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Negotiating on Behalf of Low-Income Clients: The Distorting Effects of Model Rule 4.1

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**NEGOTIATING ON BEHALF OF LOW-INCOME CLIENTS:
THE DISTORTING EFFECTS OF MODEL RULE 4.1**

Megan McDermott*

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I. INTRODUCTION

According to Socratic adage, true happiness comes from a combination of moderate wealth and great virtue, as opposed to great wealth and no

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virtue.¹ Discussions of ethics in negotiation sometimes draw on such Platonic ideals to encourage parties to choose the long-term benefits of virtuous behavior over the short-term benefits of material gain.² But this notion of moderation leaves out an entire swath of society: people with no wealth. Where are they expected to fall on the virtue scale when negotiating for some material advantage? To the extent that ethical negotiation is treated as a universal good, the very poor are indistinguishable from the very wealthy, and all are held to the same standard.³

From a moral perspective, this is arguably the correct approach. However, the question is much more difficult from a practical perspective. In particular, once we attempt to police ethical conduct, we risk imposing unfair burdens due to improperly calibrated rules of conduct.⁴ If the Rules of Professional Conduct governing lawyers are improperly calibrated, we may create a dynamic in which those with the lowest wealth are held to the highest standards of virtue, which in turn leads to unethical outcomes.⁵

This Article focuses on whether Model Rule 4.1, which prohibits an attorney from making false statements of material fact, is properly calibrated

1. Gerald Wetlaufer, *The Limits of Integrative Bargaining*, in WHAT'S FAIR: ETHICS FOR NEGOTIATORS 48 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004) [hereinafter WHAT'S FAIR] (citing PLATO, GORGIAS 37–50, 66, 72, 85, 90 (Donald J. Zeyl trans., 1987)); see generally Carol D. Ryff, *Happiness Is Everything, or Is It? Explorations on the Meaning of Psychological Well-Being*, 57 J. PERSONALITY & SOC. PSYCHOL. 1069, 1070 (1989) (stating that “happiness” is a loose translation of eudaimonia, a Greek concept that translates more precisely as “well-being”).

2. See, e.g., Wetlaufer, *supra* note 1, at 48 (“[A] negotiator’s pecuniary self-interest is, at best, only a portion of his true self-interest.”); Jonathan R. Cohen, *When People Are the Means: Negotiating With Respect*, 14 GEO. J. LEGAL ETHICS 739, 767 (2001) (discussing the personal benefits of grappling with one’s morality); see also Rob Atkinson, *An Elevation of Neo-Classical Professionalism in Law and Business*, 12 GEO. J.L. & PUB. POL’Y 621, 662 (2014) (drawing heavily on Platonic discourse to broadly reframe concepts of professionalism); James Boyd White, *The Ethics of Argument: Plato’s Gorgias and the Modern Lawyers*, 50 U. CHI. L. REV. 849, 850 (1983) (arguing that the Socratic dialogues in *Gorgias* are the best way to enliven the “dreary” discourse surrounding legal ethics).

3. But see MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 2016) (“[A]ll lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”).

4. See generally Irma S. Russell, *The Evolving Regulation of the Legal Profession: The Costs of Indeterminacy and Certainty*, 2008 J. PROF. L. SYMP. ISSUES 137, 138 (2008) (describing ethical rules as a normative system designed to influence behavior, with sanctions that consider the gravity of the interests at stake).

5. See Philip Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39, 44–45 (2015) (asserting that Model Rule 1.8(e), which prohibits lawyers from providing financial assistance to clients, acts to deny adequate access to the justice system for indigent clients).

when applied to the negotiation context. Drawing on the work of a variety of ethicists both inside and outside the legal profession, this Article will evaluate how to draw an ethical line between a false statement of material fact that violates Model Rule 4.1 and a strategy that helps ensure a fair outcome for a low-income client in furtherance of the lawyer's duty to the client.⁶

The difficulty in drawing the right line is perhaps starkest in the negotiation context. Indeed, the degree of candor a lawyer should bring to a negotiation is one of the most vexing questions in both theory and practice.⁷ Moreover, the division between the theorists and the ethicists is also stark: theorists tend to evaluate the question of the appropriate level of candor without regard to professional rules of conduct to the great dismay of ethicists who in fact believe that the professional rules should be stricter.⁸

The difficulty in line-drawing is further heightened in situations involving significant disparities in bargaining power, where the rules governing negotiation ethics may in fact worsen the power differential.⁹ Surprisingly little attention has been paid to how these power differentials play out in settings involving low-income litigants.¹⁰ This Article seeks to begin bridging this gap by arguing that sanctions-based rules requiring candor in negotiation may create barriers to settlement to the particular disadvantage of low-income litigants.

6. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.1 ("A lawyer shall provide competent representation to a client."); *id.* r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

7. See, e.g., *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 446 (D. Md. 2002) (explaining that the line dividing ethical behavior from unethical behavior can be "difficult to discern" in the negotiation context); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1816 (2000) (stating that "how much candor to exhibit . . . is one of the most difficult normative questions with which negotiators wrestle").

8. See, e.g., Alvin B. Rubin, *A Causerie of Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 578-79 (1975) (arguing that lawyers should be expected to observe "something more than the morality of the market place"); Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990) (positing that lawyers must grant a place for a broader form of ethics outside the Model Rules in the practice of law).

9. See, e.g., Eleanor Holmes Norton, *Bargaining and the Process of Ethics*, in WHAT'S FAIR, *supra* note 1, at 270 ("Negotiation . . . raises controversial questions of whether power or status . . . may impinge upon outcomes. When the unique ethical questions that surround negotiation are added, these power and status disparities may be exacerbated.") (footnote omitted).

10. See Michael Meltsner & Philip Schrag, *Negotiating Tactics for Legal Services Lawyers*, in WHAT'S FAIR, *supra* note 1, at 205 (explaining that when it comes to legal services and public interest lawyers, "relatively little has been written on the tactics and techniques of negotiation").

This Article presents two critiques of the conventional interpretation of Model Rule 4.1. First, by requiring truthfulness about a client's bottom line for settlement, Rule 4.1 disproportionately disadvantages low-income clients. Second, to the extent that Rule 4.1 does not draw a clear line between permissible and impermissible tactics, the rule may chill settlement discussions in circumstances in which both parties would benefit from less restrained negotiation.

Regarding the first critique, low-income clients are more likely to have a lower threshold for acceptable settlements.¹¹ Indeed, ethics rules already disadvantage low-income clients by prohibiting lawyers from financing living expenses for clients who need funds to cover their daily needs such as food and rent.¹² As a result, clients who are facing severe financial pressures may be more likely to accept a lower settlement amount¹³ than clients who do not need a quick settlement in order to pay basic living expenses and can therefore afford to prolong negotiations.¹⁴ To the extent that low-income clients are likely to perceive lowball offers as acceptable, the requirement that a lawyer must be truthful when discussing a client's authorization to settle disproportionately disadvantages this type of client.

The second critique highlights the fact that such a rule does not always benefit ordinary litigants, either. Indeed, strong prohibitions against false statements in negotiation may have the unintended consequence of chilling settlement discussions in circumstances in which both parties would benefit from unfettered discussion. Thus, a sanctions-based regime requiring candor

11. See, e.g., Courtney R. Barksdale, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 710 (2007) (stating that even where lenders assist low-income individuals in financing the costs of their claim, such agreements provide that the lender is entitled to a substantial portion of the settlement or award).

12. MODEL RULES OF PROF'L CONDUCT r. 1.8(e). See MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 163 (11th ed. 2015) (stating that this prohibition has been heavily criticized and quite controversial from its introduction).

13. Or, even more problematically, such clients may turn to a litigation financing lender who will purchase the client's claim in exchange for an even lower cash payment. This is a lose-lose proposition, because the defendant must now negotiate against a corporate entity with more freedom to gamble on upside. See, e.g., Barksdale, *supra* note 11, at 710 ("[F]irms are willing to provide loans where traditional lenders are not because they stand to gain a substantial percentage of the plaintiff's recovery or an attorney's contingent fee when the case is settled or is won at trial.").

14. Waiting out a defendant's posturing is itself a powerful negotiation technique. See generally Edward T. Hall & William Foote Whyte, *Intercultural Communication: A Guide to Men of Action*, 19 HUMAN ORG. 4-5 (1960) (providing that the head of a large Japanese firm believed that he could get Americans, due to their impatience, to agree to almost anything simply by making them wait).

in negotiations may have the unexpected effect of making negotiations more difficult rather than less difficult.

Section I introduces Model Rule 4.1 and explains how it applies to negotiations. Section II critiques the requirement of candor in negotiations, explaining how strict rules can chill settlement discussions and cause particular harm to low-income litigants. Section III offers some suggestions for a new approach to Rule 4.1 that avoids these particular problems.

II. MODEL RULE 4.1 AND ITS APPLICATION TO NEGOTIATIONS

This section explains the lawyer's duty of truthfulness and outlines the conventional wisdom about how to determine whether a negotiation tactic crosses an ethical line in violation of this duty. Part A introduces Model Rule 4.1, the rule requiring lawyers to be truthful in their dealings with others. Part B outlines the negotiation process and identifies a particularly thorny issue of settlement authorization or reservation price. Part C explains why the question of settlement authorization is particularly sensitive for low-income litigants. Lastly, Part D discusses the conventional wisdom regarding the application of Rule 4.1 to the question of settlement authorization.

A. *The Lawyer's Duty of Truthfulness*

When we think of lawyers, we tend to divide the world into two main camps: the litigators and the counselors. The litigators are the courtroom performers who present cases to a judge or a jury, as well as the lawyers who engage in the many precursors to getting into the courtroom in the first instance—the research, the pleading and motion writing, and the discovery practice. In contrast, few counselors expect to see the inside of a courtroom—instead, they advise business and government agencies about transactions and regulatory issues. But regardless of how close to a courtroom a lawyer comes in his chosen field, one skill that crosses this divide between litigation and transactional or regulatory work is negotiation.¹⁵

15. See generally James White, *Machiavelli and the Bar*, in WHAT'S FAIR, *supra* note 1, at 92 (stating that negotiation ethics apply to “an almost galactic scope of disputes”); Robert H. Mnookin, *When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 U. COLO. L. REV. 1077, 1077 (2003) (stating that “negotiations are omnipresent” not just in practice but in day-to-day life); Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 249 (2009) (“[A]lmost all lawyers negotiate.”).

All lawyers are governed by ethical rules,¹⁶ some that apply specifically to the particular task the lawyer is performing and others that apply more broadly to a range of tasks.¹⁷ When performing a specific task, a lawyer needs to be mindful of all of the general and specific rules that govern that particular task. In the negotiation context, this is truly daunting, as the ABA has identified almost thirty different ethical considerations that apply in the negotiation context.¹⁸ Many of the rules that apply to negotiations are straightforward. For example, a lawyer cannot settle a case without the client's authorization.¹⁹ But others are more complicated to apply.²⁰ And one of the most complicated rules impacting negotiations is Model Rule 4.1, which prohibits an attorney from making false statements of material fact.²¹

Model Rule 4.1 is not limited to any specific practice area or setting, but rather applies to the full range of lawyers in all of their representations.²² Yet, this is also a controversial rule for three reasons. First, it not only requires an attorney to be honest in the things he says, but it also requires an

16. Lawyers are regulated at the state level, and each state has its own ethical rules. *See, e.g.*, S.C. APP. CT. R. r. 407 RPC 8.4(d). However, most states draw from the American Bar Association's Model Rules of Professional Conduct. For simplicity purposes, this Article will focus on the latter.

17. *Compare* MODEL RULES OF PROF'L CONDUCT r. 3.3 (requiring a litigator to disclose adverse authority to the tribunal), *with* MODEL RULES OF PROF'L CONDUCT r. 1.1 & 1.3 (requiring an attorney to act with competence and diligence in pursuing a client's interests).

18. *See generally* ABA, *Ethical Guidelines for Settlement Negotiations* (2002). The guidelines suggest thirty-four different considerations that draw on a variety of different Model Rules; however, a few of these rules only apply in specific factual contexts, such as representing multiple clients (Model Rule 1.8(g)), or representing particular types of clients, such as a client with diminished capacity (Model Rule 1.14)).

19. *Id.* at 13–14 (citing MODEL RULES OF PROF'L CONDUCT r. 1.2(a)).

20. *See id.* at 15–17 (citing MODEL RULES OF PROF'L CONDUCT r. 1.5 cmt. 5) (explaining that lawyers who seek to limit their clients' settlement options in a retainer agreement must be "scrupulously accurate and complete . . . to avoid the risk of misleading or manipulating the[ir] client"); *see also* Andrew Hogan, *The Naïve Negotiator: An Empirical Study of First-Year Law Students' Truth-Telling Ethics*, 26 GEO. J. LEGAL ETHICS 725, 726 (2013) (explaining that under the Model Rules, "the line between what is legal and what is not can sometimes be hard to find").

21. MODEL RULES OF PROF'L CONDUCT r. 4.1. *See* Richmond, *supra* note 15, at 268 ("[T]he thorniest professional responsibility issues to arise in negotiations are rooted in the soil of honesty.").

22. MODEL RULES OF PROF'L CONDUCT r. 4.1. *See generally id.* r. 3.3(a) (extending the truthfulness requirement to apply within the litigation context by requiring candor to a tribunal); *id.* r. 8.4(b) (prohibiting a lawyer from being dishonest in his dealings with others, including non-professional settings).

attorney to correct mistakes in some instances.²³ Second, in some situations, it conflicts with an attorney's duty to keep client information confidential unless the client has authorized disclosure.²⁴ Third, the duty is narrower in the negotiation context, where the question of what is a false statement of material fact is governed by "generally accepted conventions in negotiation."²⁵

Much ink has been spilled attempting to delineate which negotiation tactics are consistent with Rule 4.1 and which tactics are unethical.²⁶ The lack of any clear consensus raises the question of whether, in fact, there are any generally accepted conventions of negotiation.²⁷ Perhaps in lieu of any commonly shared understanding of what is generally accepted in negotiation, Comment 2 to Model Rule 4.1 attempts to outline some acceptable practices: "puffery," such as self-serving estimates of valuation or damages, does not violate Rule 4.1, nor do general statements about a client's intentions as to an acceptable settlement; in contrast, false statements of material fact are prohibited, even in negotiation.²⁸

While it is often easy to tell the difference between a false statement of material fact and puffery, the line is not always clear.²⁹ As Part C explains

23. See MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 1 ("Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.").

24. See, e.g., ABA, *supra* note 18, at 38 ("[T]he ethical duty of confidentiality under Model Rule 1.6 . . . trumps the ethical duty of disclosure under Model Rule 4.1(b)."); see also Richmond, *supra* note 15, at 262 (explaining that other ethical rules may strain a lawyer's confidentiality obligations).

25. MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2.

26. See, e.g., Art Hinshaw et al., *Attorneys and Negotiation Ethics: A Material Misunderstanding?*, 29 NEGOT. J. 265, 282 (2013) ("[I]n many instances deceit, misdirection, and lying are 'ethical' negotiation tactics under the rules of professional conduct."); Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 73 (1994) (discussing a lawyer's use of deception when discussing a settlement amount); Barry R. Tempkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 180 (2004) ("The ethical constraints on a lawyer's misleading statements and omissions during settlement negotiations have been largely defined on a patchwork and intuitive level."); White, *supra* note 15, at 91–92 (discussing the requirement of truthfulness in negotiations).

27. See, e.g., Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1287, 1403 (1986) ("[N]o well-understood, commonly accepted unifying philosophy for negotiating exists.").

28. See MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2 (excluding from the category of material facts "generally accepted conventions in negotiation").

29. See Hogan, *supra* note 20, at 729 ("Determining what is and is not a material fact is a dizzying task."); see also James B. Boskey, *Blueprint for Negotiations*, 48-DEC DISP. RESOL. J. 8, 17 (1993) (evaluating the propriety of lies and misrepresentations is "[o]ne of the most difficult questions in legal ethics"). But see DONALD G. GIFFORD, LEGAL NEGOTIATION:

below, the line is particularly hazy when it comes to questions about settlement authorization or reservation price. Before addressing this ambiguity, Part B will explain these concepts.

B. Settlement Authorization and Reservation Price

Typically, the first step in settlement discussions is for each party to calculate its reservation point—i.e., the minimum price the plaintiff will accept or the maximum price the defendant will pay in order to avoid a trial.³⁰ The difference between the two reservation points is known as the bargaining zone, and settlement is only possible if the defendant's reservation point is higher than the plaintiff's.³¹

For both parties, the reservation point is based on a calculation of their Best Alternative to a Negotiated Agreement (BATNA).³² In litigation, a BATNA is calculated by considering the expected amount of recovery, discounted for the likelihood of winning at trial, and subtracting any legal costs incurred in taking the case to trial.³³ The reservation point for each party is the point at which they will decide that a trial is better than a negotiated settlement. In other words, if the defendant's final offer is below the plaintiff's reservation point, the plaintiff would rather go to trial than accept the offer.³⁴

Parties use a number of sources to calculate their respective reservation points, including factual information specific to the case, applicable laws and case law, and data about jury awards in similar cases.³⁵ However, the reservation point is also influenced by a variety of biases that lead each party to interpret the public information in the way that most favors their case.³⁶ Finally, reservation points are also influenced by private information known

THEORY AND PRACTICE 113 & n.20 (2d ed. 2007) (citing ROGER HAYDOCK, NEGOTIATION PRACTICE 201–02 (1984)) (questioning whether the difficulty in properly applying Rule 4.1 fully accounts for the frequent use of misrepresentation of facts in negotiation).

30. See, e.g., Korobkin, *supra* note 7, at 1792 (providing that “the maximum amount that a buyer will pay for a good, service, or other legal entitlement is called his ‘reservation point’ [and] [t]he minimum amount that a seller would accept for that item is her [reservation point]”).

31. *Id.* at 1793.

32. *Id.* at 1795 (citing ROGER FISHER ET AL., GETTING TO YES 100 (2d ed. 1991)).

33. *Id.* at 1795–96. See Boskey, *supra* note 29, at 8, 11 (discussing how parties evaluate their BATNA in the transactional context).

34. Korobkin, *supra* note 7, at 1796.

35. *Id.*

36. *Id.* at 1798 (citing George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 150 (1993)).

only to the party, such as that party's degree of risk tolerance or the specific litigation costs that a party will incur.³⁷

Assuming that each party has a reservation point that creates some possibility of settlement, the next step is to find a mutually acceptable settlement point within the bargaining zone.³⁸ Each side will seek a settlement point that allows their client to capture a meaningful portion of the surplus.³⁹

As a result, this is the stage in which negotiation ethics become critical. The ethical questions arise in two very different ways: first, how much of the surplus should an ethical negotiator seek to capture? And second, how much candor should a negotiator employ when attempting to find a mutually acceptable settlement point?

Determining and then concealing a reservation point is the critical component of any negotiation. Indeed, one commentator has described the BATNA as "the most important source of power in negotiation."⁴⁰ A party's success at the negotiating table depends on trying to convince the other side that one's BATNA is much more favorable than it actually is.⁴¹ As a corollary, revealing one's BATNA is almost guaranteed to ensure that the other side will be able to capture the lion's share of the surplus.⁴² Thus, although puffery and other deceptions will occur in various aspects of a negotiation, a negotiator can almost always expect to see misrepresentation about the other side's BATNA or reservation price.⁴³

C. The Reservation Prices of Low-income Litigants are Particularly Sensitive Information

As explained above in Section II.B, settlement authorization is a critical aspect of negotiations. Indeed, one of the central purposes of a negotiation is to influence the adversary's perceptions about where your client is likely to settle.⁴⁴

37. *Id.* at 1804.

38. *Id.* at 1798–99.

39. *Id.* at 1799.

40. LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 138 (2d ed. 2001).

41. *Id.*

42. *See id.* ("For these reasons, we caution the negotiator to only reveal his BATNA if he is prepared for the other party to make an offer that is minimally superior to his BATNA.").

43. *See generally id.* ("[A]lluding to options that you do not actually have is misrepresentation.").

44. *See* GIFFORD, *supra* note 29, at 99 ("[T]he purpose of competitive information gathering tactics is to determine the other party's 'bottom line.'"); *see also* Peter C. Cramton & J. Gregory Dees, *Promoting Honesty in Negotiations*, in *WHAT'S FAIR*, *supra* note 1, at 115

Thus, asking direct questions about settlement authorization during a negotiation is an attempt to conduct an end run around the substance of most negotiations. If a defendant could simply ask a plaintiff's lawyer whether its lowball offer is within the client's settlement range—and expect an honest answer—then the lawyer's effort to negotiate for a higher amount is undermined.⁴⁵

Settlement authorization is likely to be a particularly sensitive issue for a low-income plaintiff. Persons without savings or other resources will be more willing to accept a quick settlement in order to pay basic living expenses. This is particularly true if the nature of the plaintiff's claim is resulting in daily costs or losses for a low-income plaintiff. For example, an employment discrimination plaintiff who has been terminated unfairly may be without a paycheck while struggling to find new employment. A personal injury plaintiff may be incurring uninsured medical costs or taking unpaid leave from work while recovering. A car accident victim may not be injured, but may be left with a totaled car and no way to get to work.

As Philip Schrag has argued, Model Rule 1.8(e) worsens already precarious situations by prohibiting lawyers from providing financial assistance to their clients, other than litigation costs.⁴⁶ Some examples identified by Schrag of lawyers who have been disciplined for providing small loans to their clients underscore the dire straits these clients are in: one lawyer was suspended for loaning a client \$712 to pay for food and other necessities,⁴⁷ while another lawyer was publicly reprimanded for loaning an indigent personal injury client \$1200 for automobile repairs, in part so that he could get to medical appointments.⁴⁸

For low-income clients with few resources, prompt resolution of their claim may be a critical first step to getting their lives on track.⁴⁹ The number

(explaining that negotiations continue until the marginal cost of continuing exceeds the marginal benefit; thus, it is helpful to convince your adversary that any further concessions will be small); James K. Sebenius, *Three Ethical Issues in Negotiation*, in *WHAT'S FAIR*, *supra* note 1, at 7 (“The essence of much bargaining involves changing another's perceptions of where in fact one would settle.”).

45. See White, *supra* note 15, at 96 (stating that “[a] truthful answer . . . concludes the negotiation and dashes any possibility of negotiating” a more favorable settlement).

46. See generally Schrag, *supra* note 5, at 40 (“Model Rule 1.8(e) . . . is at odds with the legal profession's goal of facilitating access to justice. This rule bars lawyers from assisting their low-income litigation clients with living expenses, such as food, shelter and medicine, though such clients may suffer or even die while waiting for a favorable litigation result.”).

47. Att'y Grievance Comm'n of Md. v. Engerman, 424 A.2d 362, 366–67 (Md. 1981).

48. Att'y Grievance Comm'n of Md. v. Kandel, 563 A.2d 387, 387–88 (Md. 1989).

49. See, e.g., Schrag, *supra* note 5, at 44 (relating stories from Georgetown's asylum law clinic, where clients are frequently homeless and sometimes lack the funds necessary to be able to communicate with their lawyers by phone or take the bus to meet with them in person).

of families living paycheck to paycheck in this country is staggering,⁵⁰ and the cost of obtaining the money necessary to pay basic living expenses is prohibitive.⁵¹ In many cases, prompt settlement of a client claim is the only realistic option, even if it means accepting a lower dollar amount than the client could otherwise receive by pursuing the litigation.

D. The Application of Rule 4.1 to Settlement Authorization

The literature is divided on how Rule 4.1 applies to settlement authorization.⁵² Comment 2 explains that under “generally accepted conventions in negotiation,” some assertions in negotiation are not considered statements of material fact; thus, the scope of Rule 4.1 is more limited in a negotiation setting.⁵³ Moreover, Comment 2 notes that “a party’s intentions as to an acceptable settlement of a claim are ordinarily” not considered material statements.⁵⁴ Some have taken this to mean that lawyers have carte blanche to lie about settlement authority.⁵⁵

However, the ABA has indicated that there is a difference between “intentional vagueness regarding a negotiating party’s ‘bottom line’”⁵⁶ and a deliberate misrepresentation of a client’s settlement authority.⁵⁷ The former

50. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF AMERICAN HOUSEHOLDS IN 2014, at 1, 18 (2015) (showing that 47% of families would have difficulty covering an unexpected expense of \$400).

51. See generally Derek Thompson, *When You’re Poor, Money Is Expensive*, THE ATLANTIC, July 14, 2014, at 1 (explaining how a \$450 payday loan trapped a couple into “a cycle of dependency” in which they racked up \$1700 in fees).

52. Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 778 (2006).

53. MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 2.

54. *Id.*

55. See, e.g., Freedman, *supra* note 52, at 778 (arguing that Comment 2 allows a lawyer with settlement authority of \$75,000 to state that his client “is insisting on no less than \$200,000”); see also Meltsner & Schrag, *supra* note 10, at 210 (encouraging lawyers for low-income clients to convince their adversary they do not have settlement authority and that they will be unlikely to obtain it). Even commentators who believe that this sort of posturing is permissible recognize that there is a fine line between puffery and a statement of material fact. David Geronemus, *Lies, Damn Lies and Unethical Lies: How to Negotiate Ethically and Effectively*, 6 BUS. L. TODAY 10, 11, 14–16 (May-June 1997) (stating that negotiators should never trust their adversary’s statements about a bottom line).

56. *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 446 (D. Md. 2002).

57. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 93-370 (1993) (“[A] party’s actual bottom line or the settlement authority given to a lawyer is a material fact.”). For an example of the slender distinction, compare Richmond, *supra* note 15, at 269 (arguing that it is ethical for an attorney to say, “I can’t do that” in response to a settlement offer, even when the offer is in fact within the client’s authorization), with *id.* at 285 (telling a magistrate

falls within Comment 2's guidance about permissible negotiation tactics, while the latter violates Rule 4.1. Based on the ABA's opinion, many scholars believe that it is unethical to make statements that directly misrepresent the settlement authorization that a client has given to a lawyer.⁵⁸ The fact that there is significant disagreement about the basic issue of whether Rule 4.1 permits a false answer to this question indicates, at the very least, that the rule should be clarified.⁵⁹

Still, others have argued that the precise application of Rule 4.1 is largely irrelevant⁶⁰ because questions about settlement authority can simply be dodged or deflected.⁶¹ For example, Judge Richard Shell explains that it is perfectly fair to respond to questions with the non-answer, "I'm not at liberty to say."⁶² Similarly, the ABA has explained that it is ethical for a lawyer to "downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's 'bottom line.'"⁶³

But short-circuiting the ethical question is unsatisfactory because it may signal to your adversary that the answer is not favorable to your client.⁶⁴ After all, if the answer were favorable to your client, why wouldn't you give one?⁶⁵ So-called "blocking techniques"⁶⁶ can easily backfire because they

during a settlement conference that an offer is your client's "top dollar" is a misstatement of material fact that violates Model Rule 3.3).

58. See generally Boskey, *supra* note 29, at 8, 17 ("[M]any legal scholars take the view that one should not offer or respond with a false bottom line."); see also William H. Hodes, *Truthfulness and Honesty among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. REV. 527, 542 (2002) (stating that a false response to a direct question about settlement authority violates Rule 4.1).

59. See Hodes, *supra* note 58, at 542 (criticizing the prohibition against lying about settlement authority as "notoriously weak").

60. See generally Richard Shell, *Bargaining with the Devil Without Losing Your Soul*, in WHAT'S FAIR, *supra* note 1, at 60, 73 (providing a list of possible answers to settlement questions that do not violate Rule 4.1).

61. See, e.g., *id.* at 60, 73 (noting that often in the face of inconvenient questions, negotiators are forced to use verbal feints and dodges such as "I don't know about that," or "This is not a subject I'm at liberty to discuss").

62. *Id.* at 60.

63. ABA Comm'n. on Ethics & Prof'l Responsibility, Formal Op. 06-439, at 6 (2006).

64. White, *supra* note 15, at 96 ("Even a moment's hesitation in response to the question may be a non-verbal communication . . . that [a client] has given such authority.").

65. *Id.* at 97 ("[I]n that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point . . ."); see also Cramton & Dees, *supra* note 44, at 114 (explaining that it is useful to share inside information like a reservation point if it will not result in exploitation by the other side).

66. James Freund, *Smart Negotiating: How to Make Good Deals in the Real World*, in WHAT'S FAIR, *supra* note 1, at 213-14.

alert your adversary to the fact that you are unwilling to disclose sensitive information.⁶⁷

For these reasons, misleading your adversary about your real bottom line is one of the most commonly accepted forms of deceit in negotiation.⁶⁸ Thus, any suggestion that Rule 4.1 prohibits even outright falsehoods about settlement authority puts lawyers' professional obligations at odds with their clients' commonly used tactics.

III. THE CRITIQUES OF RULE 4.1

This section argues that the conventional wisdom regarding Rule 4.1 is flawed. Part A discusses the results of an in-class negotiation exercise in which the threat of strict enforcement of Rule 4.1 impeded settlement. Part B tries to explain this result, drawing on negotiation theory to argue that strict rules governing truthfulness may chill settlement discussions and therefore hurt all parties. Part C explains why strict enforcement of Rule 4.1 leads to particularly unfair outcomes for low-income litigants.

A. *The Surprising Results of a Class Exercise*

My criticism of Rule 4.1 has an unlikely genesis: a classroom exercise designed to teach the value of Rule 4.1 in a negotiation setting.⁶⁹

As part of an in-class simulation, I developed a pre-litigation negotiation scenario in which both parties had strong incentives for quick settlement. The scenario involved an on-the-job injury sustained by a construction worker who was being paid off the books. The injured worker needed money, while the construction company wanted to settle the matter quickly to avoid having its unlawful practices aired in an insurance coverage dispute.

67. *Id.*

68. See, e.g., Roy J. Lewicki & Robert J. Robinson, *Ethical and Unethical Bargaining Tactics: An Empirical Study*, in WHAT'S FAIR, *supra* note 1, at 224–31 (conducting surveys of business students, where hiding the real bottom line was seen as one of the most likely tactics and most ethically appropriate).

69. Although I teach doctrinal courses, I try to incorporate skills exercises to the extent possible. In particular, I believe that negotiation skills are critical to every type of law practice, and therefore try to incorporate at least one negotiation exercise into each doctrinal course. Because I expected that a strict truthfulness requirement would lead to an increased likelihood of settlement, I scheduled a negotiation exercise for my Professional Responsibilities course during the week when I was teaching Rule 4.1. I hoped that the results would underscore to students the inherent value of truthfulness. Instead, I was surprised to see the opposite effect. Fortunately for my broader purposes, I had not predicted the results in advance to students and did not need to devote class time to discussing the disparity in outcomes.

However, discussions were complicated by two factors: there was a very narrow window for settlement (\$90,000-100,000) and both parties started with unrealistic settlement expectations (\$250,000/\$25,000). Tempering these expectations required facts that were in the adversary's exclusive control. Plaintiff needed to know the extent of Defendant's insurance coverage, while Defendant needed to know the actual value of Plaintiff's out of pocket expenses. In other words, the parties needed to be able to communicate candidly in order to get into settlement range.

I divided the class into two ethics regimes, each representing an extreme: one set of students negotiated in a jurisdiction where any misrepresentation as to material facts violated Rule 4.1; the second set negotiated in a jurisdiction where lawyers had carte blanche to bluff their way to settlement. I expected that the students in the first regime would be more likely to reach a settlement, because they could trust that they were obtaining accurate information about key facts.

In fact, I was surprised to find that the opposite was true. Students in the second regime all reached a settlement within the stated range, despite awareness that their opponent was free to bluff about key facts. In contrast, only half of the students in the first regime settled. The students who did not settle reported that they were so unnerved by the strict application of Rule 4.1 and so afraid of giving up information that could hurt their clients that they were unable to engage in substantive discussion about the facts. In other words, my expectation that Rule 4.1 would enhance settlement by promoting candor was wrong, because I had failed to anticipate the possibility that it would instead promote silence and impede settlement.

Inspired by this exercise, I decided to review the literature on negotiation theory to try to explain this result. As Part B shows, the theory supports the proposition that a strict ethics regime may impede settlement.

B. The Chilling Effect of Rule 4.1

As a general matter, indeterminate rules that are backed by sanctions for egregious conduct can be helpful for enforcing ethical conduct.⁷⁰ When the line between sanctionable and permissible conduct is not entirely clear, in most cases, regulated individuals will err on the side of caution.⁷¹ However, indeterminate rules regarding truthfulness in the negotiation context may not

70. See generally Irma S. Russell, *The Evolving Regulation of the Legal Profession: The Costs of Indeterminacy and Certainty*, 2008 PROF. LAW. 137, 138-43 (2008) (explaining that the indeterminacy of the rule gives courts vast flexibility).

71. See *id.* at 142-43 ("Staying well away from 'the line' of questionable tactics is 'good business.'").

have the same salutary effect. Indeed, many lawyers believe that false statements are quite prevalent in negotiations, due in part to the uncertainty surrounding the application of truthfulness duties.⁷² Thus, the indeterminate duties under Rule 4.1 may not have the broad impact that is generally seen with common law rules.

Moreover, in addition to lacking broad effectiveness, an indeterminate rule may have a chilling effect on those lawyers who do try to steer clear of the ethical line during negotiations. This section introduces several frameworks for negotiation theory to explain why an indeterminate rule requiring candor in negotiations can lead to suboptimal outcomes in negotiations.

In his groundbreaking book, *Barriers to Conflict Resolution*, Robert Mnookin describes three types of barriers to negotiation: strategic, psychological, and structural.⁷³ Strategic barriers arise when one or both parties' efforts to gain a tactical advantage make it more difficult to find a mutually advantageous solution.⁷⁴ Psychological barriers arise when negotiators have unconscious biases that interfere with their ability to recognize an optimal resolution for themselves.⁷⁵ Finally, structural barriers occur when the conditions of the broader context of the negotiation impede the parties' ability to reach a resolution.⁷⁶

A strict ethics regime that impedes negotiations would likely fall into the third category of structural barriers. When negotiating in a regime in which Rule 4.1 is strictly enforced, there is a risk that negotiators will err on the side of caution and give away less information that they otherwise

72. See, e.g., GIFFORD, *supra* note 29, at 113 n.20 (explaining that surveys show between 18–28% of lawyers believe that misrepresentations occur regularly or frequently in negotiations).

73. ROBERT H. MNOOKIN ET AL., *BARRIERS TO CONFLICT RESOLUTION* 1082 (1995).

74. See generally DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 30–32 (1986) (acknowledging the idea that there are two types of negotiators: “value creators,” and “value claimers”; the former seeks joint gains for all negotiating parties, while the latter seeks to have one winner and one loser in any negotiation).

75. See generally Robert C. Bordone et al., *The Negotiation Within: The Impact of Internal Conflict over Identity and Role on Across-the-Table Negotiations*, 2014 J. DISP. RESOL. 175, 177 (2014) (noting that these barriers, or the negotiators' unconscious cognitive biases, may prevent the parties from recognizing that an agreement was mutually advantageous to begin with). One common example is “loss aversion,” a cognitive bias in which the risk of losing takes on increased significance to the point where it often outweighs an even greater likelihood of gain. See generally Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 342 (1984) (explaining the intuition that a loss of \$X is more aversive than a gain of \$X is attractive).

76. See generally Bordone et al., *supra* note 75, at 177 (explaining that barriers may prevent negotiators from obtaining the necessary information to make sound decisions).

would. In turn, this reciprocal effect of holding back information prevents the parties from fully exploring a bargaining situation.⁷⁷ Without the exchange of information, “genuine bargaining” cannot get underway.⁷⁸

More recent literature on barriers has identified a new framework for analyzing obstacles to optimal resolutions: “the negotiation within.”⁷⁹ In their 2014 article, Robert Bordone, Tobias Berkman, and Sara del Nido describe three types of internal conflicts that may prevent a party to a negotiation from being able to pursue his or her best interests at the bargaining table.⁸⁰ They identify three types of internal conflicts: aspirational identity conflicts, in which the negotiator is seeking to embody two or more conflicting roles;⁸¹ valenced identity conflicts, in which the negotiator’s internal views of positive and negative values skew his or her ability to pursue an optimal outcome;⁸² and transformative identity conflicts, which arise when a negotiation awakens fears and uncertainty about the future role of one of the parties.⁸³

A lawyer negotiating under a strict ethics regime faces an aspirational identity conflict.⁸⁴ On the one hand, the lawyer wants to achieve the best result for his client (and indeed, is bound by competence rules like Model Rule 1.1 to do so).⁸⁵ But on the other hand, the lawyer may be anxious about the ethical repercussions of certain negotiating strategies.⁸⁶ In essence, the lawyer is facing a conflict between personal well-being and the well-being of his client. By choosing a negotiation strategy that avoids violating Rule 4.1, the lawyer may end up undermining his client’s interest.

77. See GIFFORD, *supra* note 29, at 99 (“Frequently, when negotiators discuss their needs and aspirations, and begin to exchange information, this signals the beginning of genuine bargaining.”).

78. *Id.*

79. Bordone et al., *supra* note 75, at 178.

80. *Id.* at 176 & n.1 (citing BARRIERS TO CONFLICT RESOLUTION 8 (Kenneth Arrow et al. eds., 1995)).

81. *Id.* at 184.

82. See *id.* at 187–88 (noting that valenced identities occur when a negotiator’s positive and negative views of himself or herself come into conflict, resulting in failed negotiation outcomes).

83. See *id.* at 189–91.

84. Bordone et al., *supra* note 75, at 186.

85. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2014).

86. Roger Fisher suggests that this same dilemma arises even without the threat of sanctions, arguing that the lawyer’s dilemma arises from “a conflict of interest between the lawyer’s obligation to the client . . . and two of the lawyer’s other interests: behaving honorably toward others . . . and self-interest in preserving reputation and self-esteem.” Roger Fisher, *A Code of Negotiation Practices for Lawyers*, in WHAT’S FAIR, *supra* note 1, at 23. However, my class exercise suggests that the conflict may be heightened when there is an express threat of sanctions.

Bordone and his coauthors explain that when a negotiator faces this sort of competing loyalty, it can lead to inhibited performance at the negotiating table, including paralysis.⁸⁷ Indeed, of the three identity conflicts, aspirational identity conflict is “particularly fraught” because it puts the negotiator in an untenable position that appears purely distributive.⁸⁸ The seemingly stark choice between “self” and “other” leads to negative emotions, such as anxiety and helplessness that can further inhibit negotiations.⁸⁹

The effect of Bordone’s predicted conflicts is underscored by research from other disciplines indicating that even slight changes in mood have a significant impact on performance.⁹⁰ Moreover, although Bordone’s models of internal conflict apply generally to any type of negotiator, the emotional impact may well be starker among lawyers. Indeed, lawyers are much more susceptible to anxiety and obsessiveness than other professionals.⁹¹ Thus, while Bordone proposes methods a negotiator can use to manage the internal conflict,⁹² these methods may be less effective for lawyers who already struggle with negative emotions. In short, to the extent that ethical rules create an aspirational identity conflict, the impact of this conflict on lawyers is likely to be magnified.

So far, these theories have addressed the psychological aspects of negotiating. A third set of theories melds the psychological to the practical and addresses how certain approaches can advance or impede information flow.⁹³ This theoretical approach starts from the premise that communication is critical in negotiations, particularly those in which an integrative resolution would benefit the parties more than a mere distributive

87. Bordone et al., *supra* note 75, at 186.

88. *Id.* at 213.

89. *Id.* at 186.

90. See generally Clark Freshman et al., *The Lawyer-Negotiator as Mood Scientist*, 2002 J. DISP. RESOL. 1, 12–15 (2002) (summarizing studies that demonstrate the impact of improved mood on performance).

91. *Id.* at 45, 45–46 n.214; see also Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 764–65 n.74 (2001) (stating that lawyers have “exceptionally high levels of psychologically distress”).

92. See Bordone et al., *supra* note 75, at 192, 200 (outlining the typical approaches a negotiator can use to manage internal conflict, such as denial, avoidance, suppression, and resignation, and suggesting a new approach called “integration”).

93. See, e.g., Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 225 (2004) (discussing how small talk and building rapport can improve e-mail negotiations).

resolution.⁹⁴ Because the exchange of information is usually necessary to explore the possibility of integrative solutions, factors that increase the flow of information are seen as desirable in a negotiation context.⁹⁵

Scholars who focus on information as a key ingredient recognize that there are many barriers to the free exchange of information, leading to the so-called “negotiator’s dilemma.”⁹⁶ In this common scenario, a negotiator becomes overly focused on the risk of disclosing too much information or giving away the wrong piece of information.⁹⁷ The fear that an adversary will be able to exploit an uneven exchange of information encourages each side to limit disclosures, which in turn impedes the information flow necessary to identify integrative solutions.⁹⁸

Indeed, feedback from my students suggested that the negotiator’s dilemma was at work in the regime that applied Rule 4.1 strictly. The prospect of discipline for statements made during negotiations increased the students’ level of caution about what they disclosed and made them feel like they had very little latitude in terms of how they framed those disclosures. As a result, both sides were reluctant to undermine their negotiating position by disclosing too much of their client’s private information. With neither side willing to share the critical information necessary to reach an integrative solution, negotiations stalled.

In designing this classroom exercise, I had expected that a strict ethics regime would create a sense of trust between negotiators, leading to increased likelihood of reaching a mutually beneficial settlement and avoiding trial.⁹⁹ But this was not what happened. In fact, empirical research suggests that increased information flows and improved outcomes are a product of interpersonal factors, rather than factors external to the negotiation.¹⁰⁰ According to the academic literature, there are three different ways to establish effective information flow.¹⁰¹

94. See, e.g., *id.* at 249 (“Often in negotiation, reaching an agreement may be difficult because it is unclear whether a mutually beneficial solution is possible; negotiators must exchange enough information to ascertain that positive bargaining zone exists.”).

95. See, e.g., THOMPSON, *supra* note 40, at 68–69 (noting that negotiators who build trusting relationships, ask the other party about his or her preferences, and share information are more likely to reach integrative agreements).

96. LAX & SEBENIUS, *supra* note 74, at 38–46.

97. See *id.* at 38 (noting that negotiators in a “negotiator’s dilemma” become afraid that the other side will exploit them if they share information).

98. *Id.*

99. See, e.g., Cramton & Dees, *supra* note 44, at 111 (hypothesizing that mutual trust creates a basis for ethical behavior, while suspicion that you are being deceived can destroy it). Moreover, when verification is possible, trust is enhanced. *Id.* at 116–18.

100. See generally Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39, 44 (2002)

First, a past relationship from prior dealings typically improves settlement outcomes, both in terms of the number and the time invested in negotiations.¹⁰² Importantly, this is true even when the past relationship was adversarial: the significant factor is not how much the lawyers like each other based on past dealings, but rather how effectively the lawyers have learned to communicate with one another.¹⁰³ The more interactions the lawyers have had, the easier it becomes to share critical information.¹⁰⁴

Second, when negotiators do not have a prior relationship, other efforts to develop rapport between negotiators can improve information flow.¹⁰⁵ For example, researchers have shown that non-verbal factors like body position, eye contact, and head nodding can contribute to rapport.¹⁰⁶ Even just mirroring the behavior of the negotiator across the table can add to rapport and increase trust between negotiators.¹⁰⁷

A third factor that benefits negotiations, particularly in situations in which there is neither a prior relationship nor an opportunity for face-to-face contact, is small talk.¹⁰⁸ In an email negotiation experiment conducted between law students at two different schools, Janice Nadler found that students who engaged in light email exchanges before addressing the subject of their dealings were able to develop a rapport and improve their performance over students who launched straight into the negotiation.¹⁰⁹

The literature on building trust in negotiations suggests that purely external indicators of trustworthiness play no real role in improving information flow.¹¹⁰ Indeed, none of the three ways to build rapport depend on the negotiator's ability to gauge the accuracy of the information being

(finding that prior dealings can improve information flow); Nadler, *supra* note 93, at 228–29 (finding that non-verbal factors and small talk can improve information flow).

101. Johnston & Waldfogel, *supra* note 100, at 44.

102. *Id.* at 40–41.

103. *See id.* at 45 (noting that attorneys with past interaction with each other learn to communicate, which leads to more effective cooperation).

104. *See id.* at 59 (noting that attorneys that frequently litigate against each other are able to eliminate “information asymmetries”).

105. *See* Nadler, *supra* note 93, at 228–29 (noting that non-verbal or preverbal behavior can help build rapport).

106. *Id.*

107. *Id.* at 229.

108. *Id.* at 225.

109. *Id.* at 235–39.

110. *See generally* Johnston & Waldfogel, *supra* note 100, at 44 (finding that prior dealings can improve information flow); Nadler, *supra* note 93, at 228–29 (finding that non-verbal factors and small talk can improve information flow).

shared.¹¹¹ While it is possible that this factor may be implicit in situations in which the lawyers have had repeat dealings with each other, the key factor identified by the researchers is trust in reciprocity,¹¹² not necessarily trust in the accuracy of the information that is being shared.¹¹³

More significantly, the mechanisms used to establish trust in new negotiating relationships are inherently untrustworthy.¹¹⁴ For example, using small talk as a way to build trust is paradoxical in that polite chit chat is widely considered “costless, non-binding, and non-verifiable.”¹¹⁵ Nonetheless, polite conversation that is disconnected from the purpose of the negotiation is critical to building trust.¹¹⁶ Similarly, flattery can be an effective method of building trust—even when negotiators are aware that the flatterer has ulterior motives.¹¹⁷ In sum, information flow seems to depend largely on interpersonal methods of building trust that are not verifiable, as opposed to imposing external pressure to provide accurate information.¹¹⁸ To the contrary, this external pressure may undermine rapport to the extent that it leads to the negotiator’s dilemma and chills communications.¹¹⁹

111. See generally Johnston & Waldfogel, *supra* note 109, at 228–29 (discussing prior dealings); Nadler, *supra* note 93 (discussing non-verbal factors and small talk).

112. The “reciprocity effect” predicts that a lawyer who has successfully negotiated against a colleague in the past will be more willing to make concessions or disclosures in future negotiations out of a sense of fairness. See Freshman, Hayes, & Feldman, *supra* note 90, at 27–28 (noting that the reciprocity effect occurs when one person makes a concession or shares certain information, causing the other person to want to reciprocate in a similar manner).

113. Cf. Brian C. Gunia et al., *Trust Me, I’m a Negotiator: Diagnosing Trust to Negotiate Effectively, Globally*, 43 ORGANIZATIONAL DYNAMICS 27, 28 (2014) (outlining some of the other factors besides trust in the accuracy of information that can influence trust).

114. See Freshman et al., *supra* note 90, at 27–28 (outlining some reasons people decide to trust others, such as culture, personality, past experiences, the immediate environment, and the social behavior of others).

115. Nadler, *supra* note 93, at 223 (citing Vincent P. Crawford & Joel Sobel, *Strategic Information Transmission*, 50 ECONOMETRICA 1431, 1450 (1982)).

116. See THOMPSON, *supra* note 40, at 129 (“[O]n a preconscious level, schmoozing has a dramatic impact on our liking and trust of others.”).

117. *Id.*

118. But see Howard Raiffa, *Negotiation Analysis*, in WHAT’S FAIR, *supra* note 1, at 20–21 (arguing that visible acts of kindness, though self-serving, are also beneficial because of the “contagion factor” of acting nobly).

119. See, e.g., LAX & SEBENIUS, *supra* note 74, at 38–41 (discussing the negotiator’s dilemma).

C. *The Particular Harms to Low-Income Litigants*

The outcome of my class negotiation exercise bothered me for a second reason: the possibility that a duty of truthfulness chilled negotiations resulted in a disproportionately poor outcome for the low-income plaintiff. I had designed an exercise in which both sides valued a quick settlement and derived benefits from reaching a resolution. However, the construction company's benefit was simply a monetary gain. By reaching a quick settlement, the company would be covered by insurance and would therefore avoid a loss. In contrast, the benefit to the worker was not really a benefit at all: the worker needed the settlement money in order to be able to pay for necessary medical treatment. The possibility that Rule 4.1 chilled settlement meant that the defendant experienced a lost benefit, but the plaintiff was actually hurt. This was a particularly troubling result to me.

This section helps explain why this result is troubling from an ethical perspective. At the outset, negotiation is unique in terms of the lack of structure and oversight.¹²⁰ Applying general ethical rules in the negotiation context is particularly challenging, because unlike litigation, there is rarely a judge or other mediator overseeing either the process or the result.¹²¹ Nor is there anyone to police its fairness, except at the margins.¹²²

One exception is the requirement that courts independently review settlements involving a minor.¹²³ A helpful example comes from the Minnesota Supreme Court's decision in *Spaulding v. Zimmerman*.¹²⁴ In *Spaulding*, defense attorneys withheld a medical report indicating that the

120. Norton, *supra* note 9, at 272. See also Boskey, *supra* note 29, at 8, 17 (explaining that because negotiations take place in private, negotiators may feel more freedom to engage in unethical conduct); Steele, *supra* note 27, at 1387 (noting that instead of the framework of rules governing civil litigators, negotiators are governed only by "primitive and obtuse rules of professional responsibility and . . . an amorphous set of professional mores").

121. But see generally Kristine Gamboa, *Positive Prognosis for Judges: A Look into Judge-Directed Negotiations in Medical Malpractice Cases*, 13 PEPP. DISP. RESOL. L.J. 235 (2013) (discussing the use of judge-directed negotiations in medical malpractice litigation and suggesting the use of judge-directed negotiations in other types of tort cases).

122. See, e.g., Norton, *supra* note 9, at 270–71 ("Negotiation is dominated by process and technique, unguided by any specific consensus as to how ethical standards and norms should be applied to a process that tolerates the disguising of intentions and the use of pressure tactics.").

123. See Brian C. Haussmann, Note, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218, 1219 (2004) (citing *Spaulding v. Zimmerman*, 116 N.W.2d 704, 709–11 (Minn. 1962)) (noting that because *Spaulding* was a minor, his settlement had to be approved by the trial court).

124. *Spaulding*, 116 N.W.2d at 706.

16-year old plaintiff had a life-threatening aneurysm.¹²⁵ While the non-disclosure resulted in a lower settlement, it also prevented the plaintiff from obtaining immediate treatment.¹²⁶ Fortunately, the injury was detected two years later before it could cause further harm.¹²⁷ After the facts relating to the non-disclosure emerged, the plaintiff sought to reopen the case, arguing that the defense attorneys had acted unethically in withholding the medical report.¹²⁸ But the Minnesota Supreme Court rejected this argument, explaining that in a typical adversarial setting, defense lawyers had no duty to disclose this information to the plaintiff.¹²⁹

However, all was not lost for Spaulding: because he was a minor at the time of settlement, the trial court had an independent duty to evaluate the fairness of the settlement.¹³⁰ The Minnesota Supreme Court concluded that the reviewing court did not have adequate factual information when it approved the settlement, and therefore the case had to be reopened.¹³¹

But *Spaulding* is the exception that proves the rule, because his relief was dependent on the fact that he was a minor.¹³² In contrast, most plaintiffs in Spaulding's position would have no recourse for harms caused by parties who choose to elevate the adversarial process over basic human decency.¹³³

In light of the absence of any real oversight in most settlements, a key question in negotiation ethics is the extent to which they take into account disparities in the power and status of the negotiating parties.¹³⁴ Some have argued that an imprecisely calibrated ethical framework may in fact exacerbate the power and status differences that are likely to lead to unfair negotiation outcomes.¹³⁵ This problem is particularly stark in the case of low-income clients for three reasons.¹³⁶

125. *Id.* at 707–08.

126. *See id.* at 707–08 (discussing how Spaulding did not find out about his medical condition until two years after the settlement was reached).

127. *Id.* at 708.

128. *Id.*

129. *Id.* at 709.

130. *Spaulding*, 116 N.W.2d at 709.

131. *Id.* at 710–11.

132. *Id.* at 709.

133. *See generally* Haussmann, *supra* note 123, at 1219 (arguing that the adversarial ethic led to “reprehensible” results in the *Spaulding* case).

134. *See, e.g.,* Norton, *supra* note 9, at 270 (noting that negotiation raises questions of whether power or status disparities negatively affect outcomes).

135. *Id.*

136. *See id.* at 270–71 (explaining that those who are “poor, poorly informed, or otherwise disadvantaged in relation to their opponents” are more likely to face unfair results in the absence of institutional legal protections).

First, to the extent that negotiations are viewed as an opportunity to reach a win-win outcome, a client's precarious financial situation may undermine the likelihood of achieving this goal. Indeed, in one critique of the much-lauded theory of integrative bargaining, Gerald Wetlaufer identified several factors that reduce the possibility that negotiations can serve to expand the pie and lead to resolutions that benefit both sides.¹³⁷ Several of the factors identified by Wetlaufer would be more likely to apply in situations in which a low-income individual is negotiating against a financially stable adversary.¹³⁸ For example, Wetlaufer argues that integrative bargaining typically contains some element of risk-taking in terms of predicting future outcomes;¹³⁹ when parties have different risk preferences, one party may be unwilling to take on the degree of risk necessary to achieve the integrative benefits.¹⁴⁰ In these cases, the size of the pie may shrink rather than grow.¹⁴¹ As explained above in Section I.C, low-income clients are likely to have a relatively low risk tolerance.

Second, even if integrative bargaining is still possible, low-income clients may systematically be exploited by an adversary's well-founded assumptions about their financial situation. The clearest example is the extent to which the parties' time preferences regarding payment or performance are a factor in negotiations.¹⁴² As a general matter, making a discounted payment today to an adversary who places a high value on immediate payment is considered an integrative solution that has expanded the pie.¹⁴³ This makes sense when the parties that are still too far apart on numbers can reach resolution by using the timing of performance to bridge the gap. But are these time preferences ever going to lead to integrative solutions in the case of low-income plaintiffs, who predictably require a quick payout in every instance? As Wetlaufer points out, a "hard bargainer" may always be able to use time preferences to his advantage.¹⁴⁴ Arguably, the plaintiff's obvious preference for an early payout will consistently put

137. Wetlaufer, *supra* note 1, at 392 (arguing that "cooperation, openness, and truth-telling" do not lead to resolutions that benefit both sides).

138. *Id.* at 38–44 (asserting that buyers with differing risk assessments, possible economies in scale, and differences in capabilities between parties will not create opportunities for integrative bargaining).

139. *Id.* at 38–40 (stating that examples of risks in integrative bargaining include predicting future demand for a product or service, estimating the longevity and use value of certain items, and betting on future stock prices).

140. *Id.* at 42–43.

141. *Id.* at 43.

142. Wetlaufer, *supra* note 1, at 43–44 (quoting LAX & SEBENIUS, *supra* note 74, at 32).

143. *Id.*

144. *Id.* at 44.

him at a disadvantage, allowing a financially stable “hard bargainer” to consistently shrink the size of the pie even further to its own advantage.

Wetlaufer concludes that encouraging openness and truth-telling may be beneficial in situations in which it leads to integrative bargaining.¹⁴⁵ However, in light of dynamics that likely shrink the size of the pie, honesty can sometimes lead to disintegrative bargaining.¹⁴⁶ The fact that a client has authorized a quick, lowball settlement is in some ways the ultimate “honest” disclosure that is likely to lead to pie-shrinking, because it showcases the client’s low tolerance for risk and high preference for immediate performance.¹⁴⁷ Both of these factors are likely to lead to a disintegrative bargain and a result that some may consider fundamentally unfair.¹⁴⁸

Third, the precarious financial situation of low-income clients raises fundamental questions about whether they have the same free will or agency that we usually attribute to participants in a negotiation.¹⁴⁹ This lack of agency tends to undermine any attempts to universalize negotiation ethics.¹⁵⁰ For example, Eleanor Holmes Norton proposes a functionalist model of negotiation ethics that rests on four basic assumptions about the role and purpose of bargaining.¹⁵¹ Her final assumption conceives of negotiation as “an adversarial market process” involving “willing opponents.”¹⁵² It is highly questionable whether a low-income client who is unable to work or pay basic expenses due to an injury is a “willing opponent” to a settlement discussion, at least in the same way we might think of a business looking to negotiate a contract, or even a personal injury litigant who has the resources to hold out for trial, if necessary.¹⁵³

145. *Id.* at 46.

146. *Id.* at 49.

147. *See id.* at 35–36 (arguing that the “size of the pie” will vary depending on how badly and how quickly the clients need the money).

148. *See, e.g.,* Rubin, *supra* note 8, at 591 (noting that vast differences in the bargaining power of parties can lead to unconscionable settlements).

149. *See, e.g.,* Norton, *supra* note 9, at 270 (asserting that negotiation “raises controversial questions about whether power or status, in the absence of formal adjudication, may impinge upon outcomes”).

150. *Id.* at 271.

151. *See id.* at 286 (summarizing the assumptions of the functionalist model as follows: “(1) bargaining is indispensable to the functioning of society; (2) the fundamental purpose of bargaining is to achieve a valid agreement; (3) practices that threaten the validity of an agreement violate the fundamental purpose of the process; and (4) bargaining is an adversarial market process in which willing opponents use partisan strategic dealings to arrive at accurate information and to obtain fair treatment”).

152. *Id.*

153. Indeed, a low-income client’s position at the bargaining table is exacerbated by another ethical rule, Model Rule 1.8(e), which prohibits lawyers from providing financial assistance to clients beyond the actual costs of litigation. *See generally* Schrag, *supra* note 5, at

For these reasons, misleading an adversary about your settlement authority may be critical to helping ensure a fair result for a low-income client. Indeed, a list of negotiating tactics that is specifically aimed at legal services and public interest lawyers recommends claiming that the lawyer does not have authority to settle below a certain point.¹⁵⁴ And, in case this claim is not enough to persuade your opponent, lawyers serving low-income clients are also encouraged to persuade their adversary that they will not be able to obtain such authority.¹⁵⁵ Finally, to avoid undermining this steadfast message, lawyers for low-income clients are advised not to bring their client to negotiations.¹⁵⁶ In other words, particularly when a low-income client needs a quick settlement and has privately expressed willingness to accept a lowball offer, lawyers are encouraged to do all they can to hide these facts in order to best serve their clients' interests.¹⁵⁷

Even scholars who advocate most strenuously for increasing rather than relaxing professional obligations in negotiation understand that there are situations in which the relative status of the parties in negotiation is likely to lead to unfair results.¹⁵⁸ For example, in his seminal article, *A Causerie of Lawyers' Ethics in Negotiation*, Judge Alvin Rubin explains that "vast differences in the bargaining power of the principals" can lead to unconscionable settlements, particularly where one party is not in a position to withstand the expense or delay of trial.¹⁵⁹ In these situations, a rule that prohibits a lawyer from making false or misleading statements about a client's settlement authorization will increase the risk of an unconscionable result.¹⁶⁰

41–49 (discussing the issues that indigent clients face following from lawyers' inability to provide financial assistance to clients they are representing in litigation under Model Rule 1.8).

154. See Meltsner & Schrag, *supra* note 10, at 210 (advising that a lawyer should claim he does not have, and cannot obtain, the authority to compromise beyond a certain point because it can make a topic non-negotiable and force the other side to make concessions).

155. *Id.*

156. *Id.*

157. See generally *id.* (describing negotiating techniques that best serve the client).

158. Rubin, *supra* note 8, at 591.

159. *Id.*

160. Judge Rubin's analysis raises the difficult question of how to determine when a negotiation has produced an "unconscionable" result. Some have argued that we can look to an objective standard, as set forth in the body of law governing unconscionability in contract. See, e.g., Murray Schwartz, *The Professionalism and Accountability of Lawyers*, in WHAT'S FAIR, *supra* note 1, at 334 (asserting that whether or not a transaction is "unconscionable" is an objective determination of whether the means and ends would be regarded as unconscionable under existing law). Although the doctrine of unconscionability often requires extreme disparities in bargaining power beyond the fact that a plaintiff needs a quick settlement, the Consumer Financial Protection Board's recent proposal to ban arbitration clauses in consumer financial contracts could be a major step in expanding black letter law about fairness. See

Elsewhere, Michael Rubin highlights the stark conflict between lawyers' duty of candor to the tribunal and the apparent lack of any duty of candor in negotiations.¹⁶¹ He argues, convincingly, that there is no ethical justification for this disparity.¹⁶² Indeed, the main arguments supporting a relaxed duty of candor in negotiations stem from a belief that achieving the best outcome for one's client is the critical value in a negotiation setting.¹⁶³ However, Rubin posits that there is an overarching duty to the profession that should counsel in favor of greater ethical duties in the negotiation setting.¹⁶⁴ Building on Judge Rubin's earlier article, he argues that "if the profession is ultimately to be grounded in ethics and morality . . . we should strive to create rules that mandate moral and ethical results."¹⁶⁵

Judge Rubin's words are compelling, yet they simultaneously highlight the fact that the professional rules sometimes lead to uneven results. Going back to the scenario of the low-income client who is willing to accept a lowball offer because she needs money now and does not have time to negotiate for a higher offer, the rules are what put her attorney in a moral bind in the first place. It is Rule 1.8(e), rather than any perceived moral and ethical directive, that prevents the lawyer from being able to pay a client's living costs during litigation.¹⁶⁶ And now, with professional duty having placed the attorney in a situation in which he has authorization to settle for an amount that is not fairly representative of the value of his client's claim, should Rule 4.1 again require him to choose professional interests over client interest and disclose the low authorization if asked? It is, in essence, a double whammy for the lawyer representing the low-income client. At least at the margins, a lawyer's careful adherence to ethical rules could lead to unconscionable results, in contrast to the moral and ethical results envisioned by Judge Rubin.

The already uneven playing field looks even worse in light of the fact that some attorneys can ethically dodge the issue if they postpone obtaining

generally Press Release, Consumer Fin. Prot. Bureau, CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers Their Day in Court (May 5, 2016) (proposing a regulation, designed to protect consumers' rights to their day in court, that would prohibit mandatory arbitration clauses in new contracts that prevent class action lawsuits unless they say explicitly that they cannot be used to stop consumers from being part of a class action in court).

161. Michael H. Rubin, *The Ethics of Negotiation: Are There Any?*, 56 LA. L. REV. 447, 453–54 (1995).

162. *Id.* at 475–76 (citing Rubin, *supra* note 8, at 591).

163. *Id.* at 469.

164. *Id.* at 470.

165. *Id.*

166. MODEL RULES OF PROF'L CONDUCT r. 1.8(e) (AM. BAR ASS'N 1983).

settlement authority from the client until very late in the negotiation.¹⁶⁷ But such game-playing can easily lead to delay,¹⁶⁸ and delay is seldom a good option when a low-income client needs a settlement check in order to pay the bills or put food on the table.¹⁶⁹ Moreover, delay becomes an even worse problem when a client is hard to reach,¹⁷⁰ perhaps because he is working a job where he can't take calls, perhaps because she is incarcerated and only available to speak by phone at certain times of the week, perhaps because he has been deported.¹⁷¹ Thus, with fewer options for ethically avoiding the Rule 4.1 problem, the ethical lawyer who represents low-income individuals is at a particular disadvantage.¹⁷²

Finally, the use of contingent fees may exacerbate the risks already faced by low-income litigants. Lawyers who accept cases on contingency may be able to maximize their profits by settling quickly.¹⁷³ To the extent that a lawyer's inclination to settle quickly overlaps with the client's desire to accept a lowball settlement offer, the lawyer will be more likely to have entered negotiations with settlement authority and will have less incentive to prolong negotiations by bluffing about that authority.¹⁷⁴

Given the uneven playing field when parties have unequal bargaining power, does it make sense to hold both parties to the same ethical rules? Not

167. See, e.g., White, *supra* note 15, at 96–97 (proposing that a “clever lawyer” can simply defer obtaining authorization to settle until late in a negotiation).

168. See *id.* (suggesting that clever lawyers will advise clients not to grant them authority until the final stages in negotiation).

169. See Owen M. Fiss, *The Case Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (asserting that the low-income party in negotiations has an incentive to settle as a means of accelerating payment, even if he realizes he will get less money in the moment than if he awaited judgment).

170. See Carol Ruth Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URB. L. 217, 220 (1968) (asserting that lawyers' communication difficulties with low-income clients during the pursuit of “chronically delayed justice” creates a major problem during representation).

171. See, e.g., *id.* at 221 (“[T]he mere mechanics of being poor further complicate the lawyer-client relationship when appointments are missed because baby-sitting arrangements or a borrowed car break down or because a functional illiterate could not remember on which day of the week his appointment was set.”).

172. See White, *supra* note 15, at 91–92 (asserting that the rules are more difficult for an honest lawyer to follow because by following the rules he puts his client at a significant disadvantage compared to others who do not follow the rules).

173. See generally Philip J. Havers, *Take the Money and Run: Inherent Ethical Problems of the Contingency Fee and Loser Pays Systems*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 621, 623 (2000) (asserting that because the contingency fee system makes litigation risky and expensive, those with less money assume the greater risk in any suit).

174. See *id.* at 630–31 (illustrating that on a contingency fee, an attorney could work less hours and make a settlement to make a portion of that money rather than “negotiate harder” work longer hours, and therefore make less return on his money).

necessarily. For one thing, research suggests that negotiators bargaining from a position of strength engage in less self-monitoring in negotiation situations.¹⁷⁵ In contrast, those with less bargaining power more carefully scrutinize the details of an interaction.¹⁷⁶ Thus, to the extent that strict ethical rules have a chilling effect on a negotiator's conduct,¹⁷⁷ the effect may be greater on those who are already negotiating from a position of weakness.

Furthermore, holding both sides to strict truthfulness rules regarding settlement authority may not be the correct approach from a moral perspective either. Some ethicists have pinpointed the moral wrong that comes from dishonest negotiation tactics: specifically, these tactics lead to a result that would not have otherwise occurred.¹⁷⁸ As Sissela Bok has explained, the moral problem is that "deceit coerces someone to do something against their will."¹⁷⁹ This is a helpful general guideline for avoiding immoral forms of deception, but what about negotiations involving unequal bargaining power? If one party is looking to take advantage of the inequality by making a lowball offer, then arguably any effort to mask that inequality and treat the negotiation as a level playing field is a coercive deceit. But is that deceit immoral, or does it simply prevent one of the parties from achieving an arguably immoral outcome? This appears to be a situation in which a false statement about settlement authority is a coercive practice that prevents an unconscionable result, which in turn creates a dilemma for those who believe that these outcomes are both at odds with fundamental fairness.¹⁸⁰

IV. PROPOSALS FOR A FAIRER VERSION OF RULE 4.1

Having explained why the conventional wisdom regarding Rule 4.1 leads to suboptimal outcomes, this section proposes new approaches to Rule 4.1 that do not create the same risks for low-income litigants. Part A presents a hypothetical to reexamine the boundaries of the truthfulness requirement in Rule 4.1. Part B draws on ethics theory to help defend the notion of treating

175. THOMPSON, *supra* note 40, at 142. In one experiment cited by Thompson, groups of people were recorded during a social function that involved food. Those attendees deemed high power tended to eat messier foods and show less concern for their appearance. *Id.*

176. *Id.*

177. See *supra* Section II.B.

178. See, e.g., Sissela Bok, *Truthfulness, Deceit, and Trust*, in WHAT'S FAIR, *supra* note 1, at 80 (stating that lies distort information and the available choices).

179. *Id.* at 79.

180. See, e.g., Norton, *supra* note 9, at 275 ("[B]argaining is unfair when coercive practices are used or when an unconscionable outcome results.").

certain categories of information differently. Part C addresses likely critiques of this approach and explains why these critiques may be less valid in the context of low-income litigants. Finally, Part D suggests ways to improve truthfulness by reframing it as an aspirational goal rather than an indeterminate rule that is policed with sanctions.

A. *Reexamining the Boundaries of Rule 4.1*

The strictest view of Rule 4.1 starts with the categorical imperative that one must be truthful at all times.¹⁸¹ But a universal rule of truthfulness is flawed if it sometimes leads to unethical results.¹⁸² For example, if a murderer asked you to disclose the location of his intended victim, it would be unethical to tell the truth and ethical to lie.¹⁸³

Obviously, the ethical dilemmas confronting lawyers are typically far more nuanced,¹⁸⁴ so how can we determine whether deceit is ever justified? The following hypothetical aims to at least start the conversation in the context of low-income litigants.

Imagine a large manufacturer is faced with a sudden and massive exposure to product liability suits. The manufacturer would like to settle these suits rather than litigate, so it invites injured persons to submit their medical records and await a settlement offer. Injured persons may submit claims directly, or they may submit their claims through a lawyer. The manufacturer will then categorize the degree of injury and calculate a settlement offer. The calculation starts with the same base amount for each category of injury, but then adjusts it based on the zip code associated with the claim: offers are adjusted upward for claimants in zip codes with above-median incomes, on the theory that these claimants will be more likely to accept a settlement, while there is a downward adjustment for claimants from zip codes with lower-median incomes, on the theory that these claimants are more likely to accept a lowball offer.¹⁸⁵

181. See, e.g., Alvin Rubin, *supra* note 8, at 585 (despairing about the state of ethics in negotiation and the frequency with which lawyers are encouraged to deceive). But see Michael Rubin, *supra* note 161, at 453 (arguing that Model Rule 4.1 does not require truthfulness).

182. Alan Strudler, *On the Ethics of Deception in Negotiation*, in *WHAT'S FAIR*, *supra* note 1, at 139–40.

183. *Id.*

184. See generally *id.* (providing that the ethical dilemma in negotiation may be less serious than in the murderer analogy).

185. This example is not especially far-fetched, as corporations facing large product liability costs consider the likelihood that an injured person will have access to a legal remedy in assessing settlement values. For example, in order to settle breast implant injury claims, Dow Corning used the Chapter 11 bankruptcy process to pay various classes of injured people

Setting aside whether the settlement differential is ethical, would it be ethical for a low-income claimant's lawyer to attempt to game this system? Four variations of this hypothetical help shed light on the precise ethical question.

The first variation assumes that it is common practice for lawyers to use their own address and contact information when submitting claims on their clients' behalf, and that the manufacturer's submission form doesn't expressly forbid this practice. The lawyer simply follows his normal practice and puts his own address without any significant thought. There does not seem to be any deception in this variation.

The second variation assumes the same facts as the first: namely, that it is not necessarily deceptive to list the lawyer's own address. But what if the lawyer makes a considered decision about whether to use his own address or the client's address, and decides to use his own address in order to give the client the extra benefit of a higher median income zip code? Here, there is an intent to mislead the manufacturer. Therefore, the lawyer has started down the slippery slope toward deceit.

The third variation takes the hypothetical a step further, with a lawyer who is submitting claims on behalf of several different clients. What if the lawyer uses the clients' home address only in cases in which the client lives in an above-median zip code, and his own address for the remaining clients? Here, the deceit is clear: the lawyer is selectively misleading the manufacturer in order to gain a tactical advantage for his clients.

Using Bok's conception,¹⁸⁶ the lawyer in the second and third variations has coerced the manufacturer into doing something against its will—i.e., offering a higher settlement, and increasing the total payout. But arguably, the deception leads to a fairer result because it prevents the manufacturer from being able to exploit potentially unfair and incorrect assumptions about various claimants' settlement choices. As a result of the lawyer's deception, the manufacturer is also unable to exploit its superior bargaining power to the particular detriment of low-income litigants. In this situation, interpreting Rule 4.1 to allow the dishonesty is arguably necessary to achieving an ethically sound result.¹⁸⁷

different amounts based on the wealth of their countries and their likely access to civil remedies. See *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir.), *cert. denied*, 537 U.S. 816 (2002).

186. See Bok, *supra* note 178, at 79 (stating that deceit and violence can coerce a lawyer into doing something against his or her will).

187. See also White, *supra* note 15, at 92 (noting that there may be special considerations justifying a lie); *id.* at 97 (noting that it may be acceptable to lie if the question itself is improper); *cf.* Bok, *supra* note 178, at 160 (suggesting that people can engage in deception in

Finally, a fourth variation: the facts are the same as the third variation, with the lawyer representing multiple clients and selectively using his own address when it boosts the recovery for low-income clients. But what if the lawyer knows that his particular low-income clients would rather litigate than accept a lowball settlement offer? Although the deceitful conduct in the fourth variation is identical to the deceitful conduct in the third variation, the outcome is quite different: arguably, the lawyer's deceit creates a win-win outcome. Given the settlement intentions of these particular clients, the manufacturer's crudely designed system would actually undermine its effort to minimize both the total payout and the litigation costs. But due to the lawyer's intentional deception, the low-income client receives a fair payment for his injury and the manufacturer achieves its ultimate goal of avoiding litigation. Perhaps the lawyer has done the manufacturer a favor by engaging in deceptive conduct.

This hypothetical shows that the exact same conduct can result in a variety of ethical outcomes depending on the lawyer's intent. In contrast, a view that Rule 4.1 imposes universal duties of truthfulness would fail to capture any of this nuance. As a result, Rule 4.1 may lead to suboptimal outcomes not only for low-income litigants but for both parties.

B. Incorporating an Outcome-based Standard into Rule 4.1

As the murderer example in Part A shows, a universal application of the truthfulness rule will sometimes lead to consequences that are morally wrong. Drawing the line between a moral and immoral outcome is undoubtedly difficult. However, to the extent the legal profession conceptualizes truthfulness as a universal good,¹⁸⁸ there needs to be some consideration of outcomes in order to avoid morally wrong results.

To be sure, drawing that line is not easy. However, the fact that it is not easy does not excuse the profession from at least attempting it. In fact, an outcome-based standard for truthfulness in negotiations has been proposed

negotiation if it is for "morally benign reasons"); Geoffrey C. Hazard, *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, in WHAT'S FAIR, *supra* note 1, at 170–73 (arguing against a rule of disclosure that would require lawyers to disclose facts to opposing parties of which they were obviously ignorant and which might "affect the integrity of the transaction" because lawyers' trustworthiness cannot be regulated).

188. See Bok, *supra* note 178, at 87 ("[T]rust in some degree of veracity functions as a foundation of relations among human beings; when this trust shatters or wears away, institutions collapse.").

in the past.¹⁸⁹ Specifically, in the drafting of the Model Rules, an early formulation of Rule 4.1 was coupled with a rule requiring lawyers to be “fair” in negotiations.¹⁹⁰ The language in the current version of Rule 4.1 was initially contained in a broader proposed rule entitled “Fairness to Other Participants,” proposed as Rule 4.2.¹⁹¹ Similar to today’s Rule 4.1, the proposed Rule 4.2(b) contained a prohibition against knowing misrepresentation of fact, as well as a disclosure requirement in which disclosure is necessary to correct “a manifest misapprehension of fact or law resulting from a previous representation,”¹⁹² by the lawyer or the client.¹⁹³ But proposed Rule 4.2(a) contained a specific directive for negotiators: “In conducting negotiations a lawyer shall be fair in dealing with other participants.”¹⁹⁴

This language regarding “fairness” in negotiations provoked a firestorm of criticism.¹⁹⁵ Geoffrey Hazard explains that the vehement aversion to the proposed rule was likely a result of several factors, including the lack of clear norms regarding fairness in negotiations, as well as the differences in technique among different types of lawyers.¹⁹⁶ There was much concern that due to wide variations in negotiating styles relating to region and the nature of the dispute, it would be impossible to define or enforce any rule requiring “fairness.”¹⁹⁷ Without clear definitions, Rule 4.1 risked becoming “a vehicle for lawyers with one set of values to characterize other, honest lawyers with different values as ‘unfair’ and in violation of the rule.”¹⁹⁸ The language requiring fairness in negotiations was ultimately removed,¹⁹⁹ and the

189. See ABA Comm. on Evaluation of Prof'l Standards, Discussion Draft (1980) (proposing that a statement be “false, fraudulent, or misleading if it is likely to create an unjustified expectation”).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. See Hazard, *supra* note 187, at 170 (noting many fundamental objections were made toward the proposal that lawyers be “fair”).

196. *Id.* at 171–72. See also GIFFORD, *supra* note 29, at 114 (explaining that geographical reasons and the norms of a practice area will influence each lawyer’s degree of truthfulness); Steele, *supra* note 27, at 1400–01 (explaining that fairness is too “nebulous” a concept for sanctions-based rules).

197. Hazard, *supra* note 187, at 171.

198. Steele, *supra* note 27, at 1400–01.

199. See *id.* at 1402 (explaining that the drafters of Rule 4.1 voted for a different version of the rule that ignored fairness).

proposed truthfulness obligations in Rule 4.2(b) became a standalone rule in the final version of the Model Rules.²⁰⁰

But imagine if this controversial language had not been deleted. We would be left with a specific rule requiring fairness in negotiations, followed by a more general rule regarding truthfulness in all dealings with others. The proposed fairness obligation in Rule 4.2(a) would undoubtedly have colored our understanding of how to comply with the truthfulness obligation in Rule 4.2(b) during negotiations. This is a stark contrast to the current version of the rules, in which the truthfulness obligation in Rule 4.1 stands as a categorical imperative. Only upon further reading of Comment 2 does one see that this categorical imperative is not intended to impede “generally accepted conventions in negotiation,”²⁰¹ such as bluffing about valuations. And there is no longer any mention of fairness. As Section II.C explains, there are good reasons to revisit this language in order to prevent harmful outcomes for low-income litigants.

In addition, Comment 2 to Rule 4.1 could be revised to make clear that false responses to direct questions about settlement authority are permissible. For many practitioners, this will not be viewed as a rule change at all; instead, it will merely support their present understanding of the rule.²⁰² More importantly, with all parties on the same page about permissible tactics, truthful statements about settlement authority will no longer be a virtue exercised by the most ethical lawyers to the detriment of their clients—and low-income clients in particular.

C. A Theoretical Framework

The proposal in Part B finds some support in the existing literature. For example, Alan Strudler has endorsed a limited exception to the general rule that negotiators should not deceive that applies specifically to settlement positions.²⁰³ Strudler argues that deceptions are immoral when they undermine trust, cause economic harm, or violate the Kantian prescription

200. *See id.* at 1402 (citing MODEL RULES OF PROF’L CONDUCT r. 4.1 (AM. BAR ASS’N 2016)) (noting the adopted Rule 4.1 focused merely on a lawyer not knowingly making false statements of material fact or failing to disclose a material fact).

201. MODEL RULES OF PROF’L CONDUCT r. 4.1. cmt. 2.

202. *See supra* Section II.C; *see also* Hogan, *supra* note 20, at 733–34 (explaining that three studies of professionals and law students between 1988 and 2012 all showed great conflict over the question of whether it was ethical to lie about a client’s authorization to settle).

203. Strudler, *supra* note 182, at 138. Strudler’s discussion uses the term “reservation price,” which is the negotiator’s bottom line, or the amount at which the negotiator would rather walk away from the deal. *Id.*

against using people as means to an end.²⁰⁴ But he believes that lying about one's settlement position does none of these things, and in fact helps facilitate a mutually beneficial solution.²⁰⁵

Strudler concludes that lying about one's settlement position is fair, as long as both parties understand that it is a common negotiation convention to lie.²⁰⁶ If the parties have equal assumptions about the possibility of deception inherent in a party's stated reservation price, they will continue bargaining in an attempt to ascertain the other side's true settlement preferences.²⁰⁷ Strudler notes that his perspective is consistent with others who have described the art of bargaining as "the art of sending misleading messages" about settlement positions.²⁰⁸

In a direct criticism of Strudler's position, Peter Cramton and J. Gregory Dees challenge his assertion that lies about settlement preferences are not immoral.²⁰⁹ In particular, they argue that Strudler overestimates the likelihood of a mutually beneficial solution.²¹⁰ Indeed, when one party has been deceived about operative facts, what may appear to be a "good" result is in fact not objectively good.²¹¹ Likewise, Cramton and Dees argue that the proposal underestimates the cost of deception, particularly if parties who are truthfully asserting a reservation price must then send a more costly signal to convince the other side that they are sincere.²¹² For example, a union may have to engage in a costly strike if the employer does not trust that its demand for a particular wage is in fact the union's bottom line.²¹³ In both instances, the sense of trust in negotiations is undermined.²¹⁴

Importantly, neither of the concerns raised by Cramton and Dees apply in a situation involving a low-income plaintiff. As discussed above in Section II.B, the client's need for fast cash to pay living expenses makes it more likely that the client is willing to accept an offer that is below what both parties would otherwise consider a fair settlement price. Moreover, because a low-income plaintiff does in fact need to accept a quick

204. *Id.* at 146.

205. *Id.* at 146–49.

206. *Id.* at 152–53. *See also* LAX & SEBENIUS, *supra* note 74, at 148 (quoting the British statesman Henry Taylor: "[F]alsehood ceases to be falsehood when it is understood on all sides that the truth is not expected to be spoken.").

207. Strudler, *supra* note 182, at 152–53.

208. *Id.* at 139 n.3 (citing ROBERT H. FRANK, PASSIONS WITHIN REASON 165 (1988)).

209. Cramton & Dees, *supra* note 44, at 158–61.

210. *Id.* at 159.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 159–60.

settlement, the risk that other plaintiffs will have to engage in costly signaling is diminished. Indeed, just ceasing negotiations for a month or two may be all the signal that a defendant needs to realize that a plaintiff is willing to stand firm in her refusal to accept a lowball offer.

Strudler's position finds some unlikely support from the field of business law, where securities professor Donald Langevort has written extensively about what types of fraud should be deterred by legal institutions.²¹⁵ Langevort's theory starts with the premise that the question of what constitutes fraud is by definition contextual and fact-specific.²¹⁶ He contends that instead of attempting to reach an *ex ante* definition of when a statement crosses the line into actionable fraud, the law should be more concerned with the purpose of preventing the wrongs that fraud produces.²¹⁷ In his view, the reason why we have a law of fraud in the first place is to promote efficiency: it is sometimes more efficient for a party to rely on an adversary's statement than to conduct one's own investigation.²¹⁸ According to Langevort, the more important the information and the more costly it is for the reliant party to obtain the information on its own, the more important it is to compel accurate disclosure.²¹⁹

There are three aspects of Langevort's view that conflict with lawyers' professional ethics. The first conflict arises from the corollary that if it is relatively low cost for a party to obtain the information necessary to evaluate the adversary's statement, then it follows that the party should be expected to do so. In other words, the law of fraud should not punish the easily verifiable statement because it would be foolish to rely on your adversary's representation if you can simply obtain the information on your own. However, neither the ABA nor the legal profession in general would likely look favorably on a rule that says you can lie if a competent adversary could easily detect your lie.²²⁰ Casual deceit is not a good look for the profession.

The second conflict comes from the fact that certain statements that may have a high verification cost are permitted by Rule 4.1. For example, Comment 2 explicitly authorizes a lawyer to engage in puffery about things

215. Donald Langevort, *Half Truths: Protecting Mistaken Inferences by Investors and Others*, in WHAT'S FAIR, *supra* note 1, at 398–99.

216. *See id.* at 399 (explaining that fraud is about human discourse and human discourse is essentially contextual and fact-specific).

217. *See id.* at 401 (explaining that while some guidelines may be useful to determine fraud, discourse is contextual in nature and language is inherently imprecise).

218. *Id.* at 401–02.

219. *Id.*

220. *See* GIFFORD, *supra* note 29, at 100 (noting that negotiation can and should be used as a cheaper alternative to discovery, particularly in low dollar disputes).

like valuation, even though verification may require costly investments.²²¹ For example, in order to verify an intentionally inflated valuation of property, it may be necessary to hire an assessor, which could cost several hundred dollars. In personal injury cases, it is even more costly to verify an opponent's claims about injuries or future medical costs. Typically, a record review by a medical expert costs a few thousand dollars.²²² The costs are even higher if litigation is likely.²²³ Moreover, having invested the resources into coming up with a competing valuation, litigation may in fact become more likely. Thus, arguably, the current version of Rule 4.1 does little to protect against inefficient fraud.

But the third conflict dovetails nicely with Strudler's theory: what happens when information is in the exclusive control of the party disclosing it? For this category of information, the law of fraud has no efficiency component;²²⁴ requiring honesty is not going to increase or decrease the costs to the parties.²²⁵ Therefore, arguably, a party to a negotiation should never trust unverifiable information from its opponent.²²⁶ And because there is a natural element of distrust in this type of assertion, there is no need to use Rule 4.1 to cover this conduct.²²⁷

The ABA has already endorsed this approach in the context of caucused mediation, where the mediator meets individually with each party to obtain private information that can be used cautiously to bridge gaps.²²⁸ In a formal opinion, the ABA explained that "puffing" refers to a statement that a party would not justifiably rely upon in a negotiation setting.²²⁹ Because Comment 2 carves out puffery from the duties imposed by Rule 4.1, a fair corollary would be to clarify that Rule 4.1 only applies to statements upon which your

221. See MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2 (noting that certain types of statements, like estimates of price or value, ordinarily are not taken as statements of material fact).

222. See generally Stephen D. Easton, *Damages: Expert Witnesses*, 1 J. DISP. RESOL. 37, 48 (2004) (stating that expert witnesses often charge a substantially higher rate than the attorneys in the case).

223. See generally *id.* (stating that it is common for expert witness fees to be the largest component of litigation expenses).

224. Langevort, *supra* note 215, at 403.

225. *Id.*

226. *Id.*

227. See LAX & SEBENIUS, *supra* note 74, at 148–49 (arguing that an appropriate ethical system should work no matter which side of the encounter the lawyer is on).

228. See ABA Comm'n. on Ethics & Prof'l Responsibility, Formal Op. 06-439 (2006) (explaining that mediation is a consensual process with a neutral third party and in caucused mediation the mediator meets privately with each party individually to assist in resolving disputes).

229. *Id.* at 2.

adversary or negotiating partner is justified in relying. A clear statement that Rule 4.1 does not apply to settlement authority would help ensure that negotiators should not rely on a party's representations, thereby creating a level playing field for this aspect of negotiations.

D. Critiques of an Outcome-Based Model Don't Apply to Situations Involving Low-Income Litigants

One of the main critiques of relaxing truthfulness obligations in negotiations is that a rule change will encourage unethical behavior.²³⁰ Indeed, with so many scholars advocating for stricter rules, a proposal to relax the rules may seem unreasonable on its face.²³¹ But this Article argues that relaxing the disclosure obligations in negotiation situations will not increase unethical behavior.²³²

At the outset, the existing Rule 4.1 is not a model of clarity. What appears to be a clear prohibition in the text of the rule itself is then scaled back by comments that obscure the clear line drawn by the text.²³³ Although this approach is likely intentional, it is not at all satisfying to those who argue for clear and enforceable rules.²³⁴ Moreover, even for those who favor uncertainty, the indeterminacy of the rule does not seem to have a broad salutary effect, at least in negotiations.²³⁵ Thus, the current formulation of the rule is not satisfying to anyone. There are three arguments for why replacing it with a purely aspirational rule is likely to improve outcomes.

First, it is not entirely clear that a sanctions-based regime is an effective way to police unethical conduct in negotiation in the first place.²³⁶ If a

230. See Art Hinshaw & Jess Alberts, *Doing the Right Thing: An Empirical Study of Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 108–09 (2011) (noting that the current truthfulness standards adopted in Rule 4.1 promote a significant amount of deception in negotiation).

231. *Id.*

232. Interestingly, business ethicists don't appear to place a high value on lawyers' duties of truthfulness. Compare Cramton & Dees, *supra* note 44, at 115–26 (explaining the importance of verification and reputation for truthfulness in business negotiations), with *id.* at 131 (explaining that lawyers are known for “their strong norms to faithfully represent their clients' interests”).

233. See Russell, *supra* note 4, at 150–51 (outlining the comments to Rule 4.1 and how the comments interact with Rule 4.1).

234. *Id.* at 150 (“For those who prefer a clear-cut rule, the impact of the comments may seem an annoyance, muddying the water of a crystalline rule and burdening lawyers with uncertainty.”).

235. See discussion *supra* Section II.B.

236. See generally Russell, *supra* note 4, at 137, 149 (noting the widespread critique of both statutory and common law based sources of ethics); see also Cramton & Dees, *supra* note

lawyer makes a false representation about a client's authorization to settle, this results in a violation of Rule 4.1.²³⁷ But how likely is it that this sort of rule violation will ever come to light, much less result in disciplinary proceedings?²³⁸ In the vast majority of situations, it is only the aspirational desire to be an ethical lawyer that will influence a lawyer's behavior, and not the possibility of rule-based sanctions.²³⁹ When circumstances make a deception hard to detect, the likelihood of deception is heightened.²⁴⁰ In addition, the low level of detection will result in limited enforcement, which in turn will lead to arbitrary results that undermine buy-in.²⁴¹ The tension is heightened by the knowledge that an unethical lawyer can easily skirt this rule, leaving only the ethical lawyer to suffer the consequences in terms of feeling conflicted and stymied.²⁴²

For example, consider a scenario in which two parties have been negotiating over a personal injury settlement. The defense lawyer is authorized to settle for up to \$750,000 and has made an offer of \$650,000. Instead of negotiating for a higher amount, the plaintiff's lawyer simply asks whether the defense attorney is authorized to settle for \$750,000. Many ethicists who have written about truthfulness in negotiations would agree that the defense lawyer cannot simply say "No."²⁴³ But in reality, the

44, at 130 (noting that the law is "unfortunately . . . rather a blunt instrument for the enforcement of norms").

237. ABA Comm'n. on Ethics & Prof'l Responsibility, Formal Op. 93-370 (1993). *But see* Hogan, *supra* note 20, at 733-34 (noting that studies show great professional conflict over the question of whether it is ethical to lie about a client's authorization to settle).

238. *See* Hogan, *supra* note 20, at 733 (noting "the tension between 4.1(a) and the lack of realistic consequences"); *see also* White, *supra* note 15, at 91 (explaining that negotiations are generally non-public behavior where there is rarely an opportunity to detect false statements). Perhaps due to the fact that communications with clients are generally kept confidential, most cases that have culminated in discipline or other negative consequences for Rule 4.1 violations in negotiations involve untrue statements about matters that can be disputed by evidence from third parties, such as the extent of a party's insurance coverage or the death of a client. *See, e.g.*, Hogan, *supra* note 20, at 729-30 (collecting cases).

239. *See* White, *supra* note 15, at 91-92 (explaining that because negotiation is nonpublic behavior, ethical norms can probably be violated with greater confidence that the lawyer will not be discovered and sanctioned).

240. *See* Cramton & Dees, *supra* note 44, at 124-26 (noting that the accuracy of a statement about reservation value is hard to verify, and therefore likely to be a source of deception).

241. *See* Schwartz, *supra* note 160, at 334 (noting that imposing discipline in the few cases where deception surfaces would create an arbitrary system of enforcement).

242. *See* White, *supra* note 15, at 91-92 (arguing that generally unenforceable rules like Rule 4.1 put ethical lawyers at a disadvantage).

243. *See, e.g.*, Hodes, *supra* note 58, at 542 ("[L]ying in response to a direct question regarding settlement authority is unacceptable, and everyone within [Professional Reform Initiative] agrees.").

profession is sharply divided on this question: two studies that combine responses from professors, litigators and judges show that between a quarter and half of respondents think that it is ethical to misrepresent the facts of client authorization.²⁴⁴

So what is a truly ethical lawyer to do in that situation? Revealing the information hurts the client's negotiating position, because it reframes the discussion from a number that the negotiators agree is reasonable to what the defense client agreed was an acceptable worst-case scenario in private discussions with his or her attorney. Moreover, there is no guarantee that the plaintiff's lawyer will share the same ethical compunction to reveal the plaintiff's bottom line on settlement; to the contrary, simply by asking the question, the plaintiff's lawyer is indicating that she is jockeying for an advantage.

Several respondents thought that dodging the question was the most palatable option.²⁴⁵ But this does not necessarily solve the problem; evasion is not especially effective when the fact that a lawyer is clearly evading certain yes/no questions can be as telling as an accurate answer would be.²⁴⁶ But setting aside the fact that evasion may not solve the practical problem for the attorney facing this sort of question, evasion will likely chill discussions, thereby undermining the possibility of rapport that could otherwise lead to an effective negotiation.²⁴⁷

Second, in light of the respect-based dynamic in negotiation,²⁴⁸ aspirational ethics may be as effective or even more effective than sanctions-based codes of conduct. Indeed, with the exception of Comment 2 to Model Rule 4.1, the rules have few direct prescriptions about what lawyers must or must not do during negotiations.²⁴⁹ And this is likely intentional: one of the drafters of the Model Rules has explained that the Rules should not be called

244. See Hogan, *supra* note 20, at 731–32 (describing studies by Larry Lempert and Peter Reilly).

245. *Id.* at 734 (quoting Larry Lempert, *In Settlement Tales, Does Telling the Truth Have Its Limits?*, 2 *INSIDE LITIG.* 16 (1988)); see also Korobkin, *supra* note 7, at 1807 (explaining that a negotiator can simply refuse to answer particular questions designed to elicit private information that will affect a party's reservation point).

246. See *supra* Section II.D and notes 69–72.

247. See *supra* Section II.B.

248. See Cohen, *supra* note 2, at 743 (“[T]he act of negotiation does not relieve one of the moral duty to respect others.”).

249. See, e.g., Steele, *supra* note 27, at 1388 (“[N]o well-understood, commonly accepted unifying philosophy for negotiating exists.”); see also Hogan, *supra* note 20, at 726 (explaining that, under the Model Rules, “the line between what is legal and what is not can sometimes be hard to find”).

“a code of ethics” but rather “legislation defining [the] role and rules of role in the practice of law.”²⁵⁰

To be sure, many scholars have criticized the Model Rules for not going far enough to prevent unethical negotiations, and perhaps even promoting dishonesty by explicitly authorizing tactics like puffery.²⁵¹ But others have defended the efficacy of the current rules,²⁵² while a few have even suggested that disciplinary rules are not the most effective way to promote good behavior.²⁵³ For example, Jonathan Cohen has made a strong case against using professional rules to regulate the values that underlie effective negotiations, specifically, “the inner respect of the heart and mind” that a lawyer should have for his or her adversary.²⁵⁴ The Rules’ focus on “punishing egregious behavior”²⁵⁵ does little to “promote maximalist goals,”²⁵⁶ and the threat of sanctions is unlikely to produce the degree of respect for one’s adversary that facilitates effective resolutions.²⁵⁷

Courts have expressed similar frustration with the notion that the details of ethical behavior need to be clearly spelled out for lawyers.²⁵⁸ For example, in a case involving a lawyer’s failure to disclose that her client had died during litigation, the Kentucky Supreme Court noted that this should have been “a matter of common ethics and plain common sense.”²⁵⁹ Instead,

250. Geoffrey C. Hazard, Jr., *The Legal and Ethical Position of the Code of Professional Ethics*, 5 SOC. RESP.: JOURNALISM L. MED. 5, 7 (1979).

251. See, e.g., Rubin, *supra* note 8, at 591 (arguing that lawyers should be held to a higher standard of truthfulness in negotiation); see also Rubin, *supra* note 161, at 456 (citing Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 7 REV. LITIG. 173 (1988); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990)) (arguing that because authors have felt the need to “develop and articulate [ethics] criteria for negotiations,” this “indicates that the . . . Model Rules are seriously deficient in this regard”); Steele, *supra* note 27, at 1403 (arguing for a duty of “total candor and total cooperation” in negotiation).

252. See generally Russell, *supra* note 4, at 137, 138 (“[T]he Model Rules emphasize certainty . . . [and] lessen the costs to lawyers of imposition of sanctions in situations of uncertainty.”).

253. See, e.g., Freedman, *supra* note 55, at 782 (quoting MODEL RULES OF PROF’L CONDUCT Scope ¶¶ 14, 15 (AM. BAR ASS’N 2004)) (arguing that the Model Rules should be viewed as “rules of reason” that should be interpreted broadly based on the specific factual context of the lawyer’s role).

254. Cohen, *supra* note 2, at 794.

255. *Id.* at 757.

256. *Id.*

257. *Id.* at 794.

258. See, e.g., Ky. Bar Ass’n v. Geisler, 938 S.W.2d 578, 580 (Ky. 1997) (rejecting the notion that attorneys need guidelines to understand ethical obligations).

259. *Id.*

the Court adopted an ABA ethics opinion outlining this duty,²⁶⁰ explaining with some exasperation that this step was necessary “because attorneys such as respondent cannot discern such matters and require written guidelines so as to figure out their ethical convictions.”²⁶¹

The prospect of less detail also appeals to those commentators who are skeptical of the ABA’s attempt to micromanage various styles of practice.²⁶² For instance, James White has criticized the “gratuitous direction” of the ABA’s commentary on how to conduct ethical negotiations.²⁶³ He argues that most of the ABA’s ethical guidance interferes with substantive choices among legitimate negotiation techniques.²⁶⁴

Relying on aspirational rather than sanction-based professional standards has three benefits.²⁶⁵ First, it avoids creating an external source of the “negotiator’s dilemma,”²⁶⁶ which can chill communication and diminish the prospects of building rapport.²⁶⁷ Second, to the extent that ethics rules can sometimes be a trap for the unwary, they avoid creating a source of obligation that can be exploited by a less ethical adversary.²⁶⁸

Third, replacing narrow rules with broad aspirations shifts the emphasis from the question of “what can I get away with” to “what is the best way to behave in this situation?” To facilitate the latter inquiry, Jonathan Cohen proposes increasing reputation-based economic incentives, together with better education of law students, lawyers, and clients about what makes an

260. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 397 (1995) (discussing an attorney’s duty to disclose the death of a client during settlement negotiations of a pending lawsuit to opposing counsel).

261. *Geisler*, 938 S.W.2d at 580.

262. *See, e.g.*, White, *supra* note 15, at 93 (“[D]iscussion of style and substance of negotiation as opposed to the ethical behavior in negotiation seems gratuitous and inappropriate in the Model Rules and in the Comments to the Model Rules.”).

263. *Id.*

264. *Id.* at 92. For example, White believes that the ABA has unfairly branded curmudgeonly lawyers as less ethical than those who negotiate with a smile on their face, while lawyers who argue over every last detail are deemed less ethical than those who are content to argue over the main aspects of the agreement and then shake hands on a commitment to getting the deal done. *Id.*

265. *See generally* Cohen, *supra* note 2, at 741–42 n.3 (citing sources) (discussing the debate on whether there should be a greater duty of candor in negotiation placed on lawyers rather than the “minimalistic duties that currently exist”).

266. *Id.* at 768.

267. *See supra* Section II.B.

268. *See generally* Jamison Davies, *Formalizing Legal Reputation Markets*, 16 HARV. NEGOT. L. REV. 367, 374 (2011) (arguing that cooperative reputations between negotiating lawyers create and enforce trust, which leads to “agreeable long-term deals in which neither side feels exploited”).

effective negotiator.²⁶⁹ Similarly, Jamison Davies has argued for increased transparency in the market of lawyer reputation.²⁷⁰

The prospect of having access to lawyers' negotiation tactics and patterns could be a very effective check on attorney behavior.²⁷¹ In addition, access to information about who is engaging in honest negotiation could also help avoid the "spillover" problem, when lawyers assume that because everybody else seems to be engaging in dishonest tactics, they need to as well.²⁷² Even advocates for a stronger sanctions-based regime agree that making ethical actions more visible might be a more effective approach to solving the social dilemma that arises when we can't count on our counterparts in negotiations to be ethical.²⁷³

For example, it's hardly a stretch to imagine a defense attorney beginning every negotiation by explaining that the client believes that this is a nuisance suit and it will not settle for more than the cost of litigation. If the lawyer couples this posturing with an assertion that the client's top dollar is \$10,000, this statement arguably violates Rule 4.1 if the client has privately authorized a more reasonable payment. But how would that violation ever come to light? Instead, the better deterrent would be the reputational hit to the attorney if it were clear that she takes the same position at the outset of every case.

Changing the reputational consequences for and among lawyers may not be sufficient to deter unethical conduct, particularly if there are client expectations that a lawyer will achieve the best result using any means necessary. Arguably, this could lead to the defection problem identified by Howard Raiffa.²⁷⁴ Thus, some scholars have proposed reeducation of clients

269. See Cohen, *supra* note 2, at 796–801 (discussing reputation-based economic incentives and education as "possible avenues for promoting better orientation ethics" in addition to ethics codes).

270. Davies, *supra* note 268, at 377, 378.

271. See Hogan, *supra* note 20, at 736 ("Practitioners . . . understand . . . the strong advantages a good reputation can have in negotiation.").

272. See generally LAX & SEBENIUS, *supra* note 74, at 152–53 (describing the long-term externality of dishonest tactics, which is that the spillover effect makes unethical behavior "irresistible").

273. See, e.g., Raiffa et al., *supra* note 118, at 17 (explaining the "n-person social trap" that arises when negotiators weigh the short-term benefit of acting selfishly against the long-term benefit of acting nobly); *id.* ("[I]f the rules of the game were changed to make 'goodness' more visible, then more [negotiators] would opt for the noble action.").

274. See *id.* at 18. But see THOMPSON, *supra* note 40, at 131 (explaining the "halo effect," in which we presume that people with one socially desirable characteristic also possess other attractive traits). Therefore, one may presume that lawyers with good reputations are also intelligent and capable. A strong halo effect could make it less likely that lawyers would risk their reputation by defecting in specific instances where it is advantageous to do so.

as a key step in realizing the benefits of aspirational ethics.²⁷⁵ One option proposed by Roger Fisher is to provide a memorandum to new clients explaining the benefits of negotiating ethically, along with the risks that arise with unethical behavior.²⁷⁶ However, this approach potentially gives the client too much of a say in the lawyer's choice to follow aspirational ethics: not only does this approach indicate that the client has authority to request that the lawyer defect from the noble course of action,²⁷⁷ but it even suggests that the client must approve the lawyer's choice to take an ethical approach.²⁷⁸ Thus, this approach is ultimately an endorsement of situational ethics, which too easily leads to defection problems.

Fisher's approach is a very client-centric reading of the current Model Rules, particularly Model Rule 1.2.²⁷⁹ While a take-it-or-leave-it approach to negotiation ethics would arguably also be appropriate, Fisher's focus on client approval for acting nobly ensures the maximum flexibility in achieving a good outcome for the client,²⁸⁰ thereby emphasizing the lawyer's duties under Model Rules 1.1 and 1.4. However, the question of how to balance the desire to act nobly with the duty to serve the client's interests would be much clearer if the Model Rules contained an aspirational obligation to act nobly.²⁸¹ Including this aspirational duty alongside the other Model Rules would make clear that a client has no authority to "opt out" of a lawyer's decision to act nobly in negotiations.

Another possibility noted by Cramton and Dees is to create industry associations that certify an attorney's credibility and reputation in negotiations.²⁸² In the business context, small contractors rely on large

275. See, e.g., Fisher, *supra* note 86, at 23–26 (asserting that ethical problems may be limited "by conducting a preliminary negotiation between lawyer and client, clarifying the basis on which the lawyer is conducting the negotiation" and proposing a memo to facilitate this discussion).

276. *Id.* at 24–29.

277. See generally Steele, *supra* note 27, at 1390–91 (criticizing the notion that "clients have a right to a lawyer who engages in deception").

278. See Fisher, *supra* note 86, at 25 (encouraging the client to read the Code of Negotiation Ethics "and approve my trying to adhere to it").

279. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2015) (stating that the client determines the objectives of the representation and consults with the lawyer about the means used to accomplish those objectives).

280. Fisher, *supra* note 86, at 24 (stating that a lawyer has a professional duty to act zealously to advance the client's interests).

281. See Steele, *supra* note 27, at 1390 (arguing that the Model Rules should do more to clarify whether a client is entitled to a lawyer who acts deceptively).

282. See, e.g., Cramton & Dees, *supra* note 44, at 132 (explaining that using a brand or certifier for credentialing purposes is an effective way to promote ethical negotiations).

brands to establish trustworthiness.²⁸³ For instance, third party organizations like Consumer Reports and J.D. Powers and Associates provide independent information to help evaluate products and services.²⁸⁴ These sources of reputational information work alongside enforcement tools like state lemon laws or agencies like the Federal Trade Commission to help deter deceptive practices.²⁸⁵

Importing these concepts to the legal profession, a lawyer's trade group could develop a voluntary code of ethical conduct that individual lawyers could choose to sign on to. A lawyer's membership in this group would send a strong signal as to his or her commitment to certain norms of negotiating. In conjunction with client education that promotes these norms as efficient and leading to optimal outcomes, such lawyers could find themselves in higher demand at the bargaining table. Moreover, the organization's rules could make clear that lawyers who sign on to the trade group's code of conduct but then disregard it may be referred for discipline under their state's rules against dishonesty or deception.²⁸⁶ Here, the deception would not derive from the negotiation conduct itself, but rather from the fact that the lawyer held herself out as an adherent to a voluntary code of ethics that she did not fully uphold. In this fashion, state disciplinary authorities could work in conjunction with private trade associations to improve the overall ethics of the profession.

In sum, there are several ways to encourage greater commitment to ethical standards in negotiation that do not depend upon an indeterminate rule coupled with an implausible threat of enforcement. Arguably, a system that depends on transparency and the buy-in of lawyers and clients may be more effective in creating a level playing field than a system that can easily be exploited by an unethical lawyer or a party seeking short-term gain.

V. CONCLUSION

In the negotiation context, Model Rule 4.1 is neither clear in its scope nor effective in producing ethical results. A strict enforcement of the truthfulness obligation in negotiation context risks chilling settlement discussions, hurting all parties. But the burdens from the current articulation

283. *Id.*

284. *Id.* at 131–32.

285. *Id.* at 129–30 (noting that the efficacy of these formal mechanisms are debatable).

286. Most states have some version of Model Rule 8.4(c), which prohibits lawyers from engaging in any conduct that involves dishonesty, deception, or misrepresentation. *See, e.g.*, S.C. APP. CT. R. r. 407 RPC 8.4(d) (stating that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation”).

of Rule 4.1 fall particularly hard on low-income litigants. To the extent that our professional responsibility regime is concerned with the outcomes for disadvantaged clients, this rule should be revisited.

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