

## Gender and Attorney Negotiation Ethics

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### I. INTRODUCTION

Belief and interest in gender differences are widespread and pervasive. From birth, male and female children are socialized into gender identities and roles that influence how they behave, perceive the world, and are perceived by the world. In addition to dressing their male and female children differently, parents typically play with their infants and toddlers, as well as approve and disapprove of their

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behavior, based on each child's biological sex.<sup>1</sup> Two studies suggest that within twenty-four hours after birth, a child's gender results in parents having different expectations for them, although this behavior occurs to a lesser degree these days than forty years ago.<sup>2</sup>

While many studies highlight gender differences, some studies suggest the differences may be exaggerated. For example, many people believe that men and women communicate differently, and that belief is buoyed by researchers who argue that women's verbal style is best described as supportive, egalitarian, personal, and disclosive, while characterizing men's as instrumental, competitive, and assertive.<sup>3</sup> However, other researchers refute this claim. A recent review of studies comparing males and females on a large array of psychological and communication differences revealed very few significant differences.<sup>4</sup> In fact, some studies suggest the differences in men's and women's communication patterns are estimated to be as small as 1 percent, or even less.<sup>5</sup>

When it comes to gender differences in ethical behavior, scholars and lay people believe that ethical decision-making is affected by gender.<sup>6</sup> A number of studies have found differences in men's and women's ethical behavior,<sup>7</sup> with past analyses suggesting that women are more likely to view certain questionable acts as unethical and are

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1. See generally Susan D. Witt, *Parental Influence on Children's Socialization to Gender Roles*, 32 *ADOLESCENCE* 256 (1997).

2. Jeffrey Z. Rubin et al., *The Eye of the Beholder: Parents' Views on Sex of Newborns*, 44 *AM. J. ORTHOPSYCHIATRY* 512, 514–17 (1974); Katherine Hildebrandt Karraker et al., *Parents' Gender-Stereotyped Perceptions of Newborns: The Eye of the Beholder Revisited*, 33 *SEX ROLES* 687, 697–700 (1995).

3. Anthony Mulac et al., *Empirical Support for the Gender-as-Culture Hypothesis: An Intercultural Analysis of Male/Female Language Differences*, 27 *HUM. COMM. RES.*, 121, 141–43 (2001).

4. Janet Shibley Hyde, *The Gender Similarities Hypothesis*, 60 *AM. PSYCHOLOGIST* 581, 582, 586 (2005).

5. Daniel J. Canary & Kimberly Hause, *Is there Any Reason to Research Sex Differences in Communication?*, 41 *COMMUN. Q.* 129, 140 (1993).

6. Sean Valentine et al., *Gender in Ethics: Ethical Judgments, Ethical Intentions, and Altruism Among Healthcare Professionals*, 24 *GENDER IN MGMT.* 112, 114–16 (2009).

7. See, e.g., Terry W. Loe et al., *A Review of Empirical Studies Assessing Ethical Decision Making in Business*, 25 *J. BUS. ETHICS* 185, 186–87 (2000); Michael J. O'Fallon & Kenneth D. Butterfield, *A Review of the Empirical Ethical Decision-Making Literature: 1996–2003*, 59 *J. BUS. ETHICS* 375, 376–79 (2005).

less willing to behave unethically.<sup>8</sup> Studies of accounting students,<sup>9</sup> health practitioners,<sup>10</sup> and business students<sup>11</sup> all have determined that women report being less tolerant of unethical conduct than men. However, for every study concluding that women are more ethical than men, there are nearly as many that suggest there are few to no ethical differences between males and females.<sup>12</sup>

Few studies of gender differences and legal ethics exist, and of these only a handful focus on gender and negotiation ethics.<sup>13</sup> In light of the paucity of evidence on this topic, we decided to include gender as a component of a broader study of attorney negotiation ethics. This Article sets forth and discusses our findings and hypotheses regarding gender and negotiation ethics.

Before discussing the results of the gender study reported in this Article, it is important to review some of the basic results of the broader study which have already been published elsewhere.<sup>14</sup> We surveyed more than 700 practicing lawyers and asked whether they would agree with a client request to engage in a fraudulent

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8. Danielle S. Beu et al., *Ethical Decision-Making: A Multidimensional Construct*, 12 BUS. ETHICS 88, 93–94, 101 (2003); Leslie M. Dawson, *Ethical Differences Between Men and Women in the Sales Profession*, 16 J. BUS. ETHICS 1143, 1147, 1150 (1997); Peter Skogman Thoursie, *Happy Birthday! You're Insured! Gender Differences in Work Ethics*, 94 ECON. LETTERS 141, 144 (2007); E. Sharon Mason & Peter E. Mudrack, *Gender and Ethical Orientation: A Test of Gender and Occupational Socialization Theories*, 15 J. BUS. ETHICS 599, 601–02 (1996).

9. Elsie C. Ameen et al., *Gender Differences in Determining the Ethical Sensitivity of Future Accounting Professionals*, 15 J. BUS. ETHICS 591, 596 (1996).

10. Valentine et al., *supra* note 6, at 120, 122.

11. Michael Betz et al., *Gender Differences in Proclivity for Unethical Behavior*, 8 J. BUS. ETHICS 321, 324 (1989); Durwood Ruegger & Ernest W. King, *A Study of the Effect of Age and Gender upon Student Business Ethics*, 11 J. BUS. ETHICS 179, 181–82, 184–85 (1992).

12. Donald Robin & Laurie Babin, *Making Sense of the Research on Gender and Ethics in Business: A Critical Analysis and Extension*, 7 BUS. ETHICS Q. 61, 71 (1997) (reviewing results of ten studies which consist of ninety-three total scenarios); James R. Davis & Ralph E. Welton, *Professional Ethics: Business Students' Perceptions*, 10 J. BUS. ETHICS 451, 462–63 (1991); Charles W. McNichols & Thomas W. Zimmerer, *Situational Ethics: An Empirical Study of Differentiators of Student Attitudes*, 4 J. BUS. ETHICS 175, 180 (1985); Maria L. Roxas & Jane Y. Stoneback, *The Importance of Gender Across Cultures in Ethical Decision-Making*, 50 J. BUS. ETHICS 149, 161–62 (2004); Andrew Sikula, Sr. & Adelmiro D. Costa, *Are Women More Ethical than Men?*, 13 J. BUS. ETHICS 859, 869 (1994).

13. *Cf. infra* Part IV.

14. See Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95 (2011).

negotiation scheme to settle a case,<sup>15</sup> a clear violation of Rule 4.1 of the Model Rules of Professional Conduct governing the truthfulness of statements to others.<sup>16</sup> Based on the respondents' answers, we came to several important conclusions:

- An unacceptably high number of lawyers indicate they would be willing to engage in a fraudulent settlement negotiation scheme in violation of Rule 4.1 if asked to do so by their client.
- Considerable confusion surrounds the elements of Rule 4.1.
- Lawyers may believe other legal principles take precedence over Rule 4.1.
- Lawyers believe violations of Rule 4.1 are widespread.<sup>17</sup>

These findings indicate a systemic problem in the legal profession, and we have made several recommendations to address the situation, including revising Rule 4.1 to clarify its requirements, improving instruction surrounding the rule, and increasing the rule's enforcement.<sup>18</sup>

As discussed earlier, the literature examining gender and ethics finds either that women act more ethically than men or that there is no difference between the sexes. Our findings in this study are more nuanced: while there was no difference in responses of men and women when asked to engage in a fraudulent negotiation strategy, there was a difference in response to a follow-up request to employ a pure omission strategy in the negotiation, a more subtle form of the fraudulent negotiation strategy.<sup>19</sup> Unexpectedly, the men performed better than women.<sup>20</sup> Additionally, the men performed better than women when asked whether the client's initial request constituted a misrepresentation and whether a key fact was protected from

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15. *Id.* at 99.

16. *See infra* Part II for an in-depth discussion of Rule 4.1 and its requirements.

17. Hinshaw & Alberts, *supra* note 14, at 148–49.

18. *Id.* at 150–62.

19. *See infra* Part V.A.1–2.

20. *See infra* Part V.A.2.

disclosure by the Rules of Professional Conduct.<sup>21</sup> Some of this difference correlated with the amount of respondent professional experience,<sup>22</sup> but that does not explain the entire difference in the results. However, the survey instrument was not designed to investigate and uncover those additional reasons. Thus, we cannot definitively explain the gender differences; rather, we must hypothesize what these other factors may be, such as differences in the manner in which women and men organize information when making decisions, differences in how men and women respond in ambiguous ethical situations, and differences in how men and women advocate for others.

We caution against using the data presented here to conclude that male attorneys are more ethical negotiators than female attorneys. Why? Primarily because there was no difference between men and women in response to the client's first request to engage in a fraudulent negotiation strategy. Furthermore, some studies designed to uncover gender differences use numerous ethics scenarios to determine how men and women compare; in those studies women typically outperform men on the whole while men usually outperform women on certain scenarios.<sup>23</sup> Our study presented participants with only one hypothetical situation and could well fall into the category of negotiation scenarios where men outperform women.

The remainder of the Article proceeds as follows. In Part II we explain the requirements of the professional rules of attorney conduct governing negotiation, and in Part III we discuss the study's methodology and findings from the larger study. Part IV offers a detailed review of the literature related to the influence of gender on ethical decision-making. The data resulting from this study is presented in Part V, and in Part VI, we discuss potential explanations for our findings in addition to addressing our study's limitations. In conclusion, Part VII makes several suggestions for further studies on this topic.

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21. See *infra* Part V.A.3-4.

22. See *infra* tbls.4, 5, 7, 8, 10 and 11.

23. See, e.g., William A. Weeks et al., *The Effects of Gender and Career Stage on Ethical Judgment*, 20 J. BUS. ETHICS 301, 307 (1999) (reporting that women adopted a more ethical stance than men in seven out of nineteen vignettes and men adopted more ethical stance than women in two out of nineteen vignettes).

## II. NEGOTIATION AND THE MODEL RULES OF PROFESSIONAL CONDUCT

Promulgated by the American Bar Association in 1983 and adopted in virtually every jurisdiction since,<sup>24</sup> the Model Rules of Professional Conduct regulate attorney behavior in all aspects of their work, including negotiation. The Model Rules' regulation of attorney negotiation behavior stems from Rule 4.1, which states:

### RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

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

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

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24. California is currently the only state without a code of professional conduct patterned after the Model Rules. *ABA Model Rules of Professional Conduct*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited Mar. 5, 2012); see ALA. RULES OF PROF'L CONDUCT (2006); ALASKA RULES OF PROF'L CONDUCT (2009); ARIZ. SUP. CT. R. 42 (2003); ARK. RULES OF PROF'L CONDUCT (2005); COLO. RULES OF PROF'L CONDUCT (2008); CONN. RULES OF PROF'L CONDUCT (2007); DEL. RULES OF PROF'L CONDUCT (2008); FLA. STAT. ANN. BAR ch. 4 (West 2004); GA. R. BAR pt. IV (2009); HAW. RULES OF PROF'L CONDUCT (1993); IDAHO RULES OF PROF'L CONDUCT (2004); ILL. COMP. STAT. ANN. S. CT. RULES OF PROF'L CONDUCT, art. VIII (West 2009); IND. RULES OF PROF'L CONDUCT (2005); IOWA CODE ANN. ch. 32 (West 2005); KAN. RULES OF PROF'L CONDUCT (2007); KY. SUP. CT. R. 3.130 (2009); LA. REV. STAT. ANN. tit. 37, ch. 4, art. XVI (2009); ME. BAR RULE 3 (2009); MD. RULE 16-812 (2005); MASS. RULES OF PROF'L CONDUCT (1997); MICH. RULES OF PROF'L CONDUCT (1988); 52 MINN. STAT. ANN., RULES OF PROF'L CONDUCT (2006); MISS. RULES OF PROF'L CONDUCT (2005); MO. SUP. CT. R. 4 (2010); MONT. RULES OF PROF'L CONDUCT (2004); NEB. RULES OF PROF'L CONDUCT (2005); NEV. RULES OF PROF'L CONDUCT (2006); N.H. RULES OF PROF'L CONDUCT (2008); N.J. RULES OF PROF'L CONDUCT (2004); N.M. STATE CT. R. 16 (2008); N.Y. RULES OF PROF'L CONDUCT (2008); N.C. STATE BAR R. ch. 2 (2003); N.D. RULES OF PROF'L CONDUCT (2006); OHIO RULES OF PROF'L CONDUCT (2007); OKLA. STAT. ANN. tit. 5, ch. 1, app. 3-A (2001); OR. RULES OF PROF'L CONDUCT (2005); PA. RULES OF PROF'L CONDUCT (2005); R.I. SUP. CT. R. art. V (2007); S.C. APP. CT. R. 407 (2005); S.D. CODIFIED LAWS § 16-18, app. (2009); TENN. SUP. CT. R. 8 (2002); TEX. GOV'T CODE tit. 2, subtit. G, app. A, art. X, § 9 (2009); UTAH RULES OF PROF'L CONDUCT (2005); VT. RULES OF PROF'L CONDUCT (2009); VA. RULES OF PROF'L CONDUCT (2007); WASH. LTD. PRACTICE OFFICER RULES OF PROF'L CONDUCT (2007); W. VA. RULES OF PROF'L CONDUCT (1988); WIS. SUP. CT. R. 20 (2007); WYO. RULES OF PROF'L CONDUCT (2006).

(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.<sup>25</sup>

The key to understanding Rule 4.1's application is to understand the term "material." A material fact is one in which a reasonable person would view the fact as important to a fair understanding of what is being exchanged in the deal.<sup>26</sup> This is a fairly broad standard, and Comment 2 to the rule narrows the definition of material fact by exempting (a) "[e]stimates of price or value . . . on the subject of the transaction" and (b) "a party's intentions as to an acceptable settlement of a claim."<sup>27</sup> Thus, assuming a statement is covered by the broad language in the rule itself, one must determine whether the statement falls into the comment's exception to the general rule.<sup>28</sup> "Material" law is law that is either "significant" or "essential" to the negotiation.<sup>29</sup> To summarize, when speaking about material issues, Rule 4.1(a) "requires lawyers to speak the truth as they understand it without engaging in any misrepresentations."<sup>30</sup>

The general rule for omissions under Rule 4.1 is that "lawyers have no duty voluntarily to inform an opposing party of relevant facts when negotiating."<sup>31</sup> However, Rule 4.1(b) creates "a duty to disclose material facts or law . . . if doing so avoids assisting in a client's criminal conduct or fraud."<sup>32</sup> Yet, the rule is written so that this duty

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25. MODEL RULES OF PROF'L CONDUCT R. 4.1 (1983).

26. See *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 449 (D. Md. 2002), *aff'd*, 352 F.3d 896 (4th Cir. 2003). Because the standard for summary judgment also uses the phrase "material fact," it is easy to confuse the two standards. See FED. R. CIV. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

27. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. (1983). A third item that falls into the "non-material fact" category under the comment is "the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud." *Id.*

28. See *Hinshaw & Alberts*, *supra* note 14, at 103.

29. BLACK'S LAW DICTIONARY 1066 (9th ed. 2009).

30. *Hinshaw & Alberts*, *supra* note 14, at 104.

31. *Hinshaw & Alberts*, *supra* note 14, at 104 (citing MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. (1983)).

32. *Id.*; see also MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (1983). The Model Rules define fraud as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." MODEL RULES OF PROF'L CONDUCT R. 1.0(d) (2003). The basic common law definition of fraud is found in numerous sources

appears to be limited by Rule 1.6, the rule requiring attorneys to maintain client confidences.<sup>33</sup> As we have discussed in depth elsewhere, the clause referring to Rule 1.6 is a superfluous exception to Rule 4.1(b) and should be removed from the Rule.<sup>34</sup>

In practice, Rule 4.1 does little more than declare that attorneys must comply with the common law's prohibition of fraudulent misrepresentations in negotiation.<sup>35</sup> As a result, many commentators agree that a negotiator's personal ethical standards likely provide more scrupulous guidance than Rule 4.1.<sup>36</sup> Nevertheless, clients may request that their attorneys engage in negotiation conduct that violates their personal ethics and/or Rule 4.1. In response to such a request, the attorney should first discuss with the client the consequences of following the request.<sup>37</sup> If the client refuses to reconsider the action, then the lawyer should withdraw from the representation.<sup>38</sup>

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including: *State v. Galioto*, 613 P.2d 852, 856 (Ariz. Ct. App. 1980) ("Fraud is an instance or act of trickery or deceit; an act of deluding; an intentional misrepresentation for the purpose of inducing another in reliance upon it to part with some valuable thing."); *Smile v. Lawson*, 435 S.W.2d 325, 328 (Mo. 1968) ("Fraud is defined as an instance or act of trickery or deceit especially when involving misrepresentation; an act of deluding." (citing Webster's Third New International Dictionary)); and RESTATEMENT (SECOND) TORTS §§ 525-51 (1977).

33. See MODEL RULES OF PROF'L CONDUCT R. 1.6, 4.1(b).

34. See Hinshaw & Alberts, *supra* note 14, at 105, 155-56. Rule 1.6's exceptions permit lawyers to disclose fraudulent and criminal conduct; thus such information is not required to be kept confidential. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(2) (1983). Additionally, the general requirements of Rule 1.6 have always been subject to Rule 1.2(d)'s prohibition against knowingly participating in a client's criminal or fraudulent conduct. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983); *In re Potts*, 158 P.3d 418, 425 (Mont. 2007) (holding that Rule 1.6 does not shield a lawyer from requirements of Rule 1.2(d)); 2 Law of Lawyering (Aspen) § 37.6 (3d ed. 2001).

35. For an in-depth discussion of these issues, see Hinshaw & Alberts, *supra* note 14, at 102-06.

36. See Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 503 and 529 (1989); see also MARTIN E. LATZ, GAIN THE EDGE! NEGOTIATING TO GET WHAT YOU WANT 250 (2004) (warning "don't use a tactic if you find it morally objectionable or just plain wrong"); ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 282 (2000) (advising negotiators to follow their own moral convictions).

37. See Hinshaw & Alberts, *supra* note 14, at 105-06.

38. *In re Potts*, 158 P.3d at 425; MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1), (b)(3) (1983); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-366 (1992).



### III. METHODOLOGY AND REVIEW OF PRIOR FINDINGS

The respondents completed a web-based questionnaire that presented a negotiation scenario adapted from the fact pattern in the DONS Negotiation developed by the Program on Negotiation at Harvard Law School.<sup>39</sup> Specifically, the scenario focuses on settlement negotiations for a threatened lawsuit where the study-participant attorney represents a client who believed his former girlfriend infected him with the hypothetical DONS virus, a fatal virus for which there is no cure.<sup>40</sup> The way the scenario is presented, the question of whether the client was infected by his former girlfriend is not disputed; the negotiation presents itself simply to answer the question of how much money will change hands in order to keep a potential lawsuit from being filed.<sup>41</sup>

After the setup, the questionnaire placed the respondent in the moments just before the face-to-face negotiations were about to begin when the client revealed some startling news—he recently found out that he does not have the disease after all; his test results were a false positive.<sup>42</sup> Despite the good news, the client remains angry because he had been grappling with his death sentence on many different levels, including quitting his job and selling or giving away his belongings.<sup>43</sup> As a result, he wants to punish his former girlfriend for her reckless behavior.<sup>44</sup> To do so, he asks his attorney, the respondent, to refrain from revealing the fact that he is DONS-free during the settlement negotiation.<sup>45</sup> The survey began here by asking participants if they would or would not agree to the client's request.<sup>46</sup>

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39. The hypothetical scenario used for this study was adapted with permission from the DONS Negotiation, written by Robert C. Bordone and Jonathan Cohen based on another simulation by Nevan Elam and Whitney Fox. Copies of the DONS Negotiation simulation are available from the Program on Negotiation Clearinghouse at <http://www.pon.org> or 800-258-4406.

40. Hinshaw & Alberts, *supra* note 14, at 116.

41. *See id.* at 116–17.

42. *Id.* at 116.

43. *Id.*

44. *Id.*

45. *Id.* at 116–17.

46. For a brief overview of the survey questions, see *id.* at 117.

The survey then proceeded to pose follow-up questions asking why the respondent agreed or disagreed with the client's request.<sup>47</sup> Next, a subset of respondents, those who either were not sure how they would respond to the client's request and those who would not agree to the client's request, were asked a softer version of the client's initial request—would they refrain from disclosing the fact that he is DONS-free unless the other side specifically asks about his DONS status? The questionnaire concluded by focusing on the entirety of the respondents and their understanding of the elements of Rule 4.1, the rule governing truthfulness with others.<sup>48</sup>

At its essence, the hypothetical tests whether respondents can navigate Rule 4.1's admonition against engaging in fraudulent or criminal conduct in conjunction with Rule 1.2's prohibition of engaging in criminal or fraudulent conduct, which overrides Rule 1.6's general rule for keeping client confidences.<sup>49</sup> The way to respond to the client's requests and properly navigate these rules is to refuse both requests.<sup>50</sup>

Looking at this problem from the client's perspective, tort law creates a duty for the client to correct his former girlfriend's erroneous belief that he is infected with the DONS virus. His statement to her created her belief and the information that he subsequently acquired made his statement to her that he had the disease untrue.<sup>51</sup> Going forward with the negotiation without disclosing that his belief was mistaken and that he does not actually

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47. *Id.*

48. *Id.*

49. Arizona and Missouri have adopted Rules 4.1 and 1.2(d), two of the three rules implicated in the hypothetical, and their comments without material modification. ARIZ. SUP. CT. R. 42, ER 1.2(d), 4.1; MO. SUP. CT. R. 4-1.2(f), -4.1. Arizona and Missouri have adopted a slightly different version of Rule 1.6 as compared to the Model Rule. However, these deviations have no impact on the analysis of the interplay of Rules 4.1 and 1.6 in a negotiation context. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(6) (2003), with ARIZ. SUP. CT. R. 42, ER 1.6(d)(1)-(6), and MO. SUP. CT. R. 4-1.6(b)(1)-(4).

50. For a more in-depth discussion of the following analysis, see Hinshaw & Alberts, *supra* note 14, at 118–20.

51. *Id.* at 118; see also RESTATEMENT (SECOND) OF TORTS § 551(2)(c) (1977).

have the virus constitutes a fraudulent misrepresentation.<sup>52</sup> By extension, the client's request that his lawyer refrain from disclosing his actual DONS status to induce a settlement would constitute a request to engage in a fraudulent settlement scheme on his behalf.<sup>53</sup>

Any attempt by the attorney to knowingly assist the client in this negotiation scheme violates the Model Rules.<sup>54</sup> If in the negotiation the lawyer were to make an actual misrepresentation of the client's DONS status or were to request money as reimbursement for any future DONS-related symptoms, the lawyer would violate Rule 4.1(a).<sup>55</sup> The lawyer would violate Rule 4.1(b)'s omission standard if she simply failed to try to correct the former girlfriend's mistaken belief.<sup>56</sup>

The aggregated results of the survey, which report the findings from 734 respondents from the Phoenix, Arizona and St. Louis, Missouri metropolitan areas, found that in response to the client's initial request to refrain from disclosing his DONS-free condition, 62 percent of the respondents said that they would not agree to such a request, while 19 percent said they would agree to the client's request.<sup>57</sup> The remaining 19 percent of the respondents indicated they were not sure how they would respond if placed in this situation.<sup>58</sup>

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52. *See id.* §§ 526, 551(1) & cmt. h. Comment h specifically addresses this situation as follows:

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

*Id.* § 551, cmt. h.

53. *See id.* §§ 525, 526; *see also In re Kersting*, 726 P.2d 587, 592 (Ariz. 1986) (en banc) (holding that attorney's failure to disclose material facts about client's substitution of less marketable land as investment collateral violated Rules); *In re Cupples*, 979 S.W.2d 932, 936-37 (Mo. 1998) (en banc).

54. To meet the scienter requirement the lawyer only needs to know or believe the matter is not as he or she represents it to be, not that the conduct is fraudulent. RESTATEMENT (SECOND) OF TORTS § 526(a) (1977). Even in instances where a lawyer finds that her work has unwittingly been used to further an ongoing fraud, the lawyer has a duty to correct the misapprehension. *See* 2 Law of Lawyering, *supra* note 34, § 37.5; RESTATEMENT (SECOND) OF TORTS § 551(1) (1977).

55. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-375 (1993).

56. Hinshaw & Alberts, *supra* note 14, at 119; *see also supra* Part II.

57. Hinshaw & Alberts, *supra* note 14, at 118.

58. *Id.*

The responses to the client's second request—to disclose his DONS-free status only if directly asked whether he had DONS<sup>59</sup>—revealed similar results. Sixty-four percent of these respondents (592 respondents) indicated they would refuse the request, 13 percent indicated that they would agree, and 23 percent replied that they were not sure what they would do.<sup>60</sup>

Focusing on the client's first request, we asked those who indicated they would agree with this request to rate the importance of a number of potential justifications for their decision to agree with the client's request. Using a 10 point scale, with 1 being "not at all important" and 10 being "very important," this subset of respondents gave only three proposed rationales importance ratings higher than the midpoint: "The information is protected by the professional rules of conduct regarding client confidences" (mean = 9.63), "[t]he information is protected by attorney-client privilege" (mean = 9.60), and "[t]he client has specifically requested that this information not be disclosed" (mean = 8.19).<sup>61</sup> For those who indicated they would not agree to the client's request, we asked them to rate the importance of a number of potential justifications to refuse the client's request. Using a 10 point scale, with 1 being "not at all important" to 10 being "very important," all but one proffered rationale was rated above the midpoint with the following three being rated as very important: "My integrity is too important" (mean = 9.65), "[t]o do so may violate the rules of professional conduct" (mean = 9.54), and "[m]y moral compass will not allow me to do so" (mean = 9.18).<sup>62</sup>

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59. This request was only addressed to those respondents who either refused the first request or weren't sure what they would do in response to that request.

60. Hinshaw & Alberts, *supra* note 14, at 120.

61. *Id.* at 125. The remaining proffered rationales rated as follows: "Since the suit is not yet on file, there is no need to disclose anything at this time" (mean = 4.08), "[a] lawyer has no affirmative duty to inform an opposing party of relevant facts" (mean = 3.91), "[d]isclosing the information compromises my role as a zealous advocate" (mean = 3.75), "[t]he information is harmful to the client's claim" (mean = 3.52), "[n]ot disclosing the client's DONS status unless directly asked is typical negotiation behavior" (mean = 3.43), and "[f]ailing to disclose client's DONS status at this time is typical negotiation behavior" (mean = 2.76). *Id.*

62. *Id.* at 128. The remaining proffered rationales were rated as follows: "If there is a lawsuit, the fact that he does not have the virus will come to light" (mean = 7.02), the "[c]lient does not understand the consequences to *you* if you follow his request" (mean = 6.46), the "[c]lient does not understand the consequences to *him* if you follow his request" (mean = 6.29),

When combining the results of the client's two requests, we found that 30 percent of the respondents agreed to engage in the fraudulent settlement negotiation scheme in violation of Rule 4.1,<sup>63</sup> 50 percent of the respondents refused both client requests, thereby following the proper course of action, and the remaining 20 percent responded that they were unsure how to respond to one or both requests.<sup>64</sup> The study also revealed that potential reasons for this problem include considerable confusion among some attorneys regarding the elements of Rule 4.1. That is, just more than a quarter of the respondents failed to recognize that refraining from disclosing the client's DONS-free status constituted a misrepresentation,<sup>65</sup> and many were unable to properly identify various material facts in the hypothetical negotiation.<sup>66</sup> The study also revealed that many attorneys believe that confidentiality concerns, such as client confidentiality and the attorney-client privilege, trump the Model Rule's dictates to refrain from assisting clients in fraudulent conduct.<sup>67</sup>

For the purposes of the current study we took the group of respondents and compared how women and men responded to the survey.<sup>68</sup> When comparing the professional experience of the two respondent groups, we found the longest period of bar licensure

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and "[n]egotiation strategy decisions should be made by lawyers, not their clients" (mean = 3.68). *Id.*

63. *Id.* at 120.

64. *Id.* "The category of unsure respondents breaks down as follows: 11 percent (80 respondents) refused one of the client's requests but were not sure what they would do in response to the client's other request, suggesting they were leaning toward complying with Rule 4.1, and the remaining 9 percent (67 respondents) were not sure what they would do in response to both client requests." *Id.* at 120 n.127.

65. When asked if failing to disclose the client's actual DONS-free status was a misrepresentation, 26 percent of the respondents indicated it was not and another 13 percent indicated that they were not sure. *Id.* at 123.

66. When asked if the client's DONS-free status was a material fact in the negotiation, 16 percent of the respondents indicated that it was not material to the negotiation. *Id.* at 122. Additionally, 67 percent of the respondents mistakenly indicated that the girlfriend's desire to settle the claim was a material fact to the negotiation. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. (1983) (stating that a party's intentions to settle a claim are not considered material facts to a negotiation).

67. Hinshaw & Alberts, *supra* note 14, at 126.

68. For more information about the study's respondents, see Hinshaw & Alberts, *supra* note 14, at 115.

among the women respondents was thirty-four years while eighty male participants reported more than thirty-four years since licensure. Given this discrepancy and the likelihood that it could distort the study's findings,<sup>69</sup> we limited our analysis to those respondents who identified themselves as having been licensed for thirty-four years or fewer at the time of the survey. Furthermore, a number of respondents refused to indicate their gender or the date they were first licensed to practice law, and those responses were not included in this analysis. Thus, this study analyzes the results of a total of 617 respondents; of that number, 417 identified themselves as men and 200 identified themselves as women.

#### IV. GENDER AND ETHICS RESEARCH

The literature on the intersection of gender and ethics is large and diverse, with scholars from many disciplines attempting to determine the impact of gender on ethical perceptions and decision-making. This plethora of studies is due, in part, to a societal fascination with gender differences and also, in part, to the relative ease with which one can factor this variable into a study.<sup>70</sup>

Generally, the results from these studies are mixed, typically finding that women behave more ethically than men or that no differences exist between the sexes. For example, a meta-analysis of research on gender differences in perceptions of ethical business decision-making examined data from more than 20,000 respondents and showed that women were more likely than men to perceive specific hypothetical business practices as unethical,<sup>71</sup> while a meta review of 14 studies of gender and ethical judgments reported "inconclusive findings regarding gender differences and ethical

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69. When analyzing gender differences in professional contexts, it is important to factor professional experience into the analysis because purported gender differences may be the result of variances in experience rather than gender. *See generally* Ruegger & King, *supra* note 11, at 184–85.

70. *See* Amy Cohen, *Gender: An (Un)Useful Category of Prescriptive Negotiation Analysis?*, 13 *TEX. J. WOMEN & L.* 169, 181 (2003).

71. George R. Franke et al., *Gender Differences in Ethical Perceptions of Business Practices: A Social Role Theory Perspective*, 82 *J. APPLIED PSYCHOL.* 920, 928 (1997) (surveying sixty-six separate data samples).

judgment,”<sup>72</sup> though it noted that whenever a difference was found, women were more ethical.<sup>73</sup>

Some scholars have attempted to provide a more nuanced understanding of gender differences in ethical conduct by examining other demographic characteristics that might influence individuals’ ethical stances. For example, a number of studies have examined the impact of age or work experience on men’s and women’s ethical choices.<sup>74</sup> Uniformly, these studies have found that gender differences are mitigated by respondents’ ages and work experience, with older and more experienced respondents responding more ethically and demonstrating few gender differences, though where gender differences did exist, women were often found to be more ethical. For instance, although one study of business professionals determined that career stage had a major impact on ethical judgments, women were nonetheless found to be more ethical in seven of nineteen scenarios, while men were more ethical in two of nineteen scenarios.<sup>75</sup>

The preponderance of studies finding women to be more ethical, in fact, led the authors of one study to go so far as to proclaim: “Our results suggest that further research assessing only this question is unwarranted; on average, women do show higher ethical standards than men.”<sup>76</sup> However they moderated their tone, cautioning that “[i]t is important to recognize that the gender similarities in ethical perceptions are greater than the gender differences.”<sup>77</sup>

When it comes to attorney professional discipline, there is no question that women fare better than men. A study of attorney discipline actions across the United States found that female attorneys were subject to discipline at a significantly lower rate than their male counterparts relative to their respective proportions in the attorney population.<sup>78</sup> A comparable study of attorney discipline in

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72. Weeks et al., *supra* note 23, at 303.

73. *Id.*

74. *See, e.g.*, Franke et al., *supra* note 71, at 925; Ruegger & King, *supra* note 11, at 182–84; Weeks et al., *supra* note 23, at 311.

75. Weeks et al., *supra* note 23.

76. Franke et al., *supra* note 71.

77. *Id.* at 929.

78. Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An*

Australia yielded similar results.<sup>79</sup> These results lead many to believe that female attorneys are more ethical than male attorneys.

While our research turned up no other studies of gender and attorney negotiation ethics, the few studies of gender and legal negotiations have revealed few differences between women and men. For example, a study of more than 727 attorneys in Milwaukee and Chicago found “no statistically significant difference in overall [perceived] effectiveness” based on the gender of attorney negotiators.<sup>80</sup> Similarly, one professor tracked years of negotiated outcomes from his law school negotiation course and found no discernible differences in outcomes between women and men.<sup>81</sup>

Consequently, based on the large body of research analyzing gender differences in ethical perceptions and behavior, as well as the more limited research specifically examining gender differences in legal negotiations, we hypothesized that, when it comes to conforming to the rules regulating attorney negotiation ethics, either there would be no differences between women and men or women would conform to the rules more than men would.

## V. RESULTS

The data reported in this Section is organized around four separate questions. The first two questions are the threshold questions presented to the respondents—that is, the two client requests to refrain from disclosing his actual DONS status. The next two questions focus on the assessments respondents made regarding competing legal doctrines, misrepresentation, and client confidentiality. The data for each question is organized around three

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*Empirical Study*, 31 FLA. ST. U. L. REV. 785, 800 (2004) (finding that “less than half the number of female attorneys that would be expected to be disciplined [based on their proportion of the attorney population] were actually disciplined” in year 2000).

79. Francesca Bartlett & Lyn Aitken, *Competence in Caring in Legal Practice*, 16 INT’L J. LEGAL PROF. 241, 241–42 (2009).

80. CARRIE J. MENKEL-MEADOW ET AL., NEGOTIATION: PROCESSES FOR PROBLEM SOLVING 411–12 (2006) (reporting gender results from data collected as part of the study reported in Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEG. L. REV. 143 (2002)).

81. Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 347 (1999).



variables: gender, time since licensure, and gender by time since licensure. Time since licensure is included in this study to ensure that the gender results were not simply capturing experiential differences.<sup>82</sup>

Of the 617 survey respondents analyzed in this study, 417 identified themselves as men and 200 identified themselves as women. As explained earlier, we limited the set of respondents to those who reported having been licensed for thirty-four years or fewer at the time of taking the survey, as no women reported being licensed for more than that length of time.<sup>83</sup>

To test whether experience influenced the results, we divided the respondents into three groups that best approximated professional milestones—fewer than ten years since licensure, ten to nineteen years since licensure, and twenty or more years (up to 34) since licensure.

TABLE 1  
TIME SINCE LICENSURE (IN YEARS)

TIME SINCE LICENSURE (IN YEARS)	
Fewer than 10	23%
10 to 19	30%
20 or more	47%

As Table 1 indicates, nearly half of the respondents had been licensed to practice law for twenty or more years, and nearly one-third had been licensed from ten to nineteen years. Fewer than a quarter of the respondents had been licensed for ten years or fewer.

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82. See Franke et al., *supra* note 71, at 925; Ruegger & King, *supra* note 11, at 182–84; Weeks et al., *supra* note 23, at 311. When reporting our prior nongendered findings we looked at time since licensure and found that the primary differences occurred after nearly two decades of practice. See Hinshaw & Alberts, *supra* note 14, at 138, 146.

83. See *supra* Part III.

A comparison of the respondents' genders at the three experience levels appears below in Table 2.

TABLE 2  
GENDER BY TIME SINCE LICENSURE

TIME SINCE LICENSURE (IN YEARS)	GENDER	
	FEMALE	MALE
Fewer than 10	33%	18%
10 to 19	33%	29%
20 or more	34%	53%

Note:  $\chi^2(2, n = 617) = 22.6; p < .01$

Nearly one-third of the female respondents fit into each level of experience. A slight majority of the male respondents had been licensed for twenty or more years, while only 18 percent of the male respondents fell into the fewer than ten years category. The differences shown in Table 2 were statistically significant,<sup>84</sup> confirming the importance of adding this comparison to the analysis.

#### A. Client's First Request

As explained earlier, we first asked all of the respondents whether they would agree to refrain from disclosing the client's actual DONS-free status during the negotiation with his former girlfriend. The correct answer is "no."

##### 1. Gender

No statistically significant gender differences were found in the responses to the client's first request,<sup>85</sup> despite some minor variations in responses between the men and women. Furthermore, upon testing the justifications for agreeing or refusing the client's request, there were minimal differences between women and men.<sup>86</sup>

84.  $\chi^2(2, n = 617) = 22.6; p < .01$

85.  $\chi^2(2, n = 617) = 4.5; p = .11$

86. See *supra* notes 61–62 and accompanying text for a list of the various justifications.

## 2. Time Since Licensure

The analysis of professional experience on participants' responses to the client's request revealed minor variations in responses, but no statistically significant differences between women and men.<sup>87</sup>

## 3. Gender by Time Since Licensure

Next we analyzed whether the combination of gender and time since licensure affected participants' responses to the client's first request. Our analysis revealed some small variations among the categories, resulting in those at the mid-level of experience (10–19 years) in both genders slightly outperforming the other groups. But despite the variation, the results of the analysis were not statistically significant.<sup>88</sup>

### *B. Client's Second Request*

Those respondents (500 total; 153 women and 347 men) who indicated that they would either refuse the client's initial request or were unsure how they would answer the initial request were asked a follow-up request: would you agree to refrain from disclosing the client's DONS-free status unless directly asked about it. The correct answer is "no."

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There were no differences between men and women with respect to the nine justifications for agreeing with the client's first request. There were differences between men and women with respect to three of the seven justifications for refusing the client's initial request, all of them with women rating the justification as more important than men. Those justifications are: the client doesn't understand the consequences to him  $F(1, n = 378) = 5.97, p < .05$ ; my moral compass will not allow me to agree  $F(1, n = 378) = 4.99, p < .05$ ; and lawyers should make negotiation strategy decisions not clients  $F(1, n = 378) = 5.02, p < .05$ . See Hinshaw & Alberts, *supra* note 14, at 124–29 (describing various justifications for agreeing and disagreeing with client's initial request).

87.  $\chi^2(4, n = 619) = 2.6, p = .63$

88.  $\chi^2(10, n = 617) = 13.4; p = .20$

## 1. Gender

The results of comparing the data by gender appear in Table 3 below.

TABLE 3  
CLIENT'S SECOND REQUEST BY GENDER

QUESTION	RESPONSE	GENDER	
		FEMALE	MALE
If the client instead said you could disclose his DONS-negative status if you were directly asked about it, but asked you otherwise to refrain from disclosing his DONS status, would you agree to that request?	Yes	18%	12%
	No	53%	68%
	Not Sure	29%	20%

Note:  $\chi^2(2, n = 500) = 10.8; p < .01$

Men were more likely to answer this question “no” (68 percent) than women (53 percent), thus refusing to agree to withhold the information. Women, however, were more likely than men to answer “not sure” (29 to 20 percent) and “yes” (18 to 12 percent). The results illustrated in Table 2 are statistically significant.<sup>89</sup> As with justifications for agreeing with the client’s first request, there were no statistically significant differences between men and women when comparing justifications for agreeing to the client’s second request.<sup>90</sup>

89.  $\chi^2(2, n = 500) = 10.8; p < .01$

90. The six justifications offered were: disclosing the client’s DONS status without being asked about it compromises my role as a zealous advocate, this is the manner in which the client wishes to proceed in the negotiation, the information is harmful to the client’s claim, not disclosing the client’s DONS negative status unless directly asked about it is typical negotiation behavior, since the suit is not on file, there is no need to disclose anything at this time, a lawyer has no affirmative duty to inform an opposing counsel of relevant facts. *See* Hinshaw & Alberts, *supra* note 14, at 129–31.

## 2. Time Since Licensure

The responses to client's second request organized by time since licensure appear in Table 4 below.

TABLE 4  
CLIENT'S SECOND REQUEST BY TIME SINCE LICENSURE

QUESTION	TIME SINCE LICENSURE (IN YEARS)			
	RESPONSE	FEWER THAN 10	10 TO 19	20 OR MORE
If the client instead said you could disclose his DONS-negative status if you were directly asked about it, but asked you otherwise to refrain from disclosing his DONS status, would you agree to that request?	Yes	21%	12%	11%
	No	54%	63%	68%
	Not Sure	25%	24%	21%

Note:  $\chi^2(4, n = 502) = 9.4, p = .05$

The analysis of the effect of time since licensure on the client's second request found that the least experienced attorneys reported being almost twice as likely to respond "yes" than did those with more than ten years and more than twenty years of experience. The widest gap occurred in the "no" response between those with lower levels of experience and those with higher levels of experience at a rate of 54 to 68 percent. Little variation occurred among the three experience levels in the "not sure" category (ranging from 21 to 25 percent). Despite the apparent disparity in results, the results depicted in Table 5 are, at best, only marginally significant.<sup>91</sup>

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91.  $\chi^2(4, n = 502) = 9.4; p = .05$

### 3. Gender by Time Since Licensure

The responses to the client's second request, organized by gender and time since licensure, appear in Table 5 below.

TABLE 5  
CLIENT'S SECOND REQUEST BY GENDER AND TIME SINCE  
LICENSURE

QUESTION	RESPONSE TO CLIENT'S REQUEST	GENDER AND TIME SINCE LICENSURE (IN YEARS)					
		FEMALE			MALE		
		FEWER THAN 10	10 TO 19	20 OR MORE	FEWER THAN 10	10 TO 19	20 OR MORE
If the client instead said you could disclose his DONS negative status if you were directly asked about it, but asked you otherwise to refrain from disclosing his DONS status, would you agree to that request?	Yes	29%	8%	15%	14%	14%	9%
	No	44%	64%	52%	62%	63%	74%
	Not sure	27%	28%	33%	24%	23%	17%

Note:  $\chi^2(10, n = 500) = 25.7, p < .01$

As the Table reveals, women respondents with fewer than ten years since licensure indicated that they would agree to the client's second request at a rate of 29 percent, whereas the next closest group, women with twenty or more years since licensure, agreed at a rate of only 15 percent. The group reporting the lowest rate of agreement with this request was women with ten to nineteen years since licensure at 8 percent. The group with the highest rate of refusing the client's request, men with twenty or more years since licensure, did so at 74 percent, while the group with the lowest rate of refusing the client's request was women with fewer than ten years since licensure, did so at 44 percent. Finally, the respondents with the lowest rate for "not sure" responses to this request, at 17 percent, were the men with

twenty or more years of experience, and the group with the highest percentage of respondents in this category, at 33 percent, was women with twenty or more years since licensure. Outside of the women with twenty or more years of experience, it appears that more experience results in more “no” responses to the client’s request and fewer “yes” responses. The data appearing in Table 5 is statistically significant.<sup>92</sup>

### C. Misrepresentation

The comments to Rule 4.1 specifically warn attorneys to refrain from making misrepresentations through omissions.<sup>93</sup> To determine if the respondents recognized that the omission contemplated in the client’s second request could be a misrepresentation, the questionnaire specifically asked all respondents if failing to disclose the client’s actual DONS status if opposing counsel failed to ask about it was a misrepresentation. The correct answer is “yes.”

#### 1. Gender

A comparison of women’s and men’s responses in response to this question appears in Table 6 below.

TABLE 6  
MISREPRESENTATION BY GENDER

QUESTION	RESPONSE	GENDER	
		FEMALE	MALE
If opposing counsel fails to ask about the client's DONS status, is it a misrepresentation to refrain from disclosing his true DONS status during the negotiation?	Yes	55%	64%
	No	28%	26%
	Don't know	17%	10%

Note:  $\chi^2(2, n = 617) = 6.4; p < .05$

92.  $\chi^2(10, n = 500) = 25.7; p < .01$

93. Rule 4.1, cmt. 1.

Men recognized that the client's request was a misrepresentation at a higher rate than women (64 to 55 percent), but both groups erroneously answered "no" at nearly the same rate. Women answered "don't know" at a 17 percent of the time, while only 10 percent of the men selected this answer. The results reported here are statistically significant.<sup>94</sup>

## 2. Time Since Licensure

A comparison of responses to the misrepresentation question organized by time since licensure appears in Table 7 below.

TABLE 7  
MISREPRESENTATION BY TIME SINCE LICENSURE

QUESTION	RESPONSE	TIME SINCE LICENSURE (IN YEARS)		
		FEWER THAN 10	10 TO 19	20 OR MORE
If opposing counsel fails to ask about the client's DONS status, is it a misrepresentation to refrain from disclosing his DONS status during the negotiation?	Yes	55%	54%	69%
	No	28%	31%	22%
	Don't Know	17%	14%	9%

Note:  $\chi^2(4, n = 619) = 15.1; p < 0.1$

The attorneys with twenty or more years since licensure correctly answered the misrepresentation question at a rate of 69 percent, while the other two groups of attorneys answered "yes" at comparable percentages in the mid-50s. The "no" and "don't know" answers were more bunched, with a six percentage difference among the three categories in the "no" responses and an eight percentage difference among the three categories in the "don't know" responses. The results of this analysis were statistically significant.<sup>95</sup>

94.  $\chi^2(2, n = 617) = 6.4; p < .05$

95.  $\chi^2(4, n = 619) = 15.1; p < .01$



### 3. Gender by Time Since Licensure

A comparison of responses to the misrepresentation question organized by gender and time since licensure appears in Table 8 below.

TABLE 8  
MISREPRESENTATION BY GENDER AND TIME SINCE LICENSURE

QUESTION	TIME SINCE LICENSURE (IN YEARS)						
	RESPONSE	FEMALE			MALE		
		FEWER THAN 10	10 TO 19	20 OR MORE	FEWER THAN 10	10 TO 19	20 OR MORE
If opposing counsel fails to ask about the client's DONS status, is it a misrepresentation to refrain from disclosing his DONS status during the negotiation?	Yes	54%	53%	58%	56%	54%	72%
	No	27%	29%	28%	28%	33%	21%
	Don't Know	19%	18%	14%	15%	13%	7%

Note:  $\chi^2(10, n = 617) = 20.8; p < .05$

As Table 8 reveals, male respondents with twenty or more years of experience had the highest rate of correct answers and the lowest rate of incorrect answers to this question, with 72 percent answering “yes,” 21 percent answering “no,” and only 7 percent answering “don’t know.” The remaining groups were comparable with “yes” answers in the mid-50 percent range, “no” in the high-20 to low-30 percent range, and “don’t know” in the range of the mid-to-high-teen percentages. The data in Table 8 is statistically significant.<sup>96</sup>

#### *D. Client Confidence*

As explained earlier, Rule 4.1’s admonition against engaging in fraudulent or criminal conduct in conjunction with Rule 1.2’s prohibition of engaging in criminal or fraudulent conduct overrides

96.  $\chi^2(10, n = 617) = 20; p < .05$

Rule 1.6's general rule for keeping client confidences.<sup>97</sup> The hypothetical used in this study focuses on this interaction of the professional rules of conduct and results in the conclusion that the client's DONS status is not a protected client confidence. To test respondents on this issue, the questionnaire also asked whether the client's DONS status was protected from disclosure by the professional rules of conduct for attorneys. The correct answer is "no."

### 1. Gender

A comparison of participants' responses to this question based on gender appears in Table 9 below.

TABLE 9  
CLIENT CONFIDENCE BY GENDER

QUESTION	RESPONSE	GENDER	
		FEMALE	MALE
Is the client's DONS status a client confidence protected from disclosure by the professional rules of conduct?	Yes	52%	54%
	No	22%	29%
	Don't know	27%	17%

Note:  $\chi^2(2, n = 627) = 9.7; p < .01$

As Table 9 illustrates, the differences between men and women appear in the "no" and "don't know" responses, with men answering "no" at a higher rate than women (29 to 22 percent) and women answering "don't know" at a higher rate than men (27 to 17 percent). The results reported here are statically significant.<sup>98</sup>

97. See *supra* notes 32–34 and accompanying text.

98.  $\chi^2(2, n = 617) = 9.7; p < .01$

## 2. Time Since Licensure

A comparison of participants' responses to the client confidence question organized by time since licensure appears in Table 10 below.

TABLE 10  
CLIENT CONFIDENTIALITY BY TIME SINCE LICENSURE

QUESTION	RESPONSE	TIME SINCE LICENSURE (IN YEARS)		
		FEWER THAN 10	10 TO 19	20 OR MORE
Is the client's DONS status confidence protected from disclosure by the professional rules of conduct?	Yes	48%	50%	58%
	No	30%	24%	27%
	Don't Know	22%	26%	15%

Note:  $\chi^2(4, n = 619) = 10.9; p < .05$

The respondents with fewer than ten years since licensure outperformed the other respondents on this question. They answered "no" at a higher rate than the next best group (30 to 27 percent, the respondents with twenty or more years since licensure) and answered "yes" at a slightly lower rate than the next best group (48 to 50 percent, the respondents with ten to nineteen years since licensure). The most experienced respondents had the highest number of erroneous responses ("yes") at 58 percent and the lowest number of "don't know" responses at 15 percent. The results in Table 10 were statistically significant.<sup>99</sup>

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99.  $\chi^2(4, n = 619) = 10.9; p < .05$

### 3. Gender by Time Since Licensure

A comparison of participant responses to the query about the confidentiality of client's DONS status, based on gender and time since licensure, appears in Table 11 below.

TABLE 11  
CLIENT CONFIDENCE BY GENDER AND TIME SINCE LICENSURE

QUESTION	GENDER AND TIME SINCE LICENSURE (IN YEARS)						
	RESPONSE TO CLIENT'S REQUEST	FEMALE			MALE		
		FEWER THAN 10	10 TO 19	20 OR MORE	FEWER THAN 10	10 TO 19	20 OR MORE
Is the client's DONS status a client confidence protected from disclosure by the professional rules of conduct?	Yes	49%	45%	60%	47%	51%	57%
	No	25%	24%	15%	33%	25%	31%
	Don't know	25%	31%	25%	19%	24%	12%

Note:  $\chi^2(10, n = 617) = 22.1; p < .05$

The women and men with twenty or more years since licensure answered this question incorrectly ("yes") at a rate of 60 percent and 57 percent, respectively, which is higher than any of the other groups. Furthermore, the women with twenty or more years' experience had the lowest percentage of correct ("no") answers at 15 percent, nine percent lower than the next lowest group, women with ten to nineteen years of experience. Finally, the men with twenty or more years since licensure had the fewest responses in the "not sure" category with 12 percent while women with ten to nineteen years' experience had the highest response rate in this category at 31 percent. The results in Table 11 are statistically significant.<sup>100</sup>

100.  $\chi^2(10, n = 617) = 22.1; p < .05$

## VI. DISCUSSION

This study was designed to examine gender differences in the decisions attorneys make when presented with an ethical dilemma during a negotiation. Our analysis, however, found more at work than simply gender. Specifically, we found that gender, professional experience, and the interaction between these two variables correlated with participants' responses for the client's second request, understanding that the client requested a misrepresentation, and understanding that the information requested was not a protected client confidence. While professional experience can explain some of the gender differences found in this study, it is not the only explanation. In addition to professional experience, we hypothesize that the outcomes of our study were influenced by gender differences in ethical decision-making processes, gender socialization regarding advocacy, and the framing of the particular ethical dilemma. We discuss these four factors below.

### *A. Professional Experience and Ethical Reasoning*

In our study, variances in professional experience appeared to be a primary contributor to participants' ethical decisions. Though the body of research on the impact of professional experience on ethics is limited, most of these studies suggest that experience interacts with gender to influence employees' ethical decision-making. For example, one study examined nonlawyer employees in four career stages and determined that those in later career stages provided more ethical responses than those in earlier career stages; it also determined that more experience decreased gender differences in ethical attitudes.<sup>101</sup> Another study confirmed these findings, as it discovered that gender differences in ethical reasoning declined as the work experience of the sample increased.<sup>102</sup>

As a result of these and other similar studies, we anticipated that professional experience might be a factor producing differences in responses between men and women. In our study, men and women

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101. Weeks et al., *supra* note 23, at 309–10.

102. Franke et al., *supra* note 71.

did differ overall in their years of experience, with women significantly more likely than men to have either fewer than ten or between ten and nineteen years of experience and men being more likely to have more than twenty years of experience.<sup>103</sup> However, differences in professional experience appeared to affect respondents' decision-making in ways we did not anticipate. For example, in response to the client's second request, women with fewer than ten years of experience were more likely than any other respondent group to agree to the client's request to engage in a fraudulent settlement scheme, but women with more than twenty years of experience were more likely to be unsure of what they would do.<sup>104</sup> When asked if the client's DONS status was protected from disclosure, both men and women with less experience performed better.<sup>105</sup> Consistent with the theory that time in profession improves individuals' ethical reasoning, the men with the most experience outperformed the other men in response to the question of whether the client's request constituted a misrepresentation.<sup>106</sup> However, the women with the most experience performed marginally better than the other women.<sup>107</sup> Furthermore, both women's and men's answers improved with experience in response to the client's second request, although not linearly.<sup>108</sup>

Experience was one of the factors that affected the results, and it appeared to work in concert with gender. But other factors had to affect the results. How else can we explain the fact that the highly experienced women were the most likely to report that they were unsure what they would do in response to the client's second request? Since our study did not test any other gender-related theories, we are left to hypothesize how those factors and theories work in conjunction with professional experience. The next Sections address potential gender and decision-making theories that may explain our results.

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103. *See supra* tbl.2.

104. *See supra* tbl.5.

105. *See supra* tbl.11.

106. *See supra* tbl.8.

107. *Id.*

108. *See supra* tbl.5.

### *B. Gender, Decision-Making Processes, and Ethical Reasoning*

Decision-making is a complex cognitive process, but most studies of gender differences in ethics have assumed a fairly direct relationship between respondents' genders and their ethical behaviors.<sup>109</sup> However, a few authors have suggested that gender alone is not sufficient to predict or explain respondents' differences in decision-making. Of the theories offered to explain why gender differences in ethical decision-making occur, two seem particularly relevant to our findings. The first focuses on differences in men's and women's ethical orientations, while the other examines how men and women differentially use information to make decisions.

#### 1. Gender and Ethical Orientation

Our results may have been influenced by gender differences in ethical orientation. Ethical orientation refers to the core beliefs and values that provide a framework for one's decision-making.<sup>110</sup> In her seminal work *In a Different Voice*, Harvard psychologist Carol Gilligan proposed that men and women have distinctly different moral orientations and, as a result, solve moral dilemmas through different processes, which can lead to differing results.<sup>111</sup> According to her theory, women view moral issues in terms of relationships, caring, harmony, and compassion, thereby creating a "morality of responsibility" or an "ethic of care."<sup>112</sup> Men, on the other hand, approach moral issues in terms of individual rights, rules, and justice, and therefore create a "morality of rights" or an "ethic of justice."<sup>113</sup> She contends that an ethic of justice stresses reciprocity and respect and argues for treating others fairly, while an ethic of care emphasizes responding to others' needs and supports the belief that

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109. See, e.g., Sara Jaffee & Janet Shibley Hyde, *Gender Differences in Moral Orientations: A Meta-Analysis*, 126 PSYCHOL. BULL. 703, 710–12, 719 (2000) (reviewing 113 studies of gender research).

110. See Rebecca A. Luzadis, & Megan W. Gerhardt, *An Exploration of the Relationship Between Ethical Orientation and Goal Orientation*, 5 J. ACAD. & BUS. ETHICS 1, 2 (2012).

111. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 166 (1982).

112. *Id.* at 21, 73, 164, 173.

113. *Id.* at 21, 73, 164, 172.

one should not turn away from someone in need.<sup>114</sup> Gilligan's approach, also known as gender socialization theory, asserts that the sexes bring differing values to their professions and that these differing approaches will influence their work-related ethical decision-making.<sup>115</sup>

One study using Gilligan's theory as a framework examined how women describe their processes of knowing and responding to moral dilemmas.<sup>116</sup> In interviews of 135 women, the researchers described several "ways of knowing," two of which were associated with care and one with justice.<sup>117</sup> The two associated with care were labeled "connected knowing" and "constructed knowledge."<sup>118</sup> Connected knowing refers to a process of understanding that arises from "personal, particular, and grounded firsthand experience."<sup>119</sup> Constructed knowledge occurs as a result of tolerating internal contradiction and ambiguities, asking questions and seeking integration between self and understanding.<sup>120</sup> The justice-related category of "separate knowing" values objectivity, adversarialism, reasoned critical discourse, rationality, public dialogue, and suppression of self.<sup>121</sup> The authors questioned whether women more often engage in connected knowing than men, who are often viewed as being more heavily engaged in separate knowing,<sup>122</sup> but could make no conclusions since men were not interviewed as part of the study.

Some occupational psychologists have predicted that any differences between the sexes due to gender socialization will be overridden by occupational roles and their reward systems.<sup>123</sup> According to this explanation, known as structural theory, the

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114. *Id.* at 73.

115. Franke et al., *supra* note 71, at 921; Robin & Babin, *supra* note 12, at 63.

116. MARY FIELD BELENKY ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* 11 (1997).

117. *Id.* at 12, 15.

118. *Id.* at 15, 101.

119. *Id.* at 113.

120. *See id.* at 137.

121. *Id.* at 104–12.

122. *Id.* at 102–03. The other two ways of knowing were "silence" (not expressing a sense of knowing) and "received knowledge" (which relies on information from authorities). *Id.* at 15.

123. *See* Franke et al., *supra* note 71, at 921; Robin & Babin, *supra* note 12, at 63.



differentiating factor in ethical decision-making is the difference in positions within an organization, not differences in gender.<sup>124</sup> Structural theory tends to describe ethical movement as occurring in one direction, with females adopting male ethical attitudes and behavior under similar professional business occupational conditions.<sup>125</sup>

Several studies have examined both gender socialization theory and structural theory as they apply to lawyers and law students. An early 1990's study of law students at Temple University Law School found that, during the first year of law school, female law students exhibited more care-oriented moral reasoning than their male counterparts, who exhibited more rights-oriented moral reasoning.<sup>126</sup> However, female students' rights orientation had increased to nearly match that of their male counterparts by the end of the first year of law school, and their care orientation also had decreased to nearly match that of their male cohorts, supporting the structural theory.<sup>127</sup> Studies of lawyers, however, present a more nuanced picture.

A recent study of Australian lawyers concluded that women lawyers are pressured to present a male professional persona, yet an ethic of care is present in their lawyering.<sup>128</sup> This adoption of professional norms while maintaining feminine ethical reasoning is also evident in a study of lawyers from Washington State. Before being presented with a series of moral dilemmas, the lawyer subjects were interviewed, and significantly more women than men were identified as having a care-based orientation.<sup>129</sup> When faced with a hypothetical situation where the rules governing attorney conduct were clear, female lawyers adopted a rights-based response to address

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124. Franke et al., *supra* note 71, at 921; Robin & Babin, *supra* note 12, at 63–64.

125. Franke et al., *supra* note 71, at 921; Robin & Babin, *supra* note 12, at 63–64.

126. Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 222–24 (1991).

127. *Id.* at 229–30.

128. Bartlett & Aitken, *supra* note 79, at 249.

129. See RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 188–89 (1989). In part one of the interview, 77 percent of the men and 36 percent of the women were identified as having a rights-based orientation, and 64 percent of the women and 23 percent of the men were identified as having a care-based orientation. *Id.* at 188. In part two of the interview, 77 percent of the men and 41 percent of the women were identified as having a rights-based orientation, and 59 percent of the women and 23 percent of the men had a care-based orientation. *Id.* at 189.

the situation.<sup>130</sup> But in a second hypothetical where role expectations and the legal rules at play were not so clear, female lawyers' care-based orientations came to the fore.<sup>131</sup>

The results of these two studies are consonant with our research outcomes. The more straightforward scenario, the client's first request, resulted in no differences between women and men.<sup>132</sup> However, the more ambiguous of the two scenarios, the client's second request, resulted in gender differences.<sup>133</sup> This lack of certainty may have created an opening for women to focus less on a rules-based approach and exhibit a care-based orientation to decision-making. In other words, focusing on the client's needs and suffering may have resulted in a greater likelihood for the women respondents either to agree to the client's second request or to be unsure how they should proceed.

## 2. Gender and Information Processing During Decision-Making

Researchers in the 1990s began to explore the idea that decision-making was not entirely an individual process; that is, they started to examine factors other than individual personality, temperament, or cognitive complexity that could influence how people make decisions. For example, in one study psychologists proposed that three types of factors affect individuals' decision-making process: task factors, internal factors, and environmental factors.<sup>134</sup> Task factors include the types of information available as well as the uncertainty of the available alternatives, time pressure, and possible consequences of a potential decision.<sup>135</sup> Internal factors referred to the decision-maker's motivation, emotion, and experience, while environmental factors described issues such as social influence, coercion, and work demands.<sup>136</sup> Another study building on this theory

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130. *See id.* at 74–75.

131. *See id.* at 80.

132. *See generally* Part V.A.

133. *See supra* tbl.3 (women were more likely than men to either indicate they would agree to the client's request or that they were not sure what they would do in that situation).

134. Janis A. Canon-Bowers et al., *Establishing the Boundaries of a Paradigm for Decision-Making Research*, 38 HUM. FACTORS 193, 197 (1996).

135. *See id.*

136. *See id.*

assessed the importance respondents attached to various issues associated with the decision-making process: uncertainty, time/money constraints, information and goals, consequences of the decision, motivation, self-regulation, emotions, cognition, social pressure, and work pressure.<sup>137</sup> The researchers found no sex differences occurred in cognition and self-regulation.<sup>138</sup> In other words, women and men did not differ in the intellectual aspects of decision-making like categorizing data, thinking logically to evaluate consequences, and problem-solving.<sup>139</sup> However, women and men did differ with regard to a number of other factors. Women were more concerned than men with uncertainty and doubts related to their decisions, placed more value on time and money, were more concerned about the consequences of their decisions, were more aware of the constraints of the setting and other parties, and saw emotion as more important to them in the decision process.<sup>140</sup> Men, on the other hand, placed more importance on the analysis of the information relevant to the decision, were “more focused on the definition of the goals or purposes of the decision,”<sup>141</sup> were “more motivated during the process,”<sup>142</sup> and felt work-related pressures more intensely.<sup>143</sup>

These differences may explain the differences in responses between women and men in our study. Given that the client in the study scenario faced considerable constraints due to his loss of income, property, and psychological well-being, it may be that women, more than men, factored this information into their decision-making. In addition, these constraints, as well as the conditions under which the client became involved in the lawsuit, may have engendered positive emotions or sympathy toward the client and negative ones or antipathy toward the other party. If this were the

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137. María L. Sanz de Acedo Lizárraga et al., *Factors That Affect Decision Making: Gender and Age Differences*, 7 INT'L J. PSYCHOL. & PSYCHOL. THERAPY 381, 385–87 (2007).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

case, then it may have influenced women's decision-making processes more than men's.

The men in our study also may have been more likely to make ethical choices in response to the client's second request because their decisions were more influenced by their analysis of the information available to them, including the professional code of conduct. This hypothesis is supported by the fact that men performed better than women in recognizing that the client's request was a misrepresentation and that the client's DONS status was not a protected client confidence.<sup>144</sup> Since this study was not framed as a study of ethics but rather as a study of legal negotiation strategies, some male participants may have included the ethical implications of their decisions in their analysis more than did women participants. And if women were focused on their client's outcomes and felt empathy for the client, they may not have as readily recognized the ethical nature of their choices as did men.

### *C. Gender, Advocacy, and Ethical Decision-Making*

Another contributing factor to our findings may have been a difference in women's negotiating behavior for others versus themselves. Research reveals that women often negotiate less effectively and aggressively for themselves than do men but that women are more effective negotiators than men when they advocate for others.<sup>145</sup> For instance, in a study examining pay allocation, the authors found that women paid themselves less than did men; in addition, they paid others more than they paid themselves.<sup>146</sup> In another study, in which college females and males wrote letters requesting an internship and accompanying salary for themselves or for others (and where they believed the reader would know the gender of the letter writer), women requested 8 percent less for

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144. See *supra* tbls.6, 8, 9 and 11.

145. See Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 *PSYCHOL. WOMEN Q.* 65, 68 (2001); LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION AND POSITIVE STRATEGIES FOR CHANGE* 170 (2007).

146. Charlene M. Callahan-Levy & Lawrence A. Messé, *Sex Differences in the Allocation of Pay*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 433, 437 (1979).

themselves but 9 percent more for others compared to men.<sup>147</sup> In a third study, the authors examined how male and female senior executives would negotiate when advocating for themselves as candidates for a new management position versus advocating for one of their employees.<sup>148</sup> In this case, women negotiated 18 percent higher salaries for others than for themselves.<sup>149</sup> In another study, men set goals 10 percent higher for themselves than they did for others; that is, men appeared prepared to negotiate higher salaries for themselves than others.<sup>150</sup>

In addition to advocating more forcefully for others, women also are more likely to advocate more aggressively in their professional roles than in their personal ones. That is, when their professional role requires negotiating, women may feel more comfortable being assertive, perhaps in part because they believe their professional role lends credence to the value of their requests.<sup>151</sup> This may be particularly true for women attorneys.

Both of these conditions, acting in a professional role and advocating for others, may have influenced women's negotiating behavior and ethical choices in our study. Since women advocate more strongly for others than do men and feel more justified in acting assertively for others, it is possible that the women in our study focused more on their advocacy for the client, causing their ethical obligations to fade into the background. Obviously this effect was mitigated with respect to the client's first request, but it may have led the women respondents to be more likely to agree to the client's second request or to be less certain regarding what they would and should do.

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147. BABCOCK & LASCHEVER, *supra* note 145, at 171.

148. Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951, 958 (2005).

149. *Id.* at 959.

150. *Cf. id.* at 957 (finding that men expected to pay 10 percent less in negotiations).

151. *See id.* at 962.

#### *D. Situational Framing and Ethical Decision-Making*

As we have noted throughout, between the two client requests, gender differences were found only for the client's second request, which suggests that the framing of the ethical situation may have played a role in the respondents' decisions. Framing—the way information is presented—has been found in numerous studies to influence how people respond and make decisions.<sup>152</sup> Furthermore, a range of studies have ascertained that framing affects the decision-making processes of women and men differentially.<sup>153</sup> Framing occurs at two levels, both of which affect how individuals make decisions.<sup>154</sup> At one level is the *type of situation* presented, such as whether the situation involves a gain or a loss,<sup>155</sup> and the other concerns the *way the situation is presented*, including the situation's ambiguity.<sup>156</sup> In other words, this second level asks whether the principle at issue is considered to be a simple black-and-white issue, or a more complex issue, involving shades of gray.

At least two studies support the claim that more ambiguity in the situation increases the likelihood of gender differences in ethical decision-making. An in-depth analysis of Washington State attorneys found that women and men differed in their responses to ambiguous ethical situations.<sup>157</sup> As situations become more ambiguous, individuals rely more on their personal morality for guidance, and

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152. See, e.g., John A. Fleishman, *The Effects of Decision Framing and Others' Behavior on Cooperation in a Social Dilemma*, 32 J. CONFLICT RESOL. 162, 174–76 (1988); William C. McDaniel & Francis Sistrunk, *Management Dilemmas and Decisions: Impact of Framing and Anticipated Responses*, 35 J. CONFLICT RESOL. 21, 40 (1991); Daniel J. Svyantek & Arno R. Kolz, *The Effects of Organizational Frames and Problem Ambiguity on Decision Making*, 11 J. BUS. & PSYCHOL. 131, 146–47 (1996).

153. See, e.g., Kara I. Gabriel & Ashley Williamson, *Framing Alters Risk-Taking Behavior on a Modified Balloon Analogue Risk Task (BART) in a Sex-Specific Manner*, 107 PSYCHOL. REP. 699, 699–700, 709 (2010); Yunhui Huang & Lei Wang, *Sex Differences in Framing Effects Across Task Domain*, 48 PERSONALITY & INDIVIDUAL DIFFERENCES 649, 649–50, 652–53 (2010); Irwin P. Levin et al., *The Interaction of Experiential and Situational Factors and Gender in a Simulated Risky Decision-Making Task*, 122 J. PSYCHOL. 173, 179–80 (1988).

154. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981).

155. *Id.* at 453, 457.

156. See JACK & JACK, *supra* note 129, at 93.

157. *Id.*

women are far more likely than men to employ an ethic of care.<sup>158</sup> Consequently, the study's authors suggest that when it is unclear which rules are in play, men and women are likely to respond differently.<sup>159</sup> Similarly, a second study discovered that when ambiguous or "gray" scenarios were used, gender differences occurred and the presence of these differences varied by vignette.<sup>160</sup>

Something similar occurred in our study. Respondents faced a legal negotiation that was presented, or framed, in two different ways—first as a request that included the possibility of the respondent engaging in a direct lie and later as a request for a lie of omission. Although the client's first request does not specify the type of deception that will be required, it does indicate that the respondent is being asked to engage in a lie of commission should the need arise. And the rules of the game were clearer because basic rules of ethics prohibit one from directly stating a falsehood.<sup>161</sup> As a consequence, it is possible that both women and men were equally likely to reach their decisions by reasoning according to the rule of rights mentality, and, therefore, no significant difference arose between men's and women's responses. The second request explicitly leaves out the request for a direct lie; rather, it asks the respondent to withhold information unless asked for it, apparently placing responsibility on the other party to make the truth come out. Thus, the client is asking the respondent to commit a lie of omission. In omission situations, the rules of play are more ambiguous, so that one's professional morality may give way just enough to allow one's personal morality to surface, perhaps leading women's care orientation to re-emerge and affect their responses.<sup>162</sup>

We believe the willingness to commit, or at least consider committing, an unethical act is also influenced by the framing of the ethical issue. Supporting this conclusion is a line of research revealing that, in general, people are more willing to agree to morally

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158. *Id.*

159. *Id.*

160. Aileen Smith & Violet Rogers, *Ethics-Related Responses to Specific Situation Vignettes: Evidence of Gender-Based Differences and Occupational Socialization*, 28 J. BUS. ETHICS 73, 81 (2000).

161. MODEL RULES OF PROF'L CONDUCT R. 4.1, 8.4(c) (1983).

162. See JACK & JACK, *supra* note 129, at 55.

objectionable behavior by engaging in lies of omission than commission.<sup>163</sup> That is, it is easier for many people to justify not revealing a fact if one is not asked about it because of the “blurred moral responsibility involving acts of omission.”<sup>164</sup> And it isn’t only those who engage in such behavior who feel this way; third parties also condemn others less harshly when a moral offense occurs by omission rather than by commission.<sup>165</sup>

In addition, research suggests that self-perceived identity influences moral behavior more for acts of commission (committing a bad act) than omission (failing to do a good act).<sup>166</sup> That is, taking action or “doing something” reveals more information regarding who one is than not doing something.<sup>167</sup> Thus, behavior in the active sense may be more likely to implicate the self and thereby activate the identity process than passive behavior.<sup>168</sup> The results of at least one study suggest that, compared to an omitted act, a committed act generates more cognitive processing as to who one is, thereby activating the identity process.<sup>169</sup> Furthermore, in cases of omission, individuals may not see themselves as responsible for an outcome, thus failing to frame the situation in moral terms as having done a bad thing.<sup>170</sup>

In sum, we believe the framing of the client’s second request, which requested only lies of omission, leads to a sense of ambiguity regarding ethical principles and to less cognitive processing regarding ethics and the respondents’ ethical identities. In addition it offered a less morally objectionable option than outright lying. These conditions, combined with women’s greater care orientation, may

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163. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 230 (2004); Mark Spranca et al., *Omission and Commission in Judgment and Choice*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 76, 103 (1991).

164. Tenbrunsel & Messick, *supra* note 163, at 229; *see also* MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. (1983) (stating a lawyer “has no affirmative duty to inform an opposing party of relevant facts”).

165. *See* Spranca et al., *supra* note 163, at 101.

166. Jan E. Stets, *Applying Identity Theory to Moral Acts of Commission and Omission*, 28 ADVANCES IN GROUP PROCESSES 97, 116 (2011).

167. *Id.* at 98–99.

168. *Id.*

169. *Id.* at 117.

170. *Id.* at 118–19; Tenbrunsel & Messick, *supra* note 163.



have resulted in women being more willing to act unethically and/or to be less sure how they would respond to the client's request.

## VII. STUDY LIMITATIONS

While surveys containing hypothetical negotiation scenarios provide a viable manner of studying negotiation,<sup>171</sup> they do have limitations. A study's external validity, the extent to which its findings can be generalized to individuals and circumstances beyond those in the study itself, is determined by the degree to which it reflects real world conditions.<sup>172</sup> As long as the study elicits responses similar to those in the real world, the results may be generalized to other situations.<sup>173</sup> Additionally, socially desirable responses (i.e., responses people believe they should give as opposed to those that they actually would give) are problematic when individuals know they are participating in ethics research.<sup>174</sup> Confidential surveys and anonymous responses can help minimize such biases<sup>175</sup> but cannot eliminate them entirely.

The present scenario differed from a "real world" negotiation in that we limited the number of options available to respond to the client's two requests. Participants were only given the option to accept, decline, or say they were unsure. It is possible that respondents felt constrained by or simply rejected these options and selected "not sure" because of the more nuanced manner in which they would address such requests in the real world.<sup>176</sup> And, to avoid

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171. See, e.g., Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 482–83 (2003) (discussing benefits of simulations for studying apologies in legal settlement negotiations).

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

173. Jennifer K. Robbennolt, *Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777, 788 (2002).

174. See FLOYD J. FOWLER, JR., *SURVEY RESEARCH METHODS* 93–94 (Applied Soc. Res. Methods Series Vol. 1, 1988). See generally Donna M. Randall & Maria F. Fernandes, *The Social Desirability Response Bias in Ethics Research*, 10 J. BUS. ETHICS 805 (1991).

175. FOWLER, *supra* note 174, at 94–95.

176. However, our findings in tbls.6, 8, 9, and 11 asking direct questions about the client's request suggest that this is not what occurred.

the problem of socially desirable responses, none of the materials available to participants referred to the study as a negotiation ethics study.<sup>177</sup>

Finally, this study focuses on gender as if it were an independent variable in the negotiation calculus. But gender is a multidimensional, social-psychological construct that interacts with other personal and situational variables.<sup>178</sup> As a result, there may be other principles at work here that we were unable to identify. Furthermore, to conclude that women and men constitute monolithic homogenous groups of people who act the same when presented with a certain set of facts is erroneous.

#### VIII. CONCLUSION

Studying the relationship between gender and ethical reasoning is often accompanied by some sense of trepidation on the researchers' part. This is especially true for a study like ours where men outperform women, appearing to fly in the face both of previous research and of societal beliefs about women's ethical superiority. However, we don't actually believe it does. Rather, we see our study as providing a nuanced examination of ethical decision making and how individuals manage their professional and personal codes of ethics in important and often ambiguous situations. And our study suggests that, for women, managing these codes is more fraught than it is for men.

Because professional legal ethics relies on the rule of rights, it appears to be easier for men to reconcile their own personal rights orientation with their professional responsibilities. But for women, more of whom likely have a care orientation, reconciling one's personal ethical code with one's professional responsibility code may require more effort. Our study indicates that in situations where the professional code of ethics easily resolves the issue, men and women respond similarly. When the situation becomes more ambiguous,

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177. See Donna Shestowsky, *Improving Summary Jury Trials: Insights from Psychology*, 18 OHIO ST. J. ON DISP. RESOL. 469, 486-87 (2003) (discussing use of deceptive practices in studies in order to counter "social desirability biases").

178. A. Catherine McCabe et al., *The Business of Ethics and Gender*, 64 J. BUS. ETHICS 101, 102-03, 108 (2006).

one's personal ethical identity is activated, and women and men respond differently. In these situations, women and men may rely on different sources of information and be more attuned to their own emotional understanding of potential outcomes, which allows women to invoke their underlying care orientation. Thus, in such situations, women may struggle with honoring their professional versus personal codes of ethics. Despite this finding, we believe it is likely that neither men nor women hold the upper hand concerning ethical behavior. They respond differently to ethical challenges depending on the ethical situation, their years of experience with the issue at hand, and their own personal ethical orientation.

Based on what we have learned from the present study, we believe future studies examining the interaction between gender and other factors that affect ethical decision-making are warranted. Specifically, extending our study by videotaping practicing lawyers engaging in the DONS simulation would offer two benefits—it would allow participants to manifest a variety of behaviors and responses to the scenario (as opposed to the three choices we provided) and provide a more realistic experience compared to what is available with a survey. In addition, because our findings suggest that framing may significantly affect women and men's ethical decision making, future studies would benefit from including a variety of scenarios that vary by topic and presentation. Finally, all studies of gender and ethics would be strengthened if men's and women's gender orientation, rather than just their biological sex, were used to differentiate participants from one another. All members of each sex are not homogenous in their gender identities, but rather, both sexes vary along the two continua of masculinity and femininity.<sup>179</sup> Assessing individuals' gender orientations would allow a more fine-grained analysis than using sex alone as a variable.

Another area for further research is the effect that professional experience has on negotiation ethics. One would expect more experienced lawyers to perform better on ethical issues; younger professionals are thought to be more prone to ethical lapses due to strong desires for peer acceptance, goal attainment, and performance

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179. Jan E. Stets & Peter J. Burke, *Femininity/Masculinity*, in *ENCYCLOPEDIA OF SOCIOLOGY* 998 (Borgatta & Montgomery eds., 2d ed. 2000).

standards.<sup>180</sup> Plus, attorneys look to each other to gauge the acceptability of their actions,<sup>181</sup> and observing and mimicking others are important methods of learning professional ethics and norms.<sup>182</sup> Our results were mixed when addressing whether professional experience is an important factor in ethical decision-making; on some measures, more experienced respondents performed better, and on others, they performed worse. Furthermore, if professional experience is a consistent factor in better ethical decision-making, then one of our teaching goals should be to begin students' maturation process earlier than it otherwise would so that they can achieve better results quicker.

One purpose of this study is to build off of our prior work by investigating the differences between men and women with regard to negotiation ethics. This purpose, however, serves a broader purpose involving behavioral ethics—we want to learn how attorneys behave when confronted with ethical dilemmas.<sup>183</sup> In other fields, the concept of behavioral ethics is becoming a critical component in the understanding of professional ethics and ethical training.<sup>184</sup> By applying these concepts to lawyers, we can better understand how unintentional but predictable cognitive patterns result in unethical conduct.

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180. Weeks et al., *supra* note 23, at 305.

181. Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 *FORDHAM L. REV.* 1429, 1431–32 (2006).

182. *See id.*

183. *See* MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 4–5 (2011) (discussing usefulness of ethics training and corresponding need to understand biases in ethical decision-making).

184. *Id.*