill a relationship of trust.⁷

As a colorful example, in *Reed v. King*, the buyer of a house purchased it without having been informed by the seller or his real estate agent that a woman and four children were murdered there a decade before.⁸ As the court noted, quoting Shakespeare's *Merchant of Venice*, "truth will come to light; murder cannot be hid long." A neighbor told the buyer of the murder after the sale.⁹ The mode of false representation was concealment by non-disclosure, which, under California law regarding real estate transactions, hinged on whether the seller knew material facts known not to be within the reach of the diligent buyer. Materiality in turn hinged not only on the gravity of the harm to the buyer but also on the fairness of imposing the duty to discover on the buyer.¹⁰ Permitting the case to survive a motion to dismiss, the court reasoned that a murder is not so common that a buyer should be expected to discover it, and a murder could deprive a buyer of realizing the purpose of the purchase, which could have a quantifiable effect on the house's market value.¹¹ One judge dissented without an opinion.¹²

Similarly, deception is proscribed in litigation, of which dispute settlement is an integral part. Rule 11 requires pleadings and motions to have "evidentiary support."¹³ Discovery rules call for broad and full disclosure of information about the facts of the case.¹⁴ Witnesses testify under oath to tell the truth, often framed as "the truth, the whole truth, and nothing but the truth."¹⁵ A judgment procured by misrepresentation may be set aside.¹⁶ To the particular point of settlement, a court may act in equity to set aside a settlement tainted by fraud.¹⁷

⁷ *Id.* § 161. See generally Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795 (2000).

⁸ 193 Cal. Rptr. 130 (Ct. App. 1983).

⁹ *Id.* at 130.

¹⁰ *Id.* at 131–32.

¹¹ *Id.* at 133–34.

¹² *Id.* at 134.

¹³ FED. R. CIV. P. 11.

¹⁴ See, e.g., FED. R. CIV. P. 26; FED. R. CIV. P. 31 (an interrogatory must be answered "fully" and "under oath"); FED. R. CIV. P. 37 (sanctions).

¹⁵ FED. R. EVID. 603; 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, *FEDERAL PRACTICE & PROCEDURE EVIDENCE* § 6041 (2d ed. 2010) (discussing state rules).

¹⁶ E.g., FED. R. CIV. P. 60.

¹⁷ See 15A C.J.S., *Compromise & Settlement* § 45 (2010).

For example, in *James v. Lifeline Mobile Medics*, the parties settled a wrongful discharge case after a trial favoring the employer.¹⁸ The employee later sought to set aside the settlement for various reasons. One reason was that the employer's lawyer stated in its offer that the employer's financial picture was "dire," it was losing \$20,000 per month, and paying the amount of the judgment would force the company into bankruptcy; later the lawyer indicated that the employer had indeed filed for bankruptcy. In fact, the employer had more than sufficient cash to cover the judgment and did not file for bankruptcy.¹⁹ The trial court found the statements to be hyperbole that did not extend beyond the boundary of acceptable practice and noted that the employee could have requested financial information.²⁰ The majority of the appellate court disagreed, finding the statements to be misrepresentations for purposes of the rule that a party cannot benefit from a contract obtained through misrepresentation.²¹ The dissent agreed with the trial court's reasoning.²²

In some circumstances, deception in negotiation amounts to the tort of fraud. The Restatement (Second) of Torts provides for tort liability when one makes a misrepresentation for the purpose of inducing another to act or refrain from acting in reliance on it.²³ For the reliance to support a claim, the matter must be material.²⁴ The misrepresentation is fraudulent if the maker knows or believes it to be false or does not have the confidence in it or basis for it that he conveys.²⁵ A statement that is true, as far as it goes, is nonetheless fraudulent if the maker knows or believes it to be materially misleading without additional information.²⁶ A party to a transaction who intentionally conceals or prevents access to material information is as liable as if he misstated the absence of that same information.²⁷ However, failure to disclose is tortious only if the non-discloser is under a duty to disclose. That duty arises when the parties are in a relationship of trust or confidence; disclosure is needed to correct ambiguous or false statements already made; or,

¹⁸ 792 N.E.2d 461 (Ill. App. Ct. 2003).

¹⁹ *Id.* at 457–58.

²⁰ *Id.* at 458.

²¹ *Id.* The case was decided in favor of the employee on an alternative ground, that the employer breached the agreement.

²² *Id.* at 459 (McCullough, J., dissenting).

²³ RESTATEMENT (SECOND) OF TORTS § 525 (1977).

²⁴ *Id.* § 538.

²⁵ *Id.* § 526.

²⁶ *Id.* § 529.

²⁷ *Id.* § 550.

based on custom or other circumstances, the other party would reasonably expect disclosure and is about to enter into the transaction mistaken as to a basic fact.²⁸

For example, in *Kabatchnick v. Hanover-Elm Building Corp.*, a landlord acquired title to a building where a tenant rented a shop. As the landlord assumed title midway through the tenant's lease, the landlord pressured the tenant to re-negotiate the lease.²⁹ The landlord stated that a different party had offered to rent the shop for \$10,000 annually, whereas the tenant's current rent was \$4,500. There was no such offer, and the value of the property was in accord with the current rental rate. The tenant relied on the statement and agreed to a new lease at the higher rate.³⁰ The court noted that the law presumes that sellers will naturally overstate the value of what they are selling so that buyers should not rely on such statements.³¹ However, the court ruled that the statement about the other renter was a "representation of an existing fact." "While the science of jurisprudence is not . . . coextensive with the domain of morality. . . the law is the manifestation of the conscience of the commonwealth."³² The court ruled that the plaintiff had stated a cause of action for the tort of deceit.³³

B. Lawyers' Professional Responsibility Rules

The general legal rules regarding truth in negotiation are supplemented, of course, by the rules of professional responsibility governing lawyers. Various ABA Model Rules address fraudulent conduct. Most broadly, Rule 8.4(c) provides that it is misconduct to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."³⁴ Rule 1.2(d) prohibits counseling a client to engage in fraud or assisting a client in doing so; rather the lawyer is to discuss the consequences of a proposed course of conduct.³⁵

²⁸ *Id.* § 551.

²⁹ 103 N.E.2d 692 (Mass. 1952).

³⁰ *Id.* at 692–93.

³¹ *Id.* at 693–94.

³² *Id.* at 694 (citations omitted).

³³ *Id.* at 695.

³⁴ MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2009).

³⁵ MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009).

The rule most specifically addressing negotiation, which arguably limits the more stringent and general Rules 8.4 and 1.2(d),³⁶ is Rule 4.1, titled “Truthfulness in Statements to Others,” which states:

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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.³⁷

Rule 4.1 thus comes into play when the lawyer acts knowingly and the situation involves a material fact. The rule subdivides according to the type of non-truthfulness involved: subdivision (a) prohibits affirmative misrepresentation in straightforward terms, while subdivision (b) prohibits non-disclosure, with qualifications.

Comment 2 discusses what constitutes a “fact,” including observations on the nature of truth in negotiations. Whether a statement is a fact “depends on the circumstances.” “Under generally accepted conventions in negotiation,” some statements are not considered facts: estimates of price or value, intentions as to settlement, and an undisclosed principal in most situations. The comment further notes that “[l]awyers should be mindful of their obligations . . . to avoid criminal and tortious misrepresentation.”³⁸

The comments do not discuss what makes a fact material. However, one court has indicated that a fact is material “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].”³⁹

Comment 1 discusses what constitutes “misrepresentation,” including observations about non-disclosure. After noting that a lawyer is required to be “truthful,” the comment indicates that there “generally [is] no affirmative duty to inform an opponent of relevant facts.” Yet misrepresentation can occur by incorporating or affirming a statement known to be false or by “partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”⁴⁰

³⁶ Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Negotiation Ethics*, 16 HARV. NEGOT. L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1417666>.

³⁷ MODEL RULES OF PROF'L CONDUCT R. 4.1 (2009).

³⁸ MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2009).

³⁹ *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 449 (D. Md. 2002).

⁴⁰ MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1 (2009).

Subdivision (b) qualifies the requirement to disclose: it must be necessary to avoid assisting a client's fraud. In a circular manner, the requirement to disclose is also limited by Rule 1.6, titled "Confidentiality of Information." That rule permits disclosure to prevent a client's fraud involving the lawyer's services that is reasonably certain to result in substantial financial injury to another or to mitigate or rectify the effects of such a fraud.⁴¹ More broadly, Rule 1.6 permits disclosure to carry out the representation.⁴²

Finally, Comment 3 to Rule 4.1 notes that a lawyer may have to withdraw from representation, give notice of withdrawal, or disaffirm a document to avoid participation in a fraud.⁴³

To the extent negotiation involves a tribunal, Rule 3.3 also applies. That rule prohibits knowingly making false statements of fact, failing to correct previous statements, offering evidence known to be false, and failing to take measures to correct evidence that is later known to be false.⁴⁴ Furthermore, a lawyer whose client engages in fraudulent conduct related to a case must take remedial measures, which may include disclosure to the tribunal.⁴⁵

Other bodies have formulated statements regarding ethical obligations in negotiation as well; they track Rule 4.1. The American Bar Association Section of Litigation's Ethical Guidelines for Settlement Negotiations provide that a lawyer "must not knowingly make a false statement of material fact (or law) to a third person."⁴⁶ The duty to disclose is limited and arises "when doing so is necessary to avoid assisting a criminal or fraudulent act by a client," and then only if disclosure is not barred by the duty of confidentiality.⁴⁷ The more recent Restatement (Third) of the Law Governing Lawyers provides that a lawyer may not "(1) knowingly make a false statement of material fact or law to the nonclient, (2) make other statements prohibited by law, or (3) fail to make a disclosure of information required by law."⁴⁸

⁴¹ MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3) (2009).

⁴² *Id.* at 1.6(a).

⁴³ MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 3 (2009). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.16. Model Rule 4.1 is not in force in all states. In Minnesota, where I teach, there is a far simpler rule: "In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law." The comments track Model Rule comments 1 and 2.

⁴⁴ MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2009).

⁴⁵ *Id.* at 3.3(b).

⁴⁶ American Bar Association Section of Litigation, *Ethical Guidelines for Settlement Negotiations* § 4.1.1 (1982).

⁴⁷ *Id.* § 4.1.2.

⁴⁸ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 98 (2000).

In an often-cited case, *State ex rel. Nebraska State Bar Association v. Addison*, a pedestrian injured in an accident involving two cars brought suit against the two drivers.⁴⁹ Together they had three insurance policies. When negotiating with the hospital where the client was treated, the lawyer realized that the business manager was aware of only two of the policies. Rather than disclose that there was a third policy, the lawyer settled the claim with the hospital for an amount less than its bill, based on the amounts of the two known policies. Not surprisingly, the hospital later learned of the third policy and refused to abide by the release when dealing with the third insurer.⁵⁰ The court concurred with the referee that the lawyer had a duty to disclose the material fact of the third policy. Therefore, the failure to do so was sanctionable misconduct, and the lawyer was suspended for six months.⁵¹

In *In re McGrath*, the court also sanctioned a lawyer for misrepresenting the amount of insurance coverage.⁵² The lawyer was hired by an insurer to represent a hospital in a malpractice case and had access to a file indicating that the hospital had additional coverage through another insurer. The lawyer represented that the insurance available was limited to the \$200,000 policy provided by the insurer that had hired him. During the settlement discussions during trial, the plaintiff's lawyer expressed skepticism. Nonetheless, the case was settled for \$185,000. Not long thereafter, an agent of the insurer that hired the lawyer alerted him to the error, and the lawyer notified the court. When the plaintiff's lawyer learned of the additional coverage, complicated litigation ensued.⁵³ In the disciplinary proceeding, the court found that the lawyer acted negligently but not with bad faith or intent to mislead. Rather, he "engaged in conduct which reflects adversely on his fitness to practice law." This conduct, along with other misconduct, led to a suspension of six months.⁵⁴

Rule 4.1 and related rules have prompted considerable scholarly discussion.⁵⁵ According to one succinct synthesis, critics argue

⁴⁹ 412 N.W.2d 855 (Neb. 1987).

⁵⁰ *Id.* at 856.

⁵¹ *Id.* The lawyer had previously been reprimanded.

⁵² 468 N.Y.S.2d 349 (Sup. Ct. App. 1983).

⁵³ *Id.* at 349–51.

⁵⁴ *Id.* at 351–52.

⁵⁵ The following articles are among the most often-cited and excerpted: James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255 (1999); Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1 (1992); Charles B. Craver, *Negotiation Eth-*

that the rule improperly encourages adversarial conduct; the standard is so low as to encourage near-fraud; and, if the standard is meant to reflect current practice, it should aim higher. Proponents argue that lawyers are to engage zealously in the adversary process to protect clients' interests; that negotiation has its own conventions that clients routinely use and lawyers should not be prohibited from using; and that a higher standard, not representing current practice, would be an exercise in futility. Critics and proponents alike point to personal ethical standards as more meaningful than Rule 4.1.⁵⁶ These points raise an empirical question: how commonly do lawyers engage in deception during negotiation?

II. THE PRACTICE OF DECEPTION IN NEGOTIATIONS

A. Deception by Lawyers

Art Hinshaw and Jess K. Alberts have observed that "Model Rule 4.1 legitimizes some deceitful negotiation techniques."⁵⁷ In their view, Rule 4.1 reflects a certain philosophical map: the parties are adversaries, so that one wins and the other loses; disputes are resolved by application of law, so that projected trial outcomes weigh heavily in negotiation; thus bargaining should resemble advocacy—sharing little information, focusing on demonstrating the strength of the client's position, and playing to win.⁵⁸ Does this philosophical map in fact guide how lawyers think about and conduct negotiations?

Fairly small-scale empirical studies have found that deception is common among lawyers. In various studies, lawyers considered

ics: How to Be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive, 38 S. TEX. L. REV. 713 (1997); Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055 (1998); Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be Trustworthy When Dealing With Opposing Parties*, 33 S.C. L. REV. 181 (1981); Rex R. Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 75 (1985); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1 (1987); Alvin B. Rubin, *A Causerie on Lawyer's Ethics in Negotiation*, 35 LA. L. REV. 577 (1975); Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219 (1990); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 921.

⁵⁶ Hinshaw & Alberts, *supra* note 36, at 14–15.

⁵⁷ *Id.* at 3, 4.

⁵⁸ *Id.*

low-level deception part of the negotiation game,⁵⁹ seventy-three percent of lawyers admitted to puffing in settlement,⁶⁰ and one-quarter of lawyers perceived that counterparts lied during mediation.⁶¹ In a 2008 study involving thirty lawyers, nearly three-quarters indicated that they could settle a case for a plaintiff in a lender liability action without correcting opposing counsel's misimpressions about their client's financial situation.⁶²

A large study in the 1980s by Stephen Pepe involved a client informing his lawyer that what he stated in a deposition about an operative fact was, he later came to remember, wrong.⁶³ More than half of the lawyers considered it permissible to facilitate a settlement without disclosing the error in the deposition. A smaller percentage considered it permissible to refer to the wrong fact during negotiations, and about half considered it permissible to give a partially true but incomplete response to a question about the fact.⁶⁴ Pepe also held 124 mock negotiations of the scenario. Only three of the lawyers representing the client who wrongly testified in the deposition acknowledged the error. Over seventy percent of the lawyers made statements at odds with what they knew about the facts.⁶⁵

Seeking to update and partially replicate Pepe's study, Hinshaw and Alberts surveyed 734 lawyers from Arizona and Missouri. The lawyers were told that they represented a client who learned from his former girlfriend that she may have exposed him to a fatal, sexually transmitted disease. He took two home tests, both of which yielded positive results, and sent her a letter to that effect. She suggested that his lawyer and her lawyer negotiate a settlement. Before the negotiations began, however, the client learned that he did not have the disease after all. The client none-

⁵⁹ Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173, 199 (1989).

⁶⁰ Terry Carter, *Many Lawyers Have Been Asked by Clients or Other Lawyers to Violate Conduct Rules, Survey Suggests*, A.B.A. J. 97, 97 (Oct. 1997).

⁶¹ Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 123.

⁶² The client was, in fact, solvent; opposing counsel thought the client had gone out of business. Sixty percent of lawyers in a smaller study twenty years earlier came to this conclusion. See Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 516-18 (2008).

⁶³ STEVEN D. PEPE, STANDARDS OF LEGAL NEGOTIATIONS: INTERIM REPORT AND PRELIMINARY FINDINGS 1 (1983) (cited in Hinshaw & Alberts, *supra* note 36, at 19, 21, 22, 23).

⁶⁴ Hinshaw & Alberts, *supra* note 36, at 23.

⁶⁵ *Id.*

theless requested the lawyer to continue pursuing the claim, without revealing this new information in the negotiation.⁶⁶

Nineteen percent of the participants indicated that they would follow the client's request to act unethically, sixty-two percent would not agree to the client's request, and nineteen percent were not sure. Those who refused to agree or were not sure what they would do were then asked what they would do if the client requested the lawyer to tell the truth only if directly asked. Thirteen percent would follow this request, sixty-four percent would not agree to this request, and twenty-three percent were not sure. Thus only fifty percent of the participants would ethically refuse both requests, thirty percent would act unethically, and twenty percent were unsure. Hinshaw and Alberts suspect that in practice the percentages would shift with even fewer lawyers acting ethically.⁶⁷ "[I]n the pressured world of practice, ethics tend to slide down rather than rise."⁶⁸

Hinshaw and Alberts were interested in understanding this pattern of responses. In terms of the requirements of Rule 4.1, they found that "an astonishing" sixteen percent of the participants did not see the fact as material.⁶⁹ Sixty-one percent of respondents saw non-disclosure as a misrepresentation (it constituted the equivalent of affirming a false statement), twenty-six percent indicated that it was not misrepresentation, and thirteen percent were not sure.⁷⁰ Participants also rated the importance of various rationales one might give for their choices apart from Rule 4.1. Not surprisingly, participants who would comply with the request rated the following rationales highly: the information is protected by the professional rules of conduct regarding client confidences, the information is protected by attorney-client privilege, and the client has specifically requested that this information not be disclosed.⁷¹ Those who would refuse the client's request rated the following rationales highly: my integrity is too important, to do so may violate the rules of professional conduct, and my moral compass will not allow me to do so.⁷²

⁶⁶ *Id.*

⁶⁷ *Id.* at 25–29. Ninety percent of the lawyers who would refuse the client's second request indicated that they would withdraw from the representation. *Id.* at 41.

⁶⁸ *Id.* at 32 (citation omitted).

⁶⁹ *Id.* at 33.

⁷⁰ *Id.* at 35.

⁷¹ *Id.* at 38.

⁷² *Id.* at 37.

B. Deception by Law Students

In an effort to bring our students' moral compasses into play, we introduced the truthfulness dilemma in the Verbena Gardens case described above. Recall that 300 first-year students, as part of their skills course, confronted the dilemma in the context of a dispute between tenant Verbena Gardens and landlord Kost Properties. Both sides knew that the exterior door to the Kost office building was not secured as the lease called for, permitting the burglars access to the building lobby. The burglars also made it past an interior door to the Verbena office, with a security system both parties thought had been properly armed when Verbena's director left for the night. Verbena's lawyer learned later, unbeknownst to Kost, that a Verbena freelancer had subsequently visited the office and left the door unarmed. Verbena's director passed along the information with no indication of what he expected the lawyers to do with it.

1. The Design of the Exercise

The students representing Verbena had several options. They could disclose this new information in their demand letters, in which they were required to tell the story of the burglary. They could wait until the negotiation, when they would have several further options: (i) they could disclose without a trigger from the Kost lawyers; (ii) they could disclose in response to a more or less direct question from Kost; (iii) they could seek to manipulate the discussions towards or away from the facts of the burglary to avoid this occasion; or (iv) they could decline to disclose at all, regardless of the course of the negotiation. Indeed, they could state "facts" contrary to what they had just learned.

We sought to prepare students representing Verbena to grapple with this dilemma in several ways. This was their third negotiation; they had conducted two deal negotiations several weeks before (one on their own behalf and one on behalf of a client), during which they dealt with issues of how much to reveal about their clients' positions and interests. Students read about ethics in their course text, *Lawyering Practice and Planning*.⁷³ That text efficiently discusses Rule 4.1, reasons not to deceive, various types of representations negotiators make about various topics, the dynam-

⁷³ ROGER S. HAYDOCK & PETER B. KNAPP, *LAWYERING: PRACTICE AND PLANNING* (2d ed. 2003).

ics of negotiation, examples of common deceptive conduct, strategies for avoiding reliance on certain deceptive strategies, and the overriding importance of preparation.⁷⁴ In addition, students received a one-page handout with the language of the ABA Model Rules and the Minnesota rule.

Furthermore, we included truthfulness as a topic in the small group workshops on negotiation with the adjunct professors who conducted and critiqued the negotiation exercise (as well as earlier exercises in interviewing, counseling, and deal negotiation). Based on our discussions at the time with the twenty-five adjunct professors, we believe that most covered truthfulness in the workshops at some length, some advocating a more rigorous stance than others. A typical discussion included the rules, reputational and strategic issues, and ways of avoiding misrepresentation.

Two students represented Verbena in each negotiation, one operating as in-house counsel, the other as outside counsel. They were required to collaborate before completing their demand letters, at least to the point of agreeing on a single demand. Most, if not all, discussed the issue of truthfulness—some at great length. We believed that this discussion with a colleague was critical. This is why Kost lawyers were not assigned a similar dilemma; only one student represented Kost in a homeroom with an odd number of students. As the exercise evolved, this design permitted separation of the decision about how truthful to be, experienced by the Verbena lawyers, and reaction to that decision by the Kost lawyers.

2. The Outcomes

The adjunct professors reported the Verbena lawyers' approaches to the truthfulness dilemma. No Verbena lawyer made affirmative statements contrary to the new information. Out of seventy-eight exercises, forty-six (59%) of the Verbena lawyer teams did not disclose the new information about the freelancer at all; thirty-two did (41%)—eleven (14%) in one or both of the demand letters and twenty-one (27%) during the negotiation. During our debriefing, we learned that disclosure often followed a question; thus, more Verbena lawyers likely would have disclosed if the Kost lawyers asked the right question.⁷⁵

⁷⁴ *Id.* at 160–63.

⁷⁵ At a conference discussing scholarship on dispute resolution topics, experienced professors from around the country speculated that eighty to ninety percent of the students did not disclose the information; the students present at the session speculated that sixty to eighty per-

The adjunct professors also reported the outcomes, differentiated by the Verbena lawyers' approaches to their dilemma. For various reasons, both sides very much wanted to settle. The overall non-settlement rate was 16.7%. The rate of non-settlement varied, with a higher percentage (19.6%) of the non-disclosers than disclosers (12.5%) not settling. The rate of non-settlement differed based on when the disclosure occurred: 18.2% of those who disclosed in the letter did not settle, while only 9.5% of those who disclosed during the negotiation did not settle. The high rate of non-settlement for non-disclosure negotiations suggests that if students had more time (the exercise was timed at seventy-five minutes) and probed the facts more deeply, more students likely would have disclosed.

The non-financial terms of the settlement were essentially common-value terms; that is, the two parties sought the same thing, such as staying in the lease and increasing security. Not surprisingly, most groups came to agreement on those terms. The term on which the parties differed was the payment from Kost to Verbena. The Verbena lawyers were authorized to settle for as little as \$225,000, and Kost lawyers were authorized to pay as much as \$300,000. Of the sixty-five settlements, three were out of the range provided to the students.⁷⁶ Here are data on the remaining sixty-two settlements (in \$100,000):

	Mean	Median	Range	Standard Deviation
All Settlements	263.5	264	225-300	22.8
Non-disclosers	264.2	265/267.5	225-300	20.9
All disclosers	262.5	253/264	225-300	25.5
Letter-disclosers	251.4	253	225-275	15.8
Negotiation-disclosers	266.7	264	225-300	27.4

To focus on the means (the first column), non-disclosers obtained settlements slightly more (100.3%) than the mean of all settlements. Disclosers as a group obtained slightly less (99.6%) than the mean of all settlements. This is because teams that disclosed in

cent did not disclose the information. In studies involving students from other fields, chiefly MBA students, discussed in Part III *infra*, deception is very common.

⁷⁶ Two Verbena teams that disclosed in their letters settled slightly below their authority. One Kost team, facing a non-disclosing Verbena team, settled well above its authority.

their letters obtained less (95.4%) than the mean while teams that disclosed during the negotiation obtained more (101.2%) than the mean—indeed the most of all groups.

This pattern of results is intriguing. The risk of non-settlement was higher where the solution was not to disclose. On the other hand, in general, the settlement amounts did not differ much between disclosure and non-disclosure situations. The most intriguing revelation is how much the timing of disclosure mattered. The most successful Verbena lawyers, in terms of both settling and amount of settlement, were those who disclosed during the negotiation. The letter-disclosers were less successful on both scores than the negotiation-disclosers, somewhat more successful than non-disclosers as to settling, and somewhat less successful than non-disclosers as to amount of settlement. That is:

Most to Least Successful as to REACHING Settlement	Most to Least Successful as to AMOUNT of Settlement
<ul style="list-style-type: none"> • Disclosure during negotiation • Disclosure in demand letter • Non-disclosure 	<ul style="list-style-type: none"> • Disclosure during negotiation • Non-disclosure • Disclosure in demand letter

This pattern of results could reflect various phenomena. We have taught a dispute negotiation exercise with first-year students for a decade and know that students vary widely in the many constituent negotiation skills, such as analyzing the case, framing persuasive arguments, developing appealing options, presenting positions, responding to the counterpart's points, and conveying confidence. Perhaps the students who disclosed during the negotiation were more talented overall than the others. To the extent information disclosure had an impact on the negotiation exercise, there are two main possibilities: (1) the information itself was influential, by shifting the factual balance of the story, or (2) the disclosure was influential, independent of the information, by altering the dynamics of the interaction.⁷⁷

The information was important from a factual standpoint. Had the interior door been armed, the police and Kost would have been alerted when the burglars broke in, and the burglary may have been interrupted. From the standpoint of both liability and damages, the information was clearly adverse to Verbena: it made Verbena more responsible for the burglary and its consequences.

⁷⁷ My thanks to both my colleagues at William Mitchell and to the participants at the Work-in-Progress Conference for developing the theories set forth here.

However, Verbena already bore some responsibility in failing to secure back-up materials off-site. And Kost was responsible in any event for not securing the exterior door, which should have blocked the burglar's entry.

If the effect of disclosure was information-related, one would expect the chances of settlement to rise with disclosure, because there was less reason to spar over what actually happened. This did occur. Under this theory, one would also expect the settlement amounts to favor Kost regardless of when the disclosure was made. This however was not the case.

Alternatively, disclosure could be important in influencing the dynamics of the negotiation in various ways. Astute Kost lawyers facing non-disclosing Verbena lawyers might discern discomfort or resistance, which could lead to suspicion and corresponding defensive behavior. The Verbena lawyers who did disclose might appear naïve or weak, which could lead to adverse opportunistic responses by the Kost lawyers. Alternatively, the Kost lawyers might view disclosing Verbena lawyers as forthright, trustworthy, and acting in good faith, which could lead the Kost lawyers to reciprocate.

If the effect of disclosure was interaction-related, one would expect non-settlement to occur more often in non-disclosure situations as a general matter. This was true in the present case. One might also expect early disclosure to prompt an opportunistic response, leading to fewer settlements or settlements favoring Kost. This too was true in the present case. Finally, one might expect disclosure during negotiations, especially if timed well and effectively carried out, to produce the good-faith response, promoting settlement at an amount favorable to Verbena. This too occurred.

3. The Students' Reflections

We learned how students thought about the exercise in two ways. First, we debriefed the exercise in large classes, during which my colleague led a discussion of the disclosure dilemma. Students who revealed the information generally told the same story: it was relevant, the other side had a right to know it, it was the right thing to do to be truthful, and the information was not completely harmful to Verbena's claim in any event.

Students who did not reveal the information generally stated one of two rationales. First, the information was not relevant to their theory of the case, which focused on the exterior door rather than the interior door. Quite apart from the strength of this position as a matter of legal and factual analysis, my colleague asked,

“If it was not harmful, why not reveal it?” This question generally hung in the air, unanswered. Second, students who did not reveal the information noted that they planned to reveal it if asked but indicated that they had not been asked. In some classes, this observation prompted discussion of what question needed to be asked for the information to be revealed, including a sharp comment from one student who stated that he had indeed asked and received no response.

We learned, not surprisingly, that students who learned of the new information during the negotiation found that the story made more sense and that the negotiation proceeded more smoothly. Students who learned of the new information after it was concluded had far stronger reactions; they were not shy about describing the concealment of the fact as “shady” and expressed anger at being deceived.

The second way in which we learned about students’ thoughts on the exercise is that seventy-five students in one of our sections wrote four-page essays about the exercise. To a great extent, they stated what was said in the large class. The essays further revealed that many Verbena lawyers had thought seriously about the challenge before the negotiation, and their discussions had been spirited. Furthermore, for a good number of the negotiations, the Verbena lawyers who disclosed the information during the negotiation had done so after they had caucused midway through; disclosure was a means of setting the discussion on a more productive path or satisfying their desires to be more truthful. Some Kost lawyers wrote about their suspicions during the negotiation that something was not quite right, which were confirmed when the information was disclosed, thereby setting the discussion on a more productive path.

Equally, if not more interesting, are the general ruminations about truthfulness in many of the essays. They appear in both Verbena and Kost essays; experiencing a deception dilemma from either side can prompt this rumination. Furthermore, Kost lawyers had standard truthfulness dilemmas of their own, such as how straightforward to be about settlement positions. Many students wrote about a sort of dissonance they experienced when deciding to become lawyers: they thought of themselves as ethical, honest people, yet entered a profession not known for these traits. The exercise forced them to confront this dissonance, and the confrontation was uncomfortable for many, whether they were reacting to their own conduct or to that of their peers.

Not surprisingly, many Verbena lawyers wrote about wrestling with various types of non-truthfulness, such as not coming forward, withholding the truth, spinning or fudging the truth, and outright lying. Many Kost lawyers wrote bluntly about the impact of being deceived, in terms as strong as “betrayal” and “breach of trust.” They reflected on the impact of deception on the negotiator’s credibility in the negotiation and its longer-term cousin, his reputation.

Perhaps as a result of instruction that imagery can be a powerful tool in an essay of this sort, many students described their thinking before, during, and after the exercise through imagery. Some alluded to other more or less serious interactions: battle, poker, baseball, and dancing. Others wrote of the geography of lying and truth-telling: white and black lines, gray zones, skirting and crossing lines, slippery slopes, the vicinity of being untruthful, correct and incorrect avenues, and relying on one’s moral compass. One wrote of “how murky the waters of all of the many untruths can be,” another of sailing on those waters.

Some students quoted favorite non-legal authors on truthfulness, including:

- *The Bible*: “You will know the Truth, and the Truth will set you free.”
- Winston Churchill: “The truth is incontrovertible, malice may attack it, ignorance may deride it; but in the end, there it is.”
- Atticus Finch in *To Kill a Mockingbird*: “[The] best way to clear the air is to have it all out in the open.”
- Galileo: “All truths are easy to understand once they are discovered; the point is to discover them.”
- Charles Edward Montague: “A lie will easily get you out of a scrape, and, yet, strangely and beautifully, rapture possesses you when you have taken the scrape and left out the lie.”
- Solomon: “[A] fool expresses all his feelings, but a wise man holds them back.”
- Finally, Stephen Colbert’s notion of “truthiness,” in which one decides based on what feels right, regardless of what experts, books, or reality say.

Ironically, few found productive guidance in the text we had provided them, that is, the ethics rules. Rather, those who disclosed the information followed these other texts or their own reasoning, wondered how they would feel if they were in the other sides’ shoes, considered what their parents had taught them, or followed

their guts. Those who chose not to reveal generally referred to the idea that the information would hurt their client and that they had an obligation to secure the best possible result for their client.

Finally, here are some of the students' more intriguing observations:

- "Truth and relevance are intertwined and are malleable in the eye of the beholder."
- "[T]his art of legal limbo sometimes morphs into a telling of some not so accurate depictions of the truth."
- "[T]he desire to win tempts advocacy towards the outer edge of honesty."
- "[T]he role given to truthfulness is driven by comfort."
- "It didn't seem untruthful to not reveal something that was not material to the major argument."
- "[L]ying would be gruesome. Even evasion would trace gruesome's edge."
- "It was a simple matter of deciding whether I would rely on my integrity and skill . . . to divulge the information and still negotiate a fair and equitable settlement for my client, or whether I would plot to keep the information a secret and potentially scar my reputation forever."
- "Based on their reaction to the unrevealed facts, I felt as if we let them down and did not treat them as equals, as they deserved."
- "Is it really less the [truth] because it was not disclosed?"
- "Really, when is truthfulness wrong?"

As it turns out, insights from outside the law explain these observations and answer these very fair questions.

III. INSIGHTS FROM OUTSIDE THE LAW

In 1978, Sissela Bok's landmark book, *Lying: Moral Choice in Public and Private Life*, was published. Bok drew on the humanities—philosophy, theology, and literature—to explore the ethics of lying. For Bok, deceit is one of two forms of deliberate assault on another (the other assault being violence).⁷⁸ Lying undermines the trust essential for human society; it harms the choices of the deceived by distorting information about her situation and alternatives; it undermines the integrity of the liar, skews his judgment,

⁷⁸ SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 18 (1999).

and risks harm to his reputation.⁷⁹ Thus, although lying is not always to be condemned, “[l]ying requires a *reason*, while truth-telling does not. It must be excused; reasons must be produced, in any one case, to show why a particular lie is not ‘mean and culpable.’”⁸⁰ Bok’s language draws on Aristotle: “Falsehood is in itself mean and culpable, and truth noble and full of praise.”⁸¹

Bok considered the possibility of an excuse for lying in bargaining on the grounds that it constitutes “mutual deceit.” In a market, exaggeration and false claims are conventional and therefore acceptable because both parties have consented to the rules of the game. However, when voluntariness and knowledge of the rules of the game are not complete and shared by the parties, lying in bargaining is problematic. Because bargaining has “a thousand shadings,” it may be difficult to know “when one should and should not deceive, who is and is not a voluntary participant, and how much deception ‘the rules’ allow.”⁸²

In the three decades since *Lying*’s publication, researchers in the fields of social psychology, organizational behavior, and business ethics have taken on some of the questions implied in Bok’s observation through various empirical research tools. The following discussion provides some general background and then summarizes findings about the antecedents of deception from major studies with practical implications for the practice and training of lawyer-negotiators.

A. The Phenomenon of Deception

Negotiation has been defined as the process whereby “two or more parties with interdependent and potentially conflicting goals come together, each with the express purpose of attempting to ‘. . . obtain a better’ set of outcomes than they could achieve if they simply accepted what the other side would voluntarily give

⁷⁹ *Id.* at 18–28.

⁸⁰ *Id.* at 22.

⁸¹ *Id.* (quoting from book 4, ch. 7 of *Nicomachean Ethics*).

⁸² *Id.* at 129–32. Bok also discussed the possible excuse of fidelity to clients, focusing on deception in court grounded in protecting client confidences. She discounted arguments based on the right to a loyal advocate, the need to protect confidences so that they will be shared, and the adversarial system as a means of getting at the truth. She wondered whether these arguments benefit the profession but not the public and asked whether juries should be instructed that lawyers believe they may offer perjured testimony. *Id.* at 158–64.

them.”⁸³ Because negotiating is a mixed-motive interaction, entailing both conflict and interdependence, negotiation can be a “breeding ground[] for unethical behavior.”⁸⁴

Information exchange is key to negotiation; thus arises the dilemma of deception. Sharing accurate information is necessary to identifying solutions of mutual benefit. Yet sharing information can be risky because it opens the speaker to exploitation by the recipient. Furthermore, the party with more information can generally control the progress and often the outcome of the negotiation.⁸⁵

Deception encompasses a wide range of behaviors. Misrepresenting facts, the focus of this article, ranked fourth out of five in one study of the acceptability of various types of dubious information practices—worse than exaggerating an opening demand, encouraging others to defect, feigning friendship to get information; better than falsely promising good things will happen.⁸⁶ Misrepresentation can involve various types of information, including factual events, interests, reservation price, and intentions to act.⁸⁷ As to misrepresentation of facts, there is a distinction between active and passive deception. In basic terms, providing false information is active deception, or a “sin of commission,” while concealing information is passive deception, or a “sin of omission.” The former is generally thought to be more serious, with more serious consequences, than the latter.⁸⁸

⁸³ Ingrid Smithey Fulmer et al., *Lying and Smiling: Informational and Emotional Deception in Negotiation*, 88 *J. BUS. ETHICS* 691, 692 (2009).

⁸⁴ Lucas Koning et al., *An Instrumental Account of Deception and Reactions to Deceit in Bargaining*, 20 *BUS. ETHICS Q.* 57, 57–58 (2010) (citation omitted).

⁸⁵ Karl Aquino, *The Effects of Ethical Climate and the Availability of Alternatives on the Use of Deception During Negotiation*, 9 *INT’L J. CONFLICT MGMT.* 195, 203 (1998); Mara Olekalns & Philip L. Smith, *Loose with the Truth: Predicting Deception in Negotiation*, 76 *J. BUS. ETHICS* 225, 225–26 (2007).

⁸⁶ Roger J. Volkema & Maria Tereza Leme Fleury, *Alternative Negotiating Conditions and the Choice of Negotiation Tactics: A Cross-cultural Comparison*, 36 *J. BUS. ETHICS* 381 (2002). See also Aquino, *supra* note 85, at 196–98. While this article focuses on deception regarding facts, it is interesting to note that deception about one’s emotional state has also been studied and found to be more ethically acceptable than factual deception. See Fulmer et al., *supra* note 83.

⁸⁷ See, e.g., Maurice E. Schweitzer & Rachel Croson, *Curtailing Deception: The Impact of Direct Questions on Lies and Omissions*, 10 *INT’L J. CONFLICT MGMT.* 225, 226 (1999); Reilly, *supra* note 62, at 492–93 (listing eleven types of information in a dispute context).

⁸⁸ Roy J. Lewicki, *Walk the Line: Ethical Dilemmas in Negotiation*, 6 *NEGOT. J.* 4–6 (May 2007); Mara Olekalns & Philip L. Smith, *Mutually Dependent: Power, Trust, Affect and the Use of Deception in Negotiation*, 85 *J. BUS. ETHICS* 347, 354–55 (2009).

All forms of deception occurred regularly in the studies discussed in this part. The typical study resembled the Verbena Gardens exercise: college or graduate (often MBA) students were given a hypothetical situation to negotiate. In one study, twenty-two percent lied, nineteen percent concealed, thirty-six percent did not answer a question about the adverse information, and twenty-three percent told the truth.⁸⁹ In another, fifty percent of the negotiators engaged in omission or commission; the fifty percent of the negotiators who did reveal the adverse facts were asked about it.⁹⁰ In a somewhat more optimistic finding, twenty-eight percent of the participants engaged in deception, with omission being well more common than commission.⁹¹

Deception matters. The unfortunate short-term consequence of deception is that the deceiver does generally achieve a better outcome in the negotiation.⁹² Because deception is rarely detected, it leads to information asymmetry, and the more informed negotiator typically achieves the best outcome.⁹³ However, as a breach of ethical standards, deception can be expected to inflict some psychic costs on most deceivers.⁹⁴ Stated another way, deception violates social norms of signaling truth in close relationships and mutual responsiveness.⁹⁵ Even for the ethically oblivious, deception has a long-term cost: it harms the deceiver's reputation and may cause resistance on the part of the deceived in future negotiations.⁹⁶ Given the lure of short-term gains as against the prospect of long-term costs, what prompts negotiators to deceive?

⁸⁹ Karl Aquino et al., *Testing a Social-Cognitive Model of Moral Behavior: The Interactive Influence of Situations and Moral Identity Centrality*, 97 J. PERSONALITY & SOCIAL PSYCH. 123, 133 (2009).

⁹⁰ Schweitzer & Croson, *supra* note 87.

⁹¹ Kathleen M. O'Connor & Peter J. Carnevale, *A Nasty But Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 504 (1997).

⁹² See, e.g., Aquino, *supra* note 85; Aquino et al., *supra* note 89; Fulmer et al., *supra* note 83; O'Connor & Carnevale, *supra* note 91; Schweitzer & Croson, *supra* note 87.

⁹³ Fulmer et al., *supra* note 83.

⁹⁴ *Id.*; Olekalns & Smith (2007), *supra* note 85.

⁹⁵ O'Connor & Carnevale, *supra* note 91, at 513.

⁹⁶ Fulmer et al., *supra* note 83; Koning et al., *supra* note 84 (the deceived's resistance in the next negotiation depends on the degree to which the deceived sees the deception as justified by, for example, a lack of power).

B. Antecedents of Deception

Most studies explored the interaction of more than one antecedent of some form of deception and tested a particular theory of ethical negotiation behavior. At the risk of over-simplification, the results are summarized here by broad category of antecedents: (1) the parties' situation, (2) the orientations of the party and the negotiator, (3) the negotiator's perception of his counterpart, (4) the experience of the negotiation, and (5) the negotiator's anticipated future contacts.⁹⁷

First, a key dimension is the dependence of the parties on each other and the negotiation.⁹⁸ A party is highly dependent if it has few other desirable alternatives. Dependence is also a matter of mutuality; mutuality is present when both parties are equally dependent. Mara Olekalns and Philip Smith found that deception by omission occurred more in conditions of non-mutuality of dependence than mutuality. Others have found that the absence of good alternatives to a deal through negotiation increased the likelihood of deception.⁹⁹

A second key dimension is the negotiator's orientation towards the negotiation. Maurice Schweitzer and colleagues explored two conflict frames: a cooperative frame involving seeing both parties as responsible and believing in mutual agreement as a resolution and a winning frame involving assigning responsibility to the other party for resolving the situation.¹⁰⁰ Negotiators oriented toward winning were more likely to use deception, and to do so egregiously, than negotiators oriented toward cooperating. Similarly, Lukas Koning and colleagues depicted some negotiators as focused on self-interest ("pro-self") and others on joint outcomes ("pro-social").¹⁰¹ They found that pro-self negotiators were more likely to use deception than pro-social negotiators.¹⁰²

⁹⁷ For an exploration of national and cultural differences, see Volkema & Fleury, *supra* note 86.

⁹⁸ Olekalns & Smith (2009), *supra* note 88.

⁹⁹ Koning et al., *supra* note 84; Ann E. Tenbrunsel, *Misrepresentation and Expectations of Misrepresentation in an Ethical Dilemma: The Role of Incentives and Temptation*, 41 *ACAD. MGMT. J.* 330 (1998); *but see* Aquino, *supra* note 85.

¹⁰⁰ Maurice E. Schweitzer et al., *Conflict Frames and the Use of Deception: Are Competitive Negotiators Less Ethical?*, 35 *J. APPLIED PSYCHOL.* 2123 (2005).

¹⁰¹ Koning et al., *supra* note 84.

¹⁰² *See also* O'Connor & Carnevale, *supra* note 91 (individualistic versus cooperative motives); Olekalns & Smith (2007), *supra* note 85 (exploring types of deception in the context of negotiator dyads as both individualistic, both cooperative, or mixed).

This orientation could be a reflection of the party's ethical stance. Karl Aquino explored the impact of organizational climate, that is, the individual's perceptions of how an organization operates or what it values, based on the events, practices, procedures, rewards, and behaviors that characterize the organization.¹⁰³ In simulated negotiations, he found that negotiators who had been informed that their organization prided itself on fairness and honesty were less likely to engage in deception than negotiators not so informed. Furthermore, these negotiators were perceived by their counterparts as more ethical, and the outcomes of their negotiations were more egalitarian, that is, closer to the midpoint of the bargaining range.

The organization's ethical stance may be mirrored, or not, by the negotiator's sense of self. In a different study, Aquino and colleagues explored centrality of moral identity, that is, the importance one assigns to his moral character.¹⁰⁴ Their measure of moral identity included honesty, along with traits such as compassion and fairness. In a simulated negotiation exercise, more high moral-identity participants either told the truth or did not answer in response to a question about an adverse fact than did low moral-identity participants, where as more low moral-identity participants either concealed the information or lied.

This study also explored the role of personal incentives. Low moral-identity participants were little influenced by a personal financial incentive to perform well, whereas high moral-identity participants were induced into deception by the presence of a personal financial incentive. Similarly, Ann Tenbrunsel and Kristina Diekmann found that the higher the reward for a good outcome, the more likely a negotiator would engage in deception, in what they describe as the "lure of temptation."¹⁰⁵

Third, the research into the impact of the negotiator's perceptions of his counterpart is among the most revealing and intricate. Olekalns and Smith tested two different theories of why negotiators choose to deceive.¹⁰⁶ According to the fair trade model, a negotiator focuses on the likelihood of exploitation by his counterpart: if he sees the likelihood of exploitation as low, he decides that the cost of deception (damage to his reputation) offsets

¹⁰³ Aquino, *supra* note 85.

¹⁰⁴ Aquino et al., *supra* note 89.

¹⁰⁵ Ann E. Tenbrunsel & Kristina A. Diekmann, *When You're Tempted to Deceive*, 10 NEGOT. J. 9, 9-11 (July 2007).

¹⁰⁶ Olekalns & Smith (2009), *supra* note 88.

the need to act protectively, so he elects not to deceive her. In the opportunistic model, a negotiator focuses on whether his deception is likely to be detected and punished; if he sees this risk as low, he will elect to deceive to gain a personal advantage.

Olekalns and Smith posited that perception of the counterpart's trustworthiness would factor into the assessment of whether to deceive her. They identified two forms of trustworthiness: cognitive trust, which is based on perceptions of the counterpart's competence, and affective trust, which is based on perceptions of the counterpart's benevolence. Trust operated in different ways: trusting a counterpart based on her competence led away from deception, whereas trust based on her character led to deception, especially active deception.

Along the same vein, Roger Volkema and Maria Tereza Leme Fleury found that deception was more likely when the counterpart had a reputation as an unethical negotiator.¹⁰⁷ Not surprisingly, Maurice Schweitzer and Rachel Croson found that negotiators are less likely to deceive friends than strangers.¹⁰⁸

Fourth, according to various studies, the course of the negotiation itself has an impact on the use of deception. Uncertainty as to a topic led to a more aggressive, less honest presentation of that topic than when the negotiator was confident.¹⁰⁹ When both negotiators had accurate information about a topic of common value, deception was less likely.¹¹⁰ Being asked about a topic was found to affect the use of deception by the negotiator with adverse information: when the counterpart did not ask about it, three out of four negotiators said nothing and one out of four lied; when the counterpart did ask, four out of ten lied about it.¹¹¹ Negotiators' emotions played a part: positive emotions led a negotiator away from use of deception; negative emotions led to use of deception.¹¹² One small misrepresentation led to a larger one.¹¹³

Finally, while negotiators ostensibly focus primarily on the future of their principals, a negotiator's own anticipated future contacts also influence the decision whether to deceive. Volkema and Fleury found that deception was less likely when the negotiators

¹⁰⁷ Volkema & Fleury, *supra* note 86.

¹⁰⁸ Schweitzer & Croson, *supra* note 87. *See also* Tenbrunsel & Diekmann, *supra* note 105 (deception is less likely when the counterpart is an individual than an anonymous group).

¹⁰⁹ Tenbrunsel & Diekmann, *supra* note 105.

¹¹⁰ O'Connor & Carnevale, *supra* note 91.

¹¹¹ Schweitzer & Croson, *supra* note 87.

¹¹² Olekalns & Smith (2009), *supra* note 88.

¹¹³ *Id.*

would have future business relations and when the negotiator's colleagues would learn about the conduct of the negotiation.¹¹⁴

The interplay of these various antecedents of deception during the course of a negotiation is a complicated phenomenon. Ann Tenbrunsel found that negotiators believed themselves to be more ethical than the average person and the counterpart less ethical than the average person.¹¹⁵ During the negotiation, a negotiator's moral code was tempered by situational factors, such as an incentive to misrepresent. This led to an expectation that the counterpart would misrepresent, which in turn led to the decision to misrepresent defensively. Alternatively, given the incentive to misrepresent, a negotiator created an expectation of deception by the counterpart as a means of justifying his deception.

Tenbrunsel has also written about how negotiators who see themselves as ethical rationalize their deception.¹¹⁶ Euphemism or vague terms are used to couch the statement itself. Various arguments are used to displace or diffuse responsibility for the deception (it was the counterpart's fault, or she also did it) or minimize the consequences (it was not a major problem). Ultimately, a negotiator engages in ethical fading in which "the ethical colors of a moral decision fade into bleached hues . . . void of moral implications.' Self-deceit lies at the heart of ethical fading; we hide the moral aspects of a decision from ourselves to maintain our perception that we are moral people."¹¹⁷

IV. LESSONS FOR ETHICAL LAWYERS

It is unlikely that lawyers want to engage in ethical fading; it is likely that we want to see ourselves as moral people. Yet, despite the general legal rules about negotiation we know from law school and our profession's conduct code, we seem to be not much more immune to the temptation of deception than the participants in the studies described in Part III. What lessons can one draw from the information presented thus far for lawyers who strive to negotiate in a truthful manner? This part first sets out lessons for lawyers who negotiate, then strategies for those who, formally or informally, teach lawyers to negotiate.

¹¹⁴ Volkema & Fleury, *supra* note 86.

¹¹⁵ Tenbrunsel, *supra* note 99.

¹¹⁶ Tenbrunsel & Diekmann, *supra* note 105.

¹¹⁷ *Id.* at 11.

A. Strategies for Lawyers

Not surprisingly, the social scientists who sought to discern the antecedents of deception drew practical implications from their research results. These implications are aimed, of course, at reducing the possibility of engaging in deception. Given the adverse impact of being deceived on bargaining outcomes, these implications are also aimed at reducing the likelihood of relying on deception by one's counterpart¹¹⁸ or, indeed, inducing the counterpart to engage in deception. This latter aim is particularly important when lawyers negotiate with lawyers, because lawyers are ethically obligated to monitor each other.¹¹⁹

Unlike the law's approach, proscribing deception, these implications, taken together, prescribe a *process* for ensuring truthfulness in negotiation. The process is presented here as a series of a dozen related strategies. As is true of much of law practice, preparation is key: much of the process occurs before the negotiation starts.

Prime yourself to act ethically. You are most likely to act ethically if you operate with a high moral identity; this characteristic needs regular reinforcement. Thus place yourself in settings that reinforce rather than undermine your ethical self.¹²⁰ Be mindful that your workplace can encourage deception on your part by encouraging you to act in self-interest.¹²¹ Write a personal code of behavior, and make plans to address specific dilemmas you may encounter in upcoming situations.¹²²

Foster a positive reputation. If you are known as a cooperative, ethical negotiator, your counterpart is more likely to behave towards you accordingly.¹²³

Create power for yourself in the negotiation. The situation—the law, the facts, your client's resources—may provide you with

¹¹⁸ See Reilly, *supra* note 62, at 525–32 (discussing the following self-defense tactics: background research, networking for negotiation counterparts, rapport, objective standards, strategic release of information, recognition and thwarting of evasion, long-term relationships, and come-clean questions).

¹¹⁹ See MODEL RULES OF PROF'L CONDUCT R. 8.3 (2009) (requiring reporting of unprofessional conduct in some situations).

¹²⁰ One option is volunteering. See Aquino et al., *supra* note 89, at 139. This recommendation dovetails nicely with the ethical expectation (although not requirement) of performing pro bono services under ABA Model Rule of Professional Conduct 6.1 and similar state rules.

¹²¹ See Aquino, *supra* note 85, at 210–11; Koning et al., *supra* note 84, at 71.

¹²² Tenbrunsel & Diekmann, *supra* note 105, at 11.

¹²³ Schweitzer et al., *supra* note 100, at 2143.

power. Even if you lack power in this sense, you can create power through development of knowledge, alternatives, and creative solutions.¹²⁴

Research the subject matter of the negotiation. Deception is misuse of information; the more you know, the less likely you will be susceptible to it. Think through what you do not know and prepare a list of questions to ask during the negotiation.¹²⁵

Research your counterpart. Your counterpart is likely to be influenced not only by her power in the situation but also by the culture in which she finds herself, including her client, employer, and standards specific to her practice setting; learn about these.¹²⁶ To counteract the common instinct to assume that she will behave unethically, prompting unethical defensive conduct on your own part, seek objective unbiased information about her reputation.¹²⁷

Foster a positive relationship with your counterpart. Negotiate face-to-face, if possible.¹²⁸ If you do not already know each other, discuss associates you share and ways in which you may interact in the future before you begin negotiating.¹²⁹

Set a tone of honesty, cooperation, and competence. Priming for moral action is pertinent to a specific negotiation as well as one's general course of conduct; speaking about honesty at the outset of the negotiation can have a salutary effect.¹³⁰ Conveying a competitive stance generally begets a competitive response, including the possibility of deception.¹³¹ Instead, convey a cooperative approach, e.g., demonstrate concern for the other party's interests.¹³² Take care, however, not to convey such a high level of benevolence that you induce opportunistic behavior; convey a high level of competence to counteract this risk.¹³³

Attend to the informational content of the negotiation. To avoid engaging in deception yourself, achieve as much confidence as possible in the information you have.¹³⁴ To stave off deception

¹²⁴ Tenbrunsel & Diekmann, *supra* note 105, at 11.

¹²⁵ Schweitzer & Croson, *supra* note 87, at 244.

¹²⁶ Lewicki, *supra* note 88, at 11.

¹²⁷ Tenbrunsel & Diekmann, *supra* note 105, at 11; Tenbrunsel, *supra* note 99, at 337.

¹²⁸ Lewicki, *supra* note 88, at 6; Schweitzer et al., *supra* note 100, at 2141.

¹²⁹ Volkema & Fleury, *supra* note 86, at 344.

¹³⁰ Lewicki, *supra* note 88, at 6.

¹³¹ Olekalns & Smith (2007), *supra* note 85, at 235.

¹³² Schweitzer et al., *supra* note 100, at 2143.

¹³³ Olekalns & Smith (2009), *supra* note 88, at 360.

¹³⁴ Tenbrunsel & Diekmann, *supra* note 105, at 9.

by omission by your counterpart, ask direct questions.¹³⁵ To detect deception by commission, verify what you are told by asking for reliable information on key topics from other sources.¹³⁶

Seek to engage in integrative, rather than distributive, bargaining. Much recent research on negotiation has focused on a distinction between integrative—win-win—bargaining and distributive—zero-sum—bargaining. As developed by Roger Fisher and William Ury in their 1981 book, *Getting to YES*,¹³⁷ integrative bargaining is exemplified by separating the people from the problem, focusing less on positions than interests, developing options for mutual gain, and insisting on objective criteria.¹³⁸ Fully developing the distinction is beyond the scope of this article. Of note here is that deception is less compatible with integrative than distributive bargaining; for example, finding options for mutual gain is significantly impeded by deception.¹³⁹

Read your counterpart. In part, this strategy pertains to the counterpart's orientation: a win-oriented negotiator is more likely to engage in deception.¹⁴⁰ In part, this strategy pertains to her emotions: anger makes deception by commission a real possibility; anxiety can lead to deception by omission.¹⁴¹

Monitor yourself as well. Be aware that your own incentives may induce you into the expectation that your counterpart will engage in deception, which in turn will lead to defensive deception on your part.¹⁴² And of course the emotions that may guide your counterpart may guide you as well, if you let yourself succumb to them.

Above all, take into account the long-view. If you act untruthfully, your counterpart—and the clients—may find out about your deception; so too will others in your practice community. This conduct will damage your reputation, which can impair your performance in future negotiations. As one team of researchers concluded

¹³⁵ Schweitzer & Croson, *supra* note 87, at 244.

¹³⁶ Schweitzer et al., *supra* note 100, at 2141; Schweitzer & Croson, *supra* note 87, at 244; Olekalns & Smith (2009), *supra* note 88, at 360; Lewicki, *supra* note 88, at 6.

¹³⁷ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 1981).

¹³⁸ Raymond A. Friedman & Debra L. Shapiro, *Deception and Mutual Gains Bargaining: Are They Mutually Exclusive?*, 11 *NEGOT. J.* 243, 246 (1995).

¹³⁹ Schweitzer et al., *supra* note 100, at 2141; *see also* Friedman & Shapiro, *supra* note 138, at 243.

¹⁴⁰ Schweitzer et al., *supra* note 100, at 2143.

¹⁴¹ Olekalns & Smith (2009), *supra* note 88, at 360.

¹⁴² Tenbrunsel, *supra* note 99, at 336.

in their paper on deception, “a lie always leaves a drop of poison behind.”¹⁴³

B. Strategies for Teaching Lawyers

Many in the legal profession are in positions to teach lawyers how to negotiate: law professors, most obviously, but also teachers of continuing legal education programs, senior lawyers in law offices, and those who informally mentor junior lawyers. While the following suggestions are framed in terms of professors teaching law students, these suggestions should work, with some adjustments, in other settings. The suggestions are based on the experiences of the skills faculty at William Mitchell College of Law, including our adjunct professors who are both teachers and practitioners, along with points drawn from others who have written on teaching ethics in the law and other professions.

As an initial matter, teaching students to negotiate truthfully incorporates all three of the much-noted Carnegie Report¹⁴⁴ elements of legal education: (1) legal analysis, i.e., applying general principles to particular matters; (2) practical skill, i.e., taking actions in specific situations; and (3) professional identity, i.e., ethics, professionalism, and social responsibility.¹⁴⁵ Stated slightly differently, students must know and apply certain information, acquire and implement the skills to act in a truthful manner, and have the moral compass guiding them to choose to actually do so. To accomplish these ends requires a rich pedagogy, including reading widely, observation and discussion, practice with critique, and what I call here “future reflection.”¹⁴⁶

First, students can make some progress by reading and discussing a wide range of information about negotiation. Legal textbooks on negotiation uniformly cover the legal rules covering negotiation. Some also include analysis of specific situations, and a few include practical steps to take during negotiation.¹⁴⁷ What le-

¹⁴³ O'Connor & Carnevale, *supra* note 91, at 514 (quoting Francois de Callieres, ON THE MANNER OF NEGOTIATING WITH PRINCES 31 (A.F. White trans., 1963) (1716)).

¹⁴⁴ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

¹⁴⁵ *Id.* at 13–14.

¹⁴⁶ *Cf. id.* at 14 (teaching practical skills requires modeling, habituation, experiment, and reflection).

¹⁴⁷ See CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 355–68 (6th ed. 2009); G. NICHOLAS HERMAN & JEAN M. CARY, LEGAL COUNSELING, NEGOTIATING,

gal textbooks do not include is information of the sort set out in Part III or Part IV, yet this information is as apt for lawyers as it is for non-lawyer negotiators.¹⁴⁸ In particular, teaching students about the fair trade and opportunistic models of negotiation and their implications for deceptive conduct would further many students' awareness of how negotiation actually works. The textbooks also do not include non-legal material that may provide guidance for students considering the moral aspects of negotiation.

In contrast to many legal textbooks, for example, is the text *Negotiation* by Roy J. Lewicki and colleagues.¹⁴⁹ The text catalogues types of deception, motives for deception and its consequences, facts predisposing a negotiator to engage in deception, and strategies for dealing with it, all grounded in empirical research.¹⁵⁰ Even more important, the text discusses ethical reasoning. The text differentiates ethics from prudence, practicality, and legality.¹⁵¹ It then presents four ways of thinking through issues of ethics in negotiation: (1) end-result ethics focus on the consequences of the action (as proposed by Jeremy Bentham and John Stuart Mill); (2) duty ethics focus on the obligation to apply universal standards (as proposed by Immanuel Kant); (3) social-contract ethics focus on the customs and norms of a community (as proposed by Jean-Jacques Rousseau); and (4) personalistic ethics rely on one's conscience (as proposed by Martin Buber).¹⁵²

Second, negotiation is a process; students must observe it to learn how to do it.¹⁵³ Observation is necessary to observe all dimensions of negotiation, not just the ethical challenge of potential deception. What is most likely to make the strongest impact as to truthfulness is to see, or hear about, and analyze examples of *untruthfulness*: what set the stage for the misrepresentation, how the lawyer misrepresented the truth, what impact misrepresenta-

AND MEDIATING: A PRACTICAL APPROACH 170–73 (2d ed. 2009); MELISSA L. NELKEN, *NEGOTIATION: THEORY AND PRACTICE* 383–85 (2d ed. 2007); ALAN SCOTT RAU ET AL., *NEGOTIATION* 210–45 (2d ed. 2002); E. WENDY TRACHTER-HUBER & STEPHEN K. HUBER, *MEDIATION AND NEGOTIATION: REACHING AGREEMENT IN LAW AND BUSINESS* 256–77 (rev. 2d ed. 2007); GERALD R. WILLIAMS & CHARLES B. CRAVER, *LEGAL NEGOTIATING* 97–100 (2007).

¹⁴⁸ See SULLIVAN ET AL., *supra* note 144 (calling for insight from the social sciences and the humanities).

¹⁴⁹ ROY J. LEWICKI ET AL., *NEGOTIATION* (5th ed. 2006).

¹⁵⁰ *Id.* at 246–73.

¹⁵¹ *Id.* at 237.

¹⁵² *Id.* at 238–45.

¹⁵³ See Christine N. Coughlin, *See One, Do One, Teach One: Dissecting the Use of Medical Education's Signature Pedagogy in the Law School Curriculum* (Apr. 14, 2009), Wake Forest University Research Paper Series in Legal Studies, available at <http://ssrn.com/abstract=1380079>.

tion had on the other side, what else the lawyer could have done, and so on. Learning from the mistakes of others can be powerful. As Anita Bernstein wrote in her recent piece on teaching professional responsibility through pitfall pedagogy, “[k]nowing about pitfalls ahead of time makes new lawyers more . . . secure when they begin their work.”¹⁵⁴ The most compelling examples likely are true stories from the professor’s own experience.¹⁵⁵

Third, negotiation is a practice activity; students must practice it to be able to do it well. Again this is true of negotiation generally, not just the moments when truthfulness comes into play. Practice without critique by someone more skilled is not likely to advance students’ skills or ethical choices. The coaching of a skilled and ethical practitioner is also needed. Recommending a practical approach for training for various professions, Donald Schon wrote that “[s]tudents learn by practicing the . . . performing at which they seek to become adept, and they are helped to do so by senior practitioners who . . . initiate them into the traditions of practice. . . [t]he student cannot be *taught* what he needs to know, but he can be *coached*.”¹⁵⁶ Through coaching, a student develops the hallmark of the professional: reflection-in-action in response to the immediate problem before him or her, so as to develop a suitable solution.¹⁵⁷

Having students practice negotiation always raises the real potential of untruthfulness, even if students have been thoroughly taught how to avoid it. When a simulation presents the dilemma of untruthfulness front-and-center, we should expect some students to be untruthful. This raises the challenge of helping students process that experience. Two issues are obvious: the causes and effects of the untruthful conduct. As noted above, we debriefed the exercise in class, exploring these two topics, and some students wrote essays about the exercise. Both are important: students need to hear what others have to say¹⁵⁸ and to develop and record their own opinions.

¹⁵⁴ Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 486 (2009).

¹⁵⁵ See Julie A. Oseid, *It Happened to Me: Sharing Personal Value Dilemmas to Teach Professionalism and Ethics*, 12 LEGAL WRITING: J. LEGAL WRITING INST. 105 (2006).

¹⁵⁶ DONALD A. SCHON, *EDUCATING THE REFLECTIVE PRACTITIONER* 16–17 (1987).

¹⁵⁷ *Id.* at 32–36.

¹⁵⁸ See Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621 (2002) (describing a course focused on teaching interpersonal skills through extensive student discussions aimed at development of empathy). Class discussion would be more effective in smaller and more intimate groups than the sixty- or eighty-person classes we used. In our program, a preferable setting is a meeting of the students’ ten- to twelve-person homeroom, with discussion

Also desirable is a re-run, in which students would be shown concrete ways to forestall or grapple with the specific dilemma presented in the simulation.

A simulation in which some students engage in untruthfulness raises the matter of ongoing reputation. At least some students will judge their untruthful peers harshly. While on the one hand this makes for a compelling lesson about the importance of reputation, on the other hand, concerns about the permanence of that judgment arise. For this reason, a negotiation simulation with this dilemma should not be an isolated event. In our course, the exercise was one of many occasions for students to act ethically or not: they had already engaged in a client counseling exercise as well as two other negotiation exercises, and they immediately shifted into a motion practice exercise, in which honesty was also in play.

While this article focuses on a reputation for honesty in negotiation, much more goes into a lawyer's—and a law student's—reputation. One tool for providing students insights into their reputations is peer assessment. The device can be fairly simple: students rate their peers against an objective standard or rank them relative to each other, based on factors identified by the professor, and supplement their numerical assessments with narrative explanations. Various facets of the assessment can be handled in various ways, e.g., whether the forms are completed anonymously, whether the scores are considered in grading, whether the professors read the assessments. The key point is that students see how others perceive them. Indeed, if the forms are completed midway through a class, students have the opportunity to adjust their behaviors and potentially improve their reputations as well.¹⁵⁹

Finally, students must commit to what they have learned. The pedagogical elements described thus far address three of the four steps of the dominant model of moral psychology, in which moral action requires four components.¹⁶⁰ Students who progress through such a curriculum should be able to detect a moral di-

led by the adjunct professors. The exercise was debriefed in those settings, but the discussion may or may not have touched on the disclosure dilemma.

¹⁵⁹ This idea comes from two presentations: Melissa Manwarring's presentation at the Works-in-Progress Conference of the AALS Alternative Dispute Resolution Section (Eugene, Oregon, Oct. 2010), and William D. Henderson's presentation at the Conference on Legal Education Reform after Carnegie: Bringing Law-in-Action into the Law School Classroom (Univ. of Wisconsin, Oct. 2010).

¹⁶⁰ See, e.g., Muriel J. Bebeau & Verna E. Monson, *Guided by Theory, Grounded in Evidence: A Way Forward for Professional Ethics Education*, in *HANDBOOK ON MORAL AND CHARACTER EDUCATION* 557 (Darcia Narvaez & L. Nucci eds., 2008).

lemma (sensitivity), think through it (reasoning), and have the skill to act morally (implementation). What remains is the matter of moral identity and motivation.

As noted above, researchers examining truthfulness in negotiation found that a moral prime can promote truthfulness. An educational version of this can be the writing of a “future reflection.” This reflection would be facilitated by the grounding in moral philosophy recommended above. It would look both back and forward in time. It would recount what the student experienced in the negotiations and specific lessons drawn from those experiences.¹⁶¹ It would also set out the student’s own formulation of a code of conduct for future negotiations.¹⁶² Whether the student ever pulls out the code before going into a negotiation, as the negotiation research suggests, the mere writing of it is likely to have some impact on the students’ moral identity.

Whether to provide sample language for students as they write their codes is a difficult question. If doing so seemed like a good idea, one option would be this provision from the 1980 Discussion Draft of the Model Rules of Professional Conduct: “In conducting negotiations a lawyer shall be fair in dealing with other participants.”¹⁶³ Perhaps its unqualified promotion of fairness, which contrasts with the qualified proscription of misrepresentation in the law of truthfulness in negotiation, would resonate with many students.

CONCLUSION

As noted above, a negotiator’s orientation is influenced by organizational climate. Karl Aquino’s finding bears repeating: negotiators who had been informed that their organization prided itself on fairness and honesty were less likely to engage in deception. It may be that the law of negotiation should not change; arguably

¹⁶¹ See Ronald M. Epstein, *Mindful Practice*, 282 J. AM. MED. ASS’N 833 (1999) (arguing that critical self-reflection enables doctors to recognize their errors, refine their skills, and clarify their values). See also Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 52–59 (2002) (arguing that teaching students mindfulness meditation may enhance their skills in negotiation).

¹⁶² See Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 75 (2000).

¹⁶³ MODEL RULES OF PROF’L CONDUCT R. 4.2 (Discussion Draft 1980), *quoted in* RAU ET AL., *supra* note 147, at 231.

deception is common enough in negotiation that only serious forms of it should bear legal consequences. But this does not mean that lawyers should not seek to negotiate more truthfully than the law requires.

This article has sought to present the experience and insights of soon-to-be lawyers, respond to them with insights from outside the law, generate from these insights strategies for lawyers seeking to negotiate in a truthful manner, and suggest techniques for those who seek to train these negotiators. It is hoped that the recommended training will help students go beyond what the law requires and what the profession is known for, and will fortify students to do with what they believe to be right.

As a final point, here is the quote from Sissela Bok that framed the essays of the students: “The role that one assigns to truthfulness will always remain central in considering what kind of person one wants be—how one wishes to treat, not only other people, but oneself.”¹⁶⁴

¹⁶⁴ Bok, *supra* note 78, at xix.