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Elayne E. Greenberg

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ETHICAL COMPASS: The Cheater's "High"— Harmonize Ethics, Research and Negation Behavior

By Professor Elayne E. Greenberg

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.¹ 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.² 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.³ 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.⁴ 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

behavior.⁵ For example, reminders of morality right at the decision-making juncture have been found to have a beneficial effect. Bursting my delusional bubble, the researchers also painfully reminds that Ethics CLE programs and column like this one have little impact on contributing to ethical behavior: Another helpful intervention to promote ethical behavior, signatures at the top of forms are more apt to have ethical information follow than forms that require signatures at the bottom. A third recommended intervention is to help deflate the cheater's rationalization that there are no victims by actually identifying the victims that could be harmed.

Thus, the research on "cheater's high" explains why we may make ethical behavioral transgressions. The positive emotions that accompany such transgressions allow people to rationalize that they are still the good moral beings they believe themselves to be. Yet, this reality collides with our ethical obligations as lawyers.

Part Two: The New York Rules of Professional Conduct Rule 4.1: Truthfulness in Statements to Others

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 naiveté 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.

Endnotes

1. See, e.g., Dan Ariely, *The (Honest) Truth About Dishonesty*, (HarperCollins 2012); Dan Ariely, “Why We Lie,” WSJ.com (May 26, 2012); and Nicole E. Ruedy, Celia Moore, Francesca Fino, Maurice E. Schweitzer, *The Cheater’s High: The Unexpected Affective Benefits of Unethical Behavior*, *J. Pers. & Soc. Psych.* 2013, Vol. 105, No. 4, pp. 531-48.
2. *Id.*
3. Ruedy et al., *supra* note 1 at 533.
4. Ariely, *supra* note 1 at WSJ.com.
5. *Supra* note 1.
6. Simon’s N.Y. Rules of Prof’l Conduct Annotated at 1007 (2013).
7. *Id.* at 1008.
8. *Id.* at 1009.
9. *Id.* at 1008.

Professor Elayne E. Greenberg is Assistant Dean for Dispute Resolution, Professor of Legal Practice and Director of the Hugh L. Carey Center for Dispute Resolution. Please submit your comments to greenbee@stjohns.edu.