Introduction

In the context of negotiations, how does “cheater’s high” influence our ethical behavior, decision-making and negotiation strategy? “Cheater’s high” is the term coined by behavioral ethics researchers to describe the positive feeling we experience when we cheat. Rather than feel guilty for these ethical transgressions as was previously believed, those who cheat actually experience a positive effect that further incentivizes the unethical behavior to continue. Even though some who are perched on their ivory tower may feel immune from “cheater’s high,” social scientists remind us that at times we all cheat to varying degrees. This cheating reality is problematic for us all, because it collides with a lawyer’s ethical obligation to be truthful.

In this column, I will discuss how the research about “cheater’s high” contributes to our understanding of why we as negotiators may blur truth telling in negotiations. The purpose of this column is not to debate the lines between truth and falsity in negotiations, but to heighten our awareness to our own internal ethical lines and how we react when we get to close to the edge, fueled by the “cheater’s high.” To begin, I will provide an overview of the research on “cheater’s high.” In Part II, I will explain a lawyer’s ethical anchoring in truthfulness. Then, in Part III, I will extrapolate what the research on “cheater’s high” contributes to the discussion on ethical negotiations.

Part One: Behavioral Ethics Researchers Teach Us About “Cheater’s High”

The research on cheater’s high studied the emotional response of people making voluntary, unethical decisions on a spectrum of problem-solving tasks where there was no salient victim and no obvious harm. Several relevant lessons were learned.

First, we have a fundamental need to believe that we are good moral beings and often insist that our ethical behavior conforms to that belief. However, researchers have shown there is a misalignment between what we believe is ethical, what we predict we should ethically do and how we actually behave, in the heat of the ethical moment. To clarify, the ethical decision-making process is guided by two components: the should self and the want self. The should self shapes our long-term, rational ethical decision-making and controls how we view our own ethical behavior. The want self provides us with a different ethical vantage point and compels us to act in the heat of the moment. The research has shown that many people, when asked to forecast how they will respond to an ethical dilemma in the future, will often over predict their ethical behavior. Moreover, when people do commit minor ethical transgressions, they have the ability to rationalize these ethical transgressions in a way that allows them to maintain their belief that they are moral beings.

Second, we all cheat. In the heat of the moment, the “want” self compels us to focus on the short-term benefits that we might have rather than the long-term negative consequences of ethical transgressions such as reputational costs. This focus on the short-term benefits when the want-self is operational, elicits a positive effect in the individual. The research further explains that so long as the moral transgressor, aka cheater, doesn’t believe that the cheating hasn’t actually harmed anyone, the cheater may actually feel good about the cheating, continuing to believe he or she is still a moral person, the positive effect known as “cheater’s high.”

Cheater’s high is reinforced for three primary reasons. First, there may be actual gains from cheating such as additional money or beating an opponent. Second, “cheater’s high” may give the transgressor the psychological kick that comes from circumventing the rules to deceive and manipulate others. Third, the cheater may experience a sense of personal pride for overcoming rules and finding loopholes in a process that is designed to constrain behavior.

Several factors increase cheating. Cheating increases cheating. Thus, test subjects wearing knockoffs were more likely to cheat. The thinking is, if I am willing to push some ethical limits, I am more likely to push others. Mental depletion is another factor that makes an individual more susceptible to the want self than the should self. Dieters are more likely to cheat at the end of the day when will power has become exhausted. A third factor that increases cheating is the cheater’s ability to rationalize that the cheating is not really hurting anyone. Of surprise, cheating is not increased if the cheater knows that there is the likelihood of being caught or that he will gain a sum of money from the cheating.

The researchers have also found that there are several interventions that have been shown to increase moral

In New York, lawyers representing a client in negotiations have an ethical obligation to be truthful about all (emphasis added) facts. The New York Rules of Professional Conduct Rule 4.1 Truthfulness in Statements to Others specifically provides:

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.⁶

This is a heightened obligation of truthfulness that is distinguishable from the correlate ABA Model Rule 4.1 that requires truth telling just for material facts.⁷

As explained in his commentary, Roy Simon states that for there to be a violation of Rule 4.1, the misrepresentation must have three components.⁸ The misrepresentation must take place in the course of representing a client. The misrepresentation must be knowingly made. Third, the misrepresentation must be made to a third person. Interestingly, “conventions of negotiations” such as estimates of price and a party’s expression of what constitutes an acceptable settlement are not considered violations of this rule.⁹

The challenge for many in applying this ethical rule and incentivizing truth telling is that in the course of negotiation there is little consensus about the line between truth and “strategic” negotiation tactics. Is it cheating or a negotiation strategy to keep your cards close to your chest, withhold information, proffer an attenuated version of the truth and make offers that have little to do with any objective reality?

Part Three: “Cheater’s High,” Negotiations and Interventions

The research on “cheater’s high” explains, in part, why some lawyers may continue to engage in questionable ethical behavior in negotiations. If we are to be truthful, both the collaborative and hardball negotiation styles offer opportunities for cheating. However, this uncomfortable discussion about the lines between truth and falsity in negotiations instead often morphs into the more comfortable discussion about what constitutes good advocacy in negotiations. While some of us believe that candor and the sharing of quality information in negotiations are more than likely to yield an optimal outcome for our clients, others laugh at the naïveté of this approach, and instead adamantly believe that a “hardball approach” is strategically advantageous for promoting your client’s interests. Advocates who use this approach tend to keep their cards close to their chest, withhold important information, proffer an attenuated version of the truth and make offers that have little to do with any objective reality.

Whether our negotiation advocacy style is “hardball” collaborative or a hybrid of the two approaches, truth telling is an ever-present issue in negotiation. There is a question about whether some of the aforementioned hardball strategies, even though effective, are ethical or acceptable “conventions of negotiations.” A more subtle inquiry is how collaborative negotiators, too, may cheat. Although negotiators who subscribe to the collaborative approach believe their approach is a more candid approach, collaborative negotiators may still present nuances of the truth in a way that questions the ethics of truth-telling.

The research on cheater’s high clarifies why such questionable ethical behavior continues in both the hardball and collaborative negotiation styles. For some, effective advocates and hardball negotiators are one and the same. Your goal is to get an advantage. Hardball negotiators take great pride in their reputation and talk about the “high” they get negotiating. There are no victims, it’s just the game of negotiations. One ethical transgression makes the next one easier. And, the better negotiator is the one who knows how to bend the rules, find the loophole to victory. For collaborative negotiators, the cloak of collaboration may provide a false sense of the collaborator’s commitment to candidness and sharing of information that the collaborator may exploit to cheat and gain an advantage in negotiations.

Gleaning lessons from the research, there are affirmative steps that we can all take to incentivize our truth telling. First, we need to become aware that this is an issue. Second, prior to entering negotiations, we may read the Professional Rules as an ethical anchoring to promote our ethical decision-making. Third, we might create Negotiate
Agreements and Confidentiality Agreements that require our signatures on the top, as another reinforcement to promote truth telling.

**Conclusion**

“Cheater’s high” is one example of the contribution behavioral ethics research contributes to our understanding of our professional and personal ethical behavior as negotiators. I chose to write this column about “cheater high” because I have always been fascinated with the rush many of our colleagues say they experience when negotiating. I hope this column prompts readers to scrutinize their negotiating behavior once again. It is also an opportunity to re-align our negotiating behavior with our personal values and professional ethical mandates.

Yes, we may all have different ideas about what constitutes ethical behavior in negotiations and whether there is even such a concept as an absolute truth. Nevertheless, as ethical practitioners we strive to interpret our ethical mandates in a way that is internally consistent with our personal and professional beliefs.

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**Message from the Co-Editors-in-Chief** (continued from page 2)

**International**

Alexandra Dosman examines recent authority on the always difficult issue of when non-signatories may be bound to international arbitration agreements. Prof. Dr. André Niedostadek, LL.M submits an examination of the German Mediation Act and provides a basic overview of the key issues addressed and the experiences with mediation under this new law. Sherman Kahn discusses whether patent related disputes will emerge as a major subject matter of international investor-state arbitration.

**Book Reviews**

Kim Landsman reviews *The Rise of Transparency in International Arbitration: The Case for the Anonymous Publication of Arbitral Awards*, by Alberto Malatesta and Rinaldo Sali, which examines the emerging push for transparency in arbitration and the tension that creates with traditional concepts of confidentiality in arbitration.

Stefan Kalina reviews the new Third Edition of the *College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*, which has been has been substantially expanded and updated, incorporating several new chapters on subjects such as including intra-tribunal relations, arbitrators’ fees, electronic discovery, and hybrid arbitration processes.

**Case Notes**

The case notes in this issue examine a recent case from the Second Circuit examining the applicability of the Foreign Sovereign Immunities Act to arbitration awards against foreign governments; a case from the Ninth Circuit, reaffirming that, under *Hall Street*, parties cannot preclude federal courts from reviewing arbitration awards under the criteria set forth in Section 10 of the Federal Arbitration Act; and the *Doral Financial* case from the First Circuit, which makes clear that arbitrators have the discretion to exclude evidence without fear of vacatur provided parties are given sufficient opportunity to be heard.

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**Endnotes**


2. *Id.*

3. *Ruedy et al., supra note 1* at 533.


5. *Supra note 1*.


7. *Id.* at 1008.

8. *Id.* at 1009.

9. *Id.* at 1008.

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