

Do Professional Ethics Make Negotiators Unethical?

An Empirical Study with Scenarios of Divorce Settlement

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This is an empirical study to examine effects of the U.S. attorneys' professional ethical rules in negotiation. This study is the first to seriously measure the effects of the professional ethical rules. The first novel feature of this study is in its methodology: the author conducted a survey of law school students, which enabled a comparison of two groups: those who have already learned professional ethics and those who have not yet learned them. The questionnaire presented three hypothetical cases with certain ethical dilemmas in divorce settlement negotiations. It asked the respondents how they would deal with the situations and what the reasons behind their decisions were. The second novel feature is the inclusion of ethical dilemmas concerning a third party's human rights. Specifically, this study used situations to negotiate custody of a child, a non-monetary issue. Key findings: compared to respondents before ethical education, respondents after ethical education defer to the parent's (the client's) interests more; and in return, they are more reluctant to disclose true information or to care about the child's welfare. The results indicate that the professional ethical rules and legal education in the U.S. diminishes attorneys' ethical sense of fairness (in particular, truthfulness) and public interests (in particular, third party's human rights) while enhancing loyalty to their clients.

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I. INTRODUCTION

A. *Overview*

The author conducted a survey of U.S. law school students. Participants were placed in a situation to act as a parent's attorney in divorce settlement negotiations and given three hypothetical scenarios with ethical dilemmas. This study observed the differences in responses between students who had previously learned professional ethics and students who had not yet learned them. This study revealed alterations of negotiators' ethical sense and bargaining behaviors due to learning attorneys' professional ethical rules (e.g., the Model Rules of Professional Conduct).² The purpose of this study is to examine empirically the *educational effects* of the U.S. attorneys' professional ethics and, furthermore, to uncover the *effects of the ethical rules* on negotiators' behaviors.

B. *Background*

Why does this study focus on divorce settlement? Why does it address professional ethics? The background of the study can be described from two perspectives.

The first perspective is the role of attorneys in divorce disputes (child custody disputes) with regard to the security of children's welfare. The primary focus of this study is on divorce settlements involving children. Custody of the child is an important issue for parents. For many parents, children are what matters the most, and thus, child custody and visitation frequently turn out to be the most salient issues upon divorcing. But, more importantly, child custody—which parent is to live with the child after divorce—is a critical issue for children's welfare. If a divorce case goes to trial, the court will determine the custodial parent(s) based on the “best interests of the child” standard. During the judicial procedure, the court may conduct necessary investigations and may appoint a guardian *ad litem* and/or an attorney for the child to evaluate the “best interests of the child.” From that standpoint, the welfare of children will be secured if a divorce case goes to trial.

However, the majority of divorce cases are settled through private settlement without a trial. A typical divorce process goes in the States as follows: Upon divorce, a couple must determine all of the

2. In general, the term professional “ethics” can be used for either ethical sense that attorneys actually have or rules that are norms of behaviors. In this Article to avoid confusion, the former is referred to as “ethical sense,” the latter as “ethical rules,” and both as “ethics.”

divorce conditions such as child custody, visitation, property division, child support and alimony. If they have any trouble in determining the divorce conditions, then it is developed into a dispute. Each of the parents may hire an attorney for negotiations. Attorneys representing each side negotiate to settle the dispute, without bringing a lawsuit. If attorneys can reach an agreement, the dispute is resolved. Attorneys just file the mutual agreement with the court for issuance of the divorce decree, and the court defers to this agreement.³ Only if the attorneys cannot reach an agreement is the dispute developed into litigation before the court. In practice, divorce conditions in the majority of divorce cases are privately determined outside the court, while a few cases are actually litigated before the court.

The author's concern is that children's welfare may be undermined in those majority cases, where no litigation occurs. There is no guarantee that divorce conditions privately agreed to by parents outside of court meet the "best interests of the child" standard. One classic argument concerning parents' negotiation is the existence of trade-offs between child custody and money: for instance, a mother might agree to give a father custodial rights or more frequent visitation rights in order for him to provide her with more generous child support and alimony.⁴ In other words, children's interests (i.e., custody and visitation) may be bartered for parents' interests (i.e., money).

Then, how can we secure children's welfare in divorce settlement? This study casts a spotlight on the role of parents' attorneys, who are the only legal professionals involved with divorce disputes outside the court. Of course, an attorney for a parent generally works

3. To be precise, divorcing couples are always required to obtain a decree from the court in the U.S. The court reserves the legal authority to determine the divorce conditions. However, in practice, the court usually acknowledges the conditions agreed to by the parties. In most of the divorce cases, once parents file a form with the court specifying the divorce conditions agreed upon, the court will issue a decree in accordance with the form submitted. To be specific, one standard is the "unconscionable" standard: the court shall issue a divorce decree unless the court finds the agreement "unconscionable." UNIF. MARRIAGE & DIVORCE ACT §306 (UNIF. LAW COMM'N 1973). Therefore, divorcing couples themselves have de facto discretion to settle the divorce conditions without pursuing litigation (private ordering). See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 952-58 (1979). For information on the detailed practice of divorce cases, see, e.g., DONALD G. TYE ET AL., TRYING DIVORCE CASES IN MASSACHUSETTS (3rd ed. 2013).

4. See, e.g., Mnookin & Kornhauser, *supra* note 3, at 963-66. Having said that, this argument has not been supported empirically. See, e.g., ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992) (finding no statistical evidence).

to maximize the settlement for that parent, the client. However, attorneys are perhaps somehow considerate of children's welfare during the settlement. As a legal professional working for social justice, parents' attorneys might somehow be playing a role of "safety net" to protect children's welfare in a divorce settlement;⁵ or children's welfare might be rather undermined due to the intervention of attorneys serving for the parents. In this regard, the professional ethical rules should have a certain impact on attorneys' behaviors in divorce settlement.

The second perspective is more general, moving beyond the scope of divorce disputes: how the professional ethics of negotiation should be. This perspective is also linked to discussions of the ideal role and function of attorneys in society. The negotiation ethics of attorneys have a great impact on society and social justice. For instance, in divorce disputes as described above, settlement negotiations are situations where decisions are made without involvement from a court; attorneys are the only legal professionals involved. In addition, the situation of divorce settlement is useful for examining negotiation ethics because it contains all of the major ethical principles.⁶

C. *Attorneys' Negotiation Ethics*

1. *Structure of Ethical Dilemma*

In many cases for attorneys, rendering a service for the client and achieving social justice in society are mutually reinforcing goals. A typical example would be where an attorney assists a client suffering from unlawful activities. However, in some cases, a client's interests may conflict with social justice. When an attorney negotiates with a counterparty on behalf of the client, the attorney is required to do his/her best for the client (the "Client Principle"). But, it does not mean the attorney is obliged to do *anything* to achieve the client's interests. The Client Principle does have a certain limitation from social justice.

5. This idea, whether parents' attorneys can function as "safety net," was raised in the author's previous article, Hiroharu Saito, *Bargaining in the Shadow of Children's Voices in Divorce Custody Disputes: Comparative Analysis of Japan and the U.S.*, 17 *CARDOZO J. CONFLICT RESOL.* 937, 978-79 (2016). The previous article theoretically analyzed empowerment of children's participation rights (i.e., respecting children's own wishes) in divorce custody disputes through a law and economics framework, and it referred to the attorneys' truthfulness rule (*infra* Rule 4.1) in negotiations.

6. See discussion *infra* Section I.C.1 for the details of ethical principles and Section II.B.2 for their applications to divorce settlement situations.

First, fairness in any settlement, which relates to the rights and interests of counterparty, would be a conflicting principle (the “Fairness Principle”). The Fairness Principle addresses questions such as: Can attorneys employ “dirty” or “dishonest” tactics in negotiations? If yes, to what extent can attorneys use those tactics?

Second, attorneys are required to respect public interests, in other words, rights and interests of third parties (the “Public Principle”). Can attorneys settle the case in a way to diminish and exploit any third party’s rights or interests to accomplish the client’s goal? Negotiating attorneys are sometimes placed in a situation of ethical dilemmas among these three principles, which this Article refers to as the “Structure of Ethical Dilemma” (Figure 1).

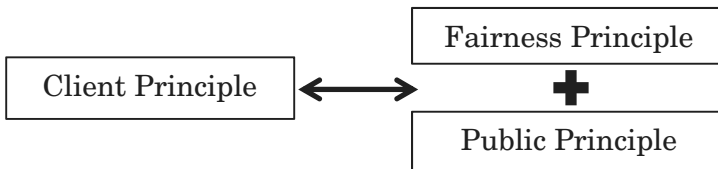


FIGURE 1—STRUCTURE OF ETHICAL DILEMMA

These principles are prescribed in the Model Rules of Professional Conduct (the “Model Rules”) of the American Bar Association (“ABA”), which is almost universally adopted in the U.S.—every state except California has adopted the Model Rules.

Client Principle. The role of attorneys was discussed during the establishment of the Model Rules in 1983, which replaced the former Model Code of Professional Responsibility.⁷ As a result of the discussions, the drafters chose to highlight the Client Principle as a fundamental role of attorneys. The first paragraph of Preamble of the Model Rules clarifies that a lawyer “is a representative of clients.”⁸ Rule 1.2 acknowledges the authority of the client: “a lawyer shall abide by a client’s decisions concerning the objectives of representation.”⁹ Rule 1.3 stipulates zealous representation: “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction

7. See Scott R. Peppet, *Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 499–500 (2005); GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* §1.04, §7.02 (4th ed. 2015). For classic discussions on the issue of loyalty to clients, see generally Jack B. Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452 (1972).

8. MODEL RULES OF PROF’L CONDUCT Preamble and Scope 1 (AM. BAR ASS’N, 1983).

9. *Id.* at r. 1.2.

or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Also, "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."¹⁰ The basic idea is to "assume that justice is being done" if each lawyer zealously represents each client.¹¹

Fairness Principle. However, at the same time, the Model Rules recognize limitations on the Client Principle in several ways. In terms of fairness, the Preamble generally emphasizes the importance of honesty: "[a] negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others."¹² Rule 8.4(c) clarifies that to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" qualifies as professional misconduct for an attorney.¹³ With regard to advocacy in judicial procedures, Rule 3.4 suggests fairness to opposing party and counsel. Although Rule 3.4 does not explicitly cover fairness in private negotiations, the ABA's Ethical Guidelines for Settlement Negotiation (2002) complements and emphasizes fairness in settlement negotiations (§2.3 Duty of Fair Dealing): "[a] lawyer's conduct in negotiating a settlement should be characterized by honor and fair-dealing." More specifically, one of the most practical fairness issues in negotiations is truthfulness. For this, Rule 4.1 of the Model Rules prohibits misrepresentation of a material fact to a counterparty (see I-C-2 below for details of Rule 4.1).

Public Principle. The Model Rules consider public interests and third party's rights as well. Rule 4.4, entitled "Respect for Rights of Third Persons," prohibits usage of "methods of obtaining evidence that violate the legal rights of [a third person]."¹⁴ Its comment emphasizes that "responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons."¹⁵ In addition, although in the context of access to justice, the preamble says "[a] lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal

10. *Id.* at r. 1.3 cmt. 1.

11. *Id.* at Preamble and Scope 8.

12. *Id.* at Preamble and Scope 2.

13. *Id.* at r. 8.4.

14. *Id.* at r. 4.4.

15. *Id.* at r. 4.4 cmt. 1.

assistance” and “[a lawyer] should help the bar regulate itself in the public interest.”¹⁶

2. Truthfulness in the Fairness Principle

a. Interpretation of Rule 4.1

In terms of the Fairness Principle, the ethical issue attorneys most often face in negotiation practice is probably the issue of truthfulness and misrepresentation. Consequently, among the three Principles and provisions mentioned above, Rule 4.1 of the Model Rules has been discussed and studied most extensively.

Rule 4.1 Truthfulness in Statements to Others (emphasis and note added):

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

(a) make a *false statement* of *material fact* or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [note: Rule 1.6 covers confidentiality of information].

Rule 4.1 suggests truthfulness in *material fact*. The fact is *material* if it would or could influence the hearer’s decision-making process significantly.¹⁷ In general, Rule 4.1 does not require affirmative disclosure of information. Rule 4.1(b) forces attorneys to disclose a material fact in exceptional circumstances where the lawyer can avoid assisting a criminal or fraudulent act *only* by disclosing the information. But, attorneys ordinarily have an option to avoid crime or fraud by withdrawing from representation of the client.¹⁸ Thus, Rule 4.1(b) would apply to only rare cases. However, Rule 4.1(a) covers certain types of nondisclosure. Although the language used in Rule 4.1(a) is “false statement,” it prohibits any *misrepresentation* of material fact; it includes misrepresentation by omission (silence) or partial statements as well as by making affirmative false statements.¹⁹ In

16. *Id.* at Preamble and Scope 6.

17. See generally, ELLEN J. BENNETT, ELIZABETH J. COHEN & HELEN W. GUNNARSSON, ANN. MODEL RULES OF PROF’L CONDUCT, R. 4.1 (8th ed. 2015). *E.g.*, *In re Merkel*, 138 P.3d 847 (Or. 2006). The former Model Code of Professional Ethics did not have this materiality requirement—it technically prohibited a false statement of any fact. Some states still have not adapted the materiality requirement today. See Am. Bar Ass’n, *State Rules Comparison Charts* (Sep. 15, 2016), <http://ambar.org/MRPCStateCharts>.

18. MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. 3.

19. *Id.* at r. 4.1 cmt. 1.

practice, misrepresentation by omission would be a more common ethical dilemma than affirmative false statements. While many attorneys would hesitate to make affirmative lies to their counterparties, they would be more open to using silence as a tactic.

In reality, the line between acceptable nondisclosure and unacceptable misrepresentation by omission is not clear. For instance, cases of nondisclosure of facts such as client's death²⁰ and the existence of third insurance policy²¹ have been judged as unacceptable misrepresentation. In contrast, a case of nondisclosure of life expectancy in settling compensation claims was exempt from Rule 4.1(a) because no question was posed regarding life expectancy.²² The judgment varies by situation and there are no simple criteria.

b. *Arguments Over Rule 4.1*

Rule 4.1(a) explicitly prohibits attorneys' misrepresentation of a material fact during negotiations. But, at the same time, the scope of its regulation is limited to such misrepresentation of a material fact. This standard is low: it is basically the same level as that for fraud as proscribed in contract law and criminal law.²³ Consequently, there are pros and cons of Rule 4.1.²⁴

Some have supported Rule 4.1 for practical reasons. For instance, Geoffrey C. Hazard, Jr. emphasized the lack of consensus among attorneys with respect to the concept of fairness in negotiation, and concluded that it was practically impossible to formulate a single standard more restrictive than Rule 4.1.²⁵ Further, Gerald B. Wetlaufer argued the importance of separating legal requirements and "ethics." He insisted that laws and codes, such as the Rules of

20. See Am. Bar Ass'n Comm'n on Ethics & Prof'l Responsibility, Formal Op. 95-397 (1995); *Ky. Bar Ass'n v. Geisler*, 938 S.W.2d 578 (Ky. 1997); *In re Rosen*, 198 P.3d 116 (Colo. 2008); *In re Lyons*, 780 N.W.2d 629 (Minn. 2010).

21. *Nebraska ex rel. Neb State Bar Ass'n v. Addison*, 412 N.W.2d 855, 856 (Neb. 1987).

22. Pa. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Informal Op. 2001-26 (2001).

23. See, e.g., Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 102-03 (1982).

24. See generally, Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 107-10 (2011); Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 46 (1994); CARRIE MENKEL-MEADOW, *Ethics, Morality, and Professional Responsibility in Negotiation*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 134-35 (Phyllis Bernard & Bryant Garth eds., 2002).

25. Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 193, 196 (1981).

Professional Conduct, should be less demanding than “ethics” because codes are meant to deal stably with all related problems.²⁶ Others have supported Rule 4.1 more proactively. For example, James J. White claimed that misleading a counterparty is “the essence of negotiation.”²⁷ In accordance with this opinion, minor deceptions (i.e., the essence of negotiation) should not be regulated by the professional rules.

On the other hand, a major criticism of Rule 4.1 has been about its low standard. Gary Tobias Lowenthal described this rule as a “no-holds-barred approach” that “do[es] very little regulating” and strongly criticized the ABA for embracing such a low standard at the level of “New York hardball” as the official standard. Lowenthal insisted that while it would be best for the ABA to develop a higher, more detailed standard, it would be better to abolish Rule 4.1 than to leave it in its current form.²⁸ Thomas F. Guernsey underlined the private nature of negotiation and difficulties in enforcing the ethical rules. His idea was that it was nonsense to further develop un-enforceable rules. Guernsey suggested abolishing Rule 4.1 or any kind of written rules; lawyers should “accept the fact that there is no guidance” and leave negotiations to be handled by “caveat” lawyers.²⁹

3. *Major Preceding Studies*

Not many empirical studies have been conducted on attorneys’ negotiation ethics. Some descriptive studies have surveyed attorneys to evaluate their ethical sense and practice. These descriptive studies focused on the tension between the Client Principle and the Fairness Principle—mostly concerning attorneys’ ethical sense regarding truthfulness and their compliance (or non-compliance) with Rule 4.1. Specifically, these studies have addressed the issues of attorneys’ *minor deceptions* (i.e., the level below material fact under Rule 4.1) and *major deceptions* (i.e., rising to the level of misrepresentations of material fact under Rule 4.1).

26. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219, 1234–35 (1990).

27. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 5 AM. B. FOUND. RES. J. 926, 928 (1980). Also, minor deceptions appear commonly in practice (see *supra* Section I.C.3). Cf. Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83 (2002) (casting doubt on White’s idea by using an example of negotiations between two saints).

28. Gary Tobias Lowenthal, *The Bar’s Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 445–47 (1988).

29. Guernsey, *supra* note 23, at 125–27.

First, with regard to *minor deceptions*, studies have suggested that they are commonly accepted in practice. Scott S. Dahl found that there was a general consensus among attorneys to accept minor deceptions as a part of the negotiation “game.” For his study, he interviewed 14 attorneys in Texas and presented them with ten situations mostly related to minor untruthfulness in negotiations.³⁰ Another survey of nearly 100 lawyers at the ABA Annual Meeting found that 73% of the respondents had actually engaged in settlement “puffery.”³¹ Also a majority (61%) of the respondents answered that it was ethically permissible to engage in settlement “puffery.”³²

Further, regarding *major deceptions*, studies have indicated that ethical sense in negotiations varies widely from attorney to attorney and by situation, and that attorneys sometimes violate Rule 4.1. Larry Lempert surveyed 15 experienced attorneys (eight law professors, five practicing lawyers, one federal court judge, and one magistrate judge) and asked them four hypothetical situations regarding misrepresentation. These situations involved the opportunity to misrepresent (i) the authorized amount for settlement, (ii) the degree of client’s injury, (iii) client’s emotional distress and (iv) the continuity of client’s business. Differences of opinion existed among attorneys in each situation.³³ Twenty years later, Peter Reilly replicated the same study with 30 attorneys around the country and obtained similar results.³⁴ More recently, Andrew Hogan replicated those studies with 112 first-year law students at Georgetown University Law Center to find out the baseline of ethical sense of beginning law students.³⁵ The results looked somewhat similar to the original studies of attorneys, suggesting that learning professional ethics at law school might not have a large impact on attorneys’ ethical sense. But, the sample sizes

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

31. Terry Carter, *Ethics by the Numbers: Many Lawyers Have Been Asked by Clients or Other Lawyers to Violate Conduct Rules, Survey Suggests*, 83 A.B.A. J. 97 (1997). The exact language of the question was “[i]s it ethically permissible to engage in settlement ‘puffery’ that involves some misrepresentation?” Given the expression of “some misrepresentation,” this question might have intended to ask about major deceptions. But, because of the word of “puffery,” it would be more reasonable to classify this question as data for minor deceptions.

32. *Id.*

33. Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?*, 2 INSIDE LITIG. 1 (1988) [Reprinted in LEGAL ETHICS 457–63 (Deborah L. Rhode & David Luban eds., 6th ed. 2013)].

34. Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481 (2009).

35. Andrew Hogan, *The Naive Negotiator: An Empirical Study of First-Year Law School Students’ Truth-Telling Ethics*, 26 GEO. J. LEGAL ETHICS 725 (2013).

of the original studies were relatively small (15 and 30, respectively), and no statistical analysis was employed in this series of studies.³⁶ In another survey of 23 Florida lawyers who participated in a mediation workshop, participants estimated that lying about material facts occurred in 23% of the non-mediated negotiations, 25% of the joint-session style mediations, and 17% of the caucus style mediations.³⁷

All of the studies listed above were inspiring but had some issues in validity and reliability for a scholarly empirical work—for instance, lack of sophisticated questionnaire design,³⁸ representative sampling, or statistical analysis. As a large and more sophisticated empirical study, Art Hinshaw and Jess K. Alberts conducted a survey of 738 practicing lawyers in Arizona and Missouri. They used a scenario of misrepresentation of fatal disease infection (the hypothetical scenario of the “DONS” case made by the Program on Negotiation at Harvard Law School for educational purposes) and asked participants how to deal with the situation. They found two things: (i) some attorneys would engage in a fraudulent settlement prohibited under Rule 4.1 if requested by their client; and (ii) attorneys’ knowledge and understanding of Rule 4.1 (i.e., of the meaning of *material fact* and *misrepresentation*) were sometimes inaccurate.³⁹

Finally, regarding a broader ethical sense of fairness (unrelated to truthfulness), Jennifer K. Robbennolt conducted an experiment of 190 attorneys, which focused on the effects of apology in settlement. The results suggested both that attorneys and litigants (i.e., laypeople) differed in their estimates of fair settlement value and that attorneys were inclined to exploit a counterparty’s apologies to achieve more favorable settlements while the client-litigants were inclined to accept less favorable settlements when apologies were being presented to them.⁴⁰ It indicated the strong impact of the Client Principle—attorneys could be even more partisan than clients with regard to maximizing clients’ monetary interests.

4. *Present Study*

The present study has two novel features.

36. Lempert, *supra* note 33; Reilly, *supra* note 34.

37. Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119 (2007). Both parties face each other in one room with a mediator(s) in the joint-session style mediation while each party talks to a mediator(s) separately and privately in the caucus style mediation.

38. See, e.g., *supra* note 32.

39. Hinshaw & Alberts, *supra* note 24.

40. Jennifer K Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349 (2008).

First, this study is the first to seriously examine the *educational effects* of the attorneys' professional ethics at law school. Moreover, it is the first to uncover the *effects of the ethical rules* for negotiation. Previous studies did observe the reality of attorneys' ethical sense and practice, but they have not really examined the effects of the ethical rules themselves. For example, even if attorneys' behaviors in negotiations conformed to Rule 4.1, those behaviors might be simply from attorneys' inherent sense of morality regardless of existence of the rule. Conversely, even if many attorneys were found to be violating Rule 4.1, existence of the rule might have decreased the number of violators to some degree. Therefore, in order to reveal the actual effects of the ethical rules, it is necessary to compare the ethical sense of those who know the professional ethical rules and those who do not know them. Surveying attorneys does not allow comparison of the two groups, because all of the attorneys are supposed to know the professional ethical rules. Therefore, to measure the effects of the ethical rules, this study instead compared responses from two law student groups: those before legal ethical education and those after legal ethical education.

Second, this study is innovative in that it encompasses the aspect of the Public Principle. It focuses on ethical dilemmas concerning a third party's human rights by employing situations to negotiate custody of a child. The situations used in preceding studies were dominated by negotiations of monetary issues, such as damage liability, in which the attorney's role was solely to seek monetary compensations from a counterparty. In accordance with the Structure of Ethical Dilemma (see Figure 1), the dilemma used in the preceding studies was simply the Client Principle versus the Fairness Principle (specifically, truthfulness). The present study is the first to test the ethical dilemmas involving the Public Principle, such as: the Client Principle versus the Public Principle and the Client Principle versus the Fairness Principle plus the Public Principle.

5. *Hypotheses*

From the Structure of Ethical Dilemma, the author developed two opposing hypotheses (theoretical hypotheses) to be examined in relation to the general effects of the professional ethical rules.

Hypothesis I: The Fairness Principle and the Public Principle both inhibit the Client Principle. The professional ethical rules as a whole have an effect of facilitating negotiators' consideration for fairness (particularly, truthfulness) and public interests in negotiations. If Hypothesis I were correct, "learning the professional ethical rules

would have an effect of softening partisan focus on parents' interests and enhancing truthfulness of relevant facts and consideration for children's welfare" (Working Hypothesis I) in the context of educational effects for divorce settlement negotiation.

Hypothesis II: The Fairness Principle and the Public Principle do not inhibit the Client Principle. The professional ethical rules as a whole have an effect of enhancing negotiators' partisan representation while diminishing negotiators' consideration for fairness (particularly, truthfulness) and public interests in negotiation. If Hypothesis II were correct, "learning the professional ethical rules would have an effect of enhancing partisan focus on parents' interests and diminishing truthfulness of relevant facts and consideration for children's welfare" (Working Hypothesis II) in the context of educational effects for divorce settlement negotiation.

The Client Principle is set as a fundamental doctrine for attorneys in the U.S. Besides, previous studies⁴¹ have indicated the reality of attorneys' usage of deception (i.e., lack of truthfulness) in negotiations. Thus, the Client Principle might be dominating over the Fairness and the Public Principles. If that is the case, Hypothesis II is correct. However, if attorneys have a natural tendency towards partisanship regardless of the ethical rules, learning the Fairness Principle and the Public Principle stated in the ethical rules might be new additions to attorneys' ethical sense. Preceding studies have also suggested that at least some attorneys are reluctant to misrepresent material facts in negotiations. Given this, Hypothesis I might be correct: the Fairness and the Public Principles might be controlling the excessive Client Principle. Which one is correct, Hypothesis I or II? To examine these Hypotheses, this study constructed the more specific Working Hypotheses mentioned above.

II. METHODOLOGY – SURVEY

A. Respondents

A total of 113 J.D. students⁴² participated in this survey.⁴³ It treated 110 respondents as one data set after excluding three participants whose experiences of ethical education were unknown. All of

41. See *supra* I.C.3.

42. This survey did not include LL.M. students. Most LL.M. students are bar practitioners in other countries, who have already learned professional ethics in their countries. Thus, their responses would be affected by ethical rules in their own jurisdictions.

43. Respondents' status as law school students was confirmed by two techniques. The aforementioned students' "groups" (for each year or section of each school) on

the respondents were from five prestigious schools⁴⁴ ranked within the top 20 in the most recent U.S. News Best Law School rankings.⁴⁵

The sample was well balanced in learning experience of professional ethics: approximately half of the respondents (58 (52.73%)) had learned professional ethics while the other half (52 (47.27%)) had not yet learned. To be specific, a respondent was classified as “after ethical education” if he/she had experienced at least one of the following three learning opportunities: 36 (32.73%) had taken the MPRE; 55 (50.00%) had taken a course of legal profession; 30 (27.27%) had taken a course of negotiation. Respondents were from each year: 1L – 29 (26.36%), 2L – 41 (37.27%), and 3L – 40 (36.36%). They were gender-balanced: male – 52 (47.27%), female – 57 (51.82%) and no response – 1 (0.91%). The age range of respondents was from 21 to 34 (mean = 25.41⁴⁶, *SD* = 2.36⁴⁷). A majority of the respondents (97 (88.18%)) were single never married while some (13 (11.82%)) were married.⁴⁸ Only one respondent answered he/she had children. Some respondents (17 (15.45%)) had experienced parents’ divorce or separation in the past while the majority (93 (84.55%)) had not.⁴⁹ The

Facebook were closed groups in which only the group members could see the post for the recruitment. Also, respondents were asked to voluntarily enter their personal email address given by the university in the end of the survey to receive a small amount of online-shopping gift card by lottery: 84 out of 113 participants provided an authentic university email address. Respondents knew to expect anonymity: they were clearly notified that the email addresses were collected separately from the other survey data and could not be matched to their responses.

44. The purpose of this study was not to compare ethical educations among different schools, and the author had no intention to harm reputations or to disturb educations of particular schools. Thus, respondents’ school names were completely eliminated from the data set after checking the above-mentioned general characteristics of the respondents (*i.e.*, the data set does not contain any data linked to specific schools). Just for clarification, this study has no affiliation to any specific schools in the U.S. It was not supported or promoted, in any sense, by any institutions in the U.S.

45. *The U.S. News Best Law School rankings 2017*, U.S. News, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Jul. 10, 2016).

46. Mean age of 108 respondents. Two respondents did not provide their age.

47. “*SD*” represents standard deviation. Hereinafter the same.

48. No respondent was divorced, separated, or widowed.

49. 15.45% seems to be lower than the general divorce rate in the U.S., which is often estimated around 50%. *See, e.g.*, National Center for Health Statistics, *National Marriage and Divorce Rate Trends*, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last updated Nov. 23, 2015) (stating that the marriage rate is 6.9 and the divorce rate is 3.2 per 1,000 people in 2014 in the States: $3.2/6.9 = 46\%$) The low divorce rate in this study may be explained by a possibly lower divorce rate among parents of students at elite law schools. But, it may be due to some self-selection bias—students who experienced their parents’ divorce might have been reluctant to participate in this survey.

respondents' average knowledge of family law and Rule 4.1 was not high. On a scale of 1–4 (from 1 “not at all” to 4 “know it well”), the mean knowledge of family law⁵⁰ was 1.58 ($SD = 0.68$), and that of Rule 4.1 was 2.00 ($SD = 0.88$).

For recruitment, this study used students' informal social channels such as Facebook⁵¹ in order to collect responses from each year and from various students. With the help of cooperator students, the description and the URL of the survey were distributed to law students. The time of distribution was carefully designed to be between mid-November 2015 and early February 2016 (i.e., from the end of fall term until the beginning of spring term) for two reasons. First, it was not preferable to implement the survey in the middle of a semester because the purpose of the study is to compare two groups of students: students after ethical education (e.g., those who have completed a course of legal profession) and students before ethical education (e.g., those who have not started a course of legal profession). In the middle of a course, students may have learned only a part of the three Principles on negotiation ethics. Second, in general, many students take the Multistate Professional Responsibility Examination (MPRE⁵²) in early November of their third year. Therefore, the survey was conducted after mid-November to secure an appropriate number of responses from students after ethical education (i.e., those who have studied for and taken the MPRE), in other words, to balance the number of responses from the two groups for comparison.

B. Questionnaire

1. Basic Scenario

The questionnaire used in this study is provided in Appendix A. In the section of Basic Scenario at the beginning of the questionnaire,

50. To be exact, the question was *what is your knowledge of family law and child law*.

51. Facebook (<https://www.facebook.com>) is a social networking service. Students usually have a “group” for each year or section of their schools on Facebook to exchange information with each other. A Facebook “group” is basically an online bulletin board, on which students can post messages freely to announce social/study events and to share information about classes etc. As Facebook is the most popular online social networking service at the present time, almost all of the students were assumed to be in those groups. Thus, recruitment through those groups was one efficient way to reach a large unbiased population of law students.

52. The MPRE is a pre/co-requisite for bar exams in most of the states, which takes place three times a year in March, August and November. The exam date in November 2015 was November 7th.

respondents were placed in a divorce settlement negotiation, of which the major issue was post-divorce custody of the child. Respondents were asked to act as an attorney representing one of the divorcing parents. In order to control any possible bias attributable to gender, the client's and the child's gender were not specified in the scenario. Also, either of age five or 14 was assigned randomly to each respondent for the purpose of controlling the effects of child's age. Attorneys' ethical sense and actions might differ in accordance with the child's age. However, with the word of "child," one might assume an infant while another might imagine a matured juvenile. Therefore, a certain age had to be given in the scenario. Since one of the situations tested in the questionnaire was about a child's own preference (see Case P below), the ages of five and 14 were used. A five-year-old child is capable of expressing his/her own wishes but is quite immature, while a 14-year-old child is often considered mature enough so that his/her own preference should be respected.⁵³

Based on this scenario, respondents were given three hypothetical cases that have ethical dilemmas in negotiation: Case A about hidden assets, Case U about client's unfitness, and Case P about child's own preference. Respondents were asked to answer how they would deal with the situations (by multiple-choice questions). After that, the questionnaire also asked reasons behind respondents' choices in Cases U and P (by scaling matrix).

2. *Three Cases*

a. *Case A (Assets)*

The first case, Case A, was a case for disclosure of client's hidden assets⁵⁴—the client confessed that he/she had secret extra assets and requested respondents not to reveal the secret assets to the counterparty *if possible*. Case A contained two questions, one with enormous assets of \$1,000,000 (obviously a *material fact*) and another with a trivial asset of \$100 (a *nonmaterial fact*).⁵⁵ The two questions

53. *E.g.*, children reaching the age of 14 have the right to select the custodial parent in the State of Georgia (GA. CODE ANN., § 19-9-3 (2011)); *Froug v. Harper*, 140 S.E.2d 844, 845 (Ga. 1965). *See, e.g.*, Saito, *supra* note 5 at 948–54 for details of the role of children's preferences in the legal system for divorce.

54. A more neutral wording, "extra assets," was used in the questionnaire because of concerns that the expression "hidden assets" might induce respondents to think that the assets should not be revealed.

55. To be exact, the impact of the assets' amount is a relative matter. \$1,000,000 could be the same value for a billionaire as \$100 for an impoverished person. However, the author rather intended to keep the questions concise by excluding information such as the client's total assets or the wealth level. Besides, in theory, any facts of

were presented to each respondent in random order to control any carry-over or anchoring effect: half of the respondents answered \$1,000,000 first and \$100 second while the other half answered in the opposite order. In both questions, respondents were asked to choose from three options: disclosure (*Yes, I would disclose it*); nondisclosure (*No, I would not disclose it*); and conditional disclosure (*I would disclose it if asked explicitly and specifically by the counterparty*).

The wording of the case was designed to be concise and to generate a gray-zone ethical dilemma. First, the condition of *if possible* grants discretion to respondents. Due to the rule of confidentiality, respondents would have no choice but to withhold the information if demanded by the client as a strict order.⁵⁶ Regarding the options, one conditional option was included based on the results of preceding studies,⁵⁷ in which a certain percentage of attorneys responded with a qualified answer to various cases. On the other hand, resignation from representation was not included as an option; if included, respondents might easily escape from confronting the designed ethical dilemmas.⁵⁸

As described above (I-C-2-a), there are no simple criteria to judge misrepresentation.⁵⁹ However, it would be reasonable to consider that nondisclosure of \$1,000,000 in Case A qualifies as misrepresentation by omission. Unless the attorney discloses this fact, the

an asset's amount (including \$100 in extra assets) might be a *material fact* despite the triviality of the amount because it affects the results of property division—it could technically be fraud even if the amount of damage is minor. But, the main purpose of Case A was not to reveal the preciseness of respondents' interpretations of Rule 4.1 but to observe respondents' reactions in situations with different levels of gravity/triviality of the information.

56. Rule 1.6(a) "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." (c) "A lawyer shall make reasonable efforts to prevent. . . unauthorized disclosure." In practice, attorneys should consider resigning from the representation if withholding the information would cause ethical problems (e.g., would assist client's crime or fraud). MODEL RULES OF PROF'L CONDUCT r. 1.6.

57. Lempert, *supra* note 33 (see also Reilly, *supra* note 34 and Hogan, *supra* note 35); Hinshaw & Alberts, *supra* note 24.

58. For this study's purpose of measuring the alterations of ethical sense, it was essential that respondents sincerely confronted the ethical dilemmas. Furthermore, resignation in real practice would not be as easy as choosing it in a multiple-choice question of a survey. Preceding studies have also not included resignation as an option.

59. This study daringly chose the scenarios of misrepresentation by omission, instead of affirmative false statement (by commission). Misrepresentation by omission would be a more common ethical dilemma in negotiation practice as mentioned in I.C.2.a above. Asking whether respondents would make an affirmative lie might make it clearer that the options fall under the violation of Rule 4.1. But, this kind of clear-cut question would be separate from the reality of legal practice.

counterparty would take the false premise of a much smaller amount as the total assets and agree to the settlement based on the false premise. Also, as the total amount of assets often appears on the settlement agreement, preparing and signing the agreement can be considered an affirmative false statement by document. Therefore, the options of *not disclose it* and *disclose it if asked* (i.e., not disclose unless asked by the counterparty) could be a violation of Rule 4.1.

Although this study used situations of divorce negotiations, the ethical dilemma in Case A was designed to be similar to situations tested in preceding studies (i.e., situations of simple financial negotiations). That is the Client Principle versus the Fairness Principle. The purpose of Case A, developed from preceding descriptive studies, was to discover the *effects of the ethical rules* in the situations of the Client Principle versus the Fairness Principle. Furthermore, it was to reveal how the *effects* differ in accordance with materiality of information.

b. *Case U (Unfitness)*

The second and third cases were both related to custody of the child: a case of client's unfitness ("Case U") and a case of child's own preference ("Case P"). These two cases were presented to each respondent in random order to control possible carry-over or anchoring effects.

In Case U, the client confessed that he/she had continuously failed to provide basic necessities to the child; essentially, the client was an *unfit* parent. An expression of "neglect" was not explicitly used in the scenario, but the situation could fall under such a category. However, the client was eager to obtain custody, and requested respondents not to reveal the fact of client's unfitness to the counterparty *if possible* as the same as Case A. The first question was whether or not to disclose this fact during the negotiations, and respondents answered from three options: disclosure (*Yes, I would disclose it*); nondisclosure (*No, I would not disclose it*); and conditional disclosure (*I would disclose it if asked explicitly and specifically by the counterparty*).

The second question was about respondents' basic strategy for the negotiations, of which options were: *I would try to obtain*; *I would somewhat try to obtain*; *I would somewhat try to give away*; and *I would try to give away* custody of the child. It is reasonable to consider parent's unfitness as a *material fact* under Rule 4.1. If Case U goes to court for adjudication, custody of the child will definitely be given to the counterparty, a fit parent, in accordance with the "best

interests of the child” standard. Also, it is a tragedy for the child to continue to live with an unfit parent who fails to provide basic necessities (i.e., neglect). In the case of parent’s unfitness, even the state agency may intervene against the family to protect the child.⁶⁰ Thus, the fact of the parent’s unfitness would certainly influence the other parent’s decision-making significantly.⁶¹ In this scenario, two parties will negotiate and argue the custody based on the premise of client’s fitness as parent unless the negotiator discloses the fact. The negotiator’s failure to do so would certainly mislead the counterparty. Thus, the options of *not disclose it* and *disclose it if asked* (i.e., not disclose unless asked by the counterparty) could be a violation of Rule 4.1.

The first question of fact disclosure included all three of the ethical principles. Respondents were placed in a dilemma between the Client Principle versus the Fairness Principle plus the Public Principle. From the Client Principle, respondents shall not disclose the fact of client’s unfitness, which was disadvantageous for the client to seek custody. But, from the viewpoint of truthfulness (the Fairness Principle) and the viewpoint of the child’s human rights (the Public Principle), respondents might want to disclose the client’s unfitness to the counterparty. The second question of basic strategy was unrelated to fact disclosure; the ethical dilemma was between the Client Principle and the Public Principle. From the Client Principle, respondents were required to do their best to obtain custody as requested by the client. But, from the perspective of the child’s human rights (the Public Principle), respondents might want to give away custody in light of the client’s unfitness.

c. *Case P (Preference)*

In Case P, the client confessed that the *child’s own preference* was to live not with the client, but with the counterparty. Both the client and the counterparty are *equally fit* parents for raising the child. The client was still eager to obtain the custody, and requested respondents not to reveal the child’s own preference to the counterparty *if possible*. As with Case U, two questions (fact disclosure and basic strategy) were presented.

It is plausible to consider the child’s preference as a *material fact* under Rule 4.1; it is more plausible in the case of a child who is 14 years old than of one who is five years old. When determining the

60. See generally DOUGLAS E. ABRAMS, ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 279–438 (5th ed. 2014) for legal issues over abuse and neglect.

61. See *supra* Section I.C.2.a for the definition of *material fact*.

custodial parent(s), the court takes the factor of a child's preference into account under the "best interests of the child" standard. Thus, if Case P goes to court for adjudication, the court will likely give the custody to the counterparty as long as other factors are balanced (Case P explicitly mentioned they are an *equally fit* parent). In that sense, the fact of a child's own preference is an important factor for the decision-making in child custody negotiation. The older the child is, the more the court defers to a child's own preference. As described above, children at the age of 14 even have a right to choose their custodial parent in a certain state.⁶²

In the scenario, two parties will negotiate and argue the custody based on the premise that the child does not have a preference of the counterparty unless the negotiator discloses the fact. Thus, as with Case U, the options of *disclose it* and *disclose it if asked* could be misrepresentation by omission that violates Rule 4.1.

The ethical dilemmas in Case P were similar to Case U. The question of fact disclosure was under the dilemma of the Client Principle versus the Fairness Principle plus the Public Principle. The question of basic strategy was under the dilemma of the Client Principle versus the Public Principle. Having said that, the materiality and seriousness of the fact differed between Case U and Case P. As mentioned above, both client's unfitness and child's preference are material facts; however, the child's preference is only one of the factors for a court to determine the best interest of the child, while parent's unfitness alone (regardless of other factors) can be a critical factor for a court to take away custody. Also, Case P (the child will live with a fit parent who does not meet the child's preference) was less severe than Case U (the child will live with an unfit parent who does neglect him/her) from the viewpoint of the child's human rights.

3. *Factors Considered*

With regard to Cases U and P, respondents were asked to provide the reasons behind their choices. On a scale of 1 to 5 (1 not at all, 2 slightly, 3 moderately, 4 very, 5 extremely), they were asked to indicate how important each of the listed factors was for them in their decision making process.⁶³ For the first question regarding disclosure, eight factors were presented to respondents: *getting a fair settlement*; *complying with the Rules of Professional Conduct*; *securing the*

62. See *supra* note 53.

63. In order to avoid any potential carry-over effects to respondents' answers in the latter case, reasons for both cases were asked after respondents completed both of Cases U and P.

child's welfare; maximizing the settlement for your client; conducting yourself ethically; maintaining your integrity; maintaining client confidences; avoiding assisting in a client's fraud. For the second question regarding strategy, six factors were presented: *getting a fair settlement; obtaining a profitable fee for yourself; securing the child's welfare; maximizing the settlement for your client; avoiding litigation; avoiding assisting in a client's fraud.* In each question, all of these factors were presented in random order in a matrix.

The primary purpose of asking for reasons was to observe differences—regarding to what extent respondents highlight each factor—between the two groups: those after ethical education and those before. Upon designing the lists of factors in each question, this study selected several factors that had been identified in preceding studies and modified them in a way to conform to the Structure of Ethical Dilemmas (Figure 1 above) in this study. *Maximizing the settlement for your client* was a factor for the Client Principle. *Getting a fair settlement*⁶⁴ and *avoiding assisting in a client's fraud* represented the ethics of the Fairness Principle. *Securing the child's welfare* was a factor for the ethics of the Public Principle. Some other factors were also included, which were identified as important rationales in truth-telling by Hinshaw and Alberts (*maintaining your integrity, maintaining client confidences, and complying with the Rules of Professional Conduct*⁶⁵) and as lawyers' high-priority goals of negotiation in another preceding study (*conducting yourself ethically, obtaining a profitable fee for yourself, and avoiding litigation*⁶⁶).

III. RESULTS

A. Case A (Assets)

In the case of \$1,000,000 secret assets, distribution patterns of respondents' decisions were almost identical between the two groups (those before ethical education and those after ethical education). In both groups, most respondents decided to disclose the fact to the counterparty: more than 40% of respondents chose to unconditionally

64. The original wordings were "maximizing settlement" and "fair settlement." Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 217–18 tbls. B8 & B9 (2002).

65. The original wordings were "my integrity is too important," "the information is protected by the professional rules of conduct regarding client confidences," and "to do so may violate the rules of professional conduct." Hinshaw & Alberts, *supra* note 24, at 125–28 tbls. 2 & 3.

66. The original wordings were "ethical conduct," "profitable fee," and "avoiding litigation." Shneider, *supra* note 64, at 217–18 tbls. B8 & B9.

disclose it, and approximately 50% chose to conditionally disclose it if asked by the counterparty (Table 1).

TABLE 1— DISCLOSURE OF \$1,000,000 ASSETS BY STUDENTS GROUP⁶⁷

	<i>Not Disclose</i>	<i>If Asked</i>	<i>Disclose</i>	<i>Total</i>
Before Education	6 (11.54%)	25 (48.08%)	21 (40.38%)	52 (100%)
After Education	3 (5.17%)	31 (53.45%)	24 (41.38%)	58 (100%)

Fisher's exact test, $p = 0.500$

In contrast, in the case of \$100 secret assets, the proportion of *disclose* largely decreased, while *not disclose* increased in both of the two groups. However, the distribution patterns of the two were different. Students after ethical education were more inclined to not disclose the fact. In the group of students after ethical education, nearly 40% chose to withhold the fact while only 25% of students before ethical education chose to do so. Also, the proportion of *disclose* was less than 10% in the group after ethical education while the proportion was more than 20% in the group before ethical education (Table 2 & Figure 2). Pearson's χ^2 test confirmed the difference between the two groups was statistically significant at the 10 percent level.

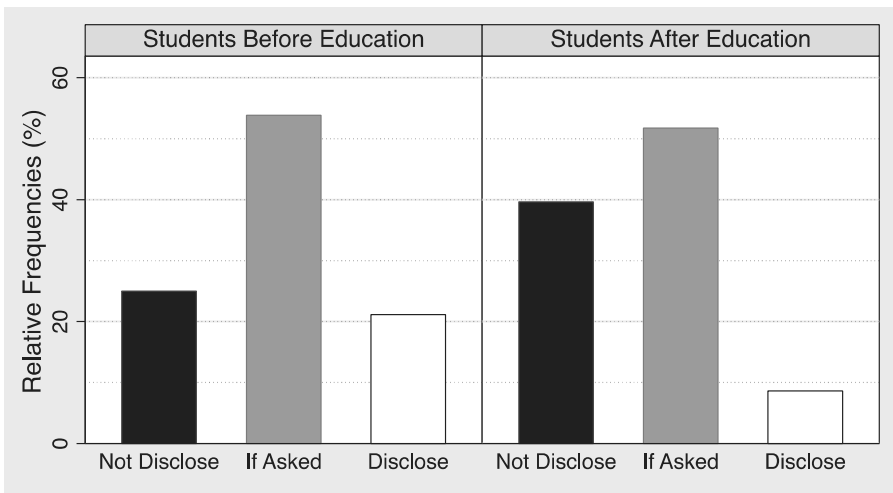


FIGURE 2 – DISCLOSURE OF \$100 ASSETS BY STUDENTS GROUP

67. Fisher's exact test, instead of Pearson's χ^2 test, was used for the significance test because there was a cell with a frequency less than five in the table (i.e., "3" for After Education – Not Disclose).

TABLE 2 – DISCLOSURE OF \$100 ASSETS BY STUDENTS GROUP

	<i>Not Disclose</i>	<i>If Asked</i>	<i>Disclose</i>	<i>Total</i>
Before Education	13 (25.00%)	28 (53.85%)	11 (21.15%)	52 (100%)
After Education	23 (39.66%)	30 (51.72%)	5 (8.62%)	58 (100%)

$\chi^2(2) = 4.7837, p = 0.091$

B. *Case U (Unfitness)*

For the question concerning disclosure of the fact of client’s unfitness, the difference of distribution patterns between the two groups was striking. Basically, students after ethical education were more inclined to withhold the fact. Only about 10% of students after ethical education decided to unconditionally *disclose* the fact to the counterparty, while over 40% of those before ethical education selected to *disclose*. Also, the proportion of *not disclose* after ethical education was almost double compared to the group before ethical education (Table 3 & Figure 3). Pearson’s χ^2 test confirmed the difference between the two groups was statistically significant at the 0.1 percent level.

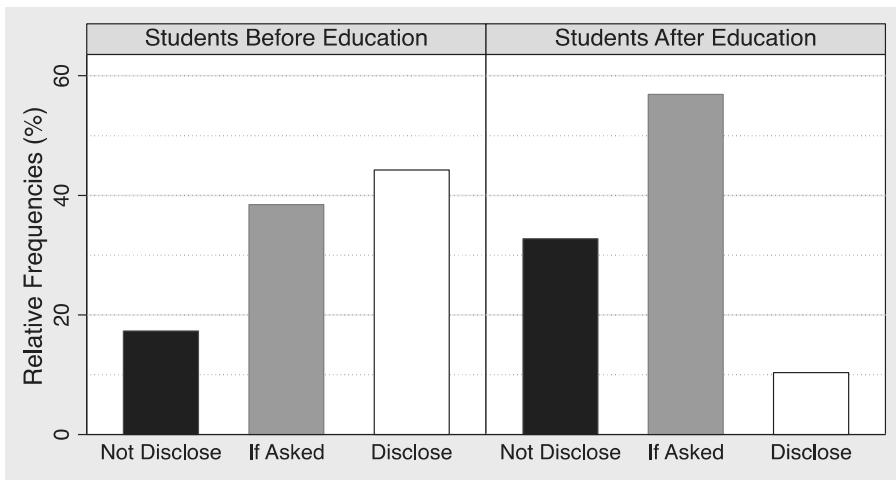


TABLE 3 – DISCLOSURE OF UNFITNESS BY STUDENTS GROUP

	<i>Not Disclose</i>	<i>If Asked</i>	<i>Disclose</i>	<i>Total</i>
Before Education	9 (17.31%)	20 (38.46%)	23 (44.23%)	52 (100%)
After Education	19 (32.76%)	33 (56.90%)	6 (10.34%)	58 (100%)

$\chi^2(2) = 16.4473, p = 0.000$

Table 4 shows results of an analysis using ordered logistic regression: ethical education and several other respondents' characteristics as independent variables⁶⁸ and respondents' choices in the disclosure question of Case U as dependent variable.⁶⁹

Column (1), the model of one independent variable, shows the effect of ethical education is statistically significant at the 0.1 percent level. Column (2) added one more factor, knowledge of family law.⁷⁰ The author hypothesized that knowledge of family law might affect respondents' understanding of importance of the client's unfitness information in the negotiation. The impact of ethical education was still statistically significant (1 percent level) after controlling the knowledge of family law. Also, as the author anticipated, the effect of knowledge of family law was significant (10 percent level). Then, in column (3), the effect of ethical education (1 percent level) and knowledge of family law (10 percent level) were statistically significant

68. Two variables, knowledge of *family law* and knowledge of *Rule 4.1*, were treated as numerical variables (1 not at all, 2 know a little, 3 know a fair amount, 4 know it well). Other independent variables were dummy variables: *gender* (0 male, 1 female); *marriage* (0 single never married, 1 married); experience of *parents' divorce* in the past (0 no, 1 yes); *child's age* in the scenario (0 five years old, 1 fourteen years old).

69. See, e.g., SCOTT J. LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 309–83 (3d ed. 2014) for details of ordered logistic regression model. The three levels in the disclosure question of Case U were *not disclose it*, *disclose it if asked explicitly and specifically by the counterparty*, and (unconditionally) *disclose it*. These levels had an order toward a direction whether to disclose the information while distance between each level would differ. Therefore, this study treated this dependent variable as ordinal but not continuous (not numerical) to employ ordered logistic regression. The estimating equation of the model (e.g., for column (3)) is:

$$\begin{aligned}
 \text{ethicsD}(\text{latent})_i &= \beta_0 + \beta_1 \text{ethics edu}_i + \beta_2 \text{family law}_i + \beta_3 \text{gender}_i + \beta_4 \text{marriage}_i \\
 &\quad + \beta_5 \text{parents' divorce}_i + \beta_6 \text{child's age}_i + \varepsilon_i \\
 \text{ethicsD}(\text{overt})_i &= \text{not disclose} && \text{if } \text{ethicsD}(\text{latent})_i \leq \alpha_1 \\
 &\quad \text{disclose if asked} && \text{if } \alpha_1 < \text{ethicsD}(\text{latent})_i \leq \alpha_2 \\
 &\quad \text{disclose} && \text{if } \alpha_2 < \text{ethicsD}(\text{latent})_i
 \end{aligned}$$

i indexes individuals. β is a constant. β_1 – β_6 are coefficients for each independent variable. ε is the error term (representing the effects of other variables not included in the equation). *ethicsD(latent)* is a latent variable not directly observable, which basically quantifies an individual's ethical sense concerning fact disclosure. *ethicsD(overt)* represents response to the disclosure question, which is the overt expression of *ethicsD(latent)* in an individual's bargaining behavior. The response to the question changes if latent ethical sense exceeds the threshold α_1 or α_2 . The ordered logistic regression model estimates constant (β_0 , all of the coefficients (β_1 – β_6) and thresholds (α_1 , α_2) simultaneously by the maximum-likelihood approach based on the assumption that the distribution of e follows the logistic distribution.

70. Correlation between ethical education and knowledge of family law was weak (0.25), under which multicollinearity would not be an issue.

even after controlling for other possibly relevant factors such as respondents' gender, marital status, parents' divorce, and the age of the child in the scenario (five or 14). At the same time, column (3) did not find any effects of these other factors at statistically significant levels. The estimated coefficients of the two variables,⁷¹ ethical education (-1.229) and knowledge of family law (-0.511), were both negative, meaning that respondents after ethical education and respondents with higher knowledge of family law were more inclined to not disclose the fact of client's unfitness. Column (4) added two more factors: year at school and knowledge of Rule 4.1.⁷² After controlling for these two factors, the effects of ethical education (5 percent level) and knowledge of family law (10 percent level) were still statistically significant. At the same time, the effects of year and knowledge of Rule 4.1 were not statistically significant. The result indicates that the respondents' choices were affected by ethical education itself and not by the entire law school education,⁷³ and that knowledge of Rule 4.1 did not have an impact on respondents' choices.

71. *I.e.*, the estimation of coefficients β_1 and β_2 , respectively, in the equation mentioned in *supra* note 69.

72. It treated year (1L-3L) as a continuous variable. Upper-class students have more opportunities to experience ethical education than lower-class students; correlation between year and ethical education was strong (= 0.70). Also, law school students learn Rule 4.1 as a part of professional ethics through their ethical education; there was correlation between knowledge of Rule 4.1 and ethical education (= 0.67). With regard to the issue of multicollinearity, the author checked VIFs for the linear model (OLS) with the same independent variables. The VIF for each variable was not high (< 3), meaning that adding these two variables in the model did not cause the issue of severe multicollinearity (*i.e.*, an issue of imprecise estimation).

73. *See infra* Section IV.D for further discussion.

TABLE 4 – DISCLOSURE OF UNFITNESS (ORDERED LOGISTIC REGRESSION)

	(1)	(2)	(3)	(4)
ethics edu	-1.389*** (0.390)	-1.232**	-1.229** (0.410)	-1.464* (0.642)
family law		-0.563† (0.289)	-0.511† (0.294)	-0.568† (0.309)
gender (female)			0.295 (0.380)	0.336 (0.390)
marriage			0.0695 (0.575)	0.0471 (0.578)
parents' divorce			0.778 (0.549)	0.764 (0.552)
child's age (14)			0.294 (0.386)	0.257 (0.398)
year				0.0402 (0.350)
rule 4.1				0.176 (0.302)
Log-likelihood	-108.867	-106.907	-103.527	-103.342
Pseudo R ²	0.0588	0.0758	0.0945	0.0961
Observations	110	110	109	109

Notes: The table reports estimated coefficients. Standard errors are in parentheses. *** Significant at 0.1% level. ** Significant at 1% level. * Significant at 5% level. † Significant at 10% level.

With regard to the question about basic strategy in Case U, the distribution patterns of the two groups differed largely. Although the *p*-value by Pearson's χ^2 test went slightly above the 10 percent level ($p = 0.113$), the difference seemed to be obvious from the graph (Table 5 & Figure 4). The most frequent response (about 40 percent) in the group after ethical education was *try to obtain* custody while it was *somewhat try to give away* custody in the group before ethical education. Respondents after ethical education were more inclined to obtain custody of the child even though the client was an unfit parent.

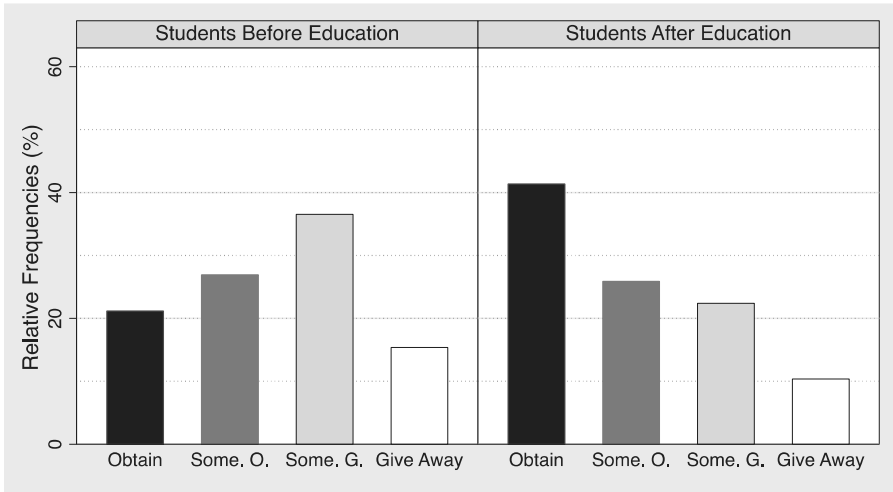


FIGURE 4 – STRATEGY FOR UNFITNESS BY STUDENTS GROUP

TABLE 5 – STRATEGY FOR UNFITNESS BY STUDENTS GROUP

	Obtain	Somewhat Obtain	Somewhat give away	give away	Total
Before Education	11 (21.15%)	14 (26.92%)	19 (36.54%)	8 (15.38%)	52 (100%)
After Education	24 (41.38%)	15 (25.86%)	13 (22.41%)	6 (10.34%)	58 (100%)

$$\chi^2(3) = 5.9642, p = 0.113$$

Table 6 shows results of ordered logistic regression like Table 4: ethical education and several other respondents’ characteristics as independent variables and respondents’ choices in the strategy question of Case U as dependent variable.⁷⁴ Column (1), the model of one independent variable, shows the effect of ethical education is statistically significant at the 5 percent level. Column (2) added one more factor: knowledge of family law. After controlling for knowledge of

74. The estimating equation of the model (e.g., for column (3)) is:

$$\begin{aligned}
 ethicsS(latent)_i &= \delta_0 + \delta_1 ethics\ edu_i + \delta_2 family\ law_i + \delta_3 gender_i + \delta_4 marriage_i \\
 &\quad + \delta_5 parents'\ divorce_i + \delta_6 child's\ age_i + \mu_i \\
 ethicsS(overt)_i &= \begin{cases} obtain & \text{if } ethicsS(latent)_i \leq \gamma_1 \\
 somewhat\ obtain & \text{if } \gamma_1 < ethicsS(latent)_i \leq \gamma_2 \\
 somewhat\ give\ away & \text{if } \gamma_2 < ethicsS(latent)_i \leq \gamma_3 \\
 give\ away & \text{if } \gamma_3 < ethicsS(latent)_i \end{cases}
 \end{aligned}$$

i indexes individuals. δ_0 is a constant. δ_1 – δ_6 are coefficients for each independent variable. μ is the error term (representing the effects of other variables not included in the equation). *ethicsS(latent)* is a latent variable not directly observable, which quantifies an individual’s ethical sense concerning basic strategy. *ethicsS(overt)* represents response to the strategy question, which is the overt expression of *ethicsS(latent)* in an individual’s bargaining behavior. The response to the question changes if latent ethical sense exceeds the threshold γ_1 , γ_2 or γ_3 .

family law, the impact of ethical education was still statistically significant (5 percent level). But, unlike in the question of disclosure, the effect of knowledge of family law was not significant. In column (3), the effect of ethical education was significant (10 percent level) even after controlling for some more possibly relevant factors such as respondents’ gender, marital status, parents’ divorce, and the age of the child in the scenario (five or 14). The effect of respondent’s gender was also statistically significant (10 percent level). Effects of other factors were not observed at statistically significant levels. The estimated coefficient of ethical education (-0.628)⁷⁵ was negative, meaning that respondents after ethical education were more inclined to obtain custody of the child. That of gender (0.603)⁷⁶ was positive, meaning that females, comparing to males, were more inclined to give away custody. In contrast to the question about disclosure (Table 4), the effect of ethical education was not statistically significant ($p = 0.140$) when controlling for “year” in column (4).⁷⁷

TABLE 6 – STRATEGY FOR UNFITNESS (ORDERED LOGISTIC REGRESSION)

	(1)	(2)	(3)	(4)
ethics edu	-0.811* (0.352)	-0.733* (0.364)	-0.628† (0.376)	-0.782 (0.530)
family law		-0.221 (0.264)	-0.312 (0.272)	-0.318 (0.273)
gender (female)			0.603† (0.363)	0.618† (0.365)
marriage			0.220 (0.508)	0.203 (0.512)
parents’ divorce			-0.0565 (0.492)	-0.0727 (0.494)
child’s age (14)			-0.323 (0.362)	-0.351 (0.369)
year				0.135 (0.326)
Log-likelihood	-144.406	-144.053	-140.990	-140.904
Pseudo R^2	0.0184	0.0208	0.0340	0.0346
Observations	110	110	109	109

Notes: The table reports estimated coefficients. Standard errors are in parentheses. * Significant at 5% level. † Significant at 10% level.

75. *I.e.*, the estimation of coefficient γ_1 in the equation mentioned in *supra* note 74.

76. *I.e.*, the estimation of coefficient γ_3 in the equation mentioned in *supra* note 74.

77. *See infra* Section IV.D for further discussion. Similar to *supra* note 72, the author checked VIFs for the linear model (OLS) with the same independent variables. The VIF for each variable was not high (< 3), meaning that multicollinearity was not a severe issue.

C. Case P (Preference)

For the question concerning disclosure of the fact of child’s own preference, the distribution patterns of the two groups were the same. About 40% of the respondents chose to *not disclose* the fact, 50% chose to *disclose it if asked* by the counterparty, and only 10% to *disclose* (Table 7). The distribution patterns of the two groups were similar for the question of strategy as well. The majority of the students decided to try to obtain or at least to somewhat try to obtain custody even though it was against the child’s own preference (Table 8). The age of the child (five or 14) in the scenario did not make a difference in the distribution patterns.

TABLE 7 – DISCLOSURE OF PREFERENCE BY STUDENTS GROUP

	<i>Not Disclose</i>	<i>If Asked</i>	<i>Disclose</i>	<i>Total</i>
Before Education	20 (38.46%)	26 (50.00%)	6 (11.54%)	52 (100%)
After Education	23 (39.66%)	30 (51.72%)	5 (8.62%)	58 (100%)

$\chi^2(2) = 0.2594, p = 0.878$

TABLE 8 – STRATEGY FOR PREFERENCE BY STUDENTS GROUP⁷⁸

	<i>Obtain</i>	<i>Somewhat Obtain</i>	<i>Somewhat give away</i>	<i>give away</i>	<i>Total</i>
Before Education	33 (66.00%)	9 (18.00%)	4 (8.00%)	4 (8.00%)	50 (100%)
After Education	30 (51.72%)	16 (27.59%)	10 (17.24%)	2 (3.45%)	58 (100%)

Fisher’s exact test, $p = 0.192$

D. Factors Considered

1. Case U (Unfitness)

With respect to the question of disclosure in Case U, the mean (scale of 1–5) of the post-education group was higher in *maximizing the settlement for your client* (0.1 percent level) and *maintaining client confidences* (1 percent level),⁷⁹ and lower in *securing the child’s*

78. Fisher’s exact test, instead of Pearson’s χ^2 test, was used for the significance test because several cells in the table had frequencies smaller than five.

79. The factor of *maintaining client confidences* as well as *maximizing the settlement for your client* represents the Client Principle. Confidentiality of client information is regulated under Rule 1.6, but with the words “if possible” in the scenario, respondents were given discretion to decide whether or not to disclose the information. Confidentiality under Rule 1.6 was not an issue in the scenarios of this study. Thus, *maintaining client confidences* can be classified as a factor simply related to client interests.

welfare (5 percent level) than the pre-education group (Table 9). Differences between the two groups in the other factors were not statistically significant.

Similarly, regarding the question of strategy in Case U, the mean (scale of 1–5) of the post-education group was higher in *maximizing the settlement for your client* (0.1 percent level), and lower in *securing the child’s welfare* (5 percent level) than the pre-education group (Table 10). No significant differences between the two groups were observed in the other factors.

TABLE 9 – FACTORS: DISCLOSURE OF UNFITNESS (SCALE OF 1–5)

	Mean of Students Before Education	Mean of Students After Education	Difference
fair settlement	3.490 (0.152)	3.661 (0.147)	0.171 (0.211)
rules of p. c.	3.843 (0.149)	4.018 (0.126)	0.175 (0.195)
child’s welfare	4.275 (0.125)	3.893 (0.139)	-0.382* (0.187)
max. client	2.922 (0.177)	3.750 (0.158)	0.828*** (0.237)
conduct ethic.	4.392 (0.101)	4.250 (0.125)	-0.142 (0.161)
integrity	4.353 (0.128)	4.196 (0.112)	-0.157 (0.170)
confidences	3.588 (0.154)	4.143 (0.123)	0.555** (0.197)
avoid fraud	3.922 (0.134)	3.964 (0.125)	0.043 (0.183)

Notes: The table reports means by scale of 1 to 5. Standard errors are in parentheses. Observations of students before education are 51 and after education are 56.
 *** Significant at 0.1% level. ** Significant at 1% level. * Significant at 5% level. By Welch’s t test (two-sided).

TABLE 10 – FACTORS: STRATEGY FOR UNFITNESS (SCALE OF 1–5)

	Mean of Students Before Education	Mean of Students After Education	Difference
fair settlement	3.549 (0.152)	3.719 (0.122)	0.170 (0.195)
obtain fee	2.157 (0.162)	2.298 (0.173)	0.141 (0.237)
child’s welfare	4.216 (0.144)	3.825 (0.144)	-0.391* (0.203)
max. client	2.902 (0.180)	3.772 (0.152)	0.870*** (0.236)
avoid litigation	2.471 (0.154)	2.667 (0.138)	0.196 (0.207)
avoid fraud	3.588 (0.173)	3.860 (0.110)	0.271 (0.205)

Notes: The table reports means by scale of 1 to 5. Standard errors are in parentheses. Observations of students before education are 51 and after education are 57.
 *** Significant at 0.1% level. * Significant at 5% level. By Welch’s t test (two-sided).

2. Case P (Preference)

As for the question of disclosure in Case P, mean (scale of 1–5) of the post-education group was higher in *maximizing the settlement for your client* (5 percent level), *maintaining client confidences* (5 percent level), and *avoiding assisting in a client's fraud* (10 percent level) than the pre-education group (Table 11). Differences between the two groups in the other factors, including *securing the child's welfare*, were not significant.

Similarly, regarding the question of strategy in Case P, mean (scale of 1–5) of the post-education group was higher in *maximizing the settlement for your client* (1 percent level) and *avoiding assisting in a client's fraud* (10 percent level) than the pre-education group (Table 12). No significant differences between the two groups were observed in the other factors including *securing the child's welfare*.

TABLE 11 – FACTORS: DISCLOSURE OF PREFERENCE (SCALE OF 1-5)

	Mean of Students Before Education	Mean of Students After Education	Difference
fair settlement	3.720 (0.131)	3.772 (0.123)	0.052 (0.180)
rules of p. c.	3.920 (0.130)	4.140 (0.126)	0.220 (0.182)
child's welfare	3.900 (0.129)	3.754 (0.131)	-0.146 (0.183)
max. client	3.540 (0.141)	3.965 (0.139)	0.425* (0.198)
conduct ethic.	4.260 (0.106)	4.193 (0.121)	-0.067 (0.161)
integrity	4.120 (0.127)	4.035 (0.117)	-0.085 (0.173)
confidences	4.000 (0.128)	4.368 (0.105)	0.368* (0.165)
avoid fraud	3.440 (0.192)	3.912 (0.126)	0.472+ (0.230)

Notes: The table reports means by scale of 1 to 5. Standard errors are in parentheses. Observations of students before education are 50 and after education are 57.

* Significant at 5% level. + Significant at 10% level. By Welch's t test (two-sided).

TABLE 12 – FACTORS: STRATEGY FOR PREFERENCE (SCALE OF 1-5)

	Mean of Students Before Education	Mean of Students After Education	Difference
fair settlement	3.451 (0.144)	3.702 (0.125)	0.251 (0.190)
obtain fee	2.118 (0.150)	2.386 (0.166)	0.268 (0.223)
child’s welfare	3.980 (0.130)	3.789 (0.132)	-0.191 (0.185)
max. client	3.451 (0.159)	4.070 (0.114)	0.619** (0.196)
avoid litigation	2.529 (0.149)	2.491 (0.123)	-0.038 (0.193)
avoid fraud	3.392 (0.179)	3.789 (0.127)	0.397+ (2.220)

Notes: The table reports means by scale of 1 to 5. Standard errors are in parentheses. Observations of students before education are 51 and after education are 57.

** Significant at 1% level. + Significant at 10% level. By Welch’s t test (two-sided).

IV. DISCUSSION

A. Key Findings – Structure of Ethical Dilemma

1. Client Principle versus Fairness Principle

The results of Case A (assets) indicate effects of the professional ethical rules given the ethical dilemma between the Client Principle and the Fairness Principle. First, the result of the case of \$100 assets (students after ethical education were more inclined to not disclose the fact) indicates that the ethical education and the professional ethical rules facilitate *minor deceptions* in negotiations. This result empirically supports the arguments by critics of Rule 4.1—critics have argued that Rule 4.1, embracing a quite low standard as an official rule, may facilitate hardball negotiation styles with heavy usage of minor deceptions.⁸⁰ A reasonable interpretation in a nutshell would be: negotiators are not only more comfortable making small lies under Rule 4.1, but also, under the Client Principle, they are required to employ minor deceptions to achieve client’s interests.

Then, does the Fairness Principle including Rule 4.1 have any positive effect in preventing negotiators’ *major deceptions*? The answer seems to be “No.” The result of the case of \$1,000,000 assets (no difference was observed between students before and after ethical education. Majority of the respondents selected *disclose* or at least *disclose it if asked*) suggests that the ethical education and the professional ethical rules do not have any impact on negotiators’ ethical sense in a situation where the fact in question is clearly material.

80. See *supra* Section I.C.2.b.

In other words, attorneys seem to follow their inherent sense of ethics to deal with a situation of material fact regardless of the ethical rules (e.g., Rule 4.1). This finding actually conforms to the preceding studies, which have discovered the reality that attorneys sometimes go against Rule 4.1.⁸¹

2. *Client Principle versus Public Principle*

The result of the strategy question in Case U indicates effects of the ethical education and the professional ethical rules under the ethical dilemma between the Client Principle and the Public Principle. Students after ethical education were more inclined to value the Client Principle. They were more inclined to obtain custody of the child even though the client was an unfit parent and the situation was serious for the child's welfare. Approximately 70% of the students after ethical education tried to obtain or somewhat obtain custody of the child while only 50% of those before ethical education did the same.⁸² Furthermore, to the question of subjective reasoning, students after ethical education, compared to those before ethical education, placed more emphasis on maximizing client's interests and less emphasis on securing the child's welfare. These results indicate that the Client Principle has a greater impact on negotiators' ethical sense than the Public Principle, and that the ethical education and professional ethical rules have an effect of diminishing negotiators' consideration for the child's welfare.

The strategy question in Case P (preference) was designed to discuss the effects of the professional ethical rules in a less severe case from the perspective of the child's welfare (i.e., a case where the demand from the Public Principle is weaker) than the case of client's unfitness. The result of the subjective reasoning was that students after ethical education, compared to those before ethical education, were more considerate of maximizing client interest. However, no difference was observed between the two groups in the strategy question (majority of the respondents tried to obtain or somewhat obtain custody). This result indicates that the ethical education and the professional ethical rules do not have an impact on negotiators' actual bargaining behaviors in non-severe cases.

81. See *supra* Section I.C.3.

82. See *supra* Table 5 and Figure 4.

3. *Client Principle versus Fairness Principle plus Public Principle*

The fact disclosure question in Case U (unfitness) was designed to discuss the effects of the professional ethical rules under the ethical dilemma between the Client Principle and the Fairness Principle plus the Public Principle. Similar to the strategy question, the result was that students after ethical education were more inclined to value the Client Principle. They were more inclined to not disclose the fact of client's unfitness (a material fact of which misrepresentation was prohibited under Rule 4.1 and a serious fact for the child's welfare) to the counterparty. In addition, the result of subjective reasoning showed that students after ethical education, compared to those before ethical education, put more emphasis on client's interests and less emphasis on securing the child's welfare. These results indicate that the Client Principle has a greater impact on negotiators' ethical sense even if the other two principles, the Fairness and the Public Principles, are combined.

One question arises when you compare the result of disclosure question in Case U with Case A. Why do the professional ethical rules have an impact on negotiators' sense of ethics in Case U (students after ethical education were inclined to not disclose) and have no impact on \$1,000,000 assets case in Case A (both groups were inclined to disclose)? Both of the facts are *material* under Rule 4.1. These results suggest that the impact of the Client Principle is stronger in the case of non-monetary negotiations such as custody negotiations than simple financial negotiations. Negotiators may be less cautious of misrepresentation or fraud if the fact in question is not a monetary or proprietary issue; or it may be easier for negotiators to rationalize non-disclosure of a fact that is somewhat amenable to different interpretations such as unfitness as a parent.⁸³ In any case, the Fairness Principle seems to be less workable in cases where the child's welfare (a public interest) is involved.

Lastly, the result of the disclosure question in Case P (preference) (both groups were inclined to disclose) indicates that the ethical

83. The description of Case U was written carefully to avoid respondents' subjective interpretations; however, it is impossible to eliminate all of the subjective aspects of a non-monetary or non-proprietary fact. For instance, the phrases "your client *seems* to be an unfit parent" and "the counterparty *seems* to be a fit parent" used in Case U might have helped some respondents rationalize non-disclosure. But, these phrases are in line with the actual situation of attorneys' practice—it is always "*seems* to be" because attorneys have to analyze fitness or unfitness of a parent from limited information.

education and the professional ethical rules do not have an impact on negotiators' actual bargaining behaviors in cases less severe for the child's welfare. Having said that, in the subjective reasoning for the disclosure question of Case P, students after ethical education, compared to those before ethical education, were more considerate of avoiding assisting fraud⁸⁴ as well as of maximizing client's interest. It indicates that the professional ethical rules have an effect of reminding negotiators of the judgment standard (as described in I-C-2-b, avoiding fraud is the same level of standard as Rule 4.1) although it does not change negotiators' actual bargaining behaviors.

B. *Summary – Hypothesis I or II?*

With regard to the ethical dilemma of the Client Principle versus the Fairness Principle, the results of Case A indicate that the professional ethical rules have an effect of facilitating minor deceptions while they have no effect of preventing major deceptions.

Regarding the ethical dilemma of the Client Principle versus the Public Principle, the results of the strategy questions in Cases U and P indicate that the professional ethical rules have an effect of enhancing negotiators' partisan representation and diminishing consideration for the child's welfare (a public interest) under severe situations while the rules do not have an impact in non-severe situations.

As for the ethical dilemma of the Client Principle versus the Fairness Principle plus the Public Principle, the indications of the disclosure questions in Cases U and P are similar to the above-mentioned strategy questions. Even if the Fairness Principle and the Public Principle are combined, the Client Principle overwhelms them and has a greater impact on negotiators' ethical sense. Furthermore, when compared to the results of Case A, it is indicated that the Fairness Principle is less workable in non-financial cases where the child's welfare (a public interest) is involved.

To sum up, the findings of this study support Hypothesis II of the two hypotheses presented in the beginning of this Article (I-C-5). In the context of divorce settlement negotiation, this study uncovered the effect of ethical education on law students, which is diminishing truthfulness of relevant facts and consideration for children's welfare (i.e., Working Hypothesis II is verified). Therefore, by implication, the U.S. professional ethical rules as a whole have an effect of enhancing negotiators' partisan representation while diminishing negotiators'

84. The factor of *avoiding assisting in a client's fraud*.

consideration for fairness (particularly, truthfulness) and public interests in negotiation (i.e., Hypothesis II is supported). The Client Principle is not inhibited by the Fairness Principle or the Public Principle, and it has predominant effects.

C. *Other Findings*

1. *Knowledge of Family Law*

Knowledge of family law affected respondents' decisions in the disclosure question in Case U (unfitness).⁸⁵ This finding also supports discussions above—it suggests the predominant impact of the Client Principle and ineffectiveness of the Fairness Principle. If the Fairness Principle or Rule 4.1 had a substantial effect on negotiators' ethical sense, knowledge of family law would enhance disclosure of the fact of client's unfitness because respondents can more easily identify parent's unfitness as a *material fact* (Rule 4.1) and as a severe fact for the child's welfare with higher knowledge of family law. But, the result was the opposite. In this study, knowledge of family law discouraged respondents from disclosing client's unfitness. This is probably due to the impact of the Client Principle. If respondents know of family law, they have a better prediction of the disadvantageous outcome of disclosing client's unfitness to the counterparty—the client will surely lose custody of the child.

2. *Gender*

Respondents' gender had a statistically significant impact on the basic strategy for Case U (unfitness).⁸⁶ The result indicates female negotiators are more considerate of children's interests than male negotiators, even if it goes against the client's request. However, the difference did not appear in Case P (preference), where the scenario was less severe from the perspective of the child's welfare. Therefore, this gender-based difference might appear only in a critical case where children's welfare or other human rights issues are severely at stake. The mechanism of the gender-based difference was beyond the scope of this study and needs to be checked by further studies.

D. *Limitations of Study*

The author would like to note five issues as limitations of this study.

85. See *supra* Table 4.

86. See *supra* Table 6.

First, the changes in students' ethical sense this study observed might be attributable to the law school education as a whole and not solely to ethical education. This study identified three major opportunities to learn professional ethics for negotiation: by taking the MPRE, by taking a course of legal profession, and by taking a course related to negotiation. However, students' ethical sense could be influenced by other experiences in law school education, such as taking clinical programs. Even the atmosphere of school might affect students' ethical sense. Due to the limited sample size of this study, it was difficult to strictly distinguish the effect of ethical education and that of entire law school education because correlation between year (1L-3L) and ethical education was strong (0.70). While this study successfully found the effect of ethical education itself separated from the effect of entire education in the disclosure question of Case U,⁸⁷ this study could not find it statistically significant in other cases when controlling the factor of year.⁸⁸ Having said that, any ethical sense students acquire from the entire law school education would be eventually based on the Model Rules and other fundamental ethical principles. Thus, this study would have observed the effects of professional ethical rules even if the difference of ethical sense in some degree between the two groups came from the entire law school education and not from the particular ethical education.

Second, as for the nature of the sample, the respondents do not represent all of the law students in the States. The sample data is only from students at five top-tier law schools (ranked within top 20). Therefore, students at lower ranked schools might have a different ethical sense, and the effect of ethical education to them might be different from the results of this study. Having said that, a certain degree of diversity was maintained, as the ranks of respondents' schools varied within top 20. Thus, this study's sample at least represents students of elite law schools.

Third, in connection with the second issue, this study treated all of the respondents from different schools as one data set⁸⁹ on the premise that there is no difference among schools. But, the actual ethical education, school climate, and student characteristics might differ by school. If so, students' ethical sense and the effect of ethical education

87. See *supra* Section III.B.

88. See *supra* Section III.B for the strategy question of Case U. The effect of ethical education was not statistically significant in questions of Case A as well when year was controlled by the method of ordered logistic regression.

89. See *supra* II.A and note 44.

might somehow differ by school. Those possible differences by school were outside the scope of this study.

Fourth, the respondents were law school students and not real attorneys. This study employed law school students in order to compare the pre-education group and the post-education group. But, attorneys' ethical sense might keep changing after practicing for a certain period of time or after taking courses of continuing legal education ("CLE") at the bar associations. Thus, the results of this study (i.e., the answers from students after ethical education) might not be the same as the ethical sense of real attorneys. It would be interesting to administer the same questionnaire to attorneys in the future. However, given that respondents of this study were students at elite schools, most of whom will safely pass the bar exam and will find actual employment at law firms immediately after graduation, the ethical sense of post-education students would not largely differ from that of real attorneys.

Fifth, this study focused on the case of divorce settlement, with some limited scenarios. The effect of ethical education and the professional ethical rules might differ in other cases than divorce settlement. Also, the results of Case A might not be exactly the same if it uses different amounts of assets. This study used the two numbers, \$1,000,000 and \$100, which were clearly material and nonmaterial. But, respondents' reactions may be different in the case of middle amounts such as \$10,000 and \$1,000. It would be ideal to test several different numbers in the future. Having said that, Cases A, U and P in this study would roughly cover all of the major situations in divorce settlement practice.⁹⁰

V. CONCLUSION

Loyalty to their clients is at the core of attorneys' ethical rules in the U.S. However, this principle might be too narrowly focused. Among the three principles related to negotiation ethics, only the Client Principle has substantial impact on negotiators, while other principles, such as the Fairness and the Public Principles, are powerless. This study empirically uncovered that learning professional ethics makes negotiators less considerate of fairness and public interests. In

90. Another important situation regarding divorce (in particular, post-divorce) would be disputes over visitation. But, the structure of visitation disputes is basically the same as that of custody disputes. Therefore, findings from Cases U and P are relevant to visitation disputes as well.

other words, legal education makes attorneys more “unethical.” Attorneys are seeking their clients’ interests by way of sacrificing third party’s rights (public interests) as well as fairness and truthfulness in negotiation. Even worse, this study found that they are less hesitant to misrepresent material facts when negotiating non-monetary issues (e.g., custody of a child).

The U.S.-style partisan role of attorneys would work perfectly well if every single person in society could hire an attorney. But, in reality, there are vulnerable people in society, such as children, who have difficulties in obtaining their own attorneys. The rights of those vulnerable people might be undermined under the current system. It would widen the welfare gap between those who can afford attorneys and those who do not have access to attorneys. For instance, in the case of divorce settlement, parents’ attorneys cannot be considered a “safety net” to protect child welfare. Unfortunately, attorneys would rather sacrifice the welfare of the child to achieve the interests of the parent, the client. Children’s rights and welfare are not secured under the current system.

For the future directions, the author would like to recommend three different approaches to improve the situation. The first approach would be to expand equal access to attorneys.⁹¹ It is necessary to secure vulnerable people’s access to attorneys when sticking to the partisan representation system. For example, in the context of divorce cases, children’s access to attorneys is essential even if the case is settled outside the court. The second approach would be education. Legal education at law school (and CLE) should also underline the importance of fairness and public interests while maintaining the partisan representation system. As the Fairness and the Public Principles are already mentioned in the Model Rules, it is perhaps a matter of how the rules are taught.⁹² But, given the current domination of the Client Principle, a mere renewal of Professional Responsibility courses would not be sufficient. It might be ideal to develop a new model of clinical education focusing on professionalism.⁹³ The third

91. See MODEL RULES OF PROF’L CONDUCT Preamble and Scope 6.

92. In this regard, it would be ideal to study qualitatively the recent reality of how professional ethics are taught in law schools and the impact of different teaching methods.

93. For reference, Harvard Medical School implemented a major reform of its medical education in 2006, and one of its purposes was to foster a better sense of professional responsibility, such as by infusing students with a sense of empathy for patients. The reform highlighted continuous clinical education and students’ interactions with patients. See, e.g., Jules L. Dienstag & Jane M. Neill, *Harvard Medical School*, 85 ACAD. MED. S269 (2010).

approach might be to simply abolish the principle of partisan representation. The current professional ethics put excessive emphasis on loyalty to the clients, and that causes the problem. By deleting the emphasis of this principle, attorneys' loyalty to their clients would be moderately guided by the attorney-client market mechanisms. Under the present market of legal services, attorneys care about the interests of their clients anyway; otherwise, they will lose their jobs. Thus, it might be unnecessary to highlight the principle of partisan representation in the professional ethical rules. This Article leaves open further discussions for system reforms. But, the attorneys' professional ethics and current legal education do have the issue of impairing fairness and public interests in negotiation. This issue should not be ignored.

APPENDIX A – SURVEY QUESTIONNAIRE⁹⁴**Introduction**

You are being asked to take part in a research study being done by Hiroharu Saito from University of Tokyo.

If you choose to be in the study, you will complete a survey. This survey will help us learn about attorneys' behaviors in divorce settlement negotiations over child custody. The survey will take you about 10-15 minutes.

You can skip questions that you do not want to answer or stop the survey at any time.

The survey is anonymous, and no one will be able to link your answers back to you. Please do not include your name or other information that could be used to identify you in survey responses.

We will give a \$5 Amazon gift card to 20 of the participants via a lottery. If you want to participate in the gift lottery, [We will give a \$1 Amazon gift card to each participant. If you want to get the gift card,]⁹⁵ you will be asked to enter your email address at the end of the survey. Your email address will not be linked to your answers and will be kept confidential. Your email address is for the purpose of holding the lottery and delivering the Amazon gift card to the winner.

Being in this study is voluntary. Please close the webpage if you do not want to participate.

You must be a current JD student at law school in the U.S. to participate in this study. If you are not, please close the webpage.

Please contact Hiroharu Saito at [saito \[at\] hrs-law.com](mailto:saito@hrs-law.com) for any questions or comments.

If you have read the above information and agree to participate in this study, click the "Next" button to start the survey.

Thank you for your participation.

94. Horizontal lines indicate page breaks in the actual online questionnaire.

95. Most participants (97) participated in this survey on the basis of \$5 to \$20 via a lottery. An additional 16 participated on the basis of \$1 each. Eighty-four participants actually provided their email address for this small compensation.

Basic Scenario

Please read the following scenario:

Basic Scenario

You are an attorney working on a pre-litigation divorce dispute. You are representing a client who is one of the divorcing parents. You will soon start the settlement negotiations for the divorce conditions such as child custody, visitation, property division, child support and alimony with the other parent's attorney. The divorcing couple has one child, who is 5 [14] years old. The biggest issue between the couple is the custody of the child. Both of the parents are very eager to obtain custody – both physical and legal custody.

Based on this scenario, three hypothetical cases will be presented to you. Those hypothetical cases are totally *independent* from each other. Answer questions *one by one in order*. You cannot go backward. Please take time to read and to think carefully before answering the questions.

Practice Question: what is the age of the child in our scenario? (click the radio button to select the option)

- 5 [14] years old
-

Case A

Your client revealed to you that he/she has *extra assets* unknown to the counterparty.

However, your client asked you not to reveal this fact (= extra assets) to the counterparty during negotiations *if possible*. Revealing this fact may affect the settlement of financial issues such as property division, child support and alimony.

Questions for Case A are on the next page.

If the amount of the extra assets was **\$1,000,000 (one million dollars)**, would you disclose the fact of your client's extra assets to the counterparty during the negotiations?

- Yes, I would disclose it.
- No, I would not disclose it.
- I would disclose it if asked explicitly and specifically by the counterparty.

If the amount of the extra assets was \$100 (*one hundred dollars*), would you disclose the fact of your client's extra assets to the counterparty during the negotiations?

- Yes, I would disclose it.
 - No, I would not disclose it.
 - I would disclose it if asked explicitly and specifically by the counterparty.
-

Case U⁹⁶

Your client revealed to you that he/she has continuously failed to provide basic necessities to the child. Based on the client's confession, your client seems to be an *unfit* parent. Furthermore, the counterparty seems to be a fit parent.

However, your client is still eager to obtain custody of the child. Your client asked you not to reveal the fact of his/her unfitness (= the client has continuously failed to provide basic necessities to the child) to the counterparty during the negotiations if possible.

Remember that the age of the child is 5 [14].

Would you disclose the fact of your client's unfitness to the counterparty during the negotiations?

- Yes, I would disclose it.
- No, I would not disclose it.
- I would disclose it if asked explicitly and specifically by the counterparty.

What would be your basic strategy for the negotiations in Case U?

- I would try to obtain custody of the child.
 - I would somewhat try to obtain custody of the child.
 - I would somewhat try to give away custody of the child.
 - I would try to give away custody of the child.
-

Case P

Your client revealed to you that the *child's own preference* is to live with the counterparty rather than with the client. Both the client and the counterparty seem to be an *equally fit* parent for raising the child.

96. The two cases, Case U and Case P, were presented in random order to each respondent.

However, your client is still eager to obtain custody of the child. Your client asked you not to reveal the child's own preference to the counterparty during the negotiations if possible.

Remember that the age of the child is 5 [14].

Would you disclose the fact of the child's own preference to the counterparty during the negotiations?

- Yes, I would disclose it.
- No, I would not disclose it.
- I would disclose it if asked explicitly and specifically by the counterparty.

What would be your basic strategy for the negotiations in Case P?

- I would try to obtain custody of the child.
 - I would somewhat try to obtain custody of the child.
 - I would somewhat try to give away custody of the child.
 - I would try to give away custody of the child.
-

Now, we would like to know the reasons behind your decisions in Case U (the case of client's unfitness).⁹⁷

On a scale of 1 (Not at all important) to 5 (Extremely important), please indicate how important each of the following factors⁹⁸ was for you in your decision making process regarding the question "Would you disclose the fact of your client's unfitness to the counterparty during the negotiations?" in Case U. Remember your answer to this question was [the respondent's answer to the previous question being inserted automatically].

Re-post of Case U

Your client revealed to you that he/she has continuously failed to provide basic necessities to the child. Based on the client's confession, your client seems to be an *unfit* parent. Furthermore, the counterparty seems to be a fit parent. However, your client is still eager to obtain custody of the child. Your client asked you not to reveal the fact of his/her unfitness (= the client has continuously failed to provide basic necessities to the child) to the counterparty during the negotiations if possible.

97. The reasons behind the answers given for the two cases, Case U and Case P, were asked in random order to each respondent.

98. Eight factors were presented in random order in a matrix.

	1 (Not at all)	2 (Slightly)	3 (Moderately)	4 (Very)	5 (Extremely)
Getting a fair settlement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Complying with the Rules of Professional Conduct	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Securing the child's welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Maximizing the settlement for your client	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Conducting yourself ethically	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Maintaining your integrity	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Maintaining client confidences	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Avoiding assisting in a client's fraud	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

On a scale of 1 (Not at all important) to 5 (Extremely important), please indicate how important each of the following factors⁹⁹ was for you in your decision making process regarding the question “What would be your basic strategy for the negotiations in Case U?”. Remember your answer to this question was [the respondent’s answer to the previous question being inserted automatically].

99. Six factors were presented in random order in a matrix.

	1 (Not at all)	2 (Slightly)	3 (Moderately)	4 (Very)	5 (Extremely)
Getting a fair settlement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Obtaining a profitable fee for yourself	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Securing the child's welfare	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Maximizing the settlement for your client	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Avoiding litigation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Avoiding assisting in a client's fraud	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Now, we would like to know the reasons behind your decisions in Case P (the case of child's own preference).

On a scale of 1 (Not at all important) to 5 (Extremely important), please indicate how important each of the following factors¹⁰⁰ was for you in your decision making process regarding the question "Would you disclose the fact of child's own preference to the counterparty during the negotiations?" in Case P. Remember your answer to this question was [the respondent's answer to the previous question being inserted automatically].

Re-post of Case P

Your client revealed to you that the *child's own preference* is to live with the counterparty rather than with the client. Both the client and the counterparty seem to be an *equally fit* parent for raising the child. However, your client is still eager to obtain custody of the child. Your client asked you not to reveal the child's own preference to the counterparty during the negotiations *if possible*.

[omitted: a matrix with the same eight factors as Case U]

100. Eight factors were presented in random order in a matrix.

On a scale of 1 (Not at all important) to 5 (Extremely important), please indicate how important each of the following factors¹⁰¹ was for you in your decision making process regarding the question “What would be your basic strategy for the negotiations in Case P?”. Remember your answer to this question was [the respondent’s answer to the previous question being inserted automatically].

[omitted: a matrix with the same six factors as Case U]

You are almost done. Please answer the final questions below.

Which year are you in?

- 1L (Class of 2018)
- 2L (Class of 2017)
- 3L (Class of 2016)

Which law school do you go to? Enter the name of your law school.

[Textbox]

What is your gender

- Male
- Female

What is your age?

[pull-down options: range 10-80]

What is your current marital status?

- Single, never married
- Married
- Divorced
- Separated
- Widowed

Do you have children?

- Yes
- No

Have you experienced your parents’ divorce or separation in the past?

- Yes
- No

101. Six factors were presented in random order in a matrix.

Have you taken MPRE (Multistate Professional Responsibility Examination)?

- Yes
- No

Have you taken any courses (by fall 2015) that satisfy the law school's Professional Responsibility requirement? (e.g., Legal Profession)

- Yes
- No

Have you taken any courses (by fall 2015) that are directly related to negotiation?

- Yes
- No

What is your knowledge of family law and child law?

- Not at all
- Know a little
- Know a fair amount
- Know it well

What is your knowledge of ABA Rules of Professional Conduct Rule 4.1 regarding misrepresentations?

ABA Rule 4.1 (note added):

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [note: Rule 1.6 covers confidentiality of information].

- Not at all
- Know a little
- Know a fair amount
- Know it well

