# The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students

*Nancy A. Welsh*

*Lawyers should care about their reputations. But exactly what sort of reputation should lawyers seek to establish and maintain in the largely nontransparent context of legal negotiation? And even if a lawyer has developed a reputation as a negotiator, how will he/she know what it is and how it came to be?*

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*ranking of, objective results, I also base part of students' final grades on their scores on a "Reputation Index." These scores are based on students' nominations of their peers, accompanied by explanatory comments.*

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**Key words:** negotiation, reputation, negotiation style, procedural justice, trustworthiness, distributive negotiation, integrative negotiation, trust.

## Introduction

It appears self-evident that lawyers should care about their reputations, not just for their own sake but for the sake of their clients, the legal profession, and the larger justice system in which they play such a significant role. But exactly what sort of reputation should lawyers seek to establish and maintain in the largely nontransparent context of legal negotiation? And even if a lawyer has developed a reputation as a negotiator, how will he/she know what it is and how it came to be?

I force my students to grapple with these questions by incorporating the issues of reputation and reputation development into my negotiation/mediation course. I introduced this innovation at the same time that I decided to increase my focus on developing students' skills in distributive (or value-claiming) negotiation. Although legal negotiation certainly offers frequent opportunities for the creation of integrative joint and individual gains, the process will almost inevitably involve distribution. The pie, once baked, must be cut.

As a result, I now base a portion of my students' final grade on the objective results they achieve in two negotiation simulations. Two dangers of this assessment choice are that it can encourage students to focus only on the numbers and, even worse, engage in "sharp practice" — an extreme form of hard bargaining that tests ethical boundaries — in order to achieve the best short-term distributive outcomes. Of course, neither a

quantitative focus nor sharp practice is synonymous with a distributive approach to negotiation. Nonetheless, to counterbalance the temptations posed by the focus on, and ranking of, objective results, I also base part of students' final grades on their scores on a "Reputation Index." These scores are based on students' nominations of their peers, accompanied by explanatory comments.

This article describes the Reputation Index and how I use it. The article also explores the empirical support for the validity of the Reputation Index as a tool for simulating the development and assessment of lawyers' reputations in the "real world." To that end, the article considers research regarding the bases for lawyers' perceptions of effectiveness in legal negotiation, the sometimes counterintuitive distinction between negotiation "approach" and negotiation "style," and the relationships among perceptions of negotiation style, procedural justice, trustworthiness, and reputation.

Ultimately, the research suggests that a negotiation style generally categorized as "cooperative" or "collaborative" or "procedurally just" — for example, allowing the other negotiator to speak, listening to what he/she has to say, demonstrating understanding of what he/she said, and generally treating him/her with respect and some degree of open-mindedness — is not necessarily associated with any particular negotiation approach and does not detract from negotiators' effectiveness in achieving favorable outcomes in purely distributive contests. This style, however, also is consistently associated with discovering integrative solutions that might otherwise remain untapped and maximization of joint returns.

Such an interpersonal style seems to operate as a heuristic for trustworthiness, thus encouraging the information disclosure that makes the maximization of joint returns more likely. Lawyers utilizing this style also seem more likely to be perceived by their peers as effective negotiators. Other research — not involving lawyers or even law students — suggests that perceptions of such a cooperative style in negotiation will then translate into the development of a more generalized (and positive) reputation as a trustworthy negotiator. This reputational effect will be especially marked for those who receive more social attention, perhaps because of their heightened engagement in social interaction, their role in the hierarchy of an organization, or their social exposure.

Importantly, though, available research has consistently indicated that it is not *impossible* for legal negotiators with an aggressive or overtly competitive style to be assessed by other lawyers as effective. It is significantly less likely, however, that they will achieve this assessment than those perceived as cooperative and presumably trustworthy. Indeed, the research suggests that the aggressive or overtly competitive legal negotiator, who

signals disinterest in and even arrogant disregard of the other lawyer and his/her client's needs, must be quite extraordinary — a respected and skilled trial lawyer, observant of the other negotiator, at least minimally respectful of the boundaries of zealous representation — and achieve extraordinary results in order to gain his/her peers' respect as an effective negotiator. This assessment, though, appears grudging, and it is unclear that it translates into a positive reputation as a legal negotiator among one's peers.

Finally, research in business and management suggests that the joint gains and positive reputations attributed to a negotiator's "cooperative" style or "procedurally just" behaviors may be trumped by a strong reputation for skill "in the art of claiming a lot of value for himself." In essence, awareness of such a reputation acts as a warning that even if a negotiator behaves in a manner that *appears* trustworthy, he/she is not; he/she represents a high risk because he/she will claim all, or the vast majority, of the value that he/she helps to unlock. Not surprisingly, such a reputation chills willingness to share the sort of information that can produce integrative solutions.

The application of these findings to legal negotiation remains an open question. Nonetheless, this provocative research suggests that even though legal negotiators will *want* to be effective distributive and integrative negotiators, they may be better off *avoiding a reputation for being* too *effective in claiming value for themselves and their clients*. Perhaps paradoxically, the negotiators who are most likely to have a reputation for effectiveness are those who acknowledge that legal negotiation is just as much about the other people who are involved and abiding by relevant professional norms as it is about the task of competing for a favorable share of apparently scarce resources. Negotiators are more likely to gain positive reputations if they are *both* sufficiently effective in creating and claiming value *and* sufficiently trustworthy in their treatment of other negotiators.

## The Reputation Index

As noted earlier, I use the Reputation Index as a counterweight to the portion of students' grades that are based upon their objective results in two negotiation simulations. As I explain to my students in the course syllabus, I determine these "objective results" by considering how a student's negotiation results "compare with others' results (i.e., those playing the same role), and the extent to which these (results) achieve and protect client's interests, recognize the scope of authority, and are consistent with relevant legal and ethical constraints." Objective results may be purely monetary or may include both monetary and non-monetary terms.[1] I am not completely transparent regarding my bases

for comparing or ranking the results.[2] The very fact of comparison or ranking, however, establishes competition among the students and may inadvertently encourage a short-term quantitative focus and even sharp practice.

Enter the Reputation Index. I first learned of this tool from Roy Lewicki, professor of management and human resources at the Fisher College of Business at Ohio State University.[3] I have adapted Lewicki's instrument over the years and expect that it will always represent a "work in progress." (The description in this article reflects my experience with the Reputation Index during the fall 2010 academic semester.) Every year, I have administered the Reputation Index very late in the semester, sometimes through the examination period. The Reputation Index permits students to nominate other students in the class who they perceive have achieved the most positive or negative reputations as legal negotiators.[4] Students' rankings on the Reputation Index then count toward their final grade in the course. Students may request to see the number of nominations they received and the comments supporting such nominations.

Although the Reputation Index is not administered until late in the semester, I try to make reputation salient from the very first day of class in negotiation/mediation. My students and I review the various assessment tools that I will use to determine their final grades. The syllabus describes them as follows:

> Your grade in this course will be based on the following components:
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> |---|---|
> | Your choice of ten-page opinion letter for client OR performance in final videotaped negotiation simulation | 30 pts |
> | Final take-home examination on legal and ethical issues | 25 pts |
> | Class participation/contribution/preparation/feedback to colleagues | 20 pts |
> | Negotiated agreement drafting exercise | 10 pts |
> | An objective measurement of your results in two negotiations (5 points each) | 10 pts |
> | Reputation Index | 5 pts |
> | Total | 100 pts |

Note that the Reputation Index counts for only five of a possible one-hundred points that will be used as the basis for the students' final grades. This small allocation of points is intentional and, I believe, important for reasons described later in this article.

The course syllabus also explicitly describes the Reputation Index and its relationship to the objective measurement of students' negotiation results in two simulations:

> *Graded Results and Reputation Index.* I encourage everyone to experiment in this class, make mistakes, and try out new approaches and techniques. That's how you learn and improve. At the same time, in the real world, you will both develop a reputation and be judged by your results in particular cases. This course will simulate the real world by taking both into account to some degree. First, I will consider your score on a Reputation Index, which has been created for use in business school negotiation courses. The index is a proxy for the long-term effects of reputations created by negotiation activities in organizations, where the negotiations you conduct today affect the perceptions and expectations of others tomorrow. The index recognizes that those individuals who have reputations as trustworthy and effective negotiators are likely to have an advantage in future negotiations, and those who have reputations as untrustworthy and/or ineffective are likely to be at a disadvantage. The index will be determined by asking class members to identify peers in the class with positive and negative negotiation reputations. These nominations will then be converted into a point distribution. Second, for two negotiation simulations (designated on the reading assignments grid), you will be graded based on your objective results, including how they compare with others' results and the extent to which they achieve and protect your client's interests, recognize the scope of your authority, and are consistent with relevant legal and ethical constraints.

Finally, the syllabus informs the students that their score for class participation/contribution will be affected by the Reputation Index because the index will seek "your colleagues' assessment of your contribution to their learning."

Most recently, the following questions comprised the Reputation Index:

1. *Positive Reputation: Direct Experience*

   In response to this question and Question 2, you will select up to six (6) people — not including yourself — who you think have developed positive reputations as negotiators. This does not mean you will select six (6) people in response to this question and select another six (6) in response to the next question. Instead, after responding to the combination of this and the next question, you will have selected up to six (6) people who have developed positive reputations as negotiators. Negotiators earn good reputations by displaying — or being perceived as displaying — competence, effectiveness, trustworthiness, integrity, and so on.

   In response to this question, please select only the people with whom you were *directly* involved in a class exercise, negotiation, or mediation (in-class, video-conferenced, video-taped). Remember that you may select

no more than six (6) people in response to the combination of both this question and Question 2.
(Questions 1 through 4 and 7 are followed by a list of all the students in the class, generally comprising twenty-eight to thirty-two students.)

2. *Positive Reputation: No Direct Experience*

   In response to this question, please select only the people with whom you were *not* directly involved in a class exercise, negotiation, or mediation (in-class, video-conferenced, video-taped).

3. *Negative Reputation: Direct Experience*

   In response to this question and Question 4, you will select up to six (6) people — not including yourself — who you think have developed negative reputations as negotiators. This does not mean you will select six (6) people in response to this question and select another six (6) in response to the next question. Instead, after responding to the combination of this and the next question, you will have selected up to six (6) people who have developed negative reputations as negotiators. Negotiators develop negative reputations as negotiators by displaying — or being perceived as displaying — dishonesty, incompetence, ineffectiveness, lack of trustworthiness, lack of integrity, and so on.

   In order for your selections to count, you will need to explain the basis for each of your selections in response to Question 5 below. In response to this question, please select only the people with whom you were *directly* involved in a class exercise, negotiation or mediation (in-class, video-conferenced, video-taped). Remember that you will select no more than six (6) people in response to the combination of both this question and Question 4.

4. *Negative Reputation: No Direct Experience*

   In response to this question, please select only the people with whom you were *not* directly involved in a class exercise, negotiation or mediation (in-class, video-conferenced, video-taped).

5. *Negative Reputation: Explanations*

   For each of the people you selected as someone who has developed a negative reputation as a negotiator, please provide a constructive, concrete explanation of no more than three sentences. If someone asks to review the information that served as the basis for his/her scores on the Reputation Index, the presumption is that your explanation will be passed along verbatim. Please consider this and try to ensure that your explanations demonstrate your respect for your colleagues and a desire to assist them in achieving their potential.[5]

6. *Positive Reputation: Explanations*

   For each of the people you selected as someone who has developed a positive reputation as a negotiator, please provide a concrete explanation of no more than three sentences.

7. *Contribution to Learning*

   In response to this question and the next one, you will select up to six (6) people — not including yourself — who have contributed substantially to your learning in this course through good feedback, insightful participation, or other actions (intended or otherwise) that have helped you to learn. These ratings will be incorporated into the points earned for class participation/contribution/feedback.

My description of the negotiators with a "positive" or "good" reputation — as negotiators who have displayed, or have been perceived as displaying, "competence, effectiveness, trustworthiness, integrity and so on" — clearly incorporates elements that can be understood as normative.[6] This article will examine research regarding the validity of including such elements, especially "effectiveness" and "trustworthiness."

Returning to the logistics of the Reputation Index, the students must complete it in one sitting.[7] A student's failure to complete the Reputation Index adversely affects his/her class contribution/participation/preparation/feedback score. I have never had a student fail to complete the index.

Even though the Reputation Index counts for only five of the one hundred raw points used to determine students' final grades, the points must be calculated carefully. It is relatively straightforward to total the number of direct-positive, indirect-positive, direct-negative, and indirect-negative nominations that each student received.[8] But, as noted in the instructions above, a negative assessment counts only if it is accompanied by an explanation. This requires double-checking to ensure that the number of comments and nominations are consistent.[9]

The next calculation is also relatively straightforward. I subtract the number of negative nominations from the number of positive nominations. I then plot the raw scores, just as I would with a standard exam, and determine the score clusters that will receive 1–5 points for the Reputation Index. It may be noteworthy that as a result of this approach, a student who receives no nominations (positive or negative) will earn the same score — and receive the same number of points for the Reputation Index — as the student who receives five positive nominations and five negative nominations. Both will receive a raw score of 0. If 0 is the median for the entire class, both of these students are likely to receive three of the five points allocated to the Reputation Index. The first student, who received no nominations, will receive no explanatory comments. There would be at least five comments, and probably more, for the second student.

By the end of this process, I will have a Reputation Index score sheet for each student. It will specify the number of nominations received in each of the four categories described above (i.e., direct-positive, indirect-positive, direct-negative, and indirect-negative), as well as the number of class contribution nominations. The score sheet also lists all of the explanations for positive and negative nominations.

I do not make these score sheets automatically available to students. Instead, I inform the students of the score sheets' availability and provide them only to the students who request them. If a student wishes, we will have a conversation about the contents of his/her score sheet.[10] Sometimes, students request receipt of this information in person. On other occasions, students request the information by e-mail. Before providing the information, I review the student comments. The vast majority are respectful, constructive, and concrete. But on those rare occasions when they are not, I delete language that I consider so inflammatory, disrespectful, or hurtful that, in my opinion, it will detract too much from the learning experience and the student's ability to achieve his/her potential. Some of the comments that remain, though, may still hurt. They also may be specific enough to suggest the identity of the author of the comment. I have not tended to remove these identifying features because students are aware that their comments will be made available if requested.

The Reputation Index makes salient, throughout the semester, the concept of long-term reputation development. In particular, it increases students' awareness of the importance of their perceived effectiveness and trustworthiness. Because of the Reputation Index, especially the opportunity for comments, many students receive individualized feedback that they would be less likely to receive in person. And, finally, the Reputation Index provides a useful counterweight to the focus on negotiation outcomes. In particular, student comments emphasize the value of preparation, assertiveness, respectful communication, trustworthiness in the management of material information, and maintaining a commitment to maximizing the outcome for the client, while also being willing to listen, work with the other negotiator to develop joint gains, and compromise if necessary.

Student comments also reveal the negative reputations created by perceptions of emotional and unyielding attachment to particular positions, arrogance in tone or behavior, a single-minded and exclusive commitment to maximizing the client's individual gain at the expense of listening to others, and failure to disclose material information. I have seen students learn valuable lessons from their review of their Reputation Index results. Some of them have then requested the opportunity to view recordings of certain negotiations in order to make their own judgments about the validity of the comments.

But no assessment tool is perfect, and the Reputation Index is no exception. Obviously, this tool requests students' subjective assessments; it is

not objective. A bigger concern is that the Reputation Index reduces the need for students to learn how to provide *direct* feedback. Even supervising lawyers in private firms can experience difficulty with this task, and it is increasingly important as lawyers work in teams.[11] Others have suggested that highlighting reputational consequences in this manner could undermine the sense that lawyers ought to "do the right thing" even when there is no obvious consequence for doing the "wrong" thing. I have tremendous sympathy for this position: I simply do not agree that there will, or should, be no consequences.[12] Finally, and most worrisome to me, are the possibilities that some students may use the Reputation Index to target certain students for "punishment" or conspire in their allocation of nominations.

My negotiation/mediation class, which is video-conferenced, is about equally divided between students in the location where I am (usually Carlisle) and students in the other location (usually University Park).[13] We use videoconferencing for both regular class sessions and one-on-one simulations. I worry about those students who may not perform as well on screen and then do not have an in-person opportunity to debrief or engage in the small talk that creates other connections.

I also worry about potential use of the Reputation Index to express discomfort with or discrimination against those who are different or who do not fit their classmates' stereotypes or cultural expectations regarding "appropriate" behavior. Because of all of these concerns, I have concluded that the Reputation Index delivers a form of "rough justice" that should never count for more than a few points in my negotiation/mediation course. The inclusion of the Reputation Index, however, forces the students to recognize that perceptions of negotiation effectiveness and reputation development inevitably involve interaction between our behaviors (regardless of the intent underlying those behaviors) and others' expectations of us.

Fortunately, those using the Reputation Index can draw upon substantial research regarding the behaviors and traits that lawyers consider effective in negotiation, the relationship between negotiation style and perceptions of effectiveness and outcomes, and the relationships among negotiation style, procedural justice, and trustworthiness. Importantly, all of the research described here involves American lawyers practicing in the United States. Further, the research described here does not differentiate among substantive practice areas with their different cultures and language. Nor does it differentiate among negotiations conducted in litigation, transactional, and regulatory contexts. These sorts of contextual differences are likely to matter. For litigators, for example, it seems likely that a lawyer's record of success at trial or in motion practice will influence his/her reputation as an effective lawyer in general and that such a reputation will also play a role in his/her reputation as a legal negotiator.

Like the Reputation Index, this research regarding the development of lawyers' reputations as legal negotiators represents a "work in progress" — a

significant and exciting one, important for our students and for the legal profession more generally.

## Reputations and Negotiation Effectiveness

In order to discuss how lawyers develop reputations as effective legal negotiators, we must first define "effectiveness" in the context of legal negotiation (Menkel-Meadow 1983). This is not easy. For example, if effectiveness is judged primarily by outcome quality, Carrie Menkel-Meadow (1984) has proposed measuring whether a solution (1) reflects clients' needs, long-term and short-term; (2) is Pareto optimal; (3) is efficient (lowest possible transaction cost) in terms of the desirability of the solution achieved; (4) is achievable, enforceable, and implementable; and (5) is fair or just. (For purposes of this article, I consider "Pareto optimal" and "maximization of joint return" to be synonymous.) Other commentators have suggested other measures. Some are relatively obvious, such as maximization of the client's returns (see Craver 2003, 2010). Others are not obvious at all, such as contract durability as evidenced by the nonoccurrence of meritorious litigation.[14]

Some commentators have even urged that the definition of effectiveness should acknowledge the interests of the negotiating agents. In the context of legal negotiations, such measures could include, according to Gerald Williams, "favorable economic return for the (lawyer-)negotiator" as well as "maintain(enance of) a favorable reputation within the bar" (Williams 1983: 44).[15] Ronald Gilson and Robert Mnookin (1994), meanwhile, have suggested that the development of a favorable reputation may not just be in *lawyers'* interests. Rather, clients who do not trust each other may nonetheless have an interest in signaling their commitment to a particular strategy — for example, cooperation — through their selection of a lawyer or firm with a reputation for such behavior.[16]

The focus of this article, then, is on that last measure, how a lawyer develops his/her reputation and what reputation he/she should seek as a legal negotiator. It seems obvious that we should begin by turning to research investigating the bases for legal negotiators' evaluations of each other's effectiveness in the short term and long term. The best-known research in this area was conducted by the Brigham Young University Legal Negotiation Project. Gerald Williams and other researchers there aimed to discern the characteristics of lawyer negotiators perceived by their peers as effective or ineffective (Williams et al. 1977; Williams 1990). Based on surveys of randomly selected active lawyers in the Denver and Phoenix metropolitan areas, the researchers concluded that lawyer negotiators' behaviors are clustered into three perceived patterns, labeled as "cooperative," "aggressive" (or "competitive"), and "no pattern" (Williams 1983, 1990).

Most frequently (65 percent), lawyers' behaviors were perceived to fit the cooperative pattern; 24 percent of the time, their behaviors fit the

aggressive pattern; and 11 percent of the time, they fit "no pattern." Much more importantly for the purposes of this article, however, lawyer respondents did not perceive *any single pattern* as having "a monopoly on effectiveness." Some percentage of the time, cooperative *and* aggressive *and* even "no pattern" patterns of behavior were perceived as effective. And, some percentage of the time, each of the three patterns was perceived as *ineffective* (Williams 1990: 14).[17]

A striking finding from Williams and his colleagues' (1977) research was that even though lawyers perceived effective and ineffective negotiators within each pattern as sharing many of the same key *objectives,* the *implementation* of those objectives separated the effective negotiators from the ineffective ones. All the effective negotiators, regardless of the pattern into which they fit, were perceived as observant and disciplined professionals, skilled in the craft of lawyering and operating within the profession's ethical constraints.[18] In other words, as lawyer respondents identified effective legal *negotiators*, they noticed whether their opposing counsel were effective *lawyers*.

In contrast, lawyer respondents perceived ineffective legal negotiators as allowing their personal egos, emotions, and insecurities to be given excessive play. Ineffective cooperative negotiators were not just trustworthy but trustful. They were not just personable but gentle, obliging, patient, and forgiving. Ineffective aggressive negotiators were not just dominating but irritating. They did not just reveal information gradually and strategically; they withheld information and were rigid. The lawyer respondents' assessments reveal their perception that ineffective negotiators failed to exercise sufficient self-control and failed to moderate their behaviors based on their observations of opposing counsel's responses. Williams has observed that with the ineffective legal negotiators, "we have . . . a description of the extremes of both styles (cooperative and aggressive), both of them ineffective, but in quite opposite ways . . . [W]e can assume that negotiators at the ineffective level are either omitting essential aspects of the strategies, or else they are defeating their own strategies by going too far with them or otherwise negating their effectiveness" (Williams 1983: 33–34).

It is also interesting, and certainly significant, that lawyer respondents perceived the occurrence of substantially more cooperative legal negotiation than aggressive legal negotiation, and were much more likely to assess those who fit the cooperative pattern as effective. Fifty-nine percent of those perceived as cooperative were also described as effective; 45 percent of those fitting no pattern were described as effective; only 25 percent of those perceived as aggressive were described as effective (Williams 1990:15). Williams has argued that those using a cooperative pattern "are self-monitors who do not want to go beyond what would be fair to both sides" (Williams 1991: 155). But the lawyer respondents perceived that effective lawyers using a cooperative pattern had maximization of their own clients'

settlement as one of their top objectives. Therefore, it might be more accurate to say that these effective lawyers apparently sought both a good result for their own clients — and something fair enough for the other side.

Nonetheless, it is also certainly significant that the lawyer respondents sometimes saw the value and effectiveness of the aggressive pattern when it was implemented intelligently and successfully. Indeed, it might be helpful to understand effective aggressive negotiators as "competitors" or "worthy foes," while ineffective aggressive negotiators could be understood as mere "bullies." Those in the former group may be trusted, at least to some degree, as professionals; those in the latter group should be distrusted. (This article will discuss the significance of trust and perceived trustworthiness in greater detail below.)

More recently, Andrea Kupfer Schneider (2002) conducted a similar survey of lawyer negotiators in Milwaukee and Chicago. Like Williams and his colleagues, Schneider asked the lawyer respondents to assess their negotiation counterparts.[19] Although Schneider used different labels to identify the patterns her research uncovered, she found that the traits and objectives associated with effective negotiators in one cluster (which she labeled "problem-solving") overwhelmingly tracked those included in Williams' effective "cooperative" pattern (Schneider 2000). Perhaps due to the addition of new choices in the survey instruments, Schneider found some differences between her "adversarial" cluster and the "aggressive" pattern identified by Williams. Nonetheless, there were many general similarities, with "egotistical," "demanding," and "ambitious" showing up as top adjectives in Schneider's study, while "tough," "dominant," "forceful," "ambitious," and "egotist" were among the top traits of effective negotiators who fit the "aggressive" pattern cited by respondents in Williams' (1983) study.

Schneider's respondents also reported that effective lawyers in the problem-solving and adversarial clusters shared two traits: "experienced" and "confident." The top bipolar descriptions and goals reported for both groups revealed several additional areas of overlap:

> Both effective problem-solvers and effective adversarials were perceived as being interested in the needs of their clients, acting consistently with the best interest of their client, and representing their client zealously and within the bounds of the law. Both were also perceived as intelligent. Finally, the goals in common were maximizing the settlement for the client, seeing that the client's needs were met, and taking satisfaction in the exercise of legal skills. It is easy to see . . . what effective lawyers have in common. They are assertive, smart and prepared (Schneider 2002: 188–189).

Once again, lawyer respondents perceived effective legal negotiators as skilled lawyers.

Some commentators have closely examined Williams' and Schneider's research results to urge that lawyers' perceptions of effectiveness are based more on negotiation *style* than on negotiation *approach* or *strategy*. It is to this important set of concepts that this article now turns.

### *Negotiation Style Versus Negotiation Approach, Strategy, and Tactics*

Donald Gifford (2007) has asserted that lawyers need:

> to distinguish style from strategy in a real negotiation for two reasons. First, many of the disadvantages of *competitive tactics* — the possibilities of deadlock and a premature breakdown of negotiation, and of generating ill-will and distrust with the other negotiator — can be mitigated if the *style* of the negotiator is friendly. Even when the substance being communicated to the other negotiator is very demanding and competitive, friendliness, courtesy and politeness help to preserve a positive working relationship. Conversely, the beginning lawyer needs to be able to identify *competitive tactics* even when the style of the negotiator is *friendly*. Often, lawyers will be misled by the polite and friendly style of the other lawyer and assume that he is using *cooperative tactics*, i.e., that his goals include a fair and just agreement and a positive, trusting working relationship between the parties. To the extent that the negotiator confuses friendly style for cooperative substance, she may be inclined to reciprocate, and the resulting agreement will disadvantage her client (Gifford 2007: 21).

Gifford has observed that the adjectives used in Williams' research combine characteristics of style with specific negotiating behaviors or tactics. For example, traits such as "tough" or "aggressive" or "attacking" actually represent "style elements," while other traits — such as "made a high opening demand" or "revealed information gradually" — have more to do with tactics (Gifford 2007: 31). If a negotiator understands that he/she can and should make a choice regarding his/her style separate from his/her choice regarding his/her approach or strategy or tactics, he/she immediately doubles his/her options and may exponentially expand his/her effectiveness.

Charles Craver has made a similar point in a series of articles and books (generally written alone but sometimes written in collaboration with Williams). For example, Craver and Williams wrote in 2007:

> Effective cooperative/problem-solver negotiators and effective competitive/adversarial negotiators share one trait that is most often associated with competitive/adversarial bargainers — they hope to *maximize settlements* for their *own clients*. This may suggest that many effective negotiators are not entirely cooperative/problem-solving or competitive/adversarial, but a combination of both styles. These individuals seek to advance client interests (competitive/adversarial goal), but do so in a courteous and professional manner (cooperative/problem-solving

> approach). They are also concerned about the interests of opposing parties and hope to achieve agreements that maximize the joint returns enjoyed by both sides (cooperative/problem-solving goal). This hybrid approach may account for the fact that lawyers rated far more cooperative/problem-solvers as effective negotiators than competitive/adversarials. If we could create a third category consisting of *competitive/problem-solvers*, this group might encompass a substantial portion of the lawyers labeled effective cooperative/problem-solvers.
>
> This is the approach that we consider to be the most effective over the long run. We believe that attorneys should work diligently to advance the interests of their own clients, but should not allow this objective to negate other equally important considerations, such as behaving ethically and professionally and seeking fair settlements that maximize the joint returns achieved by both sides. Once negotiators obtain what they think is appropriate for their own clients, they should look for ways to accommodate the non-conflicting interests of their opponents. They should seek what Ronald Shapiro and Mark Jankowski (2001) call "WIN-win" results — both parties obtain beneficial results, but their side obtains more generous terms. They should do this not only for altruistic reasons, but also for their own benefit. First, they have to provide opponents with sufficiently generous terms to induce those parties to accept agreements over their non-settlement alternatives. Second, they hope to ensure that opponents will not develop post-negotiation "buyer's remorse" and try to overturn the agreements reached. Finally, they are likely to interact with opposing counsel in the future. If they are remembered favorably, their subsequent encounters are likely to be pleasant and mutually productive. On the other hand, if they are remembered negatively as nasty competitive/adversarials who sought to exploit and even embarrass their opponents, those lawyers will seek retribution during their future interactions with these difficult negotiators (Williams and Craver 2007: 53–54).

More recently, Craver has observed that effective negotiators, whether cooperative/problem solvers or competitive/problem solvers, "recognize the crucial fact that persons work most diligently to satisfy the needs of opponents they like personally" and "enjoy interacting with these pleasant and professional persons," which enables "these subtly manipulative persons . . . to induce unsuspecting opponents to lower their guard and make greater concessions. They also generate positive moods that promote cooperative behavior and the attainment of more efficient joint agreements" (Craver 2010: 348).

Admittedly, it is a little jarring to see "pleasant and professional" negotiators reframed as "subtly manipulative." Nonetheless, Craver observes quite perceptively that those who "exude competitiveness and manipulation and . . . behave in a rude manner" (Craver 2010: 348) are much less likely to be liked — and thus will (intentionally or unintentionally) forfeit associated advantages.[20] Indeed, Craver (2009: 103) has noted that in his

courses, "Competitive/adversarial advocates generate more *nonsettlements* than their cooperative/problem-solving cohorts. The extreme positions taken by competitive/adversarial bargainers and their frequent use of manipulative and disruptive tactics make it easy for their opponents to accept the consequences associated with nonsettlements." Craver suggests that, in contrast, competitive negotiators who are perceived as problem-solving — due to their cooperative style — are likely to achieve settlement, maximization of their own side's returns, mutually efficient terms, and mutually satisfactory results.

Additional research supports distinguishing negotiation style from negotiation approach, as well as the greater influence of style upon lawyers' perceptions of colleagues' effectiveness. In 1986, Williams and his research colleagues again surveyed lawyers, this time to determine whether the lawyer-respondents perceived the other negotiator as having a "care" orientation or a "justice" orientation (Burton et al. 1991). If a lawyer respondent in this study perceived the other negotiator as "adaptable," "communicative," "helpful," "patient," having "avoided inflicting harm," having "considered my needs," etc., that negotiator was categorized as having a care orientation arising from awareness of personal relationships and empathy (Burton et al. 1991: 226). The justice orientation involved "understand(ing) moral dilemmas as conflicts of rights or claims, with the result that relationships are subordinated to rules and principles" (Burton et al. 1991: 201). If a negotiator was perceived as "analytical," "fair-minded," "objective," "organizing," "rational," "realistic," "self-controlled," etc., he/she was categorized as having a justice orientation (Burton et al. 1991: 228–229). Note the relationship between these various adjectives and negotiation *style* rather than approach or strategy.

The researchers found that lawyers assessed as either high care or high justice (which were highly and positively correlated with cooperative negotiating behaviors) were rated as significantly more effective negotiators than their low-care or low-justice colleagues (Burton et al. 1991). In one sense, it should be entirely unsurprising that lawyer respondents gave high scores to colleagues who they judged as adaptable, communicative, helpful, or patient, or who avoided the infliction of harm and were considerate of other negotiators' needs, or analytical, fair-minded, objective, organizing, rational, realistic, and self-controlled. Both sets of adjectives and behaviors should improve the dynamics and productivity of a negotiation. It is striking, though, that *both* high care and high justice were about equally associated with perceived effectiveness — and that many lawyers seemed to exhibit either high care (65 percent) (Burton et al. 1991: 228) *or* high justice (67 percent) (Burton et al. 1991: 230) in their negotiations.

Some very recent research results further support the conclusion that negotiation style plays a significant role in perceptions of effectiveness. This research suggests that the manner in which negotiators treat each other is

correlated with the perceived fairness of negotiated outcomes, the willingness to accept such outcomes (Lind 1998; Welsh 2006; Hollander-Blumoff and Tyler 2008; Hollander-Blumoff 2010),[21] and the likelihood of achieving integrative solutions (see Anderson and Shirako 2008; Hollander-Blumoff and Tyler 2008). More specifically, researchers found that in a bargaining situation that permitted *only* distributive outcomes, a negotiator was more likely to perceive the quantitative outcome as fair — even if relatively unfavorable — if his/her negotiation counterpart had treated him/her in a procedurally fair manner (Hollander-Blumoff and Tyler 2008; Hollander-Blumoff 2010). Perceptions of procedurally fair treatment were highly correlated with perceptions that the other negotiator had listened, behaved in a courteous manner, respected the rights of the respondent negotiator's client, demonstrated concern about that client's satisfaction, was trustworthy, and shared information. The assessment of fair treatment also correlated significantly, but negatively, with "whether the other party used deception" (Hollander-Blumoff and Tyler 2008: 492–493). If his/her negotiation counterpart had treated him/her in a procedurally fair manner, the respondent-negotiator was more likely to accept (or recommend acceptance of) the outcome, thus signaling greater likelihood of compliance. Note that the negotiator behaving in this fair manner did not necessarily achieve a *more* favorable distributive outcome for himself/herself or his/her client. Rather, the researchers found *no* relationship, positive or negative, between the negotiator's procedurally fair behavior and his/her own objective, quantitative results (Hollander-Blumoff and Tyler 2008).[22] In terms of the bottom line — the distributive outcome — it neither hurt nor helped to behave in a procedurally just manner.

In a second study, the researchers found that if the bargaining situation permitted the development of integrative outcomes, thus maximizing *joint* gains, the achievement of such outcomes was positively correlated with a procedurally fair negotiation process. Such maximization of joint gain was correlated with perceptions of the negotiation as collaborative, and collaborative negotiation was correlated with procedurally just behaviors.[23] The maximization of joint gain created the potential for both parties to experience additional *individual* gain. Interestingly, if both negotiators behaved in a procedurally just manner, the researchers found that the negotiators were likely to divide the gain equally. Ultimately, the researchers concluded that the disclosures necessary to achieve integrative solutions were more likely to be made in a procedurally just process.

Although this research is framed in terms of procedural fairness, I include it here because the behaviors that correlated with procedural justice — listening, behaving in a courteous manner, demonstrating respect for the rights of the other client, signaling care for the other client, sharing information, not deceiving the other negotiator — are consistent with a cooperative style.[24] Also, the researchers found the relationship between

perceptions of procedural fairness and perceptions of the other attorney's trustworthiness to be particularly strong, which is consistent with other research showing that perceptions of trustworthiness help facilitate meaningful and productive disclosures (or "voice") despite the uncertainty and risk that almost inevitably characterize negotiation and other dispute resolution processes (Hollander-Blumoff and Tyler 2008). (This research is discussed in greater detail below.) Trustworthiness facilitates the quality of "voice," which also helps explain why integrative solutions are so likely to be correlated with cooperative behavior.

The mutually reinforcing relationships among procedural justice, trustworthiness, cooperative style, and the development of integrative solutions also are consistent with Morton Deutsch's "crude law of social relations," which states that "the characteristic processes and effects elicited by a given type of social relationship also tend to elicit that type of social relationship" (Deutsch 1983: 438). But if a legal negotiator behaves in a procedurally just, cooperative, trustworthy manner, how will it affect his/her *reputation* as a legal negotiator — positively, negatively, or not at all?

### *Relationships among Reputation, Negotiation Style, and Trustworthiness*

Reputations are defined in a variety of ways (Tinsley, Cambria, and Schneider 2006). From a game-theoretic perspective, a reputation is the embodiment of others' beliefs about the strategies that an individual will use, while from a psychological perspective, it is "a coherent image of the nature of someone's character which then directs how that person will behave subject to situational constraints" (Tinsley, Cambria, and Schneider 2006: 204–205). More generally, reputation represents how an individual is perceived by multiple members of a community (see Anderson and Shirako 2008). Some research has suggested that "repeat play" in negotiation should result in the development of a reputation (Kreps et al. 1982; Kreps and Wilson 1982; Burton et al. 1991), although such reputation is more likely to reflect a behavioral mean than guarantee a particular set of behaviors in every instance (Anderson and Shirako 2008). Knowing someone's reputation — and having a positive reputation oneself — should be helpful in counteracting the potentially negative effects of uncertainty (Burton et al. 1991). In particular, "[t]he value of a reputation is that it initially conveys credible information to the parties to a transaction and no additional time or resources need to be expended to reestablish that information" (Burton et al. 1991: 223).[25]

Researchers have found empirical support for the notion that the interpersonal behaviors that make up a negotiation style influence negotiators' long-term reputations more than the outcomes they have achieved. In one study, researchers found that "above and beyond their integrative *outcomes*, individuals' cooperative *behavior* across the tasks predicted their

reputation for cooperativeness" (Anderson and Shirako 2008: 324). Importantly, however, researchers found a reputational multiplier effect for individuals described as "socially connected." These individuals already received more social attention, sometimes because of their role in the hierarchy of an organization, and in other situations, because of their heightened engagement in social interaction. More specifically, these "more socially connected individuals . . . developed reputations for cooperativeness more easily when they behaved cooperatively . . . than less socially connected individuals, whose reputations for cooperativeness were less strongly related to their behavior . . . ." Similarly, more socially connected individuals "developed reputations for selfishness more easily when they behaved selfishly" (Anderson and Shirako 2008: 327).

Anderson and Shirako observed:

> Social connectedness was not correlated with extremity in behavior, . . . with extremity in integrative outcomes, . . . or with extremity in distributive outcomes . . . Taken together, these null effects are particularly interesting because they suggest socially connected individuals are more likely to gain positive or negative reputations even though they behave in the negotiations the same way as less socially connected individuals. That is, socially connected individuals are more likely to gain reputations even though they engage in the same behavior anyone else does (Anderson and Shirako 2008: 329).[26]

To sum up, then, reputation seems to be more related to negotiation style than negotiation approach or outcomes. This is consistent with the assertions of Williams, Gifford, and Craver. Meanwhile, socially connected or socially exposed legal negotiators will need to worry more about their reputations than those who are not socially connected. As the researchers note, "individuals with fewer social ties might get away with behaving in more deceptive and selfish ways because fewer people pay attention to or talk about them" (Anderson and Shirako 2008: 329). Of course, with the social networking sites and reputational markets that are now available online, more and more legal negotiators may find that they are (willingly or not) socially connected.

Can we assume, though, that legal negotiators' reputation for "cooperation" will be positive and understood to correlate more with style than approach or strategies? What if a reputation for "cooperation" is understood to mean that lawyers should not expect each other to be fully prepared on the law or facts, or capable of exploring for underlying interests? In other words, what if "cooperation" is understood merely as "going along to get along" or "you scratch my back, I scratch yours"[27] or "wimpiness" (Schneider 2000)? No client should value a lawyer's reputation for "cooperation" if this is what the term means. Indeed, clients should prefer lawyers who have

reputations for "competition" if that is the reputation required to ensure preparation, hard work, thoughtfulness, creativity, rigorous problem solving, and advocacy (see Menkel-Meadow 1993; Craver 2003; Hollander-Blumoff 2010).

It might be helpful, therefore, to redirect our focus from this somewhat contested concept of "cooperation" to consider the value of having a reputation for "trustworthiness." As demonstrated previously, research suggests a strong correlation between perceptions of trustworthiness and procedurally just behaviors, and this article noted earlier the similarities between behaviors correlated with perceptions of procedural justice and a cooperative style.

Exploring trustworthiness requires an initial look at the general concept of trust. Roger Mayer and his colleagues (1995) performed foundational work by developing a model of the relationships among antecedents to trust, trust, perceptions of risk, and risk taking. They defined trust as "the willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that other party," and observed that "[b]eing vulnerable implies that there is something of importance to be lost" (Mayer, Davis, and Schoonman 1995: 709).

Researchers have found in other professional, nonlegal contexts that the ability to create "an environment of trust" will play a significant role in achieving a negotiation's integrative potential (Pruitt and Lewis 1975; Thompson 1991; Pruitt and Carnevale 1993; Thompson 1998; Olekalns and Smith 1999; Tinsley, Cambria, and Schneider 2006). One hears echoes here of the research regarding the effects of perceptions of procedural justice in negotiation. Further, and in light of the correlations between perceptions of procedural justice and trustworthiness, it seems that a negotiator's perceived trustworthiness — or his/her ability to create an environment of trust — is likely to be positively correlated with his/her effectiveness as an integrative negotiator and not negatively correlated with his/her effectiveness as a distributive negotiator. This suggests that there is no disadvantage to behaving in a manner that is consistent with procedural justice and trustworthiness.

But the reality of legal negotiation — in which lawyers must play the simultaneous and conflicting roles of both adversaries and professional colleagues — suggests that lawyers will find it very difficult, if not ethically impossible, to offer *unconditional* trustworthiness to each other.[28] Must lawyers, therefore, leave consideration of trustworthiness behind? Williams has urged for example that the legal negotiators who fit the aggressive pattern are hesitant to extend trust to anyone. They "recognize that one way to avoid being too soft is always to be hard negotiators; that way, they are never in danger of being too trusting. This saves them from the more difficult task of figuring out when and whom to trust" (Williams 1991: 160).

For these and other lawyers, Roy Lewicki, David Saunders, and Bruce Barry (2005) have helpfully distinguished between two different types of trust — calculus-based trust and identification-based trust — involving different types or degrees of vulnerability. Efficient commercial relations and well-functioning polities generally exhibit calculus-based trust, or consistent delivery of promised and desirable behaviors, based on cost-benefit analysis[29] — for example, the trust that if you pay for an extended warranty for your washing machine, the seller will meet its contractual obligations because it wants your future business or fears the cost of litigation or loss of business that could result from its failure to honor its obligations. Similarly, if you cast your vote in a public election and have calculus-based trust, you believe your vote will be counted in just the same way as anyone else's vote, based on the social and political benefits to governmental actors if they fulfill voters' expectations, or because of their fear of litigation or social unrest if they fail to fulfill this expectation. You are unlikely to view the seller of the washing machine or the governmental actors as unconditionally trustworthy, but instead as sufficiently trustworthy.

Identification-based trust involves more personal vulnerability and can almost connote enmeshment or self-other merging; it certainly involves a presumption of benevolence. This form of trust is based on such complete identification, understanding, and appreciation of the other's interests, desires, and intentions that one person can act for the other. The relationship between lawyer and client ideally represents something akin to identification-based trust (Hamilton and Monson 2011).

Lewicki and his colleagues (2005) have also written about another separate and valuable dimension that would seem to be the opposite of trust but is not necessarily so — *distrust*, both calculus-based and identification-based — which may coexist with trust. Indeed, research in other professional, nonlegal contexts suggests that a degree of distrust can and does coexist quite rationally with a degree of trust. Deepak Malhotra (2004) and others have found that negotiators are more likely to extend trust — and make themselves vulnerable — when they calculate the resulting risk of being harmed as relatively low.[30] The need to calculate suggests a rational, self-protective degree of distrust.

Legal negotiation is rife with conflicting relationships that have the potential to pull lawyers in opposing directions and suggest the value of thinking in terms of both calculus-based trust and even a degree of rational distrust. The relationship between lawyer and client can easily conflict with lawyers' shared commitments to their profession, to their colleagues in that profession, and to the justice system. Interestingly, the degree of this conflict may depend upon a lawyer's perception of how "deep" or "shallow" his/her relationship is with the profession, with other lawyers, and with the justice system — and whether "the profession" or "the justice system" is separate from, and has significance beyond, the individual lawyers (and

judges) who are part of it. Perhaps paradoxically, the degree of the conflict also may depend upon the clarity with which society, the legal profession, disciplinary bodies, and courts have declared the lawyer's relationship with his/her client to be primary.

Regardless of these larger issues, and focusing once again upon what constitutes a positive reputation for legal negotiators, research suggests that possessing a strong reputation as a very effective *distributive* negotiator actually may trigger rational distrust, and thus hinder the negotiator's ability to create the environment of trust needed to maximize both joint and individual gains. Research by Catherine Tinsley and her colleagues showed that negotiators facing counterparts identified as skilled distributive negotiators tended to share less information about their specific interests, needs, and priorities, and spent more time discussing procedural issues (Tinsley, O'Connor, and Sullivan 2002; Tinsley, Cambria, and Schneider 2006). Also, the negotiators who were identified as skilled distributive negotiators failed to do as well — both in terms of individual gains and the achievement of joint gains — as those negotiators who had not been so identified beforehand. The researchers concluded that assigning a distributive reputation induced a "Pygmalion" effect, with "negotiators' expectations and interpretations of their 'distributive' counterparts' behaviors, and their own distributive behavior (in response), induc(ing) their counterparts to behave more distributively than counterparts in the control condition" (Tinsley, O'Connor, and Sullivan 2002: 637).

Recall, once again, Lewicki's description of calculus-based trust involving a cost-benefit calculation. Even if the negotiator with the strong distributive reputation is no more self-interested than the average negotiator, his/her effectiveness makes disclosing potentially sensitive information to him/her a greater risk than disclosing the same information to a less effective negotiator. Reflexively perhaps, he/she will use that information for his/her own benefit.

The bottom line for lawyers, then, seems to be that having a very strong distributive reputation — perhaps also considered a reputation as a very effective competitive negotiator — is likely to reduce a lawyer's effectiveness in negotiation. But the devil is always in the details. In their research, Tinsley and her colleagues defined someone skilled at distributive bargaining as being "particularly adept at . . . the art of claiming a lot of value for themselves" (Tinsley, O'Connor, and Sullivan 2002: 629), which implied "being a bargainer who prizes claiming value over other goals" (Tinsley, O'Connor, and Sullivan 2002: 637). There is little nuance in this description. The negotiations were conducted through the "lean medium" of e-mail rather than in person; the context was transactional, rather than involving the settlement of pending litigation; the negotiation had the potential for joint gains, rather than being purely distributive; the negotiators were business school students negotiating for their companies, rather

than lawyers or law students negotiating on behalf of clients; and the negotiators were students who had completed three weeks ("novices") or ten weeks ("experts") of a negotiation course, rather than professionals with substantial real-life negotiating experience (Tinsley, O'Connor, and Sullivan 2002).

Nonetheless, the research is provocative. Recall that Williams' and Schneider's studies showed that lawyer respondents perceived *some* aggressive/competitive/adversarial negotiators to be skilled lawyers, effective negotiators, and aware of the constraints imposed by their professional ethics. They were effective as negotiators and worthy of calculus-based trust, that is, "sufficiently trustworthy" or "trustworthy enough." Of course, the legal profession's ethics rules express normative values and compromises but that does not matter (Cohen 2001; Peppet 2005). It is the fact that they are the profession's *rules*, with expressive and coercive power, that matters. The effective negotiators who fit the aggressive pattern were capable of restraining themselves from taking certain actions because such restraint was required (Pepe 1983).

Meanwhile, the Williams and Schneider studies also showed that while effective negotiators who fit the cooperative/problem-solving pattern (and exhibited a cooperative style) were perceived as caring about the achievement of fair outcomes, they also were perceived as skilled lawyers committed to maximizing settlement results for their clients. In other words, these effective negotiators were similarly ready, able, and professionally required to behave in a manner that might not be entirely consistent with an *unconditional* concern for or fairness toward the other party. Ultimately, these effective negotiators, too, were "sufficiently trustworthy" or "trustworthy enough" to be deserving of calculus-based trust — although their behaviors and reputation might also signal and create the opportunity for something more.

## Conclusion

Available research strongly suggests that lawyers with positive reputations as legal negotiators tend to be those perceived by their peers as skilled lawyers who maximize results for their clients *and* are sufficiently trustworthy. Such trustworthiness can be understood as an elastic yet meaningful concept that (1) incorporates both trust and distrust, (2) is bounded by lawyers' ethical obligations, (3) is distinct from any particular negotiation approach (i.e., distributive or integrative) but (4) is more likely to be correlated with — that is, supporting and being supported by — a cooperative, procedurally just negotiation style. The research, thus, generally supports the current Reputation Index's guidance to students regarding those characteristics that are associated with a positive reputation as a negotiator: competence, effectiveness, trustworthiness, integrity. Research regarding the development of reputations also supports the Reputation

Index's provision for nominations based on both direct experience with other students and indirect experience.

At the same time, the research also suggests that the Reputation Index would benefit from more concrete operationalization of some of the terms used to describe positive and negative reputations. "Trustworthiness," for example, might be explicitly associated with the previously described markers of procedurally just processes — allowing the other negotiator to speak, demonstrating understanding of the points made by the other negotiator, trying to be open-minded while remaining an advocate, treating the other negotiator with respect, and managing material information appropriately. It might also be associated more clearly with the literature regarding trust, assessments of vulnerability and risk, and the research suggesting that one should be careful about creating a reputation for being *too good* at claiming available gains. "Effectiveness" could also be defined in terms of key markers such as skillful use of legal skills and knowledge, maximization of *both* joint and individual gains, operating within the ethical constraints of the legal profession, and exhibiting a cooperative style.

In other words, the Research Index — and the negotiation/mediation course — will continue to evolve as the students and I continue to work toward their future reputations as legal negotiators who are both effective and trustworthy . . . enough.

## NOTES

The author thanks David Brown for his excellent research assistance and Roselle Wissler for her comments on a previous draft.

**1.** In fact, with Russell Korobkin's permission, I have used *The Stadium* simulation in my class. Korobkin has converted various options into points, thus clarifying their relative value for the students and easing my ability to grade the results.

**2.** Colleagues at other schools have used other approaches to determine the ranking of these objective results. For example, Jim Coben at Hamline University School of Law asks the students to "rank the settlements" and provides them with "a present value calculation for the monetary aspects of each settlement" (Coben 2011).

**3.** I believe he discussed it at one of the American Bar Association Dispute Resolution Section's Legal Educators' Colloquia, and subsequently provided me with a copy of his version of the Reputation Index.

**4.** Colleagues at other schools, such as Paul Kirgis at St. John's University, ask students to rate *all* other students' effectiveness in the class on a 1 to 5 scale. See Kirgis (2011).

**5.** Colleagues at other schools, such as Barbara McAdoo at Hamline University School of Law, provide additional or different guidance regarding these comments. McAdoo (2011) instructs students that appropriate feedback "[f]ocuses on negotiation performance and not on other issues (such as whether you like this person as a friend), unless you explain how those other issues factor into reputation; [i]s support[ed] by specific details and examples . . .; [a]voids global statements and generalities . . . in favor of specific details . . .; and [i]s framed in such a way as to be helpful feedback for what this person might continue doing *or consider doing differently* if they would like to maintain and/or improve their reputation. The point is not to pass judgment on anyone, or to make them feel bad or good. The point is to provide constructive feedback that will allow your classmates to act on it if they so choose." Kirgis (2011) uses language similar to McAdoo's and, in addition, instructs students that their feedback should be constructive and "is likely to be most helpful (and will be assessed most favorably as a deliverable) if it is: [h]onest and candid (don't sugar-coat simply to be nice — or vice-versa) . . . [and

a]ppropriately balanced and nuanced, acknowledging various factors that might account for this person's behavior."

**6.** Colleagues at other schools have shared that they ask for nominations of those who have developed reputations as "effective" negotiators. They do not supply any additional adjectives. See Kirgis (2011).

**7.** Originally, I handed out hard copies of the index on the last day of class, and students completed the forms before they left. For the past couple of years, I have posted the Reputation Index on ANGEL.

**8.** Colleagues at other schools use online tools to assist with these calculations. Kirgis (2011) has suggested the use of Qualtrics at http://www.qualtrics.com.

**9.** I could not complete this and other steps without the invaluable assistance of our administrative support assistants, Sherry Miller and Lisa Woltz.

**10.** Colleagues at other schools, such as McAdoo (2011b), require students to meet with them individually in order to receive and discuss their Reputation Index results.

**11.** See Carlson (2004), reporting that a 1998 National Association for Law Placement (NALP) study found that the primary factors resulting in associates' decision to leave firms included "the amount of feedback they received, quality of attorney management, availability of mentoring, [and] amount of communication with the partnership." See also Rosenberg (2004), describing an approach to feedback and its potential benefits for the individual *providing* the feedback. I have learned very recently of colleagues who had used the Reputation Index at various points throughout the semester. See Gunsalus (2005).

**12.** I have also begun considering whether I need to make clear to students that my evaluation of the language or tone of their comments for the Reputation Index may be incorporated into their class contribution scores.

**13.** Since 2006, Penn State University, Dickinson School of Law, has used advanced audiovisual equipment to offer much of its upper-level curriculum through synchronous video-conferenced classes that originate in both locations. In Negotiation/Mediation, for example, we use videoconferencing for "regular" class sessions as well as one-on-one simulations. Access to such technology allows us to experiment and evaluate the impact of various technologies on both negotiation and mediation.

**14.** See Davies (2011), who proposes a secondary or "prediction market" essentially based on the sale of derivative contracts that would monetize predictions — or bets — regarding the primary contract's durability.

**15.** Williams (1983) also hypothesized, as part of a research project, that effective negotiators would observe several informal rules and would possess certain traits. The rules included making serious attempts to reach agreement, accurately representing a client's position, avoiding emotionalism, maintaining trust, avoiding impolite acts, and avoiding causing the other lawyer to lose face. See also Menkel-Meadow (1993) regarding lawyers' interest in working with other lawyers who enable efficient resolution.

**16.** Gilson and Mnookin (1994) also acknowledge the many principal-agent conflicts that could cause defection from a cooperative strategy. See also Croson and Mnookin (1997), reporting an experiment that affirms the Gilson and Mnookin model in which the choice of lawyer facilitates client cooperation, but observing that the experiment relied on the following assumptions: "reputations are known in advance, and stable; a client can costlessly switch from a cooperative attorney to a gladiatorial one if the other side fails to choose a cooperative strategy; and no changes in attorneys are permitted once the litigation game begins" (Croson and Mnookin 1997: 345). The article also called for "real-world institutions that facilitate and promote the efficiency of reputational markets" to enhance such cooperation (Croson and Mnookin 1997: 345).

**17.** Three percent of those fitting a cooperative pattern were described as ineffective, 33 percent of those fitting an aggressive pattern were described as ineffective, and 28 percent of those fitting no pattern were described as ineffective.

**18.** Lawyers listed "maximizing settlement for client," "conducting himself ethically," and "satisfaction in exercise of legal skills" as the first, fourth, and fifth objectives of effective competitive negotiators; and "conducting himself ethically," "maximizing settlement for client," and "satisfaction in exercise of legal skills" as the first, second, and fifth objectives of effective cooperative negotiators (Williams 1983: 27).

**19.** Schneider expanded the options for each of these sections, and added sections on self-assessment and negotiation training and experience with alternative dispute resolution processes.

**20.** See Guthrie (2006), in which he describes the compliance tactic of "liking" — "[p]eople prefer to comply with requests made by those they know and like."

**21.** The participants in a study reported by Rebecca Hollander-Blumoff and Tom Tyler (2008) were first-year law students, rather than lawyers, who have the potential to limit its significance. See Hollander-Blumoff (2010), acknowledging this limitation. In addition, the negotiation problem had a shared bargaining zone. Thus, not reaching a negotiated outcome represented a "failure," rather than recognition of the contemporaneous limits of one's bargaining authority. Finally, the participants were told that if they did not reach a negotiated outcome, the case would go to arbitration — and "the expected value of the arbitration was below even the least desirable outcome in the zone of possible agreement," and thus "an acceptance of the agreement was the least risky way to ensure some gain for the client and/or to ensure a low or fixed level of loss exposure" (Hollander-Blumoff and Tyler 2008: 491). The problem was structured in this manner based on the economic analysis that urges that "[t]he structure of the legal system, including its costs and uncertainties, encourages cases to settle; in general, parties to disputes of this type are better off negotiating an agreement than they are moving forward to arbitration" (Hollander-Blumoff and Tyler 2008: 492).

**22.** Interestingly, the authors use this result to argue against the popular notion that "nice guys finish last," or that negotiators who are respectful of their counterparts are being "too nice": "Treating another party fairly, then, neither guarantees one an advantageous financial outcome nor condemns one to a disadvantageous financial outcome . . . The findings suggest that when negotiators act in procedurally fair ways, they lose nothing at all in their 'bottom line' in a zero-sum setting, expand the negotiation pie in a setting in which there is integrative potential, and in fact gain other important advantages in terms of agreement acceptance" (Hollander-Blumoff and Tyler 2008: 490, 493). See also Hollander-Blumoff (2010: 399), noting that these results refute Russell Korobkin's model, in which he posited that process matters only in terms of its ability to deliver economic benefit.

**23.** See also Welsh (2004), who describes a small qualitative research project resulting in the conclusion that parties value mediation for both the procedural justice it offers and meaningful movement toward resolution.

**24.** Indeed, Roger Mayer and his colleagues (1995) have observed that trust has often been confused with cooperation.

**25.** Reputations can be "sticky" because "people selectively perceive schema-consistent information (or behavior) from an individual and tend to ignore or discount schema-inconsistent behavior" (Tinsley, Cambria, and Schneider 2006: 204). Note that this particular application is consistent with the confirmation bias/endowment effect/status quo bias.

**26.** One might speculate whether this same dynamic would be true of individuals who represent pioneers in various social settings — for example, the first Jewish or African-American or openly gay individual to join a workplace or club. Such a pioneer might not feel particularly "socially connected" but is likely to feel quite "socially exposed."

**27.** Research suggests the existence of "social psychological forces that lead lawyers to be risk-averse and 'lazy' with respect to case preparation and management," and that "[m]any lawyers expressed interest in, but ignorance about, other methods of negotiation" and "saw little in the way of incentives to bargain in any but the most 'efficient' (least amount of work) way" (Menkel-Meadow 1993: 377). Alternatively, Menkel-Meadow argues that such behavior — and the efficient search for routinized solutions — may be explained best by entrenched power imbalances that limit the options available to one side. Externalities, such as fee arrangements, also may have relevance to this choice (Kritzer 2004). Another set of perspectives focuses on the message sent by procedural justice in negotiation and proposes that legal negotiators respond favorably to fair treatment by their counterparts because they evaluate outcomes "not in purely economic terms of gain and loss but in process terms of fairness," or because "they have learned over time to react favorably to fairness because they have learned that reaching agreements is good for their own bottom line," or because "people have recognized that procedural justice is often a signal that they ought to accept agreements since it demonstrates the other party's willingness to sincerely seek the best outcomes in the situation" (Hollander-Blumoff and Tyler 2008: 494).

**28.** Mayer and his colleagues observe that "[t]he question 'Do you trust them?' must be qualified: 'trust them to do what?' The issue on which you trust them depends not only on the assessment of integrity and benevolence, but also on the ability to accomplish it" (Mayer, Davis, and Schoonman 1995: 729). A lawyer's ability to behave in an unconditionally benevolent manner

toward opposing counsel will inevitably be limited by the lawyer's ethical responsibility to her client. See, for example, Rule 1.1, Competence; see also Hollander-Blumoff (2010), suggesting that legal negotiators will want to believe that the other negotiator "is telling the truth about important elements of the negotiation" and "will follow through on commitments made during the negotiation" (Hollander-Blumoff 2010: 411).

**29.** Lewicki, Saunders, and Barry (2005) observed that calculus-based trust occurs because negotiators will be rewarded for keeping their word or fear the consequences of failing to keep their word. See also Malhotra (2004), describing deterrence-based trust in very similar terms. But also see Mayer, Davis, and Schoonman (1995: 714), urging that "trust must go beyond predictability. . . . To equate the two is to suggest that a party who can be expected to consistently ignore the needs of others and act in a self-interested fashion is therefore trusted, because the party is predictable. What is missing from such an approach is the willingness to take a risk in the relationship and be vulnerable."

**30.** Based on the results of two experiments involving students' performance in a trust game that was structured very similarly to a sequential prisoner's dilemma game, Malhotra concluded that:

> [T]rustors and trusted parties are differentially sensitive to the risks and benefits involved in trust interactions . . . [T]hose who are in a position to trust focus primarily on the risks involved in trusting rather than on how much benefit their trust might provide to the other party. Thus, decisions to trust were more likely when risks were low. Meanwhile, trusted parties are relatively insensitive to the trustor's risks and reciprocate more on the basis of the benefits the trustor has provided. Reciprocity (by trusted parties) was more likely when the benefits provided were high. Furthermore, the results suggest that trustors consider the decision to trust to be more a matter of "being smart" (i.e., based on measurement of whether decision to trust was based on intelligence or rationality) and less a matter of "being nice" (i.e., based on measurement of whether decision to trust was based on fairness, generosity, trust, benevolence, cooperation and obligation) than do trusted parties, providing further evidence that trustors and trusted parties view the trust interaction from different perspectives . . . In addition, . . . trustors underestimate the degree to which trusted parties are influenced by the level of benefits they are being provided. In contrast, trusted parties accurately predict how important risk is to trustors (Malhotra 2004: 70).

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