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From the Editor-in-Chief...

This is the 10th volume of the Southern Journal of Business and Ethics, an official publication of the Southern Academy of Legal Studies in Business. The Journal is being published in hardcopy and electronically on the Southern Academy’s web page at http://www.salsb.org.

The SJBE has been included in Ebsco Host services, allowing for full text search on most university library systems! This provides a great benefit to our authors and readers!

All articles that appear in this volume of the Southern Journal of Business and Ethics have been recommended for publication by the Advisory Editors, using a double, blind peer review process. A personal thanks is extended to the Advisory Editors for all their hard work and dedication to the Journal and the Southern Academy; without their work, the publication of this Journal would be impossible.

This is my tenth year as Editor-in-Chief, and I wish to express my sincere thanks and appreciation to all the Officers of the Southern Academy for their support, encouragement, assistance and advice throughout this year. I would like to further express appreciation to Will Mawer of Southeastern Oklahoma State University, for his efforts in coordinating the start of the Journal. The publishing of this journal is an intense educational experience which I continue to enjoy.

Many of the papers herein were presented at the Southern Academy of Legal Studies in Business meeting in San Antonio, Texas, April, 2018. Congratulations to all our authors. I extend a hearty invitation to the 2017 meeting of the SALSB in San Antonio, Texas, March, 2019.

The Southern Academy annual meeting has been voted the “BEST REGIONAL” among all the regions affiliated with the Academy of Legal Studies in Business (ALSB) featuring over 60 authors and 50 papers. I hope to see ya’ll in San Antonio! Please check the web site (www.salsb.org) for further information. To further the objectives of the Southern Academy, all comments, critiques, or criticisms would be greatly appreciated.

Again, thanks to all the members of the Southern Academy for allowing me the opportunity to serve you as editor-in-chief of the Journal.

M.P. (Marty) Ludlum
Editor-in-Chief
Southern Journal of Business and Ethics
www.salsb.org
Notes for Authors:

The focus of the Southern Journal of Business and Ethics (SJBE) is to examine the current trends and controversies in business, law and ethics, both domestic and international. In addition, future issues will include a new section, Short Notes, which will consist of shorter articles focusing on pedagogical ideas for the new business law instructor.

All authors promise that any submission is original work, and has not been previously published.

Since the topics of SJBE cross into many different academic areas, the SJBE does not have a specific format. Authors are free to use Chicago style, Harvard style or the APA, as long as the application is consistent throughout the paper.

The title should be in ALL CAPS. The text should be in Times New Romans 12 point font for the text and 10 point font for the footnotes. Authors’ names should be centered below the title.

Paragraphs should be indented five spaces.

The maximum size for a paper is twenty-five pages, all inclusive, single spaced. Articles substantially longer may be accepted as space allows.

All submissions should include a complete copy (with author identification) and a blind copy (with author identification left blank).

All submissions are electronic, in MS-Word format. No paper copies will be reviewed or returned.

Artwork is discouraged. Tables and charts should be kept to a minimum and should be included in an appendix following the paper.

Submissions deadline is 45 days after the SALSB spring meeting each year. Articles sent after the deadline will be reviewed for the next issue, or may be withdrawn by the author and submitted elsewhere.

Look for the call for papers at the Southern Academy’s website (www.salsb.org). If you would like to serve SJBE as a reviewer, your efforts would be appreciated. Many hands make light work.

If you have any questions, please submit them to the Editor in Chief.

Please submit all papers to:
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Editor in Chief, SJBE
mludlum@uco.edu
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March 28-30, 2019

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San Antonio, Texas

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The Americans with Disabilities Act of 1990 (ADA) is a federal law that prohibits the discrimination of applicants or employees in various aspects of the hiring and employment processes. In this paper, the authors discuss the details of the ADA including enforcement; review various aspects of the litigation associated with ADA; review accommodations and example charges; and close with an approach and plan for handling ADA issues.

I. INTRODUCTION

The Americans with Disabilities Act of 1990, hereafter ADA, is a federal law that protects individuals with disabilities by eliminating barriers in the workplace and various environments related to their normal everyday lives (United States Department of Labor, 2015). More specifically, the ADA prohibits discrimination from various employment activities including talent acquisition, compensation and benefits, and other workplace activities. The foundation for the ADA is America's promise of equal access and opportunity for all citizens. Being inclusive of people with disabilities — in recruitment, retention, promotion, and in providing an accessible environment — gives businesses a competitive edge (Hogan, 2003).

According to the research of Erickson, Lee and von Schrader (2015), 6,775,300 out of 19,618,200 individuals with a disability, including age ranges of 21 and 64, and among all races and educational levels in the United States were employed. This research identified individuals with various disabilities including hearing, visual, cognitive, ambulatory, self-care and independent living. Other more recent statistics, as noted in the 2017 Disability Statistics Annual Report, stated that “the percentage of those with a disability in the US civilian population slowly increased from 11.9% in 2010 to 12.8% in 2016” (Institute on Disability/UCED, 2017, p.2). In addition, the 2017 Disability Statistics Annual Report noted that the people with disabilities vary across states with Utah (9.9%) being the state with the least reported disabilities and West Virginia (20.1%) with the highest number of disabilities.

Hogan (2003) suggested that the increasing influence of disabled people is due to an aging population and the curb effect. For example, in the year 2000 the number of people over 65 was 12% of the United States’ population and it is projected by 2030 that the number of disabled people will increase to over 20% (Hogan, 2003). Additionally, when disability accommodations are made, non-disabled people benefit from the accommodations and “the curb effect” ensues. For example, we all benefit from revolving doors, side walk curb cuts, signs with large letters and audio floor announcements on the elevator (Hogan, 2003).

In this paper, the authors discuss the details of the ADA including enforcement; review various aspects of the litigation associated with ADA; review accommodations and example charges; and close with an approach and plan for handling ADA issues.
II. AMERICAN WITH DISABILITIES ACT

The ADA was signed by President George Bush on July 26, 1990 (Hogan, 2003). The goal of the ADA was to ensure that people with disabilities received the opportunity for support by both private and public sectors. More specifically, the ADA “prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities. The ADA also establishes requirements for telecommunications relay services” (United States Department of Labor, 2015, p. 1).

The ADA includes the following five sections: employment, public services, public accommodations, telecommunications and miscellaneous (Hogan, 2003). The Equal Employment Opportunity Commission (EEOC) enforces regulations related to employment. For example, employers with 15 or more employees may not discriminate against people with disabilities and equal opportunity must be given to people with disabilities for selecting, testing and hiring of qualified applicant with disabilities. Additionally, employers must provide “reasonable accommodations” to qualified applicants or employees unless that company will be under “undue hardship” to accommodate.

The United States Department of Labor has designed the Office of Disability Employment Policy to assist organizations with the requirements for ADA by providing resources including documents and technical assistance (United States Department of Labor, 2015). There are two departments within the United States Department of Labor that have enforcement rights. These departments include the Office of Federal Contract Compliance Programs (OFCCP) that has authority for the employment part of the ADA and The Civil Rights Center that enforces “Title II of the ADA as it applies to the labor- and workforce-related practices of state and local governments and other public entities” (United States Department of Labor, 2015, p. 1).

In addition to the two departments in the Department of Labor there are five federal agencies responsible for enforcing the ADA including: (a) Equal Employment Opportunity Commission (EEOC) that enforces issues related to employment, (b) Department of Transportation that enforces transit issues, (c) Federal Communication Commission (FCC) that enforces issues related to telecommunication services, (d) Department of Justice that enforces the implementation of public accommodation and state and local services, and (e) Architectural and Transportation Barriers Compliance Board (ATBCS) responsible for guidelines to ensure buildings, facilities, and transit modes of transportation are available for disabled individuals (United States Department of Labor, 2015).

The laws enforced by EEOC include four basic rights for applicants and employees (Disability Discrimination, 2018). These rights include prohibiting employing organizations from treating you or a friend, parent, or someone that you know that has had a disability, currently has a disability or is treated as a disabled person from being treated unfairly. The laws by EEOC also prohibits a disabled person from being harassed or punished at work and allows a disabled person to request reasonable accommodations in the workplace. Additionally, the laws limit questions that can be asked about health and requires employing organizations to keep medical information confidential.

III. DISABILITY LITIGATION

The ADA did not directly include whether the court can look at the abilities of the plaintiff when making a ruling related to a disability status. There are two approaches, the
“abilities approach” and the “barriers approach”, that can be used to make a ruling related to a disabilities case (Chen, 2015). Under the abilities approach, courts look at the plaintiffs’ abilities—whether the plaintiff is able to perform a set of activities—to determine whether the plaintiff is disabled. For example, in *Toyota Motor Mfg. Ky., v. Williams*, the court looked not only at the impairments (carpal tunnel syndrome) but also the abilities and accomplishments of the claimant related to daily activities such as the ability to conduct housework and daily hygiene. The court ruled that the claimant was not substantially limited in the normal life activities and as such was not disabled.

Some courts have provided an alternative inquiry into the disability status such as the barriers approach. For these courts, disability is an impairment that imposes barriers to performing a set of activities. Under the barriers approach, courts stated that, even if the plaintiff, despite his disability, has skills and achievements, the plaintiffs’ disability is however an impairment that imposes barriers (Chen, 2015).

**IV. ACCOMMODATIONS FOR THE DISABLED**

Many disabled employees do not need accommodations to conduct their job duties; however, there are some employees that do need reasonable accommodations (United States Department of Labor, 2015). Contrary to most people’s belief, these accommodation costs are minimal. More specifically, the Job Accommodation Network (JAN) reported that “57% of accommodations cost absolutely nothing to make, while the rest typically cost only $500 (United States Department of Labor, 2015). Moreover, tax incentives are available to help employers cover the costs of accommodations, as well as modifications required to make their businesses accessible to persons with disabilities” (United Stated Department of Labor, 2015, p. 1).

A few of the approaches that have been used to address some of the accommodations for disabilities include universal design and comprehensive response. Universal design “philosophy is that a product or service should be made in such a way that it can be used by the greatest number of people possible” (Hogan, 2003, p. 19). Examples of a universal response include restaurant menus that incorporate pictures and words, large-image playing cards, and car dashboards that use symbols instead of words. Comprehensive response includes a collaboration of various departments within a company to address the disability market. Some examples of companies that use this approach include McDonalds, Marriott International, Microsoft and Wal-Mart (Hogan, 2003). The idea of non-disabled people benefitting from disabled accommodations can be seen throughout the years via technological advancements. For example, the typewriter was originally developed for a woman who was blind and in the 1930s the first talking book was recorded (Hogan, 2003).

“A print disability can be a learning disability, a visual impairment, or a physical disability. Individuals diagnosed with a print disability cannot access print in the standard way” (Blansett, 2008, p. 26). It is important to note that the ADA does not specifically state any requirements related to information technology. For example, the act “requires that places of public accommodation and the services they provide be accessible, but there’s no specific reference to the Internet as a place of public accommodation and service” (Blansett, 2008, p.26). However, the 1998 amendment to the Rehabilitation Act of 1973 requires the “information technology tools of government agencies and information services adhere to these standards. This includes software application and operating systems, web-based sites and applications, telecommunications equipment, video and multi-media, and self-contained products like
information kiosks, calculators, and fax machines, as well as desktop and portable computers” (Blansett, 2008, p. 28).

V. ADA SUITS AND MONETARY RESOLUTIONS

Table 1 below includes EEOC enforcement suit information including data related to ADA claims and monetary resolution benefits from 2012 to 2017. Note that from 2012 to 2017 that the percentage of ADA claims range to the low end of 29.03% in 2012 to the high end from 37.81% in 2017. Also, note that the monetary resolution benefits from the ADA claims range from 3.7 million in 2014 to 14.0 million in 2013.

Table 1
ADA Claims and Resolutions

<table>
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<tbody>
<tr>
<td>Total Claims</td>
<td>155</td>
<td>148</td>
<td>167</td>
<td>174</td>
<td>114</td>
<td>201</td>
</tr>
<tr>
<td>Suits with ADA Claims</td>
<td>45</td>
<td>51</td>
<td>49</td>
<td>53</td>
<td>36</td>
<td>76</td>
</tr>
<tr>
<td>ADA Claims/Total Claims (in %)</td>
<td>29.03%</td>
<td>34.45%</td>
<td>29.34%</td>
<td>30.45%</td>
<td>31.57%</td>
<td>37.81%</td>
</tr>
<tr>
<td>Monetary Benefits (Resolved Claims)</td>
<td>5.4 Million</td>
<td>14.0 million</td>
<td>3.7 million</td>
<td>6.2 million</td>
<td>12.1 million</td>
<td>7.1 million</td>
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Data extracted from EEOC Litigation Statistics, FY 1997 through FY 201

The resolved claims noted in Table 1 have mostly been resolved through negotiation or mediation (United States Department of Labor, 2015). The EEOC is responsible for investigating each of the claims and promotes alternatives to litigation as a means for solving issues. The number of ADA related claims make up a small percentage related to the number of employees in the workplace, which could potentially make claims (United States Department of Labor, 2015).

Example 1 of ADA-related EEOC Charge

A Beverage Distributor company was charged by the EEOC for refusing to hire an applicant because of eye impairment (U.S. Equal Employment Opportunity Commission, 2015). The applicants had worked for the beverage company for approximately 4 years as a driver’s helper and then the company eliminated his position and hired a contractor instead. The former worker applied for another position as a night warehouse associate and was offered the position. This position required a pre-employment medical examination and after the examination the company withdrew the offer from the driver due to poor eyesight. The job position required
loading cases and kegs of beverages into the back of a truck. EEOC stated that the driver could safely perform the job. The case was settled and the public consent decree required the company to pay the former driver $160,000 to resolve the case. The EEOC attorney stated that “employers cannot make employment decisions based on stereotypical assumptions or speculative fears about people with disabilities” (U.S. Equal Employment Opportunity Commission, 2015, p. 1).

Example 2 of ADA-related EEOC Charge

An underground mining company violated federal law by requesting applicants state their family history as part of the hiring process (U.S. Equal Employment Opportunity Commission, 2015). More specifically, the company required the applicants to engage in a post-offer medical examination including asking the applicants to include their family medical history related to “TB, Cancer, Diabetes, Epilepsy, [and] Heart Disease (U.S. Equal Employment Opportunity Commission, 2015, p.1). This request violated the Genetic Information Non-Discrimination Act.

VI. PLAN TO PROHIBIT ADA CLAIMS AND ISSUES

Despite the number of ADA claims and the monetary amounts associated with resolutions, there are other reasons why employing disabled people makes good business sense. These reasons include the upsurge in technology, education, transportation, construction, and architecture has made this previously untapped resource pool viable. In order to use and maintain these untapped resources, employers need to implement a plan for organizational integration. Thus, an employee “must rethink its entire hiring procedure and address any potential barriers to the disabled in their quest for employment” (Aalberts and Hardigree, 1992, p. 159). This rethinking needs to include employees considering a strategic plan for reducing and mitigating the likelihood of ADA claims and issues related to not providing reasonable accommodations and not implementing policies and procedures that ensure compliance with laws. The plan for preventing ADA issues is listed below.

Plan for Preventing ADA issues

1. Communicate management support and commitment throughout the organization (Hogan, 2003). This step is displayed by communicating to employees a commitment to assisting disabled individuals including providing resources and implementation plans. This step also needs to include a compliance policy including processes and procedures. For example, the policy should include a detailed process for evaluating the reasonableness of an accommodation request (Knapp, Faley, & Long, 2006).

2. Collaborate between legal and management employees to understand the requirements of ADA with specific guidelines established by the enforcement agencies (Hogan, 2003.) This includes establishing policies and procedures that support accessibility and accommodations (Blanssett, 2008). For example, in a job posting, organizations may want to specify the essential job functions (Knapp, Faley, & Long, 2006). Additionally, job analysis should focus on job outcomes rather than processes as noted by the courts.
3. Collaboration with legal and management employees annually to review and assess the status of facilities for compliance (Hogan, 2003) including annual review of facilities to ensure compliance with guidelines established by enforcement agency (Equal Employment Opportunity Commission).

4. Obtain disability-related insurance coverage (Hogan, 2003).

5. Establish proper protocols to report disability-related issues including complaints, injuries and illnesses (Hogan, 2003). This step includes collaborating with disabled employees to ensure the proper protocols are identified and deployed (Blansett, 2008).

6. Implement employee training to ensure preventive techniques are implemented (Blansett, 2008). When individuals interview at a company, the facilities must be accessible for the disabled. If not, the individual, according to ADA, has sufficient grounds for filing a complaint. Thus, companies need to involve architects and building managers to ensure the facilities are compliant.

VI. Conclusion

According to the 2017 Disability Statistics Annual Report, employment rates vary by type of disability. Employment percentages were highest for people with hearing disabilities (51.7%) and vision disabilities (43.5%) and lowest for independent living (17.0%) and self-care (15.5%) disabilities” (p. 3). In order to select and employ disabled individuals, employers need to implement a strategic plan to focus on preventing and mitigating ADA issues in the workplace. Thus, employers need to focus on talent acquisition and other human resource processes and address any potential barriers to utilize untapped resources – disabled employees.

REFERENCES


IDENTIFYING THE ELUSIVE COST MANAGEMENT TOOLS TO ALLOW HEALTHCARE REFORM

DON J. DANIELS, MD
MBA CANDIDATE, TEXAS A&M UNIVERSITY CENTRAL TEXAS

DAVID RITTER, DBA, JD, MBA, ATTORNEY, CPA
ASSOCIATE PROFESSOR OF ACCOUNTING
TEXAS A&M UNIVERSITY CENTRAL TEXAS

Abstract

Determining costs within the healthcare system has been an elusive process. Knowing the beneficial cost of procedures can assist patients, employers, insurance carriers, community leaders and government officials determine the intangible value of services provided by the health care industry. Hospitals today face a variety of obstacles in achieving financial stability. Recent economic challenges, reimbursement reductions, and health care reform have led to multiple hospital closures throughout the country. Many hospitals have looked to traditional cost cutting approaches such as staff layoffs. Other hospitals have implemented measures to reduce costs that don’t require layoffs. In addition to providing a service to the community, determining accurate costs is beneficial to assist management level personnel plan and execute changes rapidly to enhance hospital survival. Terms that the medical community uses to determine cost varies from the mainstream business community. Due to the complexity of the business model used by the healthcare industry, costing methods may vary in order to match the various practice profiles.

Keywords: healthcare, cost, current practice, patient focus, quality management

INTRODUCTION

Determining costs within the healthcare system has been an elusive process. Knowing the beneficial cost of procedures can assist patients, employers, insurance carriers, community leaders and government officials determine the intangible value of services provided by the health care industry. Hospitals today face a variety of obstacles in achieving financial stability. Recent economic challenges, reimbursement reductions, and health care reform have led to multiple hospital closures throughout the country. Many hospitals have looked to traditional cost cutting approaches such as staff layoffs. Other hospitals have implemented measures to reduce costs that don’t require layoffs. In addition to providing a service to the community, determining
accurate costs is beneficial to assist management level personnel plan and execute changes rapidly to enhance hospital survival. Terms that the medical community uses to determine cost varies from the mainstream business community. Due to the complexity of the business model used by the healthcare industry, costing methods may vary in order to match the various practice profiles. For example, Duncan, Hall and Warner (2009) define indirect cost as societal related cost, such as patients’ time away from work, and how much it cost for a family member to care for the patient at home. However, traditional business defines indirect cost as costs that are not classified as direct. According to the University of Alaska Anchorage (2012), examples of indirect cost include “salaries of administrative and clerical staff providing normal support activities in the department, office supplies including postage, local telephone calls and memberships.” The purpose of this paper is to identify the management costing tools and or terms that the healthcare industry currently uses to assist its managers in coordinating cost effective care in hospitals and for their communities.

HEALTH CHALLENGES

Ellison, Rappleye, Rosin, Marshal, and Gooch (2016) identified several costs related challenges to health care. They used isoproterenol as an example of how high prescription drug prices impacts one academic hospital’s bottom line. Priced at $50 two years earlier, isoproterenol hydrochloride rose to $2700 per vial. This caused University of Utah Health Care to remove the drug from its emergency medicine formulary, because projected cost would exceed $1.6 million to its network. The University decided to remove the medicine because it could not recoup the cost from the managed care plans that cover most of its patients. One of the concerns raised by the CEO of Scripps Health is if drug prices are too high for patients, they will not buy them, increasing the chances of their readmission to the hospital.

Ellison et al also stated that the Centers for Medicare and Medicaid (CMS) will challenge hospitals with its bundled payment program that will take effect April 1, 2016. It’s Comprehensive Care for Joint Replacement (CCJR) model will affect 800 hospitals in 67 designated geographic areas. Medicare will continue to pay under fee for service rules but will hold hospitals accountable for quality and cost of care for 90 days. Once the period is complete, the hospital will be required to repay CMS for a portion of the cost if it performs poorly on quality of care or cost performance. This move forces hospitals to find and reduce cost inefficiencies and to work together with suppliers as well as outside agencies that provide post-operative care for up to 90 days.

WHAT IS HEALTHCARE DOING WITH MANAGEMENT ACCOUNTING?

According to Hughes (2011), hospitals have traditionally managed revenues instead of cost to maintain profits. Using revenue to plan, execute and manage hospitals has grown difficult in the rapidly changing environment of health care reform, changes in insurance reimbursements, and community perception of healthcare. Hospitals increasingly recognize that cost associated with increasing revenue resulted in small incremental profits. For the past decade, cost management has been discussed as a cost finding tool that allocates both direct and indirect cost so that hospitals can more accurately set rates and charges.
Direct costs are defined as costs that are easily identified and assigned to products and services such as physician and procedure specific labor, supplies and easily assignable service related equipment cost. (Hughes, 2011) Assigning supporting overhead, or indirect cost in healthcare, is more complex. Traditional overhead allocation such as square footage, units of production or machine hours are imprecise and are difficult to allocate in healthcare environment. For example, a surgical patient will move from Day Surgery, to Radiology for a Chest X-ray, then to the Operating Room (OR), to the Post Anesthesia Care Unit, and then to the inpatient unit. Each area charge for square footage in Day Surgery, OR and Radiology may be different and the charge for the X-ray equipment in Radiology may significantly vary compared to the mobile X-ray unit that will be deployed in the OR. Activity based costing (ABC) was developed in the 1990’s to more accurately assign indirect cost (overhead) to products, services, customers and suppliers.

Using heart surgery as an example, Hughes (2011) illustrated that direct cost would include the surgeon’s professional fees, the procedure nurses salaries, and the OR supplies used for the operation. Indirect (overhead) cost would include general support staff, insurance, taxes, floor spaces, and administration. The indirect cost could be as high as 60 percent of the hospital total cost. Because this is a large portion of the total cost, it only takes a small change to significantly change the cost picture and ultimately create inaccurate assumptions and flawed decision making. Activity based costing focused on identifying costs at the activity level and performing activity surveys to determine how much employee’s time was spent on each activity. Although this approach led to more accurate costing compared to traditional approaches it was time consuming and required extensive computer processing to process the data into meaningful information.

Likewise, Akhavan, Ward, and Bozic (2016) state that “cost estimates derived from traditional hospital cost accounting systems have inherent limitations that restrict their usefulness for measuring process and quality improvement. “ Time-Driven Activity-Based Costing (TDABC) was developed by Robert Kaplan as an alternative to Activity Based Costing.(Akhavan et al, 2013, Hughes, 2011) TDABC identifies the true cost of care across the spectrum of healthcare by creating process maps and identifying the costs of resources associated with each step.

Akhavanet al (2016), compared costs of total hip arthroplasties (THA) and total knee arthroplasties (TKA) as measured using TDABC versus traditional hospital accounting (TA). They developed process maps for preoperative, intraoperative, and postoperative phases of care. Personnel cost were determined using TDABC based on “fully loaded labor rates.” Other costs such as consumables were based on direct purchase price. Total cost for 677 THA and TKA were collected over 17 months and allocated to room and board, implant, operating room services, drugs, supplies, or other services. Costs derived from TDABC based on intensity or resources utilized and actual time of services provided were compared to costs derived from TA techniques.

Significant differences were found between the TDABC and TA methods. Total hip arthroplasty cost using TDABC was $12,982 compared to TA costs $23,915. Total knee arthroplasty showed a similar difference, $13,661 for TDABC compared to $24,796 for TA.
Comparing costs between three surgeons also demonstrated TDABC cost was 49-55% of TA cost. Other significant differences in costs using TDABC to TA ratios were between implant cost (62%), operating room services (39%) as well as room and board (55%).

Utilizing TDABC for cost analysis has inherent disadvantages and differences. Akhavan et al., (2016), attribute the differences in total cost to the indirect cost allocation methodology, stating TDABC treats indirect costs as a resource consumed. At their institution, “TA approximated indirect cost as 60% of the direct costs with the assumption that services with greater direct cost consume more indirect cost as well.” They found process mapping can be resource intensive. In addition, process mapping uses time estimates based on employee or supervisor estimations which may not be directly observed events. Furthermore, utilizing mapping across the hospital may be difficult to achieve.

On the other hand, DiGioia, Greenhouse, Giarrusso, and Kress (2016) et al research may have identified a process that reduces at least one disadvantage identified by Akhavan’s group. Patient and Family Centered Care Methodology and Practice (PFCC M/P) is a process developed in 2006 which allows care providers to partner with patients and families to redesign care delivery. Digioia, et al (2016) This technique uses shadowing instead of using subject matter experts (department leaders, units managers, or clinical leaders) to create process maps. The team uses students, volunteers, etc. to shadow patients as they navigate through the different phases of their care journey to create the care experience flow maps. After these maps are created, they are verified with clinical managers to ensure accuracy. DiGioia combined the TDABC and PFCC M/P process to identify the true cost of care over the full cycle of care for THA and TKA patients. The full cycle of care was defined as 30 days before surgery to 90 days post-surgery.

In addition to creating process maps throughout the continuum, personnel capacity rates were calculated. Cost data for space, equipment and consumables were gathered from hospital departments to include Pharmacy, Supply Chain Management, etc. Indirect costs such as overhead costs for marketing, legal services, general human resources activities, on call pay, and shift differential were not included. (DiGioia et al, 2016)

Overall, DiGioia et al TDABC and PFCC M/P models showed the greatest cost was in the Operating Room segment consuming 58% and 51% of cost for THA and TKA respectively (p. 3). Primary cost drivers were consumables which contributed 53% and 44% of the cost for THA and TKA, respectively. The other primary cost driver was attributed to personnel cost which made up 44% and 50% of the total cost for THR and TKA, respectively. Consumable costs significantly varied between pre-hospital and post hospital segments, for example $8 per patient compared to $312 per patient. Space and equipment costs contributed very little in comparison at 3% and 6% of total cost. (2016)

Ruiz, Koenig, Ball, Gallo, Narziki, Parvizi, and Tongue (2013) determined the direct and indirect cost to society for the surgical treatment of end stage osteoarthritis. The study provided an estimate on the value of TKA from a societal perspective based on quality of life; and direct medical cost for the TKA and indirect cost involving employment status, earnings, disability payments as well as time missed from work. They determined that each knee arthroscopy led to
lifetime mean direct cost of $20,635. The societal savings led to an averaged indirect cost of $39,565. These findings suggest a lifetime savings of $18,930. 85% of the savings were attributed to increased income from being able to work. The other 15% of savings resulted from the combination of fewer missed days and lower disability payments. However, direct medical costs from TKA began to exceed societal savings when the patient cohort exceeded 70 years old. Based on greater than 600,000 total knee operations performed annually in the U.S., the authors estimated total lifetime societal savings of $12 billion. The intangible value is not in the savings that accrue to the hospital or to the government. As the authors suggest, “the benefits will accrue primarily to the patients,” their employers and communities “in the form of additional working years and increased income while on the workforce.” (Ruiz et al, 2013)

**CUSTOMER FOCUS: A NEW PROCESS FOR HEALTHCARE MANAGEMENT, WHAT ARE THE INTANGIBLES?**

Administrative simplification is needed to improve patient experience and reduce cost. Health care systems are overburdened with excessive and redundant paperwork. Health care workers call multiple times and access insurers’ web sites to check the status of submitted claims. Integrating clinical and financial systems and simplifying the administrative transactions would save the industry, and provider’s significant time and money. Amatayakul and Lazarus (2016) suggest that $8 billion annually could be saved if health care organizations would fully implement electronic data exchanges as specified by the Health Insurance Portability and Accountability Act (HIPAA). Implementing HIPAA standards theoretically enables hospitals and health plans to communicate with each other electronically. Quality efforts to improve standardization of terminology between organizations would standardize claims data thereby increasing accuracy and improve policies and procedures for billing and payment transactions. The process improvements would in effect create “cleaner claims,” resulting in less redundant paperwork, less provider office calls or web site checks and overall less rework. The health care industry spends an estimated 15-32% on administrative tasks. Furthermore they “estimated that 40% of billing staff time is spent making telephone calls to check the status of submitted claims.” Cost reduction would result from more efficient use of provider office personnel through office automation. Because patients are experiencing increased burden of cost sharing due to higher deductible health plans and higher co-pays, consumers are demanding more accurate estimates of their out of pocket expenses. It has been difficult for patients to receive accurate and timely estimates based on the manual process which included calling health plans to verify benefits. Full use of the HIPAA compliant electronic transaction standards promises to simplify the process benefitting both patients and providers. (Amatayakul and Lazarus, 2016)

Hospitals have traditionally approved new technology based on return on investment strategies. Today, a more holistic approach asks the question, if a “cost incurred allows a facility to keep more reimbursement, achieve overall net cost savings for the facility or increase patient volumes, then it makes sense to adopt it regardless of whether it might be reimbursed itself.” (Whelan, 2010)

As bundled payments threaten to reduce profits and hospitals look to reduce cost, Swenson , Cheng, Axelrod, and Davis, 2010) provides an example of how new technologies may achieve cost savings despite having an associated cost that is not reimbursable. They suggest
that the use of continuous nerve block catheters is a cost effective way to provide pain relief and enhance recovery of orthopedic patients. In select cases, the use of this technique has proven to allow cases that are typically hospitalized to be done as outpatients. (Swenson et al, 2010) The average cost per inpatient day across the nation ranges from $1798 to $2,346. (Ellison, 2016) US Anesthesia Partners cited a previous study by Duncan et al, that demonstrated a continuous nerve block catheter clinical pathway reduced direct medical cost to an average of $1,999 per case for TKA and THA. (US Anesthesia Partners, 2013, Duncan et al 2009) The $300 savings was determined to be due in part to a 1.2 day length of stay reduction, as well as $1699 cost savings attributed to fewer medical interventions resulting in lower medical supply cost for urinary catheters, intravenous fluids, medications and lab draws. However, indirect cost was not considered in the study.

QUALITY MANAGEMENT AS A COST MANAGEMENT TOOL

Effective Oct 1, 2012, CMS started to penalize hospitals for readmissions within 30 days following discharge for the following conditions; congestive heart failure (CHF), heart attack, pneumonia, chronic obstructive pulmonary disease (COPD), and joint replacement. (Rizzo, 2013) In the first year, CMS penalized the hospitals at 1 percent. CMS increased the penalty to 2 percent for fiscal year 2014 and 3 percent by 2015. Per patient cost of readmissions as tracked by the Healthcare Cost Utilization Project are as follows. CHF mean cost per readmission was $13,000, heart attack $13,200, Pneumonia $13,000, COPD $10,900, and total joint arthroplasty was $12,300. (Rizzo, 2013)

Hospitals are responding to CMS penalties by reducing readmissions. (Lagasse, 2015) Pennsylvania hospitals have saved approximately $700 million through its efforts to trim readmission rates. Overall, they reduced readmissions by 29 percent. Quality metrics of all skilled nursing facilities will be available on the public domain by 2018 which will allow hospitals to share information with physicians to enable them to encourage their patients to pick cost effective and quality performing centers. (Reducing Hospital Readmissions, 2016, Kindred Healthcare, 2014) Although executive leaders are responsible for leading their institutions to drive cost down, the work rests in the hands of the Quality Improvement Directors and case managers. By providing quality metrics in the public domain, unit leaders and managers in hospitals can use the information to sponsor innovation and encourage communication between skilled nursing facilities, physicians and hospitals to collaboratively improve readmission rates.

Despite CMS efforts to encourage hospitals to reduce hospital acquired infections (HAIs), and despite efforts to reduce them by implementing quality improvement measures, over $9.8 billion is spent each year treating HAIs. (Waknine, 2013). According to Morse, a 1 percent payment reduction saves CMS an estimated $364 million. (Morse, 2016) True to its word, CMS fined 750 healthcare organizations for hospital acquired infections and for good reason. According to Waknine (2013) and Zimlichman, Henderson, Tamir, Franz, Song, Yamin, Keohane, Denman and Bates (2013), HAIs such as central line associated blood stream infections (CLASBSIs) add an average of $45,814, ventilator associated pneumonia adds $40,144 and surgical site infections add $20,785 to a patient’s bill. These infections which once were considered by physicians as expected complications, are now considered preventable. Medicare’s nonpayment policy for these conditions has a profound effect on hospitals.
Although, treating infections may not be a planned part of the budget, the above cost information is shared with clinical managers and physicians to drive improvement in quality and safety of care. (Zimlichman et al, 2013) Standardized practices such as wearing sterile surgical gowns, sterile gloves, and a mask to avoid CLASBIs or protocols to remove patients from the ventilator to reduce chances of ventilator associated pneumonia are increasing in an effort to curb these non-reimbursed costs.

WHAT DOES COST MANAGEMENT HAVE TO DO WITH THE EMERGENCY ROOM?

Emergency rooms cost hospitals thousands of dollars due to patients leaving without being seen (LWBS), boarding patients waiting on beds for admission, long waits and decreased satisfaction. Guarisco mathematically defined the LWBS problem using direct cost figures. Doing nothing, which he called lost opportunity, to solve the problem cost $450,000 per year. He also calculated that if they could improve length of stay by one hour, the ER could gain another 20,000 patients for an additional $10 million in revenue. In addition, identifying the cost of malpractice due to waits longer than 60 minutes as well as financial losses due to pay for performance and low patient satisfaction is critical to cracking the code. (Guarisco, 2013) Identifying the cost associated with an inefficient ER alerts and creates a shared reality or purpose between hospital administration, emergency physicians and nursing personnel that addressing the issues is of critical importance.

The impact of collaboratively addressing these issues is noted in an article describing improvements made by Grady Memorial Hospital. (Getting Started with Analytics, 2016) By repurposing existing resources, the hospital was able to reduce average length of stay by 30%, average wait times by 70% and ED readmissions by 28%. Financially, the hospital was able to gain $7.5 million in savings by avoiding penalties associated with a reduction of revisits, and gained another $12.5 million in revenue by investing in an alternative care facility for non-urgent conditions.

WHAT DOES COST MANAGEMENT HAVE TO DO WITH THE SUPPLY CHAIN?

An article written by Deschenes (2012) typifies most hospitals current cost management style. He states that many healthcare organizations are using traditional cost cutting methods to trim cost such as layoffs and staff reductions. Instead of using cost management tools to identify waste and inefficiencies, he states many hospitals are finding ways to reduce cost through lean management methods that don’t require layoffs. These include; reduce ‘never events,’ delay or cancel construction and expansion projects, reduce overtime, reduce the length of stay and unnecessary testing or diagnostics, and reduce delays and errors in billing. Another area of growing concern is supply chain management. He suggest that hospitals should consider more frequent smaller batch deliveries or rotating supplies which can rapidly reduce the amount of cash tied up in inventory.

Pinnic (2013) interviewed Bruce Johnson the Chief Executive Officer of Global Healthcare Exchange regarding ways a supply chain can reduce rising healthcare cost. According to the article, supply chain cost represents 40-45 percent of hospital spending. He
suggest that providers can reduce supply chain cost by 5-15 percent if they better analyze, plan and control their purchases. Johnson believes that supply chain cost can be reduced in several ways. First, automating requisitions, purchase orders and invoices will allow physicians and suppliers to remove manual processes from the supply chain and reduce cost. Second, hospitals should establish connections with trading partners to enhance flexibility in contracts and work together to adopt order frequency and inventory planning to ultimately create an integrated supply chain network. Third, hospitals must take supply chain data and turn it into information on supply levels and usage in order for providers and suppliers to better understand how the products are needed and when. Using prediction models to know when and how the products are needed reduce waste. Fourth, capture data for business requirements. Fifth, improve automation among network providers. Limited investments in automation and IT services create inefficiencies in electronic order exchange. Enhanced electronic order exchange; with suppliers and automated processes around procurement, invoicing, and catalog updates; is recommended in order to achieve operating cost ratios of 2-4 percent observed by healthcare providers who did.

CONCLUSION

By identifying healthcare adoption of cost management tools, one can better comprehend those cost effective/ineffective strategies and their result within the healthcare industry. While there appears to be some efforts to adopt TDABC strategies, this tool appears better suited for clinical research at larger academic centers. Because of the resource intensive mapping strategies and advanced financial information technology requirements adoption by smaller non-academic health care facilities may require more economic pressure before it is implemented industry wide. In regards to other costs management strategies CMS appears to have taken the lead. Although the cost information is readily available on public websites, cost management accounting implementation at the community hospital level is not readily apparent in the literature. For now, the literature suggests that much of the work of implementing the innovations to improve healthcare efficiencies are centered in academic facilities. It does not appear that the health care industry has universally adopted cost management tools, nor has it educated its physicians and nurses so that meaningful conversations and actions can be taken to create cost effective and efficient processes to improve the health care industry.
REFERENCES


This paper explores one of the greatest threats to caucused mediation - deception. It examines the various forms of deception, identifies the various types of deceivers encountered in mediation, analyzes the impact on mediation, and offers strategies for detecting and coping with deception. It presents four tools derived from research in the field of group dynamics to help participants identify and deal with deception in mediation. Updates on settlement rates and success stories in mediation also are provided.

I. INTRODUCTION

Mediation offers an alternative to the rigors of formal litigation in a courtroom. According to Gene Valentini, director of the Texas Dispute Resolution System, it has become a successful conflict resolution tool because it provides an opportunity to resolve virtually any issue in “a cost effective and timely manner” (2010, p. 2). One can speak freely in mediation “about anything you feel will get you to a point of resolution because nobody’s recording or saying it’s out of order, whereas in the courtroom you may not be able to address those things” (p. 2). Business leaders must understand the dynamics of the process to prepare for successful mediation.

Applying models and recent research from the field of group dynamics, this paper examines the problem of deception in mediation arising from the dramatic shift to compulsory, caucused mediation or mass mediation. The meteoric rise of caucused mediation (mediation conducted primarily in private session) as the dominant form has profound implications for business leaders. With most lawsuits being referred to compulsory caucused mediation, business leaders must be familiar with the process and the unique challenges it presents. In particular, they must be aware of the potential for deception in the less structured mediation setting, with parties now dealing with each other at arm’s length through counsel and an increasingly powerful mediator. This article explores the issue by examining the various forms of deception in mediation, identifying the various types of deceivers encountered in mediation, assessing the impact on mediation, and offering strategies for detecting and coping with deception. It presents four new models derived from research in the field of group dynamics to help mediators identify and deal with deception in mediation.

The extent to which business leaders recognize and respond to the challenges of compulsory mediation can determine whether it succeeds. Before considering how skills can be developed in
this area, it is important to examine the meaning of mediation, its use, and its success in resolving conflict.

II. THE MEANING OF MEDIATION

Texas statutory law defines mediation this way:

(a) Mediation is the forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

(b) A mediator may not impose his own judgment on the issues or that of the parties (Texas Civil Practice, 2008).

Unfortunately, this statutory definition offers little insight into what mediation actually can and should be. When successful, mediation can be characterized as proactive, forward-looking, and problem-solving in nature. As a process, it is enlightening, flexible, confidential, and, typically, evokes less stress than does formal litigation. It is not a drastic action and does not involve the surrender of freedom that arbitration dictates, as the latter requires an impartial third party who breaks a deadlock by issuing a final binding ruling (Lovenheim, 1998). Mediation basically involves negotiation through a disinterested third party, and it effectively can defuse emotional time bombs. One drawback mars this otherwise rosy picture: neither side is bound by anything in mediation. Arbitration binds; mediation intervenes benevolently. If the parties involved remain stubborn, intervention can sour, and mediation then becomes an exercise in futility.

Proactive use of mediation can help businesses avoid costly settlements and the potential of expensive litigation. Given the number of lawsuits filed and the heavy reliance on compulsory mediation by the courts, business leaders must understand the process and how to prepare for and conduct mediation.

III. THE USE OF MEDIATION

Over the past two decades, the use of mediation has exploded. Business leaders and the courts have discovered its value as a cost-effective alternative to litigation in the traditional adversarial system. The number of mediation cases in Texas, Oklahoma, and Nebraska (the states nearest the region to track statistics) is staggering. Cases received by Texas alternative dispute resolution centers in the most recent three-year period for which records were kept average almost 20,000 annually, with a total of more than 58,000 from 2003 to 2005 (Annual Report Texas). The same situation is true of Oklahoma. As shown in Table 1, on average, almost 6,000 cases have been referred annually to the alternative dispute resolution system there, with 65,249 cases referred in just over a decade. Also, an impressive average settlement rate of 64 percent has been registered (Annual Report Oklahoma). Farther north, results in Nebraska (see Table 2) are even more impressive. The number of cases referred annually to that state’s alternative dispute resolution system has more than doubled over the past decade, with an average settlement rate of 81 percent (Annual Report Nebraska). These striking regional settlement rates are mirrored across the United States: Better Business Bureau, 78%; U.S. Equal
Employment Opportunity Commission, 70%; Financial Industry Regulatory Authority, 80%; and State of Florida Division of Administrative Hearings, 78.5% (4 Disputes.com). They are also seen internationally as the Bangalore Mediation Centre tops 60% with 100 cases per day (4 Disputes.com) and World Intellectual Property Organization exceeds 70% across its 188 member-nations (WIPO). Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well established.

<table>
<thead>
<tr>
<th>Date</th>
<th>Cases</th>
<th>Settlement Rate</th>
</tr>
</thead>
<tbody>
<tr>
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<td>6,328</td>
<td>68%</td>
</tr>
<tr>
<td>2006</td>
<td>7,968</td>
<td>62%</td>
</tr>
<tr>
<td>2007</td>
<td>5,139</td>
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</tr>
<tr>
<td>2008</td>
<td>5,766</td>
<td>64%</td>
</tr>
<tr>
<td>2009</td>
<td>6,275</td>
<td>71%</td>
</tr>
<tr>
<td>2010</td>
<td>6,375</td>
<td>63%</td>
</tr>
<tr>
<td>2011</td>
<td>6,535</td>
<td>64%</td>
</tr>
<tr>
<td>2012</td>
<td>5,704</td>
<td>62%</td>
</tr>
<tr>
<td>2013</td>
<td>5,261</td>
<td>61%</td>
</tr>
<tr>
<td>2014</td>
<td>5,046</td>
<td>63%</td>
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<tr>
<td>2015</td>
<td>4,852</td>
<td>63%</td>
</tr>
<tr>
<td>Total</td>
<td>65,249</td>
<td>64%</td>
</tr>
</tbody>
</table>

Source: Annual Report Alternative Dispute Resolution System from the Supreme Court of Oklahoma Administrative Office of the Courts

<table>
<thead>
<tr>
<th>Date</th>
<th>Cases</th>
<th>Settlement Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>1,171</td>
<td>84%</td>
</tr>
<tr>
<td>2009</td>
<td>1,467</td>
<td>83%</td>
</tr>
<tr>
<td>2010</td>
<td>1,604</td>
<td>85%</td>
</tr>
<tr>
<td>2011</td>
<td>1,723</td>
<td>83%</td>
</tr>
<tr>
<td>2012</td>
<td>1,876</td>
<td>81%</td>
</tr>
<tr>
<td>2013</td>
<td>1,948</td>
<td>79%</td>
</tr>
<tr>
<td>2014</td>
<td>2,133</td>
<td>79%</td>
</tr>
<tr>
<td>2015</td>
<td>2,083</td>
<td>78%</td>
</tr>
<tr>
<td>2016</td>
<td>2,271</td>
<td>80%</td>
</tr>
<tr>
<td>2017</td>
<td>2,367</td>
<td>79%</td>
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<tr>
<td>Total</td>
<td>18,643</td>
<td>81%</td>
</tr>
</tbody>
</table>

Source: Annual Mediation Center Case Data Report from the Nebraska Office of Dispute Resolution
IV. PURPOSE

The advent of compulsory caucused mediation has created a major shift in the mediation process. A key tenet of caucused mediation is confidentiality. The mediator may not disclose information shared by one party with the other party. Both parties attempt to “pin the tail on the donkey,” wearing an information blindfold. Only the mediator can clearly see the dynamics of the process. In order to make a deal, the parties and even the mediator agree to be actual or potential victims of constant deception regarding confidential information (Cooley, 2000, p. 2). This environment, coupled with limited guidance and enforcement of standards of truthfulness, makes caucused mediation a breeding ground for gamesmanship, duplicity, and deceptive practices (Krivis, 2002, p. 4). The authors examine the various forms of deception in mediation, identify the various types of deceivers encountered, examine the impact on mediation, and offer strategies for detecting and coping with deception. Four new tools from the field of group dynamics are presented to assist parties, their counsel, and mediators in dealing with deception. These include the Continuum of Mediation Deception, the Integrative Model of Deceptive Behaviors, the Mediation Window, and Deception Detection Strategies. The paper first examines the potential for deception in caucused mediation before closing with recommendations on how to address the problem. Updates on settlement rates and success stories in mediation also are provided.

V. DEALING WITH DECEPTION IN MEDIATION

A. DECEPTION IN MEDIATION

Now that the court system has “institutionalized the use of mediation in virtually all civil proceedings” with the advent of compulsory mediation or mass mediation, attorneys are paying closer attention to their negotiation skills (Krivis, 2002, p. 1). While these skills involve less structured behavior than arguing a case before a jury, they nonetheless necessitate one common strategy most proficient practitioners refuse to acknowledge: deception (Krivis, p. 1). It is the “elephant in the room” in modern mediation. Deception is a part of mediation because it is a part of the human condition.

Deception, which has been defined generally as “the business of persuasion aided by the art of selective display,” is comprised of two principal behaviors: hiding the real and showing the false (Nyberg, 1993, pp. 66-67). It is an integral part of the American way of life. For example, in a study conducted Krivis and Zadeh in 2006, 61.5% of subjects’ natural conversation involved some form of deception; individuals reported averaging 16 white lies over a two-week period; the typical person lied approximately 13 times per week; and 28% of negotiators lied about an issue during negotiations while 100% of negotiators either failed to reveal a problem or actively lied about it if they were not questioned directly on the issue (Krivis & Zadeh, 2006, p. 1). In an Associated Press CNN poll conducted in 2006, 52% of 1,000 respondents said lying was never justified. Yet, two-thirds agreed that lying was okay under certain circumstances, such as
protecting one’s feelings (cited in Lakhani, 2007, p. 101). More recently, in a 2014 CBS Vanity Fair poll, 56% of Americans agreed that one should always tell the truth under every circumstance, but 42% disagreed (CBS News, 2014). According to Jeffrey Krivis, white lies and exaggerations “have actually become part of our social framework” (2002, p. 1). He claims they are not only acceptable but are expected in righting wrongs, being fair, extending kindness, and avoiding harm and that individuals engage in false praise, excuses, and gratitude to spare others’ feelings while the government, in order to protect citizens, engages in deception in spying, in using undercover agents, and in military operations (Krivis, 2002, p. 1-2). Politicians make well-intended promises they cannot keep, and parents tell their children tall tales of the “Tooth Fairy, Santa Claus, and the Easter Bunny” (p. 1). These white lies or “noble lies” are considered acceptable forms of deception that are reinforced in American culture (pp. 1-2).

Some forms of deception are tolerated in the marketplace as well, hence the age-old caveat of “Let the buyer beware” (Krivis, p. 2). A used car salesperson, for example, is not required to disclose what he paid for a car. He likely will inflate the car’s value and the buyer likely will underestimate his ability to pay until eventually, through a series of moves, both parties meet in the middle. This is the dance of negotiation. As long as these dance moves are not fraudulent, “deceptive techniques tend to be the engine that drives the motor of litigated negotiations” (Krivis, p. 2). The point is that in society and in the legal profession in particular, many types of deception are acceptable. This paper is concerned with the ethical limits of acceptable deception in mediation (Cooley, 2000, pp. 1-2). Donald Peters’ research on deception in mediation paints a gloomy picture. His findings indicate that lawyers lie about material facts in 17% to 23% of all mediations and that mediators, distrusting lawyers, are often trained not to believe anything they say in mediation (cited in Cooley, pp. 1-2).

Compulsory mediation as practiced today is caucused mediation in most cases. In such mediation, after a short “meet and greet,” the respective parties and their attorneys retreat to private rooms to caucus separately with the mediator for the duration of the mediation conference.

Consensual deception is the essence of caucused mediation. It is rare that caucused mediation, a type of informational game, occurs without the use of deception by the parties, by their lawyers, and/or by mediators in some form (Cooley, p. 2).

According to John Cooley, a former judge and practicing mediator who has written extensively on the topic, the first ground rule in any mediated case in which there is caucusing is that confidential information conveyed to the mediator by any party cannot be disclosed by the mediator to anyone (p. 2). As a result:
(1) Each party in mediation, rarely, if ever, knows whether another party has disclosed confidential information to the mediator; and (2) if confidential information has been disclosed, the nondisclosing party never knows the specific content of that confidential information and whether and/or to what extent that confidential information has colored or otherwise affected communications coming to the nondisclosing party from the mediator (p. 2).

The central paradox of the caucused mediation process is that in order to make a deal, the parties and even the mediator agree to be actual or potential victims of constant deception regarding confidential information (Cooley, p. 2). To make matters worse, mediation rarely occurs without deception because the parties and their counsel are engaged in the tactics and strategies of competitive bargaining in which each side strives to make the best deal possible (Cooley, p. 2).

The confidential nature of this form of mediation amplifies the deception that normally exists in negotiation because there is little risk of being caught (Krivis, p. 4). An inverse relationship exists between the risk of being caught and the frequency of deception (Krivis, p. 4). Moreover, people are more willing to deceive indirectly as is the case with caucused mediation than they are in face-to-face communication. Finally, the American Bar Association Model Rules do little more than proscribe fraud (serious misrepresentations of material fact made through false statements or silence) in negotiation. Similarly, the Model Standards of Conduct for Mediators are similarly void of any specific guidance to the mediator regarding standards of truthfulness (Cooley, p. 5, 7). Tarlow and Sink (2015) recently reported that a Westlaw search of the terms “lying in mediation” and “deception in mediation” as keywords in all jurisdictions resulted in zero cases being found (p. 3-4). For these reasons, caucused mediation has become a breeding ground for deception and deceptive practices (Krivis, p. 4). According to Cooley, these factors also:

Create an environment rich in gamesmanship and intrigue, naturally conducive to the use of deceptive behaviors by the parties and their counsel, and yes, even by mediators. Actually, even more so by mediators because they are the conductors—the orchestrators—of an information system specifically designed for each dispute, a system with ambiguously defined or, in some situations, undefined disclosure rules in which the mediator is the Chief Information Officer who has nearly absolute control over what nonconfidential information, critical or otherwise, is developed, what is withheld, what is disclosed, and when it is disclosed (p. 2).

Thus, deception is a major threat to mediation success. It permeates every aspect of the process and no participant, not even the mediator, is immune to its effect and influence. A first step in addressing this problem lies in identifying the specific forms of deception and their severity. The Continuum of Deception in Mediation is offered below as one way to do so.
B. CONTINUUM OF DECEPTION IN MEDIATION

Before deception in mediation can be addressed, deceptive behaviors that may be encountered must be identified and examined. An examination of the literature pertaining to mediation and negotiation uncovered 35 such behaviors. These were plotted on the Continuum of Mediation Deception in terms of severity, level of malice or intent to harm, and degree of planning or premeditation required (see Figure 1). A complete list of all the deceptive behaviors identified is found in Table 3 – Typology of Deceptive Behaviors. Sources of these behaviors are noted in the table.

**Figure 1: Continuum of Mediation Deception**

![Continuum of Mediation Deception diagram]

Source: C. D. Bultena, C. D. Ramser, and K. R. Tilker

The lowest level in the Continuum of Mediation Deception is **Cultural** in nature and includes White Lies and Social Niceties. While these are spontaneous statements that are untrue, they are considered acceptable because they are driven by cultural norms of consideration and kindness. The next level is **Acceptable**, which includes an All Star list of attorney favorites. They involve
embellishing the merits of the case as well as using strong emotions and the threat of extreme action to intimidate and compel opponents to settle. Although these deceptions require more planning and involve a higher level of malice, they generally are considered ethical (Cooley, 2000). Several behaviors at the next level, Deception, cross the line of what is considered ethical, particularly lying and fraud. These behaviors, also requiring a degree of planning, display greater malice or willingness to harm. Finally, at the apex of deception in mediation is the Strategic level. Duplicity at this level has become a way of life for some mediation participants. Actions at this level require a series of well-orchestrated steps over a longer period of time and flawless planning. Most of these actions would be considered unethical and some, if detected, illegal. They necessitate the highest level of malice toward the other party and are potentially devastating to the victim.

The Continuum of Mediation Deception is a useful tool by which parties, attorneys, and mediators can identify deceptive behaviors, their severity, and potential consequences. Not all deceptive behaviors may require a response. Determining the location of an observed action or strategy on the continuum alerts mediation participants to the potential need to react and suggests an appropriate response. Early detection and classification of behaviors affords greater flexibility in choosing an effective response. In conjunction with identification of the major types of deceptive behavior in Table 3, an Integrative Model of Deceptive Behaviors can be used to ascertain specific types of deceivers one may encounter in caucused mediation.

C. INTEGRATIVE MODEL OF DECEPTIVE BEHAVIORS

Human behavior rarely takes place in isolation. Rather, it occurs in powerful clusters, or “mixtures,” of tactics known as “deceptive profiles” (Kipnis et al., 1984, p. 59). Seven clusters of such profiles emerged from an analysis of 35 deceptive behaviors from the literature. Each cluster was analogized with an animal (e.g., Otter, Rat, and Fox) that typifies characteristics of the profile. The Typology of Deceptive Behaviors in Table 3 includes a description for each profile and the deceptive behaviors upon which it is based. The sources of these behaviors are noted in the table.

The seven profiles in the table were classified on two dimensions: whether they were Ethical or Unethical as well as whether they were Spontaneous (unplanned and situational) or Strategic (premeditated and planned). Combinations of these dimensions yielded four quadrants. A fifth was added to provide a middle-of-the road position.
### Table 3: Typology of Deceptive Behaviors

<table>
<thead>
<tr>
<th>Deceptive Profile</th>
<th>Deceptive Behavior</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Quadrant 1 – Ethical/Spontaneous – Charming</strong></td>
<td></td>
</tr>
<tr>
<td>Otter (Charmer) – Engages in considerate white lies and social niceties for others’ benefit</td>
<td></td>
</tr>
<tr>
<td>False excuses, false praise, and false gratitude</td>
<td></td>
</tr>
<tr>
<td>Insincere flattery and inflated assessments</td>
<td></td>
</tr>
<tr>
<td>Ingratiation – “greasing the Skids”</td>
<td></td>
</tr>
<tr>
<td>Social niceties – going along with Santa Claus and the Easter Bunny</td>
<td></td>
</tr>
<tr>
<td><strong>Quadrant 2 – Ethical/Strategic - Concealing</strong></td>
<td></td>
</tr>
<tr>
<td>Armadillo (Evader) – Dodges, skirts, avoids, or delays providing relevant information</td>
<td></td>
</tr>
<tr>
<td>Timed, partial, and non-disclosure</td>
<td></td>
</tr>
<tr>
<td>Evades and redirects questions to protect relevant information</td>
<td></td>
</tr>
<tr>
<td>Filters or suppresses relevant information</td>
<td></td>
</tr>
<tr>
<td>Omission – selectively withholding key information</td>
<td></td>
</tr>
<tr>
<td>Chameleon (Concealer) – Camouflages, distorts, disguises, and dazzles to conceal truth</td>
<td></td>
</tr>
<tr>
<td>Delivering vague or ambiguous information, half-truths</td>
<td></td>
</tr>
<tr>
<td>Camouflaging - disguising relevant facts to conceal them</td>
<td></td>
</tr>
<tr>
<td>Distorting - twisting facts to conceal the truth</td>
<td></td>
</tr>
<tr>
<td>Dazzling – exaggerating, embellishing, sugar coating, or spinning the truth</td>
<td></td>
</tr>
<tr>
<td><strong>Quadrant 3 – Semi-Ethical/Semi-Strategic - Cajoling</strong></td>
<td></td>
</tr>
<tr>
<td>Peacock (Showman) – Intimidates, embellishes facts, and threatens extreme action to win</td>
<td></td>
</tr>
<tr>
<td>Puffing – embellishing the merits of the case, facts, or values</td>
<td></td>
</tr>
<tr>
<td>Bluffing – threatening extreme action without intending to follow through</td>
<td></td>
</tr>
<tr>
<td>Posturing – using strong emotions and actions to impress or intimidate</td>
<td></td>
</tr>
<tr>
<td>Propaganda - using biased or misleading information to promote a plan</td>
<td></td>
</tr>
<tr>
<td><strong>Quadrant 4 – Unethical/Spontaneous - Cunning</strong></td>
<td></td>
</tr>
<tr>
<td>Rat (Habitual Liar) – Instinctively misrepresents facts or disagrees to protect a position</td>
<td></td>
</tr>
<tr>
<td>Withholding or misrepresenting material facts</td>
<td></td>
</tr>
<tr>
<td>Committing fraud by falsifying information to other party’s detriment</td>
<td></td>
</tr>
<tr>
<td>Outright lying and fabrication</td>
<td></td>
</tr>
</tbody>
</table>
Table 3: Typology of Deceptive Behaviors (Continued)

<table>
<thead>
<tr>
<th>Deceptive Profile</th>
<th>Deceptive Behavior</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Quadrant 5 – Unethical/Strategic - Conniving</strong></td>
<td></td>
</tr>
<tr>
<td>Fox (Manipulator) - Crafty, long-range planner, skilled manipulator, hard-core Machiavellian.</td>
<td></td>
</tr>
<tr>
<td>Manipulate thoughts and emotions of targets</td>
<td></td>
</tr>
<tr>
<td>Manipulate information – filter, screen, and alter facts to mislead</td>
<td></td>
</tr>
<tr>
<td>Develop clever plots, schemes, and scams to win at all cost</td>
<td></td>
</tr>
<tr>
<td>Think strategically and may conspire with others to win</td>
<td></td>
</tr>
<tr>
<td>Develop a well-orchestrated plan of strategic deception to win</td>
<td></td>
</tr>
<tr>
<td>Snake (Vindicator) – Vindictive narcissist who fights with malice to win and punish opponents</td>
<td></td>
</tr>
<tr>
<td>Same behaviors as Fox, but the goal is to win and punish opponents</td>
<td></td>
</tr>
<tr>
<td>Embrace or demolish “take no prisoners” approach</td>
<td></td>
</tr>
</tbody>
</table>

**Sources:** A compilation of research findings from Cooley (1997, 2000), Krivis (2002), Krivis and Zadeh (2006), and Lakhani (2007). Arrangement of deceptive behaviors into profiles, profile names, animals, and descriptions and quadrant designations by the authors.

The Integrative Model of Deceptive Behaviors in Figure 2 graphically depicts the location of the various analogized profiles on the multidimensional space. To our knowledge, this is the first published comprehensive model of deceptive behaviors. In Figure 2, **Quadrant 1**, labeled Charming, is occupied by the Otter, whose behavior is spontaneous as well as judged ethical by most standards. Otters are playful, good-natured, and fun-loving. While they can be somewhat rambunctious, they are generally pleasant. They are good team players in mediation who are willing to bend the truth a little with “white lies” in order to promote harmony and agreement.

Behavior in **Quadrant 2, Concealing**, is also generally ethical, though some would argue otherwise. However, in this case, it is strategic (premeditated, planned action). Both the Armadillo and the Chameleon found here are masters at avoiding disclosure in mediation. They differ only in the way they avoid it. Armadillos (Evaders) are calm and bulletproof but can move quickly to evade, skirt, and dodge any efforts to extract the truth. Just as in their natural habitat, once they reach cover, they dig in quickly; and it becomes almost impossible to extract the information sought. Participants in mediation may experience a great imbalance in discovery and disclosure when facing an Armadillo lawyer or participant. Chameleons (Concealers) do not evade; they camouflage, distort, and disguise information or dazzle it in such a way that neither the truth nor information being sought can be found. Both are there, but the chameleon, as in nature, is hard to spot. These efforts to conceal information are difficult to detect and to combat in mediation. Obtaining vital information to reach a settlement is an exercise in futility with either a Chameleon or an Armadillo.
The middle-of-the-road position is found in **Quadrant 3**, labeled **Cajoling**. Behaviors in this quadrant are marginally ethical and semi-strategic, requiring more planning and forethought than those presented thus far. The animal image for this is a Peacock (Showman). Those in this category are engaged in a relentless campaign to intimidate, embellish the merits of their case, and use strong emotions and the threat of extreme action (walking out) to force an opponent’s hand. They are impossible to ignore and often prevail with even a weak case. To combat them, opponents must be well prepared, stay focused on the facts of the case, and call their bluff.

The realm of unethical behavior is entered into in Quadrants 4 and 5. In **Quadrant 4**, labeled **Cunning**, the Rats (Habitual Liars) are on the loose. They are impulsive, compulsive liars who

**Source:** C. D. Bultena, K. R. Tilker, and C. D. Ramser
withhold and misrepresent information, commit fraud by falsifying information, and outright lie when it suits them. While their behavior is clearly unethical and illegal, it may not be detected in the information void that is caucused mediation. Unsuspecting participants who are not familiar with the Rat easily can be victimized. Vigilance is required any time Rats come to mediation.

Lastly, **Quadrant 5, Conniving**, encompasses behaviors that are also unethical and potentially illegal but are more difficult to detect. Here exists strategic deception that is calculated and well planned. It is home to Foxes (Manipulators) and Snakes (Vindicators). Foxes are crafty, long-range planners, skilled manipulators, and hard-core Machiavellians. They manipulate the thoughts and actions of others as well as information. They develop clever plots, schemes, and scams, think strategically, and may conspire with others. Overall, they develop a well-orchestrated plan to win at all cost. With this type, failure to unravel the plan and be well prepared for the next move is a formula for disaster in mediation. Snakes (Vindicators) use methods that are similar to those used by the Fox, but the object of the Snakes’ action differs. Snakes are vindictive narcissists who fight with malice to not only win but to punish opponents. They enjoy the fight and the thrill of subduing the “enemy.” They employ the “Embrace or Demolish” approach. For those who choose to oppose them, they will take no prisoners. Encountering such a person would be a nightmare even in caucused mediation with a skilled, impartial mediator. Mediator selection is vital to counteract such a threat to mediation success.

Overall, this section highlights the potentially devastating impact deceptive behaviors and those who employ them can have on the mediation process. This is especially true in caucused mediation, where the parties and even the mediator face constant deception regarding confidential information in order to make a deal (Cooley, 2000, p.2). Beyond being aware of these effects, mediation participants must take action to counter the behaviors described in this model. The next section unpacks a classic model to address the communication issues that fuel deception in caucused mediation. This section introduces a new diagnostic model called the Mediation Window.
**D. THE MEDIATION WINDOW**

In 1955, Joseph Luft and Harry Ingham proposed the Johari Window as a graphic model of interpersonal awareness (Luft & Ingham, 1955). Since then, scholars, executives, and consultants have used the model as a tool for developing high levels of communication, trust, and openness in a variety of situations. The model describes mechanisms for developing effective working relationships through self-disclosure, feedback, and shared discovery. The model is depicted as a window with four panes. The panes in the original model represented information known only to Self (Hidden), only to Other (Blind), to both parties (Open), and to neither party (Unknown). The model was adapted for use in mediation by the authors in Figure 3 – the Traditional Mediation Window. This required a change in perspective from Self/Other to Party A/Party B. Thus, the Blind and Hidden areas were relabeled as “Privileged Areas” for each party. Information in these areas is known only to the respective party. The Open Area (“the window of exchange”) is the area in which successful mediation occurs. It consists of perceptions, understanding, and knowledge of relevant information held in common by both mediation parties, a sharing that can reduce the potential for conflict. This pane must be open for effective mediation to occur. The Open Area is small when communications are closed, blocked, or not forthcoming. Research in industry, universities, and among counselors has shown that communications are richer, more authentic, and complete when the Open Area is larger than the hidden areas (Luft & Ingham, 1955).

The hidden areas in the Traditional Mediation Window are comprised of the Privileged and Unknown areas. Each Privileged Area is comprised of perceptions, knowledge, and information known to one party but not the other. To illustrate, one party may be acting on a false assumption that is blocking resolution of the conflict. Building trust and effective communication leads to mutual disclosure by the parties, which expands the Open Area, thus revealing faulty assumptions that can be corrected on the path to resolution. What is hidden in the Unknown Area is known to neither party. Shared discovery, which refers to the process by which both parties jointly discover new information, is vital to opening this area.

Thus, the configuration of the four panes can be altered with mutual disclosure and shared discovery in such a way that the Open Area expands and the Privileged and Unknown areas shrink, thereby enhancing the potential for effective conflict resolution. These processes are more likely to occur in the collaborative context of face-to-face traditional or facilitative mediation with full participation by the parties.
By contrast, caucused Mediation restricts or eliminates mutual disclosure and shared discovery by eliminating face-to-face interaction among the parties, thereby limiting participation of the parties and imposing strict confidentiality by the mediator in shuttle diplomacy (negotiating separately with the parties and their attorneys in private caucuses). Thus, a new model of mediation, the Caucused Mediation Window, is proposed in Figure 4. The panes in the model are unchanged, but the direction of information flow is reversed. Separate caucuses and strict confidentiality elevate the mediator to pre-eminence in this model. As the Mediation

**Figure 3: Traditional Mediation Window**

![Traditional Mediation Window Diagram]

*Source: Adapted from the Johari Window, Joseph Luft and Harry Ingham (1955). Adaptation from Self/Other to Mediation Party A/Party B and Privileged Areas by the authors.*

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“Chief Information Officer,” the mediator becomes a repository of the limited information reluctantly disclosed by party counsel (Cooley, 2000, p. 2). The Mediator Window in Figure 4 represents what the mediator knows. It is comprised of a large portion of the Open Area, small parts of the Privileged Areas, and perhaps, by virtue of her experience as an attorney or former judge, some information in the Unknown Area. The key difference from the Traditional Mediation Window in Figure 3 is that information, albeit limited, is flowing into the Mediator Window from the Privileged Areas. Figure 4 also highlights the potential for deception, which is elevated in caucused mediation by including Deception Zones for each party. Thus, the mediator may be privy to only a small net amount of truth in the Privileged Areas. A settlement is eventually drawn from a small subset of the Mediator Window represented in Figure 4 as the Settlement Window.

The Caucused Mediation Window is a useful diagnostic tool for mediators in caucused mediation. The size and shape of the Mediator Window is not likely to be symmetrical. For example, if there is an Armadillo in the room, there will be a dearth of information from that party. If a Rat takes residence in a caucus room, the Deception Zone for that party may grow, leaving only a trace of truth. At some point, the mediator may have little to work with from one or both parties, and mediation may stall. The Caucused Mediation Window offers mediators new insight into the process and suggests specific steps to get the process rolling again.

E. DECEPTION DETECTION IN MEDIATION

Because deception is so well-entrenched in American society, it is doubtful it will be eradicated from negotiation or mediation anytime soon. Perhaps the best that can be done is to learn to detect it and respond appropriately. He who is forewarned is forearmed. Unfortunately, DePaulo and her colleagues estimate the human capacity to detect deception at only 53%, which is not much better than flipping a coin (DePaulo et al., 1996, p. 991). The inability to detect deception is due, in large part, to a “truth bias” and to misconceptions concerning detection. According to Buller and Burgoon (1996), humans have an inherent bias for mutual trustworthiness that is hard to break. As a result of this “truth bias,” many are slow to detect deception—they just don’t want to believe it. Buller and Burgoon pioneered Interpersonal Deception Theory (IDT), which revolutionized detection of deception. Prior to IDT, scholars viewed deception unilaterally as emanating from the sender. Deception is not static; it is dynamic and interactive (Leverton, 2006). Deception is hard work; it takes a great deal of cognitive, emotional, and psychological effort to deceive. The strain of deception often reveals cues, referred to as “leakage” in IDT literature, that reflect deceptive behavior (Krivis & Zadeh, 2006, p. 3).
Krivis and Zadeh (2006) compiled a comprehensive list of Non-Strategic Cues (involuntary verbal and non-verbal leakage cues) and Strategic Cues (behavioral cues designed to improve the chances of deception success) from IDT theory to serve as a handy arsenal to assist in “ferreting out the deceivers from truth-tellers” in mediation (pp. 3-5). These cues are presented as a Dual Top Ten list in Table 4. On the left side are all the involuntary signs of deception—cues involving the eyes, speech patterns, and nervous body movements. On the right side are the deliberate behaviors designed to disguise deception—patterns of conversation, speech, and timing. A laminated copy of Table 4 is essential in mediation. Mediation participants armed with decades of IDT research have a far better chance of detecting and responding to deception.

Source: Adapted from the Johari Window, Joseph Luft and Harry Ingham (1955). Adaptation from Self/Other to Mediation Party A/Party B, Privileged Areas, Mediation and Settlement Windows, and Zones of Deception by the authors.
Table 4: Deception Detection Strategies

<table>
<thead>
<tr>
<th>Non-Strategic Cues of Involuntary Leakage Revealing Deception</th>
<th>Strategic Cues of Intended Efforts to Avoid Detection</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. <strong>Increased pupil dilation</strong> as in a dark room</td>
<td>Intentional vagueness in communication</td>
</tr>
<tr>
<td>2. <strong>More frequent blinking</strong> than in those who are telling the truth</td>
<td>Withdrawing from the conversation, being aloof</td>
</tr>
<tr>
<td>3. <strong>Eye shifting</strong> away, up, down, to the side rather than looking one in the eye</td>
<td>Faking or maintaining a positive image to avoid detection</td>
</tr>
<tr>
<td>4. <strong>Self-adapters</strong> – use hands to nervously manipulate objects or parts of body</td>
<td>Speaking in a less immediate, more distancing manner (diversion)</td>
</tr>
<tr>
<td>5. <strong>Elevated speaking pitch</strong> as compared to those telling the truth</td>
<td>Sharing irrelevant information and making statements unrelated to message theme</td>
</tr>
<tr>
<td>6. <strong>Speech errors</strong> and many dysfluencies such as “uh,” “ah,” “um,” and “mm”</td>
<td>Using more generalities and “allness” terms (all, none, nobody, always, never)</td>
</tr>
<tr>
<td>7. <strong>Speech pauses</strong> – longer periods of silence or dead air in conversations</td>
<td>Speaking for shorter lengths of time, disclosing less information</td>
</tr>
<tr>
<td>8. <strong>Negative statements</strong> with a lot of words such as “no, not, can’t, and won’t”</td>
<td>Frequent use of modifiers such as “some of the time” and “usually”</td>
</tr>
<tr>
<td>9. <strong>More fidgety behavior</strong> – leg twitches, tapping feet, rocking/swiveling in chair</td>
<td>More group references and fewer self-references such as “we and us” vs. “me and I”</td>
</tr>
<tr>
<td>10. <strong>Less hand and head gesturing</strong> – speaks less with hands and keep head still</td>
<td>Waits longer to respond; takes more time to prepare deceptive answers</td>
</tr>
</tbody>
</table>

**Source:** Compilation of research findings summarized by Krivis & Zadeh (2006).
F. RECOMMENDATIONS FOR MEDIATION AND MEDIATION PARTICIPANTS

Deception has long plagued the courtroom, the negotiating table, and the mediation room. It is interwoven in human nature and into the fabric of American society. The unrelenting spread of compulsory mediation has swept the nation as most civil cases are now settled in mediation. Unfortunately, mediation has taken a turn for the worse. The shift from face-to-face traditional mediation to a caucused version has forever changed the face of mediation. Caucused mediation forces participants to subject themselves to consensual deception, according to Cooley (2000). Thus, by design, it is a breeding ground for deception (Krivis, 2002). In this paper, an extensive array of deceptive behaviors found in mediation has been presented; analyzed in terms of premeditation, malice, and severity; classified into familiar profiles using animals for easy identification; synthesized in a new model of caucused mediation; and summarized with regard to deception detection strategies. The tools presented in this paper offer mediation participants some hope for detecting and dealing with deception in mediation. Five specific recommendations for dealing with deception in mediation are offered.

1. Prepare! Prepare! Prepare! The best defense against deception is being armed with the truth. Summarize, organize, and prepare all relevant materials for quick access during mediation. Be prepared to counter any deception quickly. Those who are not fast at thinking on their feet should see Recommendation 5. Caucused mediation moves quickly, and one can be buried if unable to keep up.

2. Choose the mediator wisely. Mediators are powerful in caucused mediation and, due to confidentiality standards, there is no way to know what goes on behind closed doors. Insist on a choice of mediators if the mediator is not court appointed. As a general rule, do not agree to opposing counsel’s choice of a mediator, especially if that person has been used by the mediator many times before. Employ due diligence in selecting a mediator known to be unbiased and of impeccable character. If opposing counsel insists on its choice of mediator, take the issue to the judge.

3. In litigated cases, mediate only after discovery is complete for both sides. This opens the Privileged Area of the Mediation Window for both sides. Reaching a fair settlement is far more likely with complete disclosure, and disclosure is more likely when ordered by the court. Failing to do so invites the Armadillo to mediation.

4. Be Vigilant! Be aware of the “truth bias” and don’t be fooled. Bring a laminated copy of Table 4 and Figure 2 to the mediation to use as safeguards against deception. Be on the lookout for any voluntary or involuntary signs of deception and any Rats, Armadillos, or other animals crawling around the room. Do not buy into the Mediator’s narrative without fact-checking everything.
5. **Consider bringing an observer to mediation.** This would be done not to actively negotiate but to serve as a fact-checker and safeguard against deception. The observer should be familiar with the case and be trained to recognize deception. The party often is so overwhelmed by the emotional, behavioral, and cognitive demands of caucused mediation that he or she cannot negotiate effectively. Without an observer, it is easy to be overwhelmed and fall prey to deception. Periodic breaks during mediation should be taken as necessary to confer.

**VI. SUMMARY**

The flood of cases referred to mediation by the courts has given rise to compulsory mediation as the dominant form of mediation. This trend has also resulted in a shift from face-to-face traditional mediation to caucused mediation, which, by design, is a breeding ground for deception. To date, little has been done to acknowledge this threat to mediation, much less to address it. In this paper, an extensive array of deceptive behaviors found in mediation has been presented in the Typology of Deceptive Behaviors in Table 3. Those behaviors have been analyzed in terms of premeditation, malice, and severity in the Continuum of Meditation Deception in Figure 1. Further, they have been classified into familiar profiles using animals for easy identification; this has been used to create the Integrated Model of Deceptive Behaviors in Figure 2. Using the classic Johari Window as a framework, two new models have been created: the Traditional Mediation Window (Figure 3) and the Caucused Mediation Window (Figure 4). These highlight differences and offer mediators a diagnostic tool to address the challenge of deception and restricted information flow in caucused mediation. Finally, a comprehensive Top Ten Deception Detection List has been produced in Table 4. Mediation participants can use this in mediation as a safeguard against deceit. Finally, five useful recommendations for dealing with deception in mediation have been produced.

**VII. SUCCESSFUL MEDIATION IN BUSINESS**

While there is room to improve mediation through application of the models presented in this paper, there is little doubt that mediation has become a highly effective mechanism for conflict resolution. The significance of the process can be seen in the large number of cases in Texas and Oklahoma, the rapid growth in the number of cases in Nebraska, and the impressive settlement rates seen in the region. These impressive regional settlement rates are mirrored across the United States and internationally. Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well-established. Beyond the numbers, however, mediation’s success is also evident in the wide variety of cases settled, not to mention the many cases that do not reach full settlement yet narrow the differences to be subsequently resolved through arbitration or litigation. As shown in Table 5, successful mediation has occurred in a broad range of conflict situations, varying greatly in both the size and nature of the dispute.
Cases range from massive corporate cases involving millions of dollars in claims, from the Amtrak derailment in Philadelphia to smaller domestic disputes over a home purchase. Table 5 also highlights the variety of issues involved in mediation, varying from suits over disability claims, insurance subrogation, bank escrow accounts, price fixing, and HIV infection to claims over storm water permits, building a gas station on Native American land, hurricane damage, and environmental issues in New Zealand. Overall, the increasing volume, variety, and scope of mediation cases highlight its expanding role in business and society.

Table 5: Examples of Successful Mediation in Business

**Cases Mediated by Bruce Meyerson (2018)**
- A major claim by an insurance company seeking subrogation against a large carrier under the Carmack Amendment.
- A dispute over alleged defects in the construction of a residence and counterclaim for payment of damages.
- A dispute involving claims of breach of fiduciary duty against an escrow officer in a large bank and a title company.
- A dispute among factoring companies over payments under a personal injury settlement.
- A claim of disability discrimination by a health care worker with the HIV virus.
- A claim for specific performance of a real estate purchase contract by a home buyer against a developer.

**Major Cases Mediated by JAMS (2018)**
- Completed a series of mediated settlements stemming from the Amtrak Train Derailment in Philadelphia involving $265 million in claims.
- Successfully mediated anti-trust claims of conspiracy by an Internet bond trader, claims of price fixing of blood reagent products, and claims of price fixing in pharmaceuticals.
- Mediated conflicts involving catastrophic personal injury cases, multi-party commercial disputes and mass torts and multi-district litigations.
- Settled millions in claims sustained by businesses in the wake of Superstorm Sandy.

**Cases Mediated by Mediators Beyond Borders (2018)**
- Mediated cases arising from enforcement of New Zealand’s Resources Management Act involving a large variety of environmental suits. The result is that 80% of the cases referred to mediation were successfully resolved, and demand for mediation is increasing.
- The Bridgeport Indian Colony in Northeastern California bought land in order to put a gas station and RV park on the space. Neighboring homeowners objected, and sixteen formal protests were filed. The case was mediated, resulting in an innovative solution.
- Mediated a cooperative agreement between the State of Oklahoma and environmental concerns regarding water quality issues.
- Mediated a settlement of a four-year dispute between the city of Washington D.C. and the U.S. Navy over an EPA storm water permit to which the Navy objected.
VIII. CONCLUSION

The success of mediation and its application across a spectrum of conflict situations has been noted, the problems posed by deception in compulsory caucused mediation have been exposed, and several tools to help mediators and participants respond appropriately to ensure success in mediation have been supported. Business leaders can use these tools to avoid the pitfalls of deception in compulsory mediation and to better prepare for the inevitability of mediation when a dispute or lawsuit arises. Mediation need not be a maddening process. It is most likely to succeed when participants detect and respond appropriately to the realities of deception in compulsory mediation.

The volume, variety, and settlement rates of mediation cases suggest a bright future for this form of conflict resolution. With the use of mediation on the rise, it is more important than ever for business leaders to master skills necessary to take full advantage of the opportunities this process offers. Mediation is an effective tool when business leaders prepare for and navigate the process with a clear understanding of how to remove interpersonal barriers, thus ensuring more understanding, mutual respect, and open communication.
REFERENCES


PRIVACY IN THE AGE OF DOXXING

JEFFREY PITTMAN∗

Abstract:

Writing in 1890, Samuel D. Warren and Louis D. Brandeis penned “perhaps the most famous and certainly the most influential law review article ever written,”1 The Right to Privacy.2 There the authors posited that “now the right to life has come to mean the right to enjoy life, -- the right to be let alone . . ..”3 Is the famous privacy statement by Warren and Brandeis true and relevant today?4 Can privacy coexist with social media, facial recognition, and intrusive internet technology?

Biometrics, Doxxing & a Case of Mistaken Identity

Biometrics is the measurement and analysis of unique physical or behavioral characteristics, especially as a means of verifying personal identity. Biometrics often refers to technologies used to identify an individual based on unique physical characteristics.5 One of the most common uses of biometrics today involves facial recognition technology, scanning a person’s face, extracting facial feature data, and comparing this against information stored in a database, leading to potential identification of the person scanned.6 A new verb, doxxing, has emerged to describe

∗ Arkansas State University – pittman@astate.edu.
3 Ibid at 193.
4 Warren and Brandeis were writing, in part, against the misuse of instantaneous photography and the widespread misbehavior of ubiquitous newspapers: “Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, which thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. . .” Supra note 2, at 196.

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use of the Internet to search for and publish identifying information about a particular individual, typically with malicious intent.\(^7\)

The Unite the Right rally, also known as the Charlottesville rally, was a white nationalists rally in Charlottesville, Virginia, from August 11–12, 2017. Its stated goal was to oppose the removal of a statue of Robert E. Lee from Emancipation Park.\(^8\) The rally led to bloodshed and loss of life.\(^9\)

Friday evening, August 11, 1,100 miles away from Charlottesville, Dr. Kyle Quinn was in Bentonville, Arkansas, visiting Crystal Bridges Museum of American Art. Dr. Kyle Quinn is a biomedical engineering professor at the University of Arkansas.

Based on a faulty identification supplied by facial recognition software, a marcher at the rally was incorrectly identified as Dr. Quinn. A photo of Kyle Quinn was posted alongside one of a man attending the Friday night rally. The man at the rally was wearing an “Arkansas Engineering” T-shirt and had a beard and build similar to that of Quinn. Quinn’s social media accounts were quickly populated with messages accusing him of being a racist white nationalist, and calling for Quinn to be fired or physically harmed. That night, when his home address also was posted on social media, Quinn and his wife were forced into hiding.\(^10\)

Does Dr. Quinn have effective legal recourse to protect his right to privacy, or do we ignore the voices of Warren and Brandeis? Is this Aldous Huxley’s\(^11\) or William Shakespeare’s\(^12\) brave, new world?

**Doxxing and Privacy**

**Criminal Law**

State criminal charges against those persons who called for harm to Dr. Quinn possibly could be brought by an Arkansas prosecutor under various code provisions, e.g., Terroristic Threatening.\(^13\)

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\(^9\) Ibid.


\(^12\) “Brave new world” is a phrase used in Shakespeare’s *The Tempest*. Possibly Shakespeare’s last play, *The Tempest* finds its protagonist, Prospero, able to accept his base nature and abandon his malicious use of magic, a romantic outcome. William Shakespeare, *The Tempest*, Act V, Scene I, ll. 203–206: “O wonder! How many goodly creatures are there here! How beauteous mankind is! O brave new world, That has such people in’t.”

\(^13\) A.C.A. § 5-13-301. Terroristic threatening

(a)(1) A person commits the offense of terroristic threatening in the first degree if:

(A) With the purpose of terrorizing another person, the person threatens to cause death or serious physical injury or substantial property damage to another person; or

(B) With the purpose of terrorizing another person, the person threatens to cause physical injury or property damage to a teacher or other school employee acting in the line of duty.
Cyberbullying,\textsuperscript{14} or Harassing Communications.\textsuperscript{15} Dr. Quinn does not control the criminal process, however, and identification of the speakers urging harm against Quinn would be difficult, considering the potential anonymity of Internet postings. Criminal charges rarely are attempted in such cases. Currently, no federal law specifically proscribes doxxing. Federal legislation recently was introduced in Congress that would criminalize disclosure of personal information with the intent to cause harm.\textsuperscript{16} Unfortunately, from a plaintiff’s perspective, a cause of action appears only to lie against the individual speaker who maliciously publishes a person’s personally identifiable information.\textsuperscript{17} No criminal or civil liability under the proposed federal legislation appears to extend to any of the Internet entities or software providers who make doxxing possible.

\textit{Common Law Civil Lawsuits, Biometrics, & Facial Recognition Software}

If Dr. Kyle Quinn attempts a civil lawsuit against the Internet speakers wrongfully identifying Quinn and calling for his harm, he will face the same difficulties as criminal prosecutors: identifying the speakers will be difficult and expensive. Further, many of such speakers effectively will be judgement proof. The key question becomes, is there possible legal action available against the Internet companies commercially using personal biometric identifying information, allowing facial recognition software to exist?

The current common law protections for privacy emerged from various sources, chief being an influential article, \textit{Privacy}, authored by William Prosser.\textsuperscript{18} Coming 70 years after Warren and Brandies’ \textit{The Right to Privacy}, Prosser grouped common law privacy rights into four areas that are still the basis for common law protection today in most states: intrusion upon one’s seclusion, solitude, or personal business; public disclosure of private information; falsehood that leads to a negative public image; and use of a person’s name or likeness for gain without approval.\textsuperscript{19}

\begin{itemize}
  \item \textsuperscript{14}A.C.A. § 5-71-217. Cyberbullying
  (b) A person commits the offense of cyberbullying if:
  \begin{enumerate}
    \item He or she transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, or harass another person; and
    \item The transmission was in furtherance of severe, repeated, or hostile behavior toward the other person.
  \end{enumerate}

  \item \textsuperscript{15}A.C.A. § 5-71-209. Harassing communications
  (b) A person commits the offense of harassing communications if, with the purpose to harass, annoy, or alarm another person, the person:
  \begin{enumerate}
    \item Communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, email, message delivered to an electronic device, or any other form of written or electronic communication, in a manner likely to harass, annoy, or cause alarm.
  \end{enumerate}

  \item \textsuperscript{16}HR 3067, introduced in the House of Representatives, June 27, 2017.

  \item \textsuperscript{17}Ibid., Sec. 881. Publication of personally identifiable information with the intent to cause harm


  \item \textsuperscript{19}Ibid at 389.
\end{itemize}
Under this narrow view of privacy, a common law suit against the companies commercially using biometric identifying information would probably fail.

**Federal Preemption**

There is no federal common law to create a civil cause of action against the commercial use of biometric identifying information. From a plaintiff’s perspective, then, the only federal concern is does federal law preempt a possible state civil suit.

No federal law specifically disallows a state lawsuit against companies commercially using biometric identifying information. For example, the Digital Millennium Copyright Act\(^\text{20}\) generally was designed to limit the liability of Internet service providers for acts of copyright infringement by customers who are using the providers' systems.\(^\text{21}\) Imposing liability on the commercial use of personal biometric information, however, is a different field of liability. Similarly, under the Communications Decency Act (CDA)\(^\text{22}\) a provider or user of an interactive computer service may not be treated as the publisher or speaker of any information provided by another information content provider.\(^\text{23}\) The CDA prevents courts from imposing liability on service providers as traditional publishers of information, making editorial decisions on whether or not to publish. Again, however, an invasion of privacy lawsuit based on the commercial use of personal biometric information is a different question. The CDA explicitly provides that it is not to be construed to prevent any state from enforcing any state law that is consistent with the CDA.\(^\text{24}\)

**State Statutory Protections of Privacy for Biometric Information**

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\(^{23}\) 47 U.S.C.A. § 230(c)(1). The Communications Decency Act bars plaintiffs from holding Internet service providers legally responsible for information that third parties created and developed. Johnson v. Arden, 614 F.3d 785 (8th Cir. 2010).

Three states have enacted privacy protections applicable to the use of facial recognition software and related issues: Washington, Illinois, and Texas. The oldest of these laws, and the most litigated, is the Illinois Biometric Information Privacy Act (BIPA). Enacted in 2008, BIPA was the first of its kind. Generally, the Illinois law requires informed consent prior to collection of biometric identifiers or biometric information, prohibits profiting from biometric data, and creates a private right of action for individuals harmed by violators of the statute.

**Cases under the Illinois Biometric Information Privacy Act**

In *Rivera v. Google, Inc.*, Lindabeth Rivera and Joseph Weiss are attempting a class action lawsuit in Illinois against Google for violations of BIPA. Plaintiffs argue they were the subject of photographs taken by smartphones and uploaded, without their consent, to Google’s cloud-based service that scanned plaintiffs’ facial features to create face templates, in violation of BIPA. Google moved to dismiss. The motion was denied and the case continues. Separately, Google attempted legal action in California to stop the Illinois case. This also failed.

25 WA ST 19.375.010 -19.375.900 (2018) See e.g., 19.373.020 (1) “A person may not enroll a biometric identifier in a database for a commercial purpose, without first providing notice, obtaining consent, or providing a mechanism to prevent the subsequent use of a biometric identifier for a commercial purpose.”

26 Biometric Information Privacy Act, §740 ILCS 14 et seq. See e.g., Sec. 15. Retention; collection; disclosure; destruction.

(a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual’s last interaction with the private entity, whichever occurs first. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

(b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person’s or a customer’s biometric identifier or biometric information, unless it first:

1. informs the subject or the subject’s legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

2. informs the subject or the subject’s legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

3. receives a written release executed by the subject of the biometric identifier or biometric information or the subject’s legally authorized representative.

27 V. T. C. A., Bus. & C. §503.001. See e.g., §503.001 (b) A person may not capture a biometric identifier of an individual for a commercial purpose unless the person: (1) informs the individual before capturing the biometric identifier; and (2) receives the individual’s consent to capture the biometric identifier.

28 Supra note 26.


30 Specifically the court held: [1] plaintiffs sufficiently alleged that face templates of their features were “biometric identifiers” within meaning of Illinois Biometric Information Privacy Act; [2] plaintiffs sufficiently alleged that the face templates were created primarily and substantially in Illinois, rather than extraterritorially, so as to be subject to the Act; and [3] issue of whether extraterritorial effects of the Act violated Commerce Clause required discovery. Ibid.

31 In re Facebook Biometric Information Privacy Litigation, 185 F.Supp.3d 1155 (N.D. Cal. 2016).

32 Specifically, the court held California choice-of-law would not be enforced as it was contrary to Illinois fundamental policy and [Rivera and Weiss] stated a cause of action under [the Illinois Biometric Information Privacy Act]. Ibid.
In a separate Illinois case, plaintiff Brian Norberg is suing Shutterfly and ThisLife. Defendants operate websites offering digital photo storage, photo sharing, and photo prints and novelty gifts. Defendants’ motion to dismiss was denied, and the case continues. Though plaintiffs survived motions to dismiss in the preceding cases, the ultimate constitutionality and application of BIPA has not been determined.

The Future of Common Law Privacy Protections

Should the common law be extended to protect against unauthorized commercial use of personal biometric identifying information? Warren and Brandeis’ *The Right to Privacy* would appear to support this change. They maintained that extending the common law to protecting personal appearance was a natural extension. Restrictions on the right to privacy identified by the authors would be inapplicable to protection of personal biometric information. Finally, consider the closing words of the authors, guiding us today:

> It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required. Perhaps it would be deemed proper to bring the criminal liability for such publication within narrower limits; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted. Still, the protection of society must come mainly through a recognition of the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defence, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

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34 *Supra* note 2, at 213. [“The principle which protects personal writings and any other productions of the intellect of or the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.”]

35 *Supra* note 2, at 214-18:

1. "The right to privacy does not prohibit any publication of matter which is of public or general interest. . . .

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel. . . .

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage. . . .

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent. . . .

5. The truth of the matter published does not afford a defence. . . .

6. The absence of "malice" in the publisher does not afford a defence."

36 *Supra* note 2, at 219-20.
“I tried everything else known to man, and none of it works. [Nausea] is what kills people when they’re fighting chemo because you can’t hold anything down... Without [medical marijuana] I would be dead, no doubt. I’ve had numerous doctors tell me that.”
—Ray Jennings, throat cancer survivor

Introduction

Marijuana is a plant that has been on earth and used by humans for at least five millennia. The first recorded use of marijuana was 2727 B.C. Thus, marijuana is not new. Only the hysteria surrounding the plant is new. Even America’s history of pot is muddled. Marijuana has not always been illegal in the United States. In fact, marijuana was legal for the majority of U.S. history to date. Marijuana and hemp (same species) were vital crops for the American colonies. George Washington grew hemp at Mount Vernon. Jamestown settlers used marijuana. Early American medical journals described many uses for marijuana. In 1850, Marijuana was listed in the Pharmacopoeia, which was a widely regarded reference and authority for medicinal drugs, as a
treatment for numerous ailments, including: cholera, rabies, dysentery, tonsillitis, and menstrual bleeding. In essence, marijuana was a poor man’s pain reliever. The American Medical Association fought for marijuana’s use in medicine. Pharmaceutical giants such as Eli Lilly, and Squibb of Bristol-Myers-Squibb sold marijuana.

Today, marijuana is the most widely used psychoactive drug in the United States. Marijuana is as readily available as alcohol and is more abundant now than prior to Nixon’s War on Drugs. Public sentiment favors marijuana. According to a 2017 Gallup poll, forty-five (45) percent of all Americans have tried marijuana. A clear majority of all Americans support legal marijuana usage. According to a 2018 AARP survey, eighty percent of older Americans support medical marijuana usage. Three out of every four American physicians support medical marijuana. Famously, a sitting New York judge used medical marijuana to alleviate his pain.

In this article, we will discuss the history of marijuana in America. We will then examine the recent trend of marijuana legalization. Next, we will examine Oklahoma’s State Question 788 for what it includes and what it does not. Then we will report on the outcome of Oklahoma’s election. To conclude, we will describe several cloudy issues still pending with the outcome of the election.

The Blunt History of Marijuana

9 Boire & Feeney, supra note 3, at 16 (marijuana was also considered a treatment for alcoholism, opiate addiction, and anthrax).


11 Laura M. Borgelt, et al., The Pharmacologic and Clinical Effects of Medical Cannabis, 33 PHARMACOTHERAPY 195 (2013) (the AMA objected to criminalization efforts because of the common use of marijuana in many medical settings).


13 Sides, supra note 6, at 38; see also Ludlum & Ford, supra note 11. See also Am. Psychiatric Ass'n., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 512 (5th ed. 2013).


15 Art Swift, In U.S., 45 Percent Say They Have Tried Marijuanua, GALLUP (July 19, 2017), http://www.gallup.com/poll/214250/say-tried-marijuana.aspx?g_source=Well-Being&g_medium=newsfeed&g_campaign=tiles. (45 percent of Americans have tried marijuana as of 2017).

16 Id. (60 percent of Americans support legal marijuana in 2016.)


After the failed attempt at alcohol prohibition, marijuana was demonized as a loco-weed that drives addicts to murder and commit sex crimes. California became the first state to prohibit marijuana usage in 1913. California’s marijuana prohibition came as an obscure amendment to the state’s Poison Law and without media attention. By 1930, marijuana was outlawed in 30 of the 48 states. States had implemented racially charged anti-marijuana laws. Under Richard Nixon, the War on Drugs reached its climax, culminating with the Controlled Substances Act of 1970, making marijuana illegal in all states.

Less than a decade later, some states tried small programs of medical marijuana. New Mexico was the first in 1978. Thirty states followed New Mexico’s lead, but the support was short lived. The FDA approved a synthetic form of marijuana, Marinol, in 1980. Since marijuana was available in pill form, the interest in medical pot mellowed. Marinol was not a success. The pill is difficult to absorb and regulate, and much more expensive than marijuana.

Pot is a practical medicine. Marijuana, or Cannabis Sativa as it is known in Latin, can be ingested in many ways (smoked, vaped, eaten, liquefied/drank, aerosol, tainted, topical,


22 Id.


28 See Gregg A. Bilz, The Medical Use of Marijuana: The Politics of Medicine, 13 HAMLINE J. PUB. L. & POL’Y 117, 125 (1992); see also Renehan, supra note 7.

29 A sixty day supply of Marinol (5mg. capsules) was priced at $1,432.02 at drugs.com on Feb. 1, 2018; see Marinol Prices, http://www.drugs.com/price-guide/marinol (last visited Feb. 1, 2018).

suppository, dabbed, and others). In its many forms, the drug is relatively inexpensive, and patients could grow their own in their closet and thereby control quality and costs. Most importantly, marijuana is safe when compared to other medications used for similar ailments. No recorded fatal overdose has occurred in 3,000 years of use.

**Recent Trends in Medical Marijuana Legalization**

Before 2018, twenty-two states and the District of Columbia, Guam, and Puerto Rico have legalized marijuana for medical use. Eight additional states – Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington – have legalized marijuana for recreational use as of 2018. A clear majority of states (30/50) have approved marijuana in some form including three border states to Oklahoma with medical marijuana legalization: New Mexico, Colorado, and Arkansas.

While each state that has legalized marijuana is unique, for simplicity we can divide the regulation scheme of states into two broad categories: permissive regulation represented by California, and strict regulation represented by New York.

**Permissive Regulatory Schemes**

Having been the first to make marijuana illegal in 1913, 82 years later California was the first state to formally legalize the drug when it passed the *Compassionate Use Act of 1996*, and thereby legalize the use of marijuana for medical purposes. California’s medical marijuana scheme is extremely lax. A patient in California does not need to have any defined illness to have the drug prescribed. Any doctor can make a marijuana recommendation at any time, and for any reason. No medical follow up with the patient is required. A quick search of the internet will reveal many “medical providers” who promise a marijuana recommendation after a five-minute

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skype visit. In the competitive marketplace, the price for a consumer’s pot license continues to drop.\textsuperscript{38}

The regulations of who can sell marijuana are equally permissive. Los Angeles has more medical marijuana sellers than public schools or taco stands.\textsuperscript{39} The highly competitive pot markets are saturated with sellers. The explosion of the cannabis business is not unique to southern California. The city of Seattle has 103 medical marijuana dispensaries.\textsuperscript{40} In some major cities, legal marijuana merchants outnumber McDonalds and Starbucks.\textsuperscript{41}

\textbf{Strict Regulatory Schemes}

A contrast to California’s scheme is New York’s medical marijuana program passed in 2014, based on a pharmacy model.\textsuperscript{42} Anyone applying for medical marijuana as a patient in New York must have a specific illness defined by the State Department of Health.\textsuperscript{43} Qualifying conditions must be severe, debilitating, or life-threatening, and include cancer, positive HIV or AIDS status, amyotrophic lateral sclerosis (ALS), Parkinson’s disease, multiple sclerosis, epilepsy, inflammatory bowel disease, neuropathy, and others.\textsuperscript{44} Patients must be registered which requires certification by a registered practitioner.\textsuperscript{45}

New York also has training and certification requirements for physicians and the prescribing doctor must be specifically licensed for treatment of one of the state’s listed illnesses.\textsuperscript{46} Further, registered practitioners must complete practitioner education requirements before being registered. New York regulates medical marijuana sellers in a pharmacy-like setting with a maximum of ten sellers, each with four dispensaries (40 storefronts for the entire state).\textsuperscript{47}

\textbf{Oklahoma Marijuana Law Before 2018}

Oklahoma is a consistently conservative state. Conservative Oklahomans seemingly has supported a liberal policy like medical marijuana taboo for nearly three years. In 2015, Oklahoma allowed cannabis products (CBD oil) only if needed for medicinal usage such as debilitating

\textsuperscript{38} Prices have dropped to $39 for an online medical exam and marijuana recommendation that you can readily print from your home computer. See 420 EVALUATIONS at https://www.nuggmd.com/ (offering marijuana recommendations for California or New York for $39 (last accessed August 2, 2018).
\textsuperscript{39} Ludlum & Ford, supra note 37.
\textsuperscript{40} Jim Camden, House Weights Pot Law Proposals, SPOKESMAN REVIEW, Mar. 6, 2015.
\textsuperscript{41} Ludlum & Ford, supra note 34.
\textsuperscript{42} The New York State Medical Marijuana Program, New York State Department of Health, (July 2018), https://www.health.ny.gov/regulations/medical_marijuana/.
\textsuperscript{43} Frequently Asked Questions, New York State Department of Health (Jan. 30, 2018), https://www.health.ny.gov/regulations/medical_marijuana/faq.htm (illnesses are defined by the State Department of Health and currently: Only patients with one of the following severe, debilitating or life-threatening conditions may qualify for the Medical Marijuana Program: cancer, positive status for HIV or AIDS, amyotrophic lateral sclerosis (ALS), Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, inflammatory bowel disease, neuropathy, chronic pain as defined by 10 NYCRR §1004.2(a)(8)(xi), post-traumatic stress disorder or Huntington's disease. Patients must also have one of the following associated or complicating conditions: cachexia or wasting syndrome, severe or chronic pain, severe nausea, seizures, or severe or persistent muscle spasms.).
\textsuperscript{44} Information for Patients - The New York State Medical Marijuana Program, New York State Department of Health, (July 2018), https://www.health.ny.gov/regulations/medical_marijuana/.
\textsuperscript{45} Id.
seizures in children.\textsuperscript{48} Oklahoma is one of 16 states with a CBD oil statute.\textsuperscript{49} The program is highly regulated and does not allow for any marijuana in raw (smoked) form or for recreational use.

In 2018, Oklahoma voters petitioned for a broader form of medical marijuana under State Question 788. The petition was signed by 67,801 Oklahoma voters and presented to the state in August of 2016 for consideration.\textsuperscript{50} State Question 788 has a unique history, as it was not written with help of attorneys, but by advocates for medical marijuana.\textsuperscript{51} This was based in part on the reaction to the hundreds of Oklahoma families that have moved to Colorado to get access to medical marijuana in more forms than CBD oil.\textsuperscript{52}

**What is in Oklahoma SQ 788?**

Is Oklahoma State Question 788 more like the New York or the California scheme? To make this determination, we must examine the details of the law. First, the proposal puts strong time burdens on the State Health Department. Within 30 days of voter approval, the Health Department must have a website for applications for all those interested in medical marijuana.\textsuperscript{53} The Oklahoma State Health Department must accept applications of patients, dispensaries, growers and packagers within 60 days of passage.\textsuperscript{54} The department must also approve patient applications within 14 days.\textsuperscript{55} Applications can only be rejected for not meeting the listed criteria or for providing an incomplete application.\textsuperscript{56}

The Oklahoma State Health Department must review all dispensary applications within 2 weeks.\textsuperscript{57} Again, the department has little discretion, and must approve all dispensary applications that meet the requirements.\textsuperscript{58} Similarly, a commercial grower license must be approved within the required two-week deadline.\textsuperscript{59} Licenses for processors have an identical approval deadline of two weeks.\textsuperscript{60}

Second, SQ788 has very high possession limits for patients. An Oklahoma medical marijuana patient can possess three ounces of marijuana on his/her person, 72 ounces of edible marijuana at home, eight ounces of smoking marijuana at home, six mature plants, and six seedlings.\textsuperscript{61}

\textsuperscript{52} Id.
\textsuperscript{54} SQ 788 section 1c.
\textsuperscript{55} SQ 788 section 1g.
\textsuperscript{56} SQ 788 section 1g.
\textsuperscript{57} SQ 788 section 2a.
\textsuperscript{58} SQ 788 section 2b.
\textsuperscript{59} SQ 788 section 3a.
\textsuperscript{60} SQ 788 section 4.
\textsuperscript{61} SQ 788 section 1a.
Under Oklahoma’s program, the roles in the supply chain are clearly defined. Only the retailer can sell to the customer/medical marijuana patient. The marijuana grower must sell to the processor or retailer.\(^ {62}\) A marijuana processor must sell to a retailer.\(^ {63}\) A marijuana transportation license is also required by all who plan on transporting the substance.\(^ {64}\)

Oklahoma’s regulatory scheme also protects the medical marijuana user in a variety of realms unrelated to medicine or prescription drugs. SQ 788 provides that medical marijuana use shall cause no discrimination in schools,\(^ {65}\) housing,\(^ {66}\) employment,\(^ {67}\) the organ transplant list,\(^ {68}\) child custody or visitation\(^ {69}\) or concealed firearm carrying permits.\(^ {70}\)

Reciprocity with other state programs is also applicable for vacationers to Oklahoma under SQ 788. Applicants may receive a temporary medical marijuana card for 30 days.\(^ {71}\)

Oklahoma’s medical marijuana program has relatively modest taxes on marijuana with only a seven percent (7%) tax only on the retail sale.\(^ {72}\) After paying for the administrative cost of the program, the remaining revenue will be allocated with 75% for education\(^ {73}\) and 25% for drug and alcohol rehabilitation.\(^ {74}\)

Besides license applications, all approved commercial medical marijuana businesses must file monthly reports with health department.\(^ {75}\) Sellers will be monitored by weight – if any problem “gross discrepancy” within 2 years, get $5,000 fine.\(^ {76}\) A gross discrepancy (as opposed to a discrepancy) is not defined in SQ 788.

The Oklahoma program also modifies criminal law. SQ 788 provides infractions for possession of up to 1.5 ounces of marijuana without a medical marijuana card will be classified as a misdemeanor with a $400 fine as the maximum punishment.\(^ {77}\)

**What is missing from Oklahoma SQ 788?**

The biggest gap in Oklahoma State Question 788 is on the administrative side. The new system will need a huge administrative staff since the Health Department will only have a 14-day deadline to respond to hundreds or thousands of applications. Under ideal circumstances, this burden could work, but the status quo is far from ideal. Historically, Oklahoma’s Health Department is overburdened and chronically mismanaged.\(^ {78}\) Like all Oklahoma state entities, the Health Department has experienced multiple spending cuts and has over-extended its limited

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\(^{62}\) SQ 788 section 3c.  
^{63}\) SQ 788 section 4c.  
^{64}\) SQ 788 section 5.  
^{65}\) SQ 788 section 6a.  
^{66}\) SQ 788 section 6a.  
^{67}\) SQ 788 section 6b.  
^{68}\) SQ 788 section 6c.  
^{69}\) SQ 788 section 6d.  
^{70}\) SQ 788 section 6e.  
^{71}\) SQ 788 section 1e.  
^{72}\) SQ 788 section 1a.  
^{73}\) SQ 788 section 7c.  
^{74}\) SQ 788 section 7c.  
^{75}\) SQ 788 section 2c.  
^{76}\) SQ 788 section 2c.  
^{77}\) SQ 788 section 1b.  
^{78}\) Randy Ellis, *Advocacy groups five top reasons for voting for or against medical marijuana*, NEWSOK.COM, June 3, 2018, available at https://newsok.com/article/5596646/advocacy-groups-give-five-top-reasons-for-voting-for-or-against-medical-marijuana.
Currently, Oklahoma’s Health Department is in financial crisis. In 2018, the Health Department had a massive budget hole, required a $30 million bailout to maintain operations, but still had to terminate 200 employees. The Health Department seems unequipped for the intense burdens on the horizon.

While SQ 788 does allocate funds for the administrative costs of the program, the expenses and revenues have not been estimated in the proposal. The Health Department will require a small army of staff to review applications from patients, growers, retailers, and out of state applicants. Unfortunately, the reviews for potential sellers will have to occur before any tax revenue is received. The sellers will have to be approved, followed by the actual sales, and followed by the collection of sales tax. The system will be running sharply in the red during the startup period. The Oklahoma State Health Department will also need to hire many reviewers for each supplier’s monthly reports.

Some have argued for the ABLE Commission (Oklahoma’s alcohol regulatory body) to regulate marijuana. However, the ABLE Commission admitted it is not able to handle marijuana regulation. The ABLE Commission’s funding dropped from $4 million to $2.5 million. SQ 788 is going to be an administrative nightmare with no immediate funding and huge staffing needs.

In addition to the administrative side, SQ 788 is missing key elements common in most other state programs. Potential patients are not identified in the proposal. Unlike other state medical marijuana programs, SQ 788 does not list illnesses or qualifying conditions to get a marijuana recommendation. In addition, SQ 788 does not offer training or certification for doctors prescribing marijuana. SQ 788 does not have an age limit to get marijuana, but if the patient is under 18, he/she must have the approval of two doctors.

The Oklahoma proposal is also vague on limits of the program. SQ 788 does not put any quantity limits for commercial growers. SQ 788 does not list the number of growers, sellers, or processors in the state. Finally, SQ 788 gives the patient a license for medical marijuana valid for two years and no medical monitoring (follow up) is required.

Despite the gaps in the Oklahoma proposal, it is very popular. A SoonerPoll prior to the June election suggested the state question had a good chance of passing, with 57.5 percent of support and only 29.6 percent opposition.

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80 Id.
82 SQ 788 section 7b.
83 Sweeney, *supra* note 79.
84 Id.
85 SQ 788 section 1m. See also Ellis, *supra* note 49.
86 SQ 788 section 11.
While the public supported the program, SQ 788 had many opponents. The Oklahoma State Medical Association was against 788. The Oklahoma Hospital Association and the Oklahoma Pharmacists Association also opposed the measure. Religious institutions came out against the state question as represented by Oklahoma Faith Leaders (an organization representing 100 churches). U.S. Senator James Lankford (Rep.) was against SQ 788. The Tulsa Chamber of Commerce and Oklahoma City Chamber of Commerce were against the proposal. As expected, law enforcement was also united in opposition of the state question. The Oklahoma District Attorneys Council, Oklahoma Sheriffs Association, the State Fraternal Order of Police, and the Oklahoma Association of Chiefs of Police were all against SQ 788.

**The 2018 Oklahoma Election**

On June 26, 2018, Oklahomans voted 56.68% to 43.14% in favor of medical marijuana. These results were nearly identical to the prediction of the Soonerpoll before the election. This success was the result of years of proponents’ work to get the issue on the Oklahoma ballot. While winning the popular vote was not a huge surprise, the significant voter turnout was. More people voted in favor of SQ 788 than voted in the 2014 election for Oklahoma’s Governor. The vote established the Oklahoma Medical Marijuana Authority.

Even those who supported the voter initiative knew the proposal had gaps. Supporters predicted that if election was positive, the legislature would intervene quickly. This has been the history of similar proposals. For example, Colorado voters adopted a five-page law that expanded to thousands of pages of regulations. Oklahoma’s legislature was busy at work before the vote in case the bill passed because of the short time frame for developing a workable regulatory system.

**Pending Issues upon Implementation**

Fourteen days after the election on July 10, 2018, the Oklahoma State Department of Health approved 75 pages of rules. Two proposed rules by the Health Department (no

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92 *Id.*

93 Sullivan, *supra* note 90.

94 *Id.*

95 Standlee, *supra* note 88.


97 CBS NEWS, *supra* note 81.


101 Ellis, *supra* note 78.

102 Denwalt, *supra* note 100.

smoking marijuana, and each dispensary must have pharmacist) were on shaky legal ground. A Florida ban on smoked marijuana was ruled unconstitutional in 2018. Oklahoma’s Attorney General Mike Hunter stated: "The Board promulgated several rules in excess of its statutory authority. . . Nowhere does the text of SQ 788 expressly or impliedly authorize these regulations."  

Questions are being raised about how those rules were able to garner Governor Fallin’s signature in the first place. Members of the Board of Health have claimed to not know or have been unwilling to divulge who authored the emergency rules. Several other issues have become ripe for discussion. Now recreational marijuana is gaining support in Oklahoma. At the same time, problems are being identified, such as impaired driving, public consumption, employment, and child custody cases. Will insurance pay for Oklahoma’s medical marijuana? Mike Rhodes, deputy commissioner of the Oklahoma Insurance Department says it is unclear if SQ 788 will require insurance to pay for medical marijuana.

Conclusion

Oklahoma’s medical marijuana program has strong public support, but has some obvious gaps which will require significant work before a fully functioning program will emerge. The future of the program will continue to be interesting as important details are developed. As the board is seated and the regulations are promulgated to administer the new law, citizens may see changes to those details. Further, litigation already filed will ultimately affect the resulting administration of the law. If the opioid crisis tells us anything, it shows how even a single doctor without guidance or oversight can affect thousands of people.

104 Lang, Luschen, and Threadgill, supra note 1.
105 Id.
108 Id.
111 Ellis, supra note 49.
NORMAL DEVIANCE: AN ANALYSIS OF UNIVERSITY POLICIES AND STUDENT PERCEPTIONS OF ACADEMIC DISHONESTY

SHERRIE L. DRYE
NORTH CAROLINA A&T STATE UNIVERSITY
1601 E. MARKET STREET, GREENSBORO, NC 27411
SLDRYE@NCAT.EDU

EWUUKGEM LOMO-DAVID
NORTH CAROLINA A&T STATE UNIVERSITY

LISA GUELDENZOPH SNYDER
NORTH CAROLINA A&T STATE UNIVERSITY

Abstract

Academic dishonesty undermines the integrity of a course, the veracity of an academic program, and the credibility of the degree. Instructors in higher education are concerned about the increasing number of student violations of academic integrity policies and often blame technological advances that make cheating easier, such as group messaging applications, online sharing sites, and the simple use of cut and paste. To help instructors understand viable precautions to prevent students from cheating, this article outlines why students cheat and how they rationalize their dishonest behavior. While society in general views cheating as a deviant behavior that violates the norms of integrity and honesty, students often perceive cheating as a normal behavior that they rationalize based on convenience. The purpose of this study was to survey university students about their perceptions of their university’s academic integrity policies and cheating. Deviance literature is employed to explain concepts associated with the culture of academic dishonesty.

Keywords: academic dishonesty, academic integrity, cheating, plagiarism, deviance
I. INTRODUCTION

In a learning environment where students cheat, inequity exists not only to those who don’t cheat, but to those who cheat and may receive credit for knowledge of the course material (Park, 2004). By the time students graduate from college, it is highly likely that they have cheated more than once during their academic career. Although academic dishonesty is socially considered to be deviant and unethical behavior, it seems that the earlier it is learned, the more normally deviant it becomes to students. Teenagers often “feel willing to leave their ethics and morals behind and artificially boost their grades to cheat their way towards a better future” (Sperling, 2009). Dishonest behaviors are common among teenagers, despite their claim that they are “satisfied with their morals and ethics” (Sperling, 2009). Cheating undermines both the integrity of the student’s skills and the course in which cheating occurs. Regardless of whether universities have academic integrity policies, cheating still happens. The purpose of this study was twofold. First, students’ perceptions of a university’s academic integrity code were investigated. Second, students’ thoughts about their own cheating behaviors as well as that of others were examined. A qualitative analysis of open-ended questions provides context to the statistical analysis.

II. REVIEW OF LITERATURE

Studies report that some students admit to academic dishonesty. In many cases, cheating behaviors are practiced early. In one study, approximately one-third of elementary school students were found to have been academically dishonest (Cizek, 1999). Many studies show that approximately 13 to 19% of secondary and post-secondary students have cheated (McCabe, Trevino, & Butterfield, 2001). Other research found that the incidence of cheating at the high school and middle school level is just as high as it is in college (Bruggeman & Hart, 1996; Segovia, Ortega, & Kroger, 2015). Some studies have shown that at the college level, up to 80% of students have cheated (Cochran, Chamlin, Wood, & Sellers, 1999). Previous behaviors, such as cheating in high school can predict whether a student will cheat in college (AL-Dossary, 2017). For college students, many external factors such as family financial background, peer environment, and academic preparation play a role in cheating attitudes and behaviors, as do individual factors such as gender, age, level of self-control, and life purpose (Yu, Glanzer, & Johnson, 2017).

Cheating is most likely to occur in the disciplines of business, engineering, and science (Marsan, 2010; McCabe & Trevino, 1996; Newstead, Franklyn-Stokes, & Armstead, 1996). In one instance, half of the academic dishonesty cases at the University of Washington involved computer science students (Newstead, Franklyn-Stokes, & Armstead, 1996). In another study, 87% of business majors admitted to participating in unethical academic behavior (Meade, 1992). Studies have found that college students majoring in business and computer fields tend to have “more lax” attitudes on cheating and are more likely to cheat (Klein, Levenburg, McKendall, & Mothersell, 2007, p. 197; Nowell & Laufer, 1997; Simha, Armstrong, & Albert, 2012).

Indeed, there have been studies that found a link between the cheating behavior of business students in college and their ethical practices in the workplace (Nonis & Swift, 2001; Sims, 1993). Clearly, there is much work to be done to reverse the “cheating culture” (Crittenden, Hanna, & Peterson, 2009, p. 338). According to the David Foote, CEO of research firm Foote Partners, “ethics is a huge issue in the IT [Information Technology] industry, especially with privacy issues. . . . how do we breed people to be concerned naturally about issues of ethics and morality” (Marsan, 2010, p. 3)? “Today’s students are tomorrow’s business people and, as such, their beliefs are likely to affect the definition of acceptable business ethics” (Lawson, 2004, p. 189). Therefore, it is important, especially for business and computer science students, to learn about ethics (Little & Handel, 2016). Otherwise, “today’s future business leaders are susceptible to misconstruing the notion that an individual’s goal is to better one’s own condition regardless of the means to do so” (Crittenden, Hanna, & Peterson, 2009, p. 345).
To help curb students’ fraudulent tendencies, it is important to understand the role of academic integrity and why it is critical to uphold in academia. To address academic integrity appropriately, we must understand how and why students cheat. In this study, we propose that deviance literature from the sociology field can be utilized to examine this phenomenon.

A. WHY ACADEMIC INTEGRITY IS IMPORTANT

“Individual credibility is crucial to professional success . . . when a student receives unauthorized assistance on an individual assignment, the accuracy and value of the assessment decrease. In today’s culture, plagiarism is more than an isolated occurrence; to preserve the credibility of the degrees we award, we must adopt policies and practices that minimize plagiarism” (Stewart-Gardiner, Kay, & Little, 2001, p. 406). Ultimately, student cheating diminishes the integrity of a diploma or degree because it weakens the accurate evaluation of one’s skills and knowledge.

B. HOW STUDENTS CHEAT

Technology makes cheating easier. Common methods of e-cheating include students’ use of the wireless devices (email, texts, cameras, MP3 players, wireless earphones/microphones) to access and share test answers and homework assignments, sharing information through social media, purchasing test banks and instructor manuals from the Internet, and copying information from the Internet (Bain, 2015). Online entities have a long history of providing students with the ability to download assignments from online paper mills. Students either pay for a paper or they copy and paste content without citing the source. Online paper mills have been an issue for decades. In 1998, Boston University attempted to force the closure of 10 paper mills, but the court dismissed the lawsuit (Thomas, 2001). More recently, websites such as Course Hero allow students to download course materials that are submitted by other students. In fact, students can profit by selling their work through cheating websites. Other websites are specific to disciplines, such as Cramster, which provides answers to science and engineering textbook questions (Gabriel, 2010).

“How do you deal with students proficient in computer-hacking skills” (Thomas, 2001, p. D3)? Students have even been found using spyware and sniffer technologies to electronically peek at other students’ tests (Rowe, 2004). And tech-savvy students can manipulate their computers to purposely break the Internet connection so that they can request to retake a test in progress. While that level of cheating is difficult to prove, software has been developed to help combat the more typical cheating techniques. Programs such as TurnItIn.com and Grammarly provide instructors with resources and tools to document students’ academic dishonesty. And textbook-specific software, such as Pearson’s MyITLab, often integrates programming that will flag questionable content or duplicated files. However, as technology advances in the area of combating academic dishonesty, deviant students continue to find new ways to cheat.

Computer skills-based classes can be especially vulnerable for cheating since students can copy files easily. Professors often vary and customize assignments from one semester to the next, but technology makes it easy to circumvent those efforts. Students will copy files and change information in the file (student name, date, formatting, etc.) that would reveal that cheating occurred. This has prompted university faculty to investigate new ways to detect cheating. Lancaster and Tetlow’s investigated prevention of collusion on Visual Basic programs (2005), while Coakley and Tyran’s (2001), Wiedemeier’s (2002), and Hellyer and Beadle’s (2009) studies focused on preventing plagiarism in software skills assignments, particularly in Microsoft Excel. However, few of these were as successful as desired.

C. WHY STUDENTS CHEAT

Several studies have addressed students’ academic dishonesty. Topics include the reasons why students cheat, the types of students who tend to cheat, and the ways instructors can attempt to prevent cheating. Students often point to national scandals and recent ethics cases as justification
for their behavior. They blame society and the lack of ethics displayed by political leaders (Rimer, 2003), and they may believe that they need to act unethically in order to perform well enough to be successful (Lawson, 2004). Cheating is often viewed as a means to having a competitive edge. To that end, students may “be learning to inextricably combine the cheating culture with best business practices” (Crittenden, Hanna, & Peterson, 2009, p. 337). The following sections provide specific reasons why students cheat. Some of these occur at the student level while others happen at the instructor level, due to lack of due diligence, for example.

1. **Student Level - Lack of Understanding**

   First and foremost, students often do not understand the breadth and depth of the fraudulent behaviors that are related to academic integrity. Students may assume that they are not cheating as long as they do not use someone else’s work in its entirety. Or they might assume that there is nothing wrong with using a few lines of copied content integrated throughout their own work. In a study by Brown and Howell, students perceived paraphrasing as less “wrong” than using directly cited quotes because it “entails some effort to modify the text” (2001, p. 114). Additionally, unless they are required to read an institution’s academic integrity policy, students may not understand that inappropriate paraphrasing is considered plagiarism (Brown & Howell, 2001). Students often report being confused about correct citing techniques and may not fully appreciate the differences among quoting, citing, and paraphrasing (Chao, Wilhelm, & Neureuther, 2009; Power, 2009).

2. **Student Level - Unintentional Dishonesty**

   Related to their confusion is students’ unintentional dishonesty. For example, they might not clearly understand the concept of collaboration, such as in a computer science course when programming code is considered good if it can be reused (Gabriel, 2010; Marsan, 2010). Or students might copy and paste content with the intention of citing the source later but fail to do so (Howard & Davies, 2009). Students may not realize the extent of intellectual property and copyright regarding information and images found on the Internet. “Information technologies are blurring the lines between public information and intellectual property in need of annotation” (Thomas, 2001, p. D3).

3. **Student Level - Intentional Dishonesty**

   Finally, perhaps the most prevalent form of academic cheating, is students’ intentional dishonesty with the assumption that they will not be caught. Students may claim that they were too busy or procrastinated to the point where they ran out of time (Chao, Wilhelm, & Neureuther, 2009; Posner, 2007); that they are juggling too many labor-intensive courses simultaneously (Park, 2004); or that their work schedules distracted them from their school work (Park, 2004). Other students blame a lack of adequate preparation to perform well in the course or a lack of interest in the content of the course or in a particular assignment (Power, 2009). In some cases, students admit to intentionally providing wrong answers to fellow students in an effort to inflate their own grades (Sperling, 2009). But in the end, the based want and/or need to make better grades is often the most cited motivation for students’ intentional academic dishonesty (Sperling, 2009).

4. **Instructor Level**

   While it may seem unconventional to blame the faculty for students’ dishonesty, instructors may unintentionally be creating cheating-friendly classroom environments if they do not monitor students’ work or testing environments for academic dishonesty. For example, they might skim papers rather than read them closely before assigning grades, or they might not know the students’ writing style well enough to be able to ascertain when a written passage sounds too good to true to the students’ skills. Without the use of software tools such as Turnitin and Grammerly, it can be very time consuming to document students’ cheating.

   During test sessions, faculty often ask students to place bookbags and personal items in a separate area of the classroom so that resources are not readily available. Common practice is for
teachers to walk around the room to monitor student activity during tests. Even with these practices, students still find ways to cheat. New software such as CrossTec’s SchoolVue allows faculty to see what is on student monitors while they are taking computerized tests and can lock down other applications during test sessions. While this is helpful, it takes time to oversee the SchoolVue computer screens and prevents the teacher from walking around the room to observe students. Students have been known to intentionally distract teachers to make opportunities for cheating.

Online classes are also a challenge for preventing e-cheating. Some classroom management systems provide resources to help during tests. For example, Blackboard includes Respondus LockDown Browser and Respondus Monitor. Respondus Monitor requires students to use webcam technology to record students while they are taking tests. However, students are finding creative ways to cheat outside of the range of the camera.

Finally, instructors might perceive that their time is not used well if their administration will not support them if they challenge alleged cheating situations. Documenting and pursuing a case of academic integrity is time-consuming. Faculty are hesitant to spend time to bring forth violations if there is not a clear indication that their efforts to preserve integrity will be corroborated.

D. DEFINITION OF DEVIANCE

Deviance is a socially constructed concept and is defined as “behavior which violates institutionalized expectations... which are shared and recognized as legitimate within a social system” (Cohen, 1959, p. 462). It is a behavior that is relative to what is considered normal based on shared norms and culture (Henry, 2009). Deviance is not due to a social organization breakdown, as one may believe, but is a natural part of group structure in society (Dentler & Erikson, 1959). It creates equilibrium in society and “the deviant functions to maintain behavioral stability” (Dentler & Erikson, 1959; Farrell & Swigert, 1975, p. 11). Due to deviant behavior, groups can regulate themselves and discipline transgressors through social control (Janowitz, 1975; Mead, 1925). Deviance is not a construct that lies outside of normalcy, but both are on a continuum together (Cohen, 1959; Farrell & Swigert, 1975). Deviant behavior and normal behavior are “varying degrees of the same dimension” (Farrell & Swigert, 1975, p. 2).

There are many different theories related to deviance—neutralization, social control theory, and strain theory. These theories differ in specific ways, notably in the way that each views society’s role and effect on deviance. However, all of these “share the assumption that the deviant is a product of the same learning and interaction processes that act upon the conformist” (Farrell & Swigert, 1975, p. 7).

Deviance is sustained and encouraged by subcultures. If the group induces and absorbs deviant behavior, it becomes normal to the group’s norms (Dentler & Erikson, 1959). In a student population, there is a subculture of cheating that is encouraged, with students sharing tests, answers, and other content to help others violate academic integrity. However, there are boundaries with which members must comply. For example, a student who submits a file that was given to him by another student is expected to erase identifying information and protect the other student if he is caught with the copied file.

Deviance is based on “interactional processes” of actors involved in certain situational contexts (Brezina, 2000; Eitzen & Zinn, 2004). According to control theorists, everyone has the capability to be deviant because deviant behavior occurs when people try to meet societal beliefs, such as making good grades. Personality is formed by environment, family pattern, and culture according to psychiatrist James S. Plant in his seminal book “Personality and the Cultural Pattern” (1937). According to the strain theory (Merton, 1938), deviance is a person’s “normal reaction” to
“abnormal circumstances” in the environment (Plant, 1937, p. 248). In college, cheating may be a result of the abnormal circumstance of the pressure that students are not able to handle.

Neutralization techniques are used by students to rationalize why they cheated in a certain situational context. At some level, the student realizes that cheating behavior is viewed as deviant in society (Rettinger & Kramer, 2009), so they create “neutralizing attitudes” to “engage in deviance despite their conscience” (Brezina, 2000, p. 75). Because deviant behavior is often defined as such based on the relativity of the situation, such as killing during war versus killing a stranger standing on a street corner, there is “flexibility” for an individual to use neutralizing attitudes to rationalize a behavior and to prevent “self-blame” (Eitzen & Zinn, 2004; Sykes & Matza, 1957, p. 666). For example, students may say that cheating is okay in some circumstances if they feel that the material was not covered by the instructor. Sykes & Matza (1957) stated that deviant behavior is enabled by the learning of neutralization techniques, not necessarily by learning cheating techniques. Just because college students learn cheating methods from other students does not mean that they will cheat. They may be more likely to cheat if they learn the neutralization techniques to protect their self-images. Sykes & Matza (1957) suggested that neutralization techniques include denial of responsibility, denial of injury, denial of the victim, condemnation of the condemners, and the appeal to higher loyalties.

First, denial of responsibility suggests that deviants are not responsible for their actions. For example, students are denying responsibility of their academic dishonesty when they cheat because they claim to have too much work to do to study properly or who claim ignorance about how to properly cite references. Second, and by contrast, denial of injury refers to the likelihood of someone or someone’s property being injured in the process of the deviant act. Many students use this technique to justify cheating because the behavior does not cause harm to anyone, and, in fact, helps the cheater.

With the third neutralization technique, denial of the victim, the deviant does not recognize that there is a victim of the dishonest act or places blame for the act on the victim. For example, while students often don’t see cheating as harmful, instructors believe that when students cheat, they are actually harming themselves by avoiding learning the material. Students also tend to blame the instructor for not being more diligent about addressing cheating in the classroom. If instructors seemed to care more about academic dishonesty, then perhaps students wouldn’t cheat. The fourth technique is condemnation of the condemners, which means that the deviants shift attention to others. Students often blame instructors for not covering material, for giving too much work, and for not being helpful or understanding. This shift emphasizes what the students believe the instructor has done wrong rather than focus on their own actions, and it serves to deflect attention from their actions.

Finally, the appeal to higher loyalties suggests that students justify their deviant behaviors because they are performed on behalf of or to protect a friend or family member. Students who provide their completed work or answers on a test to a friend use this technique and don’t realize that their attempt to help someone is a deviant behavior.

These neutralization techniques “are critical in lessening the effectiveness of social controls” (Sykes & Matza, 1957, p. 669). Social control theory is the “capacity of a social group to regulate itself” (Janowitz, 1975, p. 82). When deviance occurs, social norms are applied to return balance and conformity. It is an iterative approach to how societies maintain control, reinforce, and create new norms as necessary.

III. METHODOLOGY

This qualitative study used a convenience sample of students enrolled at a public state university in the Southeast. The students were taking at least one business class at the time of the study and were asked to volunteer to participate in the survey. The survey used Likert scale and
open-ended questions to collect students’ perceptions of the university’s academic integrity policy as well as the students’ perceptions of own cheating behaviors.

IV. FINDINGS

This section divides the students’ survey responses into categories: their general understanding of the university’s academic policy, their perceptions of the frequency of academic dishonesty, and their perceptions of the reasons why academic dishonesty occurs. Additionally, students were asked to provide suggestions about how the university and instructors can encourage academic integrity. Their responses are grouped into sub-categories.

A. General Understanding of Academic Integrity Policy

On average, most (89%) students stated that they understood the meaning of academic integrity, cheating, plagiarism, the need for an academic integrity policy, and that the university stressed the importance of having an academic integrity policy. Ninety-five percent responded that they knew the university had a policy on academic integrity and that it was emphasized in course syllabi and was easy to find. However, over 88% of students incorrectly responded that the university policy defined a clear process for handling violations and 52% thought the policy offered community service and educational resolution as being consequences for violations of the policy. The university policy is broad and does not provide these details; however, the department in which these students were taking classes included these consequences as part of their policy in all the syllabi. Therefore, there may be confusion as to university policy versus the more detailed departmental policy.

Students were allowed to use a copy of the policy to answer the survey questions and the majority of those who used it said that they referred to a course syllabus rather than the actual policy on the university website. Students were less clear on who was responsible for deciding the consequences or punishment for violations. In an open-ended response, one student stated that the chancellor made the decision and another stated that “my parents” decided, both of which are inaccurate.

B. Perceptions of Frequency of Academic Dishonesty

Regarding cheating behaviors, an average of 30.6% of the students stated they knew other students who had cheated. For each of the following behaviors, approximately 40% of respondents to each question admitted that they knew someone who had either used notes on a take-home test when it was not permitted, copied homework from someone else, or provided their homework for someone else to copy. Given the same list of 16 cheating behaviors, almost 70% of students stated they had not cheated. However, 33% said they had used notes on a take-home test when it was not allowed. Forty-seven percent responded that they did not feel that it was a violation of the integrity code to use notes on a take-home test when it was not allowed. About 22% said that they had copied work from someone else, given their work to someone else to copy, worked together when it was not allowed, or used a cell phone or other electronic device to find answers on a test. For almost all of the other cheating behaviors provided (cheat sheets, copying/sharing answers, plagiarizing, or using a device during a test), approximately 60% or more of the students agreed that these are violations of the university academic integrity policy.

C. Perceptions of Reasons Academic Dishonesty Occurs

The survey outlined 16 techniques of neutralization. Of the respondents who said they had performed at least one of the cheating behaviors, 39% stated that one of the reasons was because the assignment was confusing; 38% because they were unprepared for the test; 37% said they needed more preparation; 35% that they ran out of time to complete the assignment; 32% thought they should have sought the instructor’s help earlier; 32% felt that the instructor had not covered the material well enough; 31% because they didn’t know how to complete the assignment; 30% felt the instructor had not been helpful in answering questions; 30% said it was because they
needed a good grade in the class; and others stated that increased workload from jobs (24%) and classes (28%) didn’t leave enough time. Nearly 32% blamed technology issues (computer crashed, lost USB drive, software wouldn’t work, couldn’t submit electronic file, or no access to resources) as a reason that they cheated.

D. Students’ Suggestions to Encourage Academic Integrity

Students were asked to provide feedback in an open-ended question as to how instructors and the university could help students avoid cheating or plagiarizing. Overall, students reported that they felt pressured for time and wanted more guidance from the instructor about what information would be on tests, more opportunities for collaboration with other students, to be able to use formula notecards on tests, and more time to complete assignments. Perhaps because the way the question was worded, most students placed the responsibility on cheating solutions on the instructor, which is a form of neutralization. However, one student stated that “all of the professors that I have worked with made themselves available if I showed and I needed any help.” The students’ comments are grouped into the following subcategories: instructor behaviors, test preparation, variety of assignments, and administrative oversight.

1. Instructor Behaviors

Several students suggested that instructors needed to enhance their efforts to ensure a more effective teaching/learning experience. Comments in this category included the following statements: “Listen to students when they say that something is difficult or give more time when needed.” “Don’t assume the student understands the assignment. Weekly check-ins on assignments and simply asking in class how far along you have come.” Other suggestions addressed the need “to address the [cheating] issue and let it be known periodically” and “enforce the rules more.”

2. Test Preparation

The majority of students’ advice about how to encourage academic integrity focused on the instructors need to better prepare students for tests. “Make sure students are prepared and find different ways of teaching. Most students cheat because they don’t understand and don’t have adequate time to understand the material, fear failing, and fear having a bad GPA. In the real world, we are judged by a number.” Other students suggested the instructors could better prepare students by providing helpful study guides, offering more study groups and tutors, assigning take-home tests that can be completed with notes, and reviewing content that will be on the test. As one student stated, “If all the work was reviewed in class prior to the test, the test items would be easier to learn, which would prevent cheating.” To a lesser extent, students commented on what they believed instructors should do during a test to curb cheating, such as “walk around the room when giving tests,” and “have all students place all cell phones in a basket at the door before class and give them back after class.”

3. Variety of Assignments

Students also commented on their perceived need to modify how assignments are completed, stating the need to allow more time to complete complicated or time-consuming work. One student recommended that instructors provide more critical feedback on assignments, so students can better understand and learn from their prior mistakes. And another student suggested more collaborative experiences: “Offer students to work together more because we’re going to do it anyway. We all need each other, understanding a subject will prevent cheating because then we’ll actually try to see what we can do on our own, we’ll try our best not for you, but for us individually.” Another student suggested that assignments are time-consuming and vary in difficulty, making it challenging to juggle school and outside life: “Don’t assign assignments that require so much attention. We have other obligations such as work, other classes, and want to still enjoy being a college student without worrying about failing an exam.
As our status increases in our year level, then the harder teachers should take place. There is too much of a variety that makes it hard to cope."

4. Administrative Oversight

While most of the comments focused on instructors and classroom policies, a few students suggested better administrative oversight about the skills of the instructors themselves. One student stated that “the school could hire better professors that do a better job of teaching and explaining the material” and another suggested that administrators should “make sure good professors teach tougher courses.”

The last open-ended questions elicited general comments about students’ cheating behaviors and the academic integrity policy of the university. Again, most responses provided neutralizing suggestions about ways that students’ lives could be made easier and therefore reduce the perceived need to cheat. Several students mentioned that they should be able to use notes on take-home tests and that they should be able to “lean” on each other for help. One student said that the “motivation to cheat has to be counter-balanced by the consequences of cheating, which has to be heavier than the consequences of what happens when someone doesn’t resort to cheating. [A proactive approach should be used such as] if a grade falls below a 2.5 threshold, the student gets automatic emails and alerts for tutoring hours, office hours for the professor, etc.”

A few students’ comments were more focused on policy issues and educating students about cheating behaviors and consequences. Some students stated that they wanted more resources to better understand what constitutes cheating, such as educational resources and instructors’ discussions in class. However, a few students were more regimented in stating that “cheating is wrong, and it shouldn’t happen,” that “academic integrity policies should be enforced, and cheating should not be allowed,” and “these students [who cheat] should look at life in a different way.” These and the previous comments about counter-balancing cheating behaviors with consequences demonstrate that perhaps academic integrity policies do not have strong enough penalties and that they are not consistently enforced.

V. DISCUSSION

The findings from this study reinforce the types of neutralizing techniques that students use to cheat. The strain theory was employed by students who felt that cheating is a normal reaction to circumstances such as a heavy load of classes or work responsibilities, which didn’t allow for time to study. For example, students who admitted to cheating generally used denial of responsibility when stating that they had a time-consuming workload and that their instructors should make it easier and more efficient for them to learn what they need to know to do well on tests. Students denied that they were victims of their own cheating. Instead, they saw themselves as victims of instructors who should have done more to prepare them. When accused of cheating, students would respond by condemning the condemner. They criticized the instructor for not covering the material thoroughly enough or giving them study guides to prepare for tests. Students also admitted cheating to help other students but rationalized their behavior by stating that it should be okay to “lean” on other students because they are going to do it anyway. In several cases, students indicated that earning good grades was a motivating factor, which supports control theory that states individuals have the capability to be deviant when they need to meet societal beliefs. As one student said, “in the real world, we are judged by a number.” Although 30% of the respondents justified their cheating behavior to avoid academic probation, prevent losing financial aid, or maintain athletic eligibility., 21% said they cheated because they didn’t want to disappoint their parents with bad grades.

Is cheating normal deviance? At what level does deviance become normal if deviant and normal behavior are “varying degrees of the same dimension” (Farrell & Swigert, 1975, p. 2)? Based on theory, deviance becomes normal if the group (students) induces and absorbs the deviant
behavior. Dentler and Erikson explain that inducing behavior is achieved when the group “channels and organizes the deviant possibilities contained in its membership” (1959, p. 99). Absorbing the behavior occurs as the group institutionalizes behavior rather than eliminating it, meaning that deviant behavior forces a group to adjust accordingly and set boundaries (Dentler & Erikson, 1959). The behavior is absorbed if it is repeated without deviating “markedly enough” to be disciplined or alienated by the group (Dentler & Erikson, 1959, p. 101).

In general, students don’t “snitch” on each other for cheating, so in this respect, the behavior has been absorbed by the group. Two aspects of deviance theory are that if a deviant behavior is absorbed, it affects group performance and rewards members who conform. It positively affects group performance when students help one another to cheat by sharing information and techniques, and it rewards the individual assuming that by cheating, the grade will improve with the least amount of effort. In the findings from this study, only 12% of students agreed that they cheated because “everyone else does it,” suggesting that the behavior hasn’t been absorbed widely by the group. However, students recognized that certain deviant behaviors are practiced. Over 64% of the respondents knew others who had cheated. And although only 20% admitting to cheating, 47% stated that they had used notes on take-home tests when not allowed, and over 20% had worked with another student when not allowed or allowed someone else to copy homework. These findings imply that more students cheated than admitted. The cheating behaviors are organized in the sense that although they are recognized as deviant, they can be easily neutralized through a variety of standard reasons that are widely legitimated by students.

Furthermore, cheating might seem to be a normal behavior because technology both enables the act and the discovery of the act. While many of the reasons for cheating are not new, technology may be playing a role in the perceived frequency of cheating. Or perhaps it seems that academic integrity violations are more common because in a faculty member’s view, one occurrence of cheating is too many.

One area that warrants further study is whether business students tend to have more deviant ideas about cheating than students in other majors. As stated previously, research shows that business and computer science students tend to be more likely to cheat. Since the current survey was administered in business classes, this variable could not be examined. Additional research needs to be performed with a more diverse group of students. Future research also needs to examine the content of academic integrity policies and whether the consequences of violating the policies are effective. This research stream will provide a better understanding about why students cheat, how to prevent cheating, and how to measure the effectiveness of anti-cheating techniques.

Finally, a limitation of this study is that the data were self-reported. When students were asked about other students’ cheating behaviors, their responses indicated a higher percentage of cheating behaviors. However, there may be self-bias in the reporting because the instances of non-cheating behavior were much higher when students answered questions regarding their own behaviors. Another limitation is that this data was gathered at a single university. More data needs to be gathered from a variety of universities to glean a broader understanding about student perceptions of academic integrity policies and cheating behaviors.
References


THE IMPORTANCE OF VIRTUE ETHICS AND THE ROLE OF SALIENCE IN THE ACCOUNTING PROFESSION

KATHERINE J. LOPEZ
THE BILL MUNDAY SCHOOL OF BUSINESS
ST. EDWARD’S UNIVERSITY
3001 SOUTH CONGRESS AVENUE
CAMPUS MAILBOX 1049
AUSTIN, TX, 78704-6489
KATHL@STEDWARDS.EDU

SUZANNE M. PERRY, PhD
COLLEGE OF BUSINESS
TEXAS A&M UNIVERSITY – COMMERCE
2600 NEAL STREET
P.O. BOX 3011
COMMERCE, TX 75429
SUZANNE.PERRY@TAMUC.EDU

Abstract

This paper provides a theoretical foundation for advocating the use of a virtues-based approach in the creation of an accounting professional identity. The importance of the public’s trust in the accounting profession and the significance of the accountant’s ethical image in maintaining this trust are examined. The paper demonstrates, through a discussion of role identity and role conflict, how vital it is that the profession is the most salient factor in the CPA’s concept of what it means to be an accountant, rather than the firm’s, which can vary in its emphasis on ethics and acceptance of risks. For the profession to become the most salient aspect of a CPA’s professional role identity, the paper proposes the need for a strong, unified message of a virtues-based accounting role identity, to be instilled in accountants through ensuring their college education sets a strong initial accounting role identity that is then reinforced within professional organizations and continuing professional education.

KEYWORDS: Virtue, Role Identity, Professional Identity, Salience, AICPA Code of Professional Conduct
INTRODUCTION

This paper provides a theoretical foundation for advocating the use of virtues-based ethics curricula in university courses and continuing professional education (CPE) courses, thus ensuring a unified perception of the role of an accountant. Virtue ethics is defined as an “agent-based ethical model” focusing on indoctrinating virtues in order to encourage accountants to produce “the right action[s]” (Mintz, 2006, p. 97-98). Virtue ethics inspires others to commit voluntary benevolent actions, that often contradict society’s norms (Stansbury and Sonenshein, 2012; Bright et al., 2014). This model is examined as a means to maintain the public’s trust in the accounting profession. The importance of the public’s trust is examined, as well as the significance of the accountant’s ethical image in maintaining this trust.

This paper concludes that, to maintain the public’s trust, the accounting profession’s role identity must be more salient to the accounting professional than the role identity of a specific organization. Consequently, when role conflict occurs, such as opposing interests between a client and its investors, the CPA should act upon the virtues of the profession instead of acquiescing to the demands of the client (Mintz, 2006). To consistently promote ethical behavior, despite differences in an accountant’s discipline, job role, or company, members of the accounting profession must possess a uniform professional identity. This can be encouraged through a profession-wide use of virtues-based education, that is consistently employed by college educators and CPE instructors. Also referred to as virtuous professionalism, this approach to accounting education uses a common set of virtues to encourage professionals to act ethically and in the interest of the public good (Lail et al., 2017).

This method differs greatly from the current approach employed by the majority of universities and CPE courses. Most accounting education courses concentrate on the technical aspect of a variety of accounting roles or disciplines (Lail et al., 2017), which emphasize teaching students the code and laws.

Furthermore, the paper examines the AICPA Code of Professional Conduct as a potential source of virtues that are imperative to the profession as a whole. The paper closes by discussing the implications that this new approach to accounting education will have on the profession and the public trust.

IMPORTANCE OF ETHICS AND THE PUBLIC’S TRUST IN THE ACCOUNTING PROFESSION

With the 1933 Securities and Exchange Act, the accounting profession was granted a monopoly on public audits. The profession convinced Congress that accountants were the most qualified to perform the external audits required of public firms, to ensure that the catastrophe of the 1929 stock market crash did not occur again. However, accountants have been culpable in numerous financial scandals that have occurred since (Zeff, 2003; Turner, 2006), for a variety of reasons, predominantly having to do with a cultural shift in the profession from the astute detail-orientated firms concerned with the creation and maintenance of accurate accounting records, to a more sales-based, consulting environment (Zeff, 2003). With each scandal, the accounting profession has become more judicious in the years immediately following, but with the passage of time the pattern of scandals reoccurs, resulting, perhaps, from retirement of the accountants chiefly impacted by the prior scandals. As a result, the responsibility of the profession to create and govern generally accepted auditing standards has gradually been reassigned to others who are outside of the profession. For example, the profession’s ability to set generally accepted auditing practices (GAAS) was lost in 1978 to the Financial Accounting Standards Board (FASB) (Zeff, 2003). Later, the profession’s right to govern public audit firms and create...
generally accepted auditing standards (GAAS) was restricted further with the 2002 passage of the Sarbanes-Oxley Act and the resulting creation of the Public Company Oversight Board (H.R. 3763 — 107th Congress, 2002; Turner, 2006). Auditors must maintain the public’s trust to maintain their monopoly on audits, and these measures have been created to maintain this trust.

As retirement plans have shifted from defined benefit to defined contribution plans, more and more people’s long-term financial viability is linked to the stock markets. The theory of lemons suggests that the only way our markets will function properly is if investors believe they are on a level playing field with the company insiders (Akerlof, 1970), implying the existence of a semi-efficient market, where financial statement information is accurate, instead of deceptive. Regardless of the risk that firm managers might act out of self-interest, investors can trust in the integrity of the audit, and therefore depend on the accuracy and reliability of publicly available financial information. If the public loses faith in the stock market as a level playing field, investors might exit the market, which could eventually result in its collapse (Akerlof, 1970).

One way to force a level playing field is to impose regulations, which the government has done with the Securities and Exchange Act of 1933, the Securities and Exchange Act of 1934, and the Sarbanes-Oxley Act of 2002. However, McMillan (2004) points out that regulation alone is not likely to succeed. Instead, to maintain the public’s trust, the profession needs to focus on instilling virtue characteristics in its members (McMillan, 2004).

Public trust is required in all aspects of the accounting profession, not just audit. For example, the Internal Revenue Service is one of two entities allowed to seize property, often requiring a court action for the owner to regain his assets. It is important that the public is confident that corporate and individual tax preparers possess integrity and competence, knowing that these accounting professionals carry an enormous responsibility, and could easily influence the financial well-being of a company or individual. Additionally, corporate accountants are obligated to be trustworthy and maintain the best interests of the company where they are employed. Accountants should maintain company records with accuracy and integrity and do their best to defend against embezzlement. Companies who hire consultants must also trust that their accountants maintain confidentiality and do not divulge competitive advantages to other firms. Therefore, it is imperative that all types of accounting professionals are trustworthy. Any loss of this trust would undermine the employability gains that a CPA license provides and reduce the value of that license.

One way to ensure and promote the trustworthiness of auditors and other accounting professions is to build a professional identity that is founded in virtue. Before analyzing how this can be accomplished in an accounting setting, the theoretical underpinnings of role and professional identity must be discussed.

**ROLE AND PROFESSIONAL IDENTITY**

Kahneman and Tversky (1979) theorized all events are perceived in relationship to a frame (also referred to in research as a *lens*), which was created by the person’s experience. A *role* is a specific type of frame whereby an individual possesses a set of expectations regarding how a person should behave in a specific position; it is a special kind of *norm*, a shared rule about behavior (Postmes et al, 2001; McGrath, 1978). Norms result in a common frame of reference, therefore promoting judgments that are in close agreement in relatively ambiguous situations (Sherif, 1936; Levine and Moreland, 1991). Social norms are encouraged and adopted through a process known as *enculturation*. It occurs as the organizational culture alters the individual, who then adopts different attitudes and habits after becoming enculturated through
organizational socialization (Harrison and Carroll, 2002). When this occurs, the individual incorporates the norms into his role identity.

An identity is a social product whereby an individual and others assign meanings to roles (Burke and Reitzes, 1981). In the case of accountants, the current identity of the role could include being proficient with numbers and exuding a high moral standard. Role identity occurs when a person associates himself with a particular role that, in part, begins to define him and influence his behavior. In western culture, research has found that an individual’s most salient aspect tends to be his occupational role-identity. Therefore, an individual tends to act and behave in ways that validate his occupational role-identity (Callero, 1985; Stryker and Serpe, 1982; Stryker and Burke, 2000). Additionally, in an occupational environment, an employee’s perception of identity strongly influences much of his workplace behavior (Miscenko and Day, 2016).

INFLUENCES ON THE ACCOUNTING PROFESSIONAL IDENTITY

Professional identity can be defined as an individual’s positive perception of self, which often engenders feelings of competence and job satisfaction (Trede et al., 2012). An accountant’s professional identity can be influenced by two sources: (1) firm culture (Empson, 2004; Shafer, 2008) and (2) the choice of accounting career path—public accounting versus industry—and even further by the specific job within his organization, for example, audit, tax, or consulting in a public accounting position. Such a wide range of factors puts in peril the consistency and quality of accounting professionals’ ethical judgment, which might compromise what is expected by the public. Consequently, instead of focusing on the specific, and potentially conflicting influences of an accountant’s discipline (corporate, forensic, audit) or the company he works for, it is more effective to focus on influencing the profession itself. Thus, if the accounting profession educates its members using a common set of virtues, all types of accounting professionals should be influenced to behave in a consistent, ethical manner.

Therefore, in fulfilling its role as protector of the public, the accounting profession should educate its members to adhere to a set of organizational virtues established by the accounting profession, instead of adopting alternate role identities that might contradict or change the identity expected by the profession. To influence the behavior of its members, it is especially important that professional organizations are more salient to their members’ professional identity (influenced by the accounting profession) than to alternate identities created by their members’ companies, or specific job roles. This would aid in ensuring that the identity set for the profession is more consistent across firms and subsets than would otherwise be possible.

SALIENCE AND ROLE CONFLICT

Salience is the prominence of an item to the individual; normally, when dealing with work groups, it is the degree to which the individual identifies with the group. Identity theory has noted the importance of salience. Identity theory views the self as a multifaceted social construct that arises from an individual’s roles in society. An individual can have as many role identities as he has distinct groups whose opinions matter to him. This is why the salience of the role identity is so vital; it determines the hierarchal order of the role in the individual’s self-concept and the probability that it will form the basis for the individual’s actions (Stryker, 1980; Stryker and Serpe, 1994; Hogg et al., 1995; Alvesson and Willmott, 2002). Accordingly, Van Dick et al. (2005) found evidence that, in general, salience leads to social identification, which impacted a subject’s choice of reporting extra-role behaviors related to the role they most identified with. And, Leavitt et al. (2012) found a salient occupational role identity with a strong unified message can influence the moral actions of an individual.
The level of salience also influences an individual’s perception of his work environment. When a role conflict exists, the more salient the role, the more distress will be experienced. Willcocks (1994) defined *role conflict* as occurring in situations where more than one set of incompatible or contradictory expectations exist, resulting in possible conflicts. When an employee experiences role conflict, he will tend to exhibit intensified internal conflict, increased tension and stress, reduced job satisfaction, and decreased confidence in superiors and in the organization as a whole, resulting in reduced bonds of trust and respect (Kahn et al., 1964), increased anxiety, and depression (Large and Marcussen, 2000). Theoretically, the symptoms of role conflict could promote ethical behavior in the accounting profession. For example, if the role identity of the accounting profession is more salient than that of its members’ companies, and an individual’s behavior contradicts with the accounting profession’s expectations, the individual should experience distress. If a company asks one of its members to perform a task that conflicts with the accounting profession’s mandates, the individual should experience role conflict. This should make the individual aware that the task is “dirty work” that should be considered to be “demeaning and shameful” because it is not in accordance with the norms expected of accounting professionals (Morales and Lamber, 2013). Different types of “dirty work” can result in different degrees of influence on an individual’s occupational identity. Out of the three types—physical, social, and moral—moral dirty work generates the greatest threat to an individual’s occupational identity (Ashforth and Kreiner, 2014; Miscenko and Day, 2016, p. 231). Therefore, as long as the accounting profession is more salient, and the “dirty work” is in direct contrast to the accountant’s moral obligations, the resulting role conflict should quickly cause the accountant to experience distress, discouraging participation in the “dirty work” and encouraging behavior that is in agreement with the accounting profession identity.

Conversely, if the profession is not cautious, the role identity of the company might become more salient to the accountant. If the accountant identifies more with the company than with the overall accounting profession, it is quite possible his workplace environment will become the pronounced influence on his personality and identity (Wille & De Fruyt, 2014).

**INSTILLING A UNIFORM PROFESSIONAL IDENTITY**

The accounting profession, through its professional organizations such as the state accounting societies and the American Institute of CPAs (AICPA), needs to act together with university accounting programs and providers of CPE to ensure that the curriculum consistently emphasizes a professional identity that is rooted in the accounting profession as a whole. Currently the accounting profession uses ethics education as a means to promote integrity and maintain the public trust. In this vein, the profession has created a professional code of ethics found in the AICPA Code of Professional Conduct. The profession also attempts to promote consistent ethical decision-making through the ethics curriculum of college ethics courses and CPE courses, which are required in all states (National Association of State Boards of Accountancy Inc, 2018; VanZante and Fritzsch, 2006). However, state requirements and teaching methods can vary greatly (Rockness and Rockness, 2010; VanZante and Fritzsch, 2006). This can result in professionals who possess inconsistent ethical training, and the lack of a consistent accounting ethical role identity upon which to base professional decisions. Nevertheless, the profession has created a strong infrastructure that could be adjusted to sponsor a unified accounting professional identity that promotes ethical decision-making and maintains the public’s trust. As the accounting and auditing profession transitions toward an interpretation and application of accounting principles, a principles-based framework becomes more essential to the profession. To promote an ethics-based professional identity that follows a principles-
based framework, the accounting profession should create a professional identity based on a set of virtues derived from the AICPA Code of Professional Conduct, and should coordinate with universities and continuing education providers to ensure the professional identity is instilled in accountants at all levels of education.

**VIRTUES AND THE AICPA CODE OF PROFESSIONAL CONDUCT**

It is possible to identify virtues that every member of the accounting profession should integrate into their professional identity and emulate when acting in the role of an accountant. In their 2003 paper discussing how to increase the ethical motivation of accounting students, Armstrong et al. (2003) recommended that the virtues of “objectivity, integrity, truth-telling, and professional skepticism” should be emphasized by accounting educators to motivate future accounting professionals to strive for excellence (p. 9). Similarly, the AICPA emphasizes many of the same virtues in its AICPA Code of Professional Conduct, making it ideal to examine as a basis for the United States accounting profession’s virtue ethics.

Using the AICPA Code of Professional Conduct, four virtues have been identified as essential to the construction of a strong accounting professional identity in America: integrity, objectivity, independence, and due care. The specific meaning of each of these items will be discussed in more detail below.

The AICPA Code of Professional Conduct initially examines the combination of objectivity and integrity.

According to the AICPA integrity and objectivity rule, CPAs should:

- In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others (AICPA, Professional Standards, Et sec. 1.100.001.01).

The AICPA Code of Professional Conduct further explores these two concepts individually.

The Code indicates that an accounting professional would not exhibit integrity if he or she:

- a. makes, or permits or directs another to make, materially false and misleading entries in an entity’s financial statements or records;
- b. fails to correct an entity’s financial statements or records that are materially false and misleading when the member has the authority to record the entries; or
- c. signs, or permits or directs another to sign, a document containing materially false and misleading information (AICPA, Professional Standards, Et sec. 1.130.010.01).

The Code also indicates that objectivity requires a CPA be “…impartial, intellectually honest, and free of conflicts of interest” (AICPA, Professional Standards, Et sec. 0.300.050.02).

Under the AICPA Code of Professional Conduct independence requires that a CPA “…in public practice should be independent in fact and appearance when providing auditing and other attestation services” (AICPA, Professional Standards, Et sec. 0.300.050.01). While current AICPA Code of Professional Conduct is concerned with independence for attestation services only, this should be extended to make clear that a CPA should never allow a company or client to strongly influence his identity, to the extent he becomes so vested in a particular company or
client that he would be willing to violate integrity and objectivity to meet the company’s or client’s goals. For example, independence requires that an accountant avoid valuing any one client engagement over another, and to remember that there will always be other jobs and clients available. This mindset should help the accountant to remember that the involvement with a client or company is just the current assignment and is not the accountant’s identity. As a result, the accountant should not feel compelled to compromise professional ethics if any role conflict occurs. For example, when a senior-level accountant disagrees with the final audit opinion, the accountant will be more apt to document the disagreement in the audit papers, even if it may negatively impact any advancement at that firm. This level of independence is needed to ensure that the role salience of the accountant is that of the accounting profession as a whole, instead of one of the accountant’s companies.

Finally, the AICPA Code of Professional Conduct states that due care requires a CPA to accept only jobs that he can reasonably complete in a timely manner and with a high level of professional competency (AICPA, Professional Standards, Et sec. 0.300.060.03), to ensure that all work is adequately planned and supervised (AICPA, Professional Standards, Et sec. 0.300.060.06). As a result, CPAs who exhibit due care will perform work in a manner that does not decrease the profession’s reputation. Of all the virtues, due care is the most prescriptive, yet it is an important virtue for CPAs to possess when accepting and completing a job.

The virtues cited above provide a strong foundation on which a profession-wide identity can be built for the accounting field. Accounting-specific, business, and non-business examples could be examined at the university and CPE course level to help educate accountants about the types of situations that might compromise the virtues instilled in an accounting professional identity. If chosen correctly, emphasizing these virtues should result in increased ethical behavior by strengthening an accountant’s character and ability to resist environmental and client-related pressures (Melè, 2005). As a result, the accounting profession should exhibit a new unified ethical identity that will become increasingly evident in the convictions and actions of its members.

**IMPLICATIONS**

If the accounting profession can, through increased salience to its members, ensure that its professional identity is paramount, this should directly influence the actions of its members (Alvesson and Willmott, 2002). Additionally, if the virtues that exemplify the accounting profession’s identity are in line with the public’s expectations of the profession, then the consistent ethical practices of its members should ensure that the accounting profession maintains the public’s trust.

When accounting professionals are uniformly instilled with a set of virtues common to the profession, any task or assignment that is in direct conflict with these virtues should result in noticeable role conflict. Such an experience should alert the accounting professional to proceed with caution in order to uphold the ethical standards expected by the profession (Kahn et al., 1964; Large and Marcussen, 2000; Stets and Carter, 2011). However, for this mechanism to work well, accountants must be educated to recognize the indicators of role conflict and identify situations that might contradict the goals of the profession. An accounting professional identity with sufficient salience should persuade the accountant to make a choice in line with the best interest of the overall profession.

CPE and professional meetings are important for the accounting profession to maintain high salience. Individuals are constantly updating their identities based on a reflection of the current events around them (Gendron and Spira, 2010). As a result, the CPE component is
crucial. The curriculum must be carefully crafted to encourage professionals to accurately reflect and interpret their environment as they navigate through common career milestones (such as losing and/or gaining clients, being promoted, and/or losing jobs) and witness major events (such as the shutdown of Arthur Andersen, among other professional scandals). Curriculum that is built on a shared set of virtues will ensure that a consistent professional identity is maintained, regardless of the situation and throughout a variety of accounting ranks and subskills.

**CONCLUSION**

The accounting profession, through its various professional organizations, needs to define a professional identity that is common to the accounting profession in its entirety, across accounting disciplines and professional roles. This identity must be more salient to accounting professionals than any individual firm or role. To accomplish this, the profession must educate its members, using a strong unified message of what the accounting professional identity is, and must maintain role salience throughout its members’ professional careers.

To accomplish these goals, the accounting profession needs to ensure that all learning experiences create a consistent virtue ethics framework, to be instilled first in students through college curriculum and then maintained in professionals through professional events and CPE courses.

This virtues-based approach differs greatly from the current methods employed by most universities and CPE courses, which emphasizes teaching students accounting code and law, instead of enculturating an ethical behavior pattern by instilling a set of virtues that are common to the profession. Accounting organizations also need to emphasize the importance salience has on the identity of accounting professionals. This can be accomplished through professional gatherings, including meetings, lunches, and lecture series.

In conclusion, the profession at present has many of the tools it needs for the creation of a salient virtue-based professional identity; it simply needs to reassess its use of these tools. The implementation of such a professional identity will help to ensure the viability of the profession for years to come.

**REFERENCES**


I. INTRODUCTION

Negotiations are an integral part of business, and an increase in research into ethics in negotiation is also to be expected. Business negotiations invariably involve ethical dilemmas. Shirit Kronzon, et al, note that negotiations, “are complex, dynamic processes where multiple stakeholders, interests, and values are in conflict, and the laws are often unclear.” However, Joseph T. Banas, et al, state that negotiations are a particularly important type of business interaction with different operating standards of morality and ethics. These differing standards have the potential to affect processes and outcomes. Lax and Sebenius define negotiation as "a process of potentially opportunistic interaction by which two or more parties, with some apparent conflict, seek to do better through jointly decided action than they could otherwise"

Robert D. Benjamin observed that successful negotiation requires creating a drama in which

1 When negotiating, lawyers are also expected to adhere to a Code of Ethics. Those standards are not discussed here.
3 Two lines from the poem, Auguries of Innocence.
7 Id.
the parties to the negotiation need each other. How the result of a negotiation is viewed depends on who is judging the result. Some have argued that standards of ethics in negotiation are different from other situations, because subterfuge is seen as a legitimate part of the “game” of negotiation.

“How the result of a negotiation is viewed depends on who is judging the result. Some have argued that standards of ethics in negotiation are different from other situations, because subterfuge is seen as a legitimate part of the “game” of negotiation.”

Andrew Young, 1978

It is common for people to misstate their bargaining positions during business negotiations. Researchers tell us that parties entering into a negotiation generally assume that their interests are opposed, and that the other side realizes this and will act accordingly. Behavior may be verbal and non-verbal. Some behavior may be considered appropriate under all circumstances, some may be considered appropriate only in certain specific contexts, and some may be viewed as inappropriate in all situations. So the views on proper conduct while negotiating vary widely. Many negotiators believe that gaming is part of what they enjoy the most about the process.

II. ACTING ETHICALLY

Determining what is moral or ethical is not a simple matter. Morality is complex. People often disagree about what is “right,” and there is no one universally recognized ethical standard. Even if a consensus is reached, people often do not live up to those moral standards. Many have observed that ethics in negotiation are ambiguous. “As an intellectual enterprise, one may evaluate the ethical value of conduct in relation to some theoretical paradigm of moral action such as utilitarianism (Bentham 1789/1892), justice (Rawls 1971), deontology (Kant 1797/1996), and the like.” However, others believe that the meaning of ethics in situations involving conflict resolution is grounded in how parties treat each other, not simply in some abstract moral philosophy of their isolated actions. Lax and Sebenius suggest two tests for determining ethical appropriateness: Are the rules know and accepted by both sides, and can the situation be freely entered and left?

There are, of course, practical reasons for acting ethically, especially in business. These would include reducing costs, avoiding negative publicity, establishing long-term relationships, establishing economic developments, and developing good and lasting deals. The use of questionable tactics, if found out (which may be likely), could result in retaliation. Also, the use

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10 Supra, note 8, at 13.
12 Supra, note 6, at 238.
14 Supra, note 6, at 237.
15 Id. at 236.
17 Supra, note 12, at 141.
19 Supra, note 4, at 283.
20 Id. at 281-283.
of different standards by the parties could lead to different processes and results. Kevin Gibson discussed the "harmony thesis," which holds that doing well is in harmony with doing good, and so we should be good because it is our best self-interested approach. Parties enter negotiations to benefit themselves. To do this it may be beneficial to be honest, open, and trusting, rather than to lie or bluff. Using tactics such as cooperation, openness, and truth telling would appear to be appropriate when potential exists for integrative bargaining, a style which has been widely promoted in recent years. However, some writers believe that situations where meaningful opportunities for integrative bargaining exists occur less often than claimed. Also, even when using integrative bargaining, some distributive tactics often still must be used.

Lewicki, et al., identify three major dimensions of ethical conduct that account for most of the questions arising in negotiation. The first dimension concerns the debate on the relationship between means and ends. Some individuals hold the view that the means justify the ends while others take the position that some behaviors are inappropriate regardless of the outcome. The second dimension concerns the ethical views of the negotiators themselves. They may believe in a universal set of ethics or may believe that ethics vary with the situation. The third-dimension addresses truth telling. It addresses what is truth and whether truth should be told in all situations regardless of the consequences.

There are a number of factors that may impact ethical decision-making. These may include:

- **Situations.** These could involve facts, issues, difficulties, relationship between parties, power, resources, and past experiences.
- **Conflict resolution styles.** Five basic conflict resolution styles have been identified. These include Avoiding, Accommodating, Compromising, Collaborating and Competing (or Contending). Filipe Sobral, et al, believes that competitive negotiators are more likely to tolerate ethically ambiguous behaviors. Competitiveness is seen as a relatively stable personality trait. Those pursuing a competitive strategy have been recognized as being concerned with their own outcomes with little concerns for their opponent’s desired consequences. They try to persuade

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21 Supra, note 8.
23 Id.
24 Id.
26 Id.
28 Id.
29 Id.
30 Id.
31 Supra, note 6.
33 Supra, note 6, at 284.
the other party to yield. Threats, punishment, or intimidation may be used, and possibly, ethically ambiguous tactics.\textsuperscript{35}

**Self-interest.** Peter C. Crampton and J. Gregory Dees note that one reason that parties do not live up to moral standards is concern for their own welfare.\textsuperscript{36} This is a powerful motivating factor. While attempting to reconcile competing interests without sacrificing self-interest, negotiators may feel tempted to adopt defensive, cunning, manipulative and dishonest behavior.\textsuperscript{37} When dealing with a high-stakes negotiation or with unethical opponents, a negotiator may be more inclined to protect his or her self-interest.\textsuperscript{38}

A self-serving bias also impacts a negotiators evaluation of what is considered to be ethical behavior.\textsuperscript{39} For example, various researchers have found that negotiators’ judgments of fair outcomes were biased in an egocentric direction.\textsuperscript{40} Specifically, participants who identify with someone who has chosen to perform an ethically ambiguous action will view the action as ethically appropriate.\textsuperscript{41} Participants who identify with someone who is the target of an ethically ambiguous action will view the action as less ethically appropriate.\textsuperscript{42} Additionally, parties often take more credit for a joint outcome than they deserve, and believe that if they get more it is a fair result.\textsuperscript{43} Negotiators determine their preferences before determining fairness, and so sometimes think if the outcomes are the same as their preferences, that they are fair.\textsuperscript{44} The self-interest of the negotiators must be carefully considered before identifying their bargaining behavior as being fair.\textsuperscript{45}

**Lack of trust.** Trust and ethics may be so related that maintaining trust is critical to encourage ethics.\textsuperscript{46} Trust may result in the exchange of information and less use of pressure.\textsuperscript{47} Negotiators who trust are more open and honest.\textsuperscript{48} Individuals who do not expect to be treated with honesty and candor are less likely to exercise them.\textsuperscript{49} Communicating effectively and fully where there is limited trust has been a perennial difficulty for all negotiators.\textsuperscript{50}

According to the Mutual Trust perspective, originated by Dees and Cramton, it is necessary to distinguish between ideal morality and morality in practice.\textsuperscript{51} Moral obligations rest on a foundation of mutual trust.\textsuperscript{52} When the foundation is missing the obligation is

\textsuperscript{35} Id.


\textsuperscript{37} Supra, note 6, at 240; discussing R. L. Lewicki & J. A Litterer, _Negotiation_ (1985).

\textsuperscript{38} Id.

\textsuperscript{39} Supra, note 7, at 50.

\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Madan M. Pillutla & J. Keith Murnighan, *Fairness in Bargaining*, 16 SOCIAL JUSTICE RESEARCH 244 (2003).

\textsuperscript{44} Id. at 244-245.

\textsuperscript{45} Id.

\textsuperscript{46} Supra, note 6, at 285.

\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} Id.


\textsuperscript{52} Id. at 136.
undermined. Acting on the basis of moral ideals when others cannot be trusted to do the same should go beyond one’s obligations in a negotiation. However, the authors believe that some degree of Mutual Trust is, in fact, accepted by practicing professionals and business people.

The Mutual Trust Perspective rests on two principles:

1. Mutual Trust Principle. It is unfair to require an individual to take a significant risk or incur a significant cost out of respect for the interests or moral rights of others if that individual has no reasonable grounds for trusting that the relevant others will (or would) take the same risk or make the same sacrifice.

2. Efficacy Principle. It is unfair to require an individual to take a significant risk or incur a significant cost out of respect for the moral rights of others, if the action that creates the risk or cost is unlikely to have its normally expected beneficial effect, or if it would benefit only those who would not willingly incur the same risk or cost.

Because of the difficulty in verifying an opponent’s information and preferences, it may be hard to establish trust especially in competitive negotiations with relative strangers.

III. HONESTY (AND DISHONESTY) IN NEGOTIATIONS

“Negotiations are an interesting arena in which to study ethical decision making regarding honesty.” “Most of the ethical issues that arise in negotiation are concerned with standards of truth telling.”

Cramton and Dees adopted the following definitions: A negotiation is any situation in which two or more parties are engaged in communications, the aim of which is agreement on terms affecting an exchange, or a distribution of benefits, burdens, roles, or responsibilities. Deception is any deliberate act or omission by one party taken with the intention of creating or adding support to a false belief in another party. Honesty is the absence of deception. Cramton and Dees note that lying is only one tactic that may be used to deceive a negotiation partner. Lying requires making a false statement (or at least a statement believed to be false by its maker). The manipulation of verbal and non-verbal signals may be used to create a false impression and would also count as deception. Concealing information can be a deceptive
tactic if it is intended to create a false belief. In some cases, there is a fine line between allowing the other party to continue to hold a false belief and encouraging that belief.

Unfortunately, deception is an integral part of human communication. The use of deception can be appealing because it increases actual power, perceived power and profits. People tell one or two lies per day, on average, but detecting lies is very difficult.

Leigh L. Thompson has several suggestions for detecting lies in negotiation. DIRECT METHODS: Triangulation - Asking questions to catch them in a lie; Objective Evidence - Focus on inconsistencies and vagueness. Ask for evidence; Linguistic Style - People who are lying have less cognitive complexity, use fewer references, and use more negative-emotion words.

INDIRECT METHODS: Enrich the Mode of Communication - Communicate face-to-face. Do Not Relay on a Person’s Face - Facial expressions are misleading. Gaze is not diagnostic in detecting a lie; Tone of voice - When people lie their voice is higher and they speak more slowly; Microexpressions - You would need to be trained to look for microexpressions. These are expressions that show on the face for about one-tenth of a second. They reveal how people really feel but are quickly wiped away; Interchannel Discrepancies - Inconsistencies among channels such as tone of voice, body movements, and gestures; Eye Contact - People who are lying blink more and have more dilated pupils, but these are almost impossible to detect by the naked eye. This is not reliable; Be Aware of Egocentric Biases - Most negotiators regard themselves as truthful and their opponents as dishonest.

Various writers suggest that there is a recognized practice of deception in negotiation. At the same time, other writers have called into question the desirability or prevalence of deception. For example, there is evidence that pretending about commitments - bluffing - is a tactic that involves significant costs and can escalate conflict levels. Deception is costly and inefficient. It can create unnecessary bargaining delays, increased anxiety and lost opportunity.

The exchange of information is key to negotiation. Invalid or misleading information may include exaggerated offers, misrepresented facts, and false promises. Several studies indicate these occur quite frequently. An exaggerating initial offer is generally acceptable.

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67 Id.
68 Id.
71 Supra, note 44, at 456.
72 Supra, note 45.
74 Supra, 5, at 3.
75 Id.
76 Supra, note 39, at 138.
78 Id. at 315.
79 Id. at 315.
80 Id.
Because it may become an anchor in the negotiation, it may even be recommended and necessary. The other side will probably expect it if he or she is experienced. Roger J. Volkema found early use of questionable or unethical tactics by one party was associated with early use by other party.\footnote{Id. at 334.} Volkema and other researchers found the use of these questionable tactics are more acceptable than other tactics.\footnote{Volkema’s study found that 80% used these tactics, Id. at 334.}

The concealment or the failure to reveal information might be permissible in circumstances where lying or overtly misleading behavior might not be.\footnote{Id. at 334.} It explains why lying and overt deception are characteristically considered worse than failure to reveal some information. In the latter case others may be suspect that information is not complete, and so the parties may still arrive at a morally responsible decision. Roger Fisher and William Ury are well-known for discussing the principled negotiator, and they state, “a principled negotiator need not disclose information or intentions so long as the negotiator makes clear that he or she is withholding information and is doing so for good reasons.”\footnote{Supra, note 5, at 3.} Albert Z. Carr goes so far as to suggest that there is no lying, or no deception, in negotiation, because people are interpreting one another’s statements differently than usual.\footnote{Id. at 5; Roger Fisher & William Ury, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN. (1981)} Various subsequent writers developed similar theories.\footnote{Supra, note 3.} In some contexts, the meanings of people's utterances are construed in a nonstandard way.\footnote{Supra, note 5, at 3.} Thomas Carson says that “it is not expected that one will speak truthfully about one's negotiating position,” \footnote{Id.} while Alan Strudler claims that “at the outset of the negotiation, both parties would know that they can expect lies.”\footnote{Id.}

However, despite some acceptance, traditional deception is not always necessary. Misrepresenting one's settlement preferences is generally not necessary in order to find out as much as possible about the preferences of the other party.\footnote{Id. at 5; Roger Fisher & William Ury, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN. (1981)} Negotiators have to be sensitive to a multitude of factors about any utterance, such as context, tone, syntax and more.\footnote{Supra, note 5, at 7.} Tone or context may discourage a negotiator from accepting a statement at face value.\footnote{Id.}

Dees and Cramton found some interesting reactions to moral concerns.\footnote{Supra, note 51.} When the gains to each side are known, many individuals refuse even a profitable deal, simply because they deem the division of gains to be unfair.\footnote{Id. at 138.} Despite general moral concerns, the use of aggressive, deceptive bargaining tactics rarely arouses moral indignation, except in two situations: when there is a special bond of care or trust between the parties (as in a fiduciary relationship or a friendship), and when the party against whom the tactics are used is significantly disadvantaged.\footnote{Id. at 139.} When the relationship is "arm’s length" and neither party is particularly
disadvantaged, the deceiving party is rarely blamed.96

Right Not to Disclose: It would seem that one’s opponent has no right to know all of a negotiator’s information.97 Revealing information about reservation price, aspirations, values, and so on, should be optional.98 Revelation creates a risk of exploitation, especially when one party is more desperate. Even if the less desperate party is willing to disclose information, the more desperate party may be forced to reveal information to their detriment.99

Gibson takes issue with some conclusions of Dees and Cramton.100 He disagrees with their definition of negotiation as "parties are engaged in communications, the aim of which is agreement on terms affecting an exchange, or a distribution of benefits, burdens, roles, or responsibilities." 101 Although Dees and Cramton describe their views as being pragmatic, Gibson seems to believe they would find many situations to be unethical that he would not.102 He states that the goods or services under consideration are finite, and have costs associated with them. He recognizes that individuals are self-interested in negotiation, and they should be trying to maximize their own outcomes.103 He acknowledges that this does not mean that it is not possible to have ethical negotiation. Rather it means that any discussion of negotiation behavior should take into account the central role of self-interest.104 There is no moral imperative to be nice in negotiation. Parties may use integrative and distributive bargaining as needed without raising moral issues.105 Also, Gibson does not believe that less than full disclosure is deception, but he suspects from their writing, that Dees and Cramton believe that the mere possession of advantageous knowledge is a case of deception.106

Some recent writers have advocated complete honesty in negotiation.107 A. R. Henderson suggests that rather than engaging in reciprocal deception, “if either party suspects that the other is not dealing honestly, fairly and in good faith, it should terminate discussions and pursue the transaction with different parties, or not at all.” 108

Types of Dishonesty

In negotiation, individuals may use information that is valid and relevant, or erroneous and invalid.109 Roy J. Lewicki110 developed a questionnaire (“Incidents in Negotiation Questionnaire”) and typology of lying and deception in negotiation that consists of five categories: (1) traditional competitive bargaining (e.g., making an unreasonably large or small opening offer); (2) attacking your opponent’s network (e.g., attempting to get one’s counterpart

96 Id.
97 Id. at 154-155.
98 Id.
99 Id.
100 See generally, Gibson, supra, note 22.
101 Id. at 374.
102 Id.
103 Id.
104 Id.
105 Id. at 375.
106 Id. at 375-377.
107 Supra, note 5, at 3.
109 Supra, note 50, at 316.
fired); (3) making false promises to your opponent (e.g., promise that which you know will never be delivered); (4) misrepresenting information to both your opponent and your constituency (e.g., denying the validity of information you know to be valid); and (5) inappropriate information gathering (e.g., recruiting one of your opponent’s subordinates to provide inside information). Subsequently, Lewicki and Robinson (1998)\textsuperscript{111}, and Volkema (1999a,\textsuperscript{112} 2004\textsuperscript{113}) have employed this questionnaire in their research. Lewicki and Robinson \textsuperscript{114} performed a factor analysis of negotiation behavior, classify 18 tactics into these 5 categories (and later 30 tactics). In 2000, Lewicki, Robinson, and Donahue abbreviated the scale, which they called Self-Reported Inappropriate Negotiation Strategies scale (SINS scale) to 16 items. \textsuperscript{116} (SEE APPENDIX.) The research found that the tactics associated with traditional competitive bargaining were considered generally to be acceptable for use in negotiation, while those related to the other categories were found to be generally unacceptable.\textsuperscript{117} The SINS scale also demonstrated differences in demographics such as gender, background, and national origin.\textsuperscript{118} The study also indicated that the willingness to endorse tactics is unrelated to actual negotiation performance.\textsuperscript{119}

Banas and Parks also used the SINS scale when they determined that individuals less accepting of questionable tactics who negotiated against those more accepting of such tactics were able to achieve better outcomes and a greater percentage of joint outcomes.\textsuperscript{120}

Additional classifications of dishonesty include lying by commission, lying by omission, and paltering.\textsuperscript{121} \textit{Lying by commission} involves the active use of false statements.\textsuperscript{122} \textit{Lying by omission} involves misleading by failing to disclose relevant information.\textsuperscript{123} Lying by commission is generally found to be more serious.\textsuperscript{124} People appear to be more willing to lie by omission. Studies have shown that when a question is not asked, people generally do not volunteer information.\textsuperscript{125} However, when asked a direct question, some, but not all, honestly reveal the information.\textsuperscript{126} \textit{Paltering} involves actively making truthful statements to create a mistaken impression. Both paltering and lying by commission communicate information that is relevant and informative.\textsuperscript{127} Todd Rogers, et al, conducted studies to identify paltering as a

\begin{thebibliography}{99}
\item\textsuperscript{112} Roger J. Volkema, \textit{Ethicality in Negotiations: An Analysis of Perceptual Similarities and Differences Between Brazil and the United States}, 45 \textit{JOURNAL OF BUSINESS RESEARCH} 59 (1999).
\item\textsuperscript{113} Roger J. Volkema, Denise Fleck, and Agnes Hofmeister-Toth, \textit{Ethicality in Negotiation: An Analysis of Attitudes, Intentions, and Outcomes}, 9 \textit{INTERNATIONAL NEGOTIATION} 315 (2004).
\item\textsuperscript{114} \textit{Id.}
\item\textsuperscript{115} \textit{Id.}
\item\textsuperscript{116} \textit{Id.}
\item\textsuperscript{117} \textit{Supra}, note 111.
\item\textsuperscript{118} \textit{Id.}
\item\textsuperscript{119} \textit{Supra}, note 5, at 50.
\item\textsuperscript{120} \textit{Id.}
\item\textsuperscript{121} \textit{Id.}
\item\textsuperscript{122} \textit{Supra}, note 6.
\item\textsuperscript{123} \textit{Id.}
\item\textsuperscript{124} \textit{Id.}
\item\textsuperscript{125} \textit{Id. at 451.}
\item\textsuperscript{126} \textit{Id. at 457.}
\item\textsuperscript{127} \textit{Id. at 458.}
\end{thebibliography}
distinct form of deception. In a sample question, one party asked if a car they were buying ever had problem. The palter response was, “This car drives very smoothly and is very responsive. Just last week it started up with no problems when the temperature was -5 degrees Fahrenheit.”

The statement was true, but not responsive. The studies found that experienced negotiators commonly use palters, that they believe palters to be strategically advantageous, and that they think palters are more ethically acceptable than both lies by omission and lies by commission. Also, participants preferred paltering over lying by commission because they felt lying by commission was less ethical. An additional result indicated that individuals judged prompted paltering to be less ethical than unprompted paltering.

Benjamin noted that all human beings deceive, manipulate, and lie. It is the purpose of the deceit that must be examined. If during conflict, the deception fosters and furthers their cooperation, then “the deception may well be a ‘noble lie’ (Rue, 1994).”

IV. FRAMING AND REFRAMING

Frames are shortcut devises people use to characterize situations, problems or adversaries. Frames … organize knowledge in ways that affect individuals’ interpretation of a situation, and their choices regarding it.” Frames are important in negotiation because disputes are often nebulous and open to different interpretations as a result of differences in people’s backgrounds, personal histories, prior experiences.” Research indicates that parties negotiate differently depending on the frame, specific frames may be likely to be used with certain types of issues, particular types of frames may lead to particular types of agreements. Parties are likely to assume a particular frame because of various factors such as differences in personalities, power differences and differences in background. The way a dispute is framed can limit the options for resolution. Whether parties are aware of them or not, frames play a critical role in determining how parties view each other, which tactics they choose, how they strategize in disputing contexts, and how the conflict management process unfolds.

Christopher W. Moore discussed how each party to a dispute comes with his or her own “individual picture or subjective reality of what issues are in dispute and what the basis of the conflict is. . .This one interpretation … suggests only one possible, reasonable, and permitted
solution.” Other solutions may be suggested by changing the frame. Altering the frame involves reframing. Reframing is frequently used in negotiation, and especially mediation to bring about a mutually satisfactory resolution. “Reframing provides a technique by which resistance can be surreptitiously bypassed.” It occurs, “during negotiations usually to facilitate communication, but also to promote the reframer’s preferred outcome.” It can shape the course of joint decision making. Seeing a glass as half full rather than half empty is a commonly used example of reframing from a negative to a positive. A salesperson may try to change a previous bad experience with a customer by using reframing. When the customer says, “In the past, your deliveries were always late,” the salesperson may say, “What can we do to assure you that our deliveries will be on time from now on?” This is an example of focusing on the future, rather than on the past. Reframing can be used to accomplish a number of objectives.

OBJECTIVES IN REFRAMING

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There may be a number of reasons to use reframing. Livingood notes that reframing can be used to achieve a number of effects: to achieve understanding and/or clarify a statement; to help the author of the statement and/or the other participants achieve a different perspective; to neutralize language; to construct a joint or common goal, statement of the problem or issue in dispute; to create a new relationship paradigm; and to move the resolution process into a more focused phase.

“Reframing as a fundamental shift in the...labeling of a dispute, can alter ways that parties conceptualize problems and potentially transform participants’ views of a situation.”

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141 Christopher W. Moore, THE MEDIATION PROCESS 175 (1986).
142 Peter Blanciak refers to reframing as the essence of mediation. See Reframing: The Essence of Mediation at http://www.meediate.com/pfriendly.cfm?=1110, visited 3-6-18.
143 Supra, note 134.
144 Supra, note 136, at 167.
Reframing helps parties to see each other’s points of view.\textsuperscript{148} It means placing the viewpoint in another frame which fits the facts equally well or even better and so changes the meaning.\textsuperscript{149} Another important purpose of reframing is to persuade.\textsuperscript{150}

One way to alter framing is to employ alternative patterns of asking questions during a negotiation. Questioning can generate options for redefining problems.\textsuperscript{151} Another way to reframe is to use a contrast effect.\textsuperscript{152} An example would be making an initial offer that the negotiator knows is completely out of line. The other party counters. The original offeror makes an offer that is more appropriate, and by contrast to the first, it seems more reasonable. Reflecting back words is another technique used in reframing.\textsuperscript{153} Parroting the original speaker’s exact words is never a good idea. Therefore, the reframe selects and omits certain words and issues. Metaphors are often used in reframing and may also impacts attitudes and behaviors.\textsuperscript{154} Metaphors are simple ways to communicate. They are short cuts. Metaphors used in disputes often include words such as war or battle. “Combat” suggests the use of aggressive ways to win at all costs.\textsuperscript{155} A metaphor involving teamwork may be more positive.\textsuperscript{156} Livingood notes that this “metaphoric reframing” is an extremely difficult technique to master, and caution should be exercising in using it.\textsuperscript{157}

Reframing may not be as innocuous as it seems. It can be used negatively to frustrate and impede settlements.\textsuperscript{158} Some observers have criticized framing because of its tendency to restrict a negotiator’s perspective. At times it may be detrimental to some interests, especially when opportunities are lost with unforeseen, long-term or irreversible consequences.\textsuperscript{159} It can be a tool for thinking about people and situations in a different and previously unconsidered and beneficially way.\textsuperscript{160} That may frequently happen in mediation, but in negotiation, the refamer is a party and may be influenced by self-interest bias. Bazerman and Neale recognized that, “Frames can be strategically manipulated to direct performance in a negotiation.”\textsuperscript{161}

Researchers have found that people are risk or loss adverse. A negotiator’s perspective on their outcomes as either a gain or a loss can affect negotiation behavior.\textsuperscript{162} Couching the opponent’s outcome as a potential gain, induces him or her to assume a positive frame of reference making him or her more likely to make concessions.\textsuperscript{163} People tend to resist

\textsuperscript{149} Id. at 36.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{153} Supra, note 148, at 36.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 45.
\textsuperscript{158} Id.
\textsuperscript{159} Supra, note 134, at 167.
\textsuperscript{160} Id.
\textsuperscript{161} Max H. Bazerman & Margaret A. Neale, Negotiating Rationally 40 (1992).
\textsuperscript{162} Peter J. Carnevale, Positive Affect and Decision Frame in Negotiation, Group Decision and Negotiation 2 (2008).
\textsuperscript{163} Id. at 3.
compromises and declare impasse when the frame is loss rather than gain.\textsuperscript{164} Risk-averse persons may make concession to induce others to accept agreement because they are eager to settle.\textsuperscript{165}

Research on loss and gain is credited to psychology researchers Daniel Kahneman and Amos Tversky's and their prospect theory.\textsuperscript{166} They make the case that people are more influenced by the psychological pain of loss than the psychological rewards of gain, and that people will take much greater risks to avoid loss than to realize potential gain.\textsuperscript{167} Consequently, framing a potential result as a way to avoid loss has a greater chance of success than framing the result as a way to realize gain. Bazerman, Neale, and their colleagues applied prospect theory to negotiation behavior.\textsuperscript{168} In one study, Bazerman, et al., examined the effect of frame on the outcome of the negotiation. Their finding was consistent with loss aversion: a concession framed as a loss looks larger and thus more difficult to make compared to the same concession framed as a gain; thus, concession making should be less in the case of losses.\textsuperscript{169} The frame effect can also be interpreted in terms of risk about agreement: with a loss frame, negotiators are risk tolerant thus making fewer concessions and risking nonagreement; with a gain frame, negotiators are risk averse thus making more concessions to get to agreement quickly.\textsuperscript{170}

\textbf{V. BUSINESS EXAMPLE}

An example of the use of reframing in a business context could involve a commission salesperson selling software. Assume that the purpose of the software is to test a company’s product such as a cell phone or medical devises, thus relieving the company of using people to test the product. Testing is necessary before the product hits market, and the results are useful in further research and development. Other companies produce similar testing software, but this company’s product is more expensive. Potential customers worry about cost, and the time involved in making the transformation.

The salesperson must reframe the situation as an opportunity to save money, and to produce a more accurate outcome resulting from a process that is simple to set up. The marketing materials discuss how simple the software is to use. Anyone can do it. The salesperson provides a demonstration that makes it look easy. Potential customers are given case studies describing successful users. The case studies include statistics and quotes.

However, the picture painted may not be entirely accurate. If the statistics and quotes are made-up the marketing material is clearly dishonest (and possibly fraudulent). The salesperson might also make statements about competitors’ products that are untrue to justify the higher price for this software. What is probably more likely are not lies but exaggerations and not the positive experiences that every company has. Smaller companies and less technically savvy companies may have a great deal of trouble setting up the software. The simplest application may be easy to use, but many companies may want the software to be customized, and this is much more complicated. The salesperson omits information about the thousands of dollars some

\textsuperscript{165} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Supra, note 164.
\textsuperscript{169} Id.
\textsuperscript{170} Supra, note 162, at 2.
companies have spent on contractors, and the number of techs needed to make the software do its job. The sales presentation is different if it is made to engineers or managers. Engineers ask all the difficult questions, and the two groups are concerned about different things. Since the purchase has to ultimately be approved by management, the salesperson tries to make the presentation to managers, and reframe the engineering presentation to portray an economical and easy to use product.

The salesperson may promise company support if there are problems, while customer service is really not that good. This may fall into the SINS category of making false promises to your opponent. The salesperson is not worried about losing business because of the omissions. Once a company makes the initial investment of time and money, it is determined to make the software work. (Sunk costs.\textsuperscript{171}) In fact, most of the software company’s business is repeat business because customers do not want to start over with new software.

This example may involve outright deception, or at the very least, omissions. Is this just bluffing? It appears the salesperson has crossed a line. This presentation is so full of half-truths that it is deceptive and unethical.

**DISCUSSION AND CONCLUSIONS**

While some would recommend complete honesty in negotiations, the consensus would seem to be that ethics, and therefore, honesty in negotiation may be unique. This does not mean that total lies are acceptable, but something between the two extremes. Unfortunately, there is no bright line test, and even if it was suggested that there were, not everyone would agree. Certainly, the circumstances would make a difference, including with whom you are negotiating, and the subject of the negotiation. It is prudent to be cautious if you do not know if you can trust your opponent. A negotiator does not always have an ethical obligation to reveal all, or even to answer every question, but there is no problem in saying, “I cannot answer that.” At times it is beneficial to be forthcoming; at other, holding something back. The opponent may withdraw if the response is not acceptable. Furthermore, the results might not be better if everyone discloses all.

Successful negotiation involves persuasion and manipulation, but not necessarily in their most negative connotation. Manipulative behavior is sometimes valued, especially in business. It depends on the context, but not all manipulative acts are bad.\textsuperscript{172}

An experience negotiator understands that there may not be complete honesty. In fact, one does not even need a great deal of experience to appreciate this. Any one of a certain age, or with any business education or experience understands. People do this all their lives.

Attempts at being honest, without giving too much up, is complicated by the fact that we are not good judges of what is fair and are often biased in favor of self-interest. One way to counteract this is to use an integrative tactic. It may not always be possible to have a win-win result, but even in a distributive bargaining situation, some integrative tactics may be useful. Asking open-ended questions may help and, of course, listening intently to the response. The patterns of responses, as offers change, may also be useful in determining if the opponent is comfortable with the result.

Reframing provides the perfect opportunity to question the level of honesty as the

\textsuperscript{171} Money already spent and permanently lost. Sunk costs are past opportunity costs that are partially or totally irretrievable and, therefore, should be considered irrelevant to future decision making. See http://www.businessdictionary.com/definition/sunk-cost.html. Visited 5/10/18. Some negotiators dispute this.

\textsuperscript{172} Supra, note 132, at 14-15. See Benjamin’s discussion of politicians, criminals, and sociopaths.
negotiator is attempting to change his or her opponent’s view and may even intentionally mislead. Obviously, reframing does not have to be dishonest. It may only involve sharing one’s view. It is another matter to distort facts or leave out crucial facts. The standards used should be the same as those previously discussed. The determination still depends on the circumstances. In the software example, the buyer should take steps to protect itself. It would be prudent when making a significant investment in software to get a written guarantee of follow-up help. When considering the case studies, the buyer should demand ones about companies similar to itself.

The reframe used may have an effect on trust. Lying by omission may be more accepted if it is lying at all, but important facts should be revealed. The negotiator’s attitude toward negotiation may influence his or her style. If he or she sees it only as a game, this may cause him or her to lessen his or her standard and ignore the impact that the negotiation may have.

Therefore, opinions may vary greatly on acceptable ethical conduct, but some behavior is probably never acceptable.
APPENDIX

Factors Comprising the SINS Scale and Associated Items

**Factor 1: Traditional Competitive Bargaining**
Make an opening demand that is far greater than what you really hope to settle for. Convey a false impression that you are in absolutely no hurry to come to a negotiated agreement, thereby trying to put time pressure on your opponent to concede quickly. Make an opening demand so high/low that it seriously undermines your opponent’s confidence in his/her ability to negotiate a satisfactory settlement.

**Factor 2: Attacking Opponent’s Network**
Attempt to get your opponent fired from his/her position so that a new person will take his/her place. Threaten to make your opponent look weak or foolish in front of a boss or others to whom he/she is accountable, even if you know that you will not actually carry out the threat. Talk directly to the people who your opponent reports to, or is accountable to, and tell them things that will undermine their confidence in your opponent as a negotiator.

**Factor 3: Making False Promises**
Promise that good things will happen to your opponent if he/she gives you what you want, even if you know that you cannot (or will not) deliver these things when the other person’s cooperation is obtained. In return for concessions from your opponent now, offer to make future concessions which you know you will not follow through on. Guarantee that your constituency will uphold the settlement reached, although you know that they will likely violate the agreement later.

**Factor 4: Misrepresentation of Information**
Intentionally misrepresent information to your opponent in order to strengthen your negotiating arguments or position. Intentionally misrepresent the nature of negotiations to your constituency in order to protect delicate discussions that have occurred. Deny the validity of information which your opponent possesses that weakens your negotiating position, even though that information is true and valid. Intentionally misrepresent the progress of negotiations to your constituency in order to make your own position appear stronger.

**Factor 5: Inappropriate Information Gathering**
Gain information about your opponent’s negotiating position by paying your friends, associates, and contacts to get this information for you. Gain information about an opponent’s negotiating position by cultivating his/her friendship through expensive gifts, entertaining or “personal favors.” Gain information about an opponent’s negotiating position by trying to recruit or hire one of your opponent’s teammates (on the condition that the teammate bring confidential information with him/her).

No organization is immune from crisis. An organizational crisis . . . “may be sparked by all manner of developments—from a New York Times article about bribery allegations that were improperly investigated, to a massive recall of a best-selling product linked to consumer deaths, to reporting by nonprofit researchers to a federal agency regarding deceptive conduct.”¹ For the purposes of this article, organizational crisis is defined as any event that “invites negative stakeholder reaction and thereby has the potential to threaten the financial wellbeing, reputation, or survival” of a company.² Crisis management teams assembled in response to a crisis routinely include managers, executives, directors, outside counsel, consultants, public relations personnel, and in-house counsel.³ Regardless of the incident(s) that led to the organizational crisis, the nature of crisis management forces the organization to confront a diverse array of short-term and long-term considerations. Short-term considerations involve decisions related to product recalls, responding to governmental inquiries, and the pursuit or defense of litigation. Long-term considerations include decisions concerning policies or action plans to prevent or mitigate the reoccurrence of a similar crisis in the future. The discussion in this article focuses specifically on short-term decision making in the litigation context.⁴

Legal and business considerations affect the efforts of in-house counsel to make recommendations on litigation matters to organizational crisis management teams. Initiating or moving forward in litigation may substantially disrupt daily business operations through the imposition of document retention directives, time-consuming internal investigations, and drops in employee morale derived from general uneasiness toward the litigation process.⁵ Settling a specific case, by contrast, may send a signal to potential plaintiffs that the company prefers to avoid litigation by paying a settlement.⁶ Due to the rising intensity of entrepreneurial class action litigation in the United States,⁷ developing a reputation as an easy target for litigation could have disastrous consequences for an organization. Further related considerations include publicity (positive or negative) implications, the possibility of governmental inquiries and regulatory

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² Erika H. James & Lynn P. Wooten, Leadership as (Un)usual: How to Display Competence In Times of Crisis, 34(2) ORG. DYNAMICS 141, 142 (2005)
³ Waterman & Yannett, supra note 1.
⁴ Although the focus of this article centers on litigation, the principles discussed below are equally applicable to other short-term and long-term considerations.
⁵ Waterman & Yannett, supra note 1.
responses, damage to present or potential relationships, and the prospective loss of time-sensitive business opportunities.\(^8\)

The growing complexities and challenges presented by litigation decisions require new approaches to legal decision-making in the crisis management context. Recommendations by in-house counsel, in addition to representing the best course of action from a legal standpoint, must also align with the guiding policies and action plans that support the company’s overall competitive strategy.\(^9\) An increased focus on systematic, risk-analysis in legal decision-making emerged as a means for in-house counsel to identify solutions to legal problems that satisfy the broadest range of the company’s objectives. Dependency diagrams and decision trees represent two measures that enable in-house counsel to better integrate of risk analysis principles into legal decision-making. Dependency diagrams and decision trees, however, are subject to a major limitation: their reliability is contingent on the data, perspectives, assumptions, and assessments on which they are built. The Policy Delphi provides in-house legal departments with a means for reducing or removing this limitation.

The Policy Delphi acts as a mechanism to identify every major alternative, bring out points of agreement and disagreement into the open, clarify positions and simplify arguments, assess the strength of evidence connected with each alternative, and assess the suitability of each alternative.\(^10\) The results of the Policy Delphi provide decision-maker(s) with the strongest thinkable opposing views (and supporting evidence) on any solution(s) to the problem.\(^11\) The purpose of this article is to outline how use of Policy Delphi will support the legal department’s development of dependency diagrams and decision trees through promoting deliberative decision-making while minimizing some of the challenges associated with group decision-making.

This article contains five main sections. Section I explores the differences between intuitive decision-making and deliberative decision-making, the role of legal decision-making in organizations, and the benefits and challenges of group decision-making. Section II provides an overview of the origins and strengths of the Policy Delphi. Section III encompasses a discussion on how the Policy Delphi supports decision-making by in-house counsel in the context of litigation. Section IV illustrates specific steps that in-house legal departments may take to administer a Policy Delphi analysis, followed by a discussion on how the results of the Policy Delphi will support the development of dependency diagrams and decision trees. Section V concludes with a summary of the implications presented by this article.

I. DECISION-MAKING AND THE LAW

A. Intuitive vs. Deliberative Decision-Making

Decision-making is the process of choosing the best solution to a problem from among different alternatives. The best solution satisfies the broadest range of objectives relevant to the

\(^8\) Charles F. Robinson et al., *Selection of Outside Counsel, Successful Partnering Between Inside and Outside Counsel* (2018).

\(^9\) Robinson et al., *supra* note 8.


problem to the highest possible degree.\textsuperscript{12} Intuition and deliberation represent two dramatically different approaches to decision-making. Intuitive decision-making encompasses the generation of a solution to a given problem without using a logical, conscious step-by-step process.\textsuperscript{13} Although the intuitive approach to decision-making may offer a degree of efficiency through the application of mental shortcuts, intuitive decision-makers risk neglecting or ignoring material details with respect to the problems. In contrast to intuitive decision-making, deliberation involves a more structured, systematic approach to decision-making. In deliberative decision-making, the decision maker: (1) frames the problem needing resolution; (2) identifies and prioritizes pertinent interests and objectives that may span a wide variety of perspectives; (3) develops possible courses of action; (4) assesses the consequences of each course of action and the resulting effect on the previously identified interests and objectives; and (5) chooses and implements the course of action that optimizes the interests and objectives.\textsuperscript{14} The deliberative approach is synonymous with risk analysis. Risk analysis reflects a systematic, quantitative analysis of uncertainty and its attendant consequences to make better decisions.\textsuperscript{15} The principal features of risk analysis include translating feelings of risk from gut feelings into numerical probabilities, and incorporating those probabilities into an explicit, logical process that produces reliable information for a decision-maker.\textsuperscript{16} A thorough risk analysis injects increased transparency into the decision-making process, as the process supports the communication of the decision-maker’s assumptions, decisions, and overall methodology in a graphical, mathematical format.\textsuperscript{17} Intuitive decision-making is not entirely extinguished by risk analysis, however, as judgment, knowledge, and experience still play a role in developing possible alternatives and assessing the probabilities associated with different results.\textsuperscript{18}

\textbf{B. Legal Decision-Making in Organizations}

Effective decision-making is critical to legal practice. The capacity to predict the consequences of a given course of action with a reasonable degree of accuracy is critical to a lawyer’s ability to aid her client in making informed legal decisions.\textsuperscript{19} In-house counsel have relied on both intuitive and deliberative decision-making to fulfill this charge. The profile types of in-house counsel identified by Dinovitzer et al. reflect a range of intuitive approaches to legal decision-making: (a) lawyers’ lawyer – places priority on legal knowledge in decision-making. Business considerations are secondary to legal considerations; (b) team lawyer – places principal weight on legal considerations in decision-making but gives greater consideration to personal experience; (c) lone ranger – places principal weight on personal experience in decision-making; and (d) team player – places greater weight on experience over legal knowledge while signifying

\textsuperscript{12} PAUL BREST & LINDA H. KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT (2010).
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Glidden et al., Evaluating Legal Risks and Costs with Decision Tree Analysis, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2018).
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
an appreciation of collective needs. Lawyers who rely on intuitive approaches to decision-making, however, may fail to consider how the full range of possible courses of action will affect the client. There is also evidence to suggest that lawyers across all levels of legal experience systematically miscalculate litigation predictions. The “black box” nature of the intuitive approach to legal decision-making obligates the client to blindly rely on the judgment and expertise his lawyer, shrouding the lawyer’s analytical methods and assumptions in a cloak of mystery. Such obfuscation may have implications for the lawyer’s professional responsibility to provide the client with all material information regarding the client’s legal rights/risks, as well as the client’s ability to make informed decisions.

The challenges presented by a purely intuitive approach to legal decision-making have led to a greater focus on systematic risk analysis decision-making in legal scholarship. Problem solving is one of the core competencies necessary for success in the modern legal profession. Risk analysis supports a reasoned, informed approach to legal decision-making by facilitating the quantitative analysis of risks intrinsic to different courses of action. In litigation, for example, risk analysis is critical to weighing the costs against the expected benefits of pursuing litigation, as well as to decisions related to the acceptance of settlement offers. Risk analysis techniques support other legal functions beyond litigation, such as business transactions, due diligence examinations, and regulatory planning. Dependency diagrams and decision trees are two interrelated tools that enable in-house counsel to better integrate of risk analysis principles into legal decision-making.

Dependency diagrams and decisions trees represent important tools for exploring the interrelationships among the uncertainties that inhabit legal decision-making. The dependency diagram encompasses two main components: (1) description of uncertainties relevant to the problem; and (2) statement of how each uncertainty affects resolution of the problem at issue. To conduct a proper risk analysis, the decision-maker must collect as much relevant information as possible on each of the uncertainties relevant to the problem. Once the dependency diagram reflects all of the key uncertainties and the interrelationships between those uncertainties, the decision-maker(s) may convert the dependency diagram into a decision tree. The decision tree supports decision-making by setting forth the sequence decisions required to solve the problem, identifying relevant uncertainties, identifying connections between issues, and labeling the

22 Jane Goodman-Delahunty et al., Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes, 16 PSYCHOL. PUB. POL’Y & L. 133, 133-137 (2010).
23 Glidden et al., supra note 15.
26 Glidden et al., supra note 15.
27 Osbeck, supra note 19.
28 Glidden et al., supra note 15.
29 Id.
30 Id.
31 Id.
outcomes (expected values) associated with the different decision-making scenarios.\textsuperscript{32} Given that the decision tree ideally reflects all possible outcomes implied by the dependency diagram, along with their respective probabilities and consequences, it is a powerful tool in communicating how resolution of a legal crisis could unfold.\textsuperscript{33}

Depending on the nature of the organizational crisis, the dependency diagrams and decision trees generated by in-house counsel may reflect dozens of decisions and hundreds of factors. For instance, the requisite decisions associated with litigation may touch on numerous topics and subject areas, including:

- **Litigation Planning:** staffing needs (outside counsel, company employees, consultants), use of technology in document organization, document/data retention policies, level of disclosure to company employees, steps for addressing press and government inquiries.\textsuperscript{34}
- **Forum Selection (lawsuit filed):** change of venue, removal to federal court, application of Class Action Fairness Act of 2005.\textsuperscript{35}
- **Forum Selection (lawsuit not yet filed):** evaluate factors influencing forum desirability, such as: quality of judges, nature of venire (π friendly, D friendly, or neutral), substantive law of forum, perceptions of client in forum, perceptions of adversary in forum.\textsuperscript{36}
- **Approach to Settlement:** strength of client's case (factually and legally), cost of discovery/trial preparation and trial, nature of client’s relationship with adversary, importance of avoiding uncertainty and saving time.\textsuperscript{37}
- **Cost Control Measures:** paying fixed legal fees, using budgets, negotiating bill discount, case assessment and resolution, reducing number of retained law firms.\textsuperscript{38}
- **Decision to Retain outside Counsel:** number of involved parties, number/types of disputed material issues, unique/novel nature of cause(s) of action, location/jurisdiction of dispute.\textsuperscript{39}
- **Criteria for Selecting outside Counsel:** legal expertise in relevant areas of practice, financial resources, cost/fee structure, values and cultural fit, political connections, media sophistication.\textsuperscript{40}

Business strategy considerations also affect legal strategy decisions in the litigation context. Decisions by in-house counsel must reflect a litigation outcome that is in line with the goals and objectives of the corporation.\textsuperscript{41} Principal considerations that affect the corporation’s goals and objectives in the context of litigation include:\textsuperscript{42}

\textsuperscript{32} Brest & Krieger, supra note 12.
\textsuperscript{33} Glidden et al., supra note 15.
\textsuperscript{35} Kirkland L. Hicks et al., *Determination of Litigation Forum*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2018).
\textsuperscript{36} Id.
\textsuperscript{37} Sharp & Salehi, supra note 34.
\textsuperscript{38} Kenneth D. Greisman et al., *Budgeting and Controlling Costs*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2018).
\textsuperscript{39} Robinson et al., supra note 8.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
• What strategic business considerations are implicated?
• Will the matter generate positive or negative publicity for the company?
• Are there present or potential relationships with an opposing party (or counterparty) that merit attention?
• What are the economic stakes to the dispute (threats to company’s brand, reputational issues, etc.)?
• Will fast settlement encourage further lawsuits against the company?
• How does the matter compare to other legal issues facing company?
• Does the matter involve a time-sensitive business opportunity for which there is competition?
• Will the matter necessitate time and participation by upper management?
• Could the legal matter prompt a regulatory response with wider implications for the company?

The diverse array of business strategy considerations that play a role in the litigation context reflect the new reality that the role of in-house counsel now encompass strategic planning and crisis management responsibilities alongside litigation management and other oversight duties. In-house counsel are now expected to bring a diverse array of non-legal skills to the strategic planning table, including a developed understanding of project management, human resources, budgeting, information technology, sales, and marketing.

Given the sheer volume of considerations and decisions potentially affecting a given course of action in response to a legal crisis, it is not difficult to imagine how even the most seasoned in-house counsel may feel overwhelmed. Although dependency diagrams and decision trees may assist such decision-making, their use comes with a note of heavy caution: dependency diagrams and decision trees are only as good as the data, perspectives, and assessments on which they are built. Associating inaccurate estimates of expected costs and benefits with different courses of action, or failing to include viable (and material) courses of action altogether, will lead to the generation of unreliable decision trees and dependency diagrams. The growing level of complexity and uncertainty inherent to the process of developing complete and accurate dependency diagrams and decision trees highlights the importance of group-decision making in response to an organizational crisis.

C. Group Decision-Making

Gone are the days where individuals relied largely on gut instinct to make decisions on matters having multi-million dollar consequences. Group decision-making is now the new

45 Brest & Krieger, supra note 12.
46 Id.
normal. Groups routinely generate more innovative, improved decisions due to an enhanced capacity to perceive problems from different a variety of perspectives. Unfortunately, however, challenges accompany the innovation and improved decisions that represent the lifeblood of group decision-making. Large and small groups alike are affected by barriers to creative problem solving, such as:

- Cognitive barriers – people have a tendency to embrace the first solution that comes to mind.
- Social barriers – people often converge on a ‘safe’ solution quickly to avoid proposing untested ideas that will leave them looking foolish in front of others.
- Personal barriers – people have different creative aptitudes.

To support finding a solution that satisfies the broadest range of objectives relevant to the problem highest possible degree, there is an increased need for tools that promote deliberative decision-making while minimizing some of the challenges associated with group decision-making. Supporting deliberative decision making and addressing the challenges to group decision making will produce more accurate dependency diagrams and decisions trees, which will in turn provide a better platform for legal decision-making. The Policy Delphi accomplishes both objectives.

II. THE POLICY DELPHI

The Delphi Method was pioneered by the RAND Corporation in the 1950s as a means to generate forecasts in connection with military technological innovation. The Delphi approach is particularly suited to building consensus in scenarios where prior research on an issue is absent or incomplete. The Policy Delphi, in contrast to the original formulation of the Delphi Method, is designed to support decision-analysis rather than the generation of a consensus. In a Policy Delphi, a group of knowledgeable individuals (the panel) engages in a structured dialogue on a question or problem. The process occurs through a series of rounds or iterations, routinely beginning with the distribution of broad, open-ended questions in the first round. The responses from individual panelists in the initial round are collected by a facilitator, synthesized, and returned to the collective group for evaluation in the successive rounds. As discussed in greater detail below, the six main phases of the Policy Delphi encompass:

48 Brest & Krieger, supra note 12.
51 Turoff, supra note 11.
52 de Loë et al., supra note 10.
54 Casey G. Cegieliski, David M. Bourrie, Benjamin T. Hazen, Evaluating Adoption of Emerging IT for Corporate IT Strategy: Developing a Model Using a Qualitative Method, 30 INFO. SYS. MGMT. 235, 238 (2013); de Loë et al., supra note 10.
55 Turoff, supra note 11.
• Phase 1 – Framing issue(s): consider what issue(s) need consideration and how the issue(s) should be presented.
• Phase 2 – Exposing options: consider what options are available in response to the issue(s).
• Phase 3 – Determining initial positions: consider which options reflect agreement or disagreement among panelists regarding whether the options are important (retained) or unimportant (discarded).
• Phase 4 – Exploring reasons for disagreements: consider facts, views, or assumptions used by individuals in support of their positions.
• Phase 5 – Evaluating underlying reasons: consider separate arguments used to defend various positions and how those arguments compare to each another.
• Phase 6 – Reevaluating options: reevaluation based on views of underlying "evidence" and assessment of its relevance to each position.

The Policy Delphi is well-matched to addressing problems that necessitate feedback from multiple individuals who may have conflicting perspectives. It acts as a mechanism to identify every major alternative, bring out points of agreement and disagreement into the open, clarify positions and simplify arguments, assess the strength of evidence connected with each alternative, and assess the suitability of each alternative. The results of the Policy Delphi provide the decision-maker(s) with the strongest thinkable opposing views (and supporting evidence) on any solution(s) to the problem.

Participant anonymity and rigor represent critical strengths of the Policy Delphi. Although some (or in certain cases all) individuals on a panel may know each other, the Policy Delphi restricts knowledge of the originator of each option (in the first round) and each evaluation (in successive rounds) to a central facilitator. The effect is to reduce the possibility that the proposer of an idea or evaluation, rather than the substance of the idea or evaluation itself, will be the central focus of any assessment. Alongside participant anonymity, rigor represents another critical strength of the Policy Delphi. The dimensions of desirability, feasibility, importance, and confidence provide a means of evaluating panelists’ ideas and reflect the minimum information necessary to conduct an adequate evaluation of each idea. See Appendix A for more information on each dimension. It is important to note that the desirability, feasibility, importance, and confidence scales in a Policy Delphi do not allow panelists to take a neutral position on an item. Excluding a neutral position option forces each individual to consider an item to the point where he or she can take a position.

III. HOW POLICY DELPHI SUPPORTS LITIGATION DECISION-MAKING

The Policy Delphi promotes deliberative decision-making while minimizing some of the challenges associated with group decision-making. It is important to reiterate that the goal of this article is not to argue that the Policy Delphi should replace dependency diagrams, decision trees,
or other decision-making tools used by in-house legal departments. The Policy Delphi is an organized method for correlating information, differing viewpoints (and critical assessments of those viewpoints) on a given problem, not a substitute for other forms of critical analysis by a decision-making group. The purpose of this article is to outline how use of Policy Delphi will support the legal department’s development of dependency diagrams and decision trees through promoting deliberative decision-making while minimizing some of the challenges associated with group decision-making. This section encompasses a discussion on how the Policy Delphi supports deliberative decision-making and minimizes some of the challenges associated with group decision-making. Section IV will include a more detailed discussion on administering the Policy Delphi.

A. Promoting Deliberative Decision Making

Deliberation encompasses a structured, systematic approach to decision-making. As noted above, in deliberative decision-making the decision maker engages in the following steps: (1) framing the problem needing resolution; (2) identifying and prioritizing pertinent interests and objectives that may span a wide variety of perspectives; (3) developing possible courses of action; (4) assessing the consequences of each course of action and the resulting effect on the previously identified interests and objectives; and (5) choosing and implementing the course of action that optimizes the interests and objectives. As discussed in this section, the six main phases of the Policy Delphi support the five steps of the deliberative decision-making process.

1. Framing the Problem

Phase 1 of the Policy Delphi supports step 1 of the deliberative decision-making process: framing the problem. Issue (problem) framing encompasses making determinations as to which issue(s) require consideration and how those issues/problems should be presented. Applying a proper frame to viewing the problem at issue is a critical first step in the decision-making process. Frames establish boundaries on decision-making, as they indirectly designate the goals, objectives and solutions that the decision-makers will consider. Depending on how the decision-makers frame the problem, they may misjudge the central nature of the problem at issue and generate inappropriate solutions in response. Given that the best solution to a problem satisfies the broadest range of objectives relevant to the problem to the highest possible degree, the best problem frame must encompass as many considerations as possible. Using open-ended questions in the initial Policy Delphi questionnaire supports the development of a list of problem statements designed to include the broadest range of considerations relevant to the problem. Each problem statement, in turn, represents a potential frame through which to view, and hopefully address successfully, the problem facing the company.

2. Identifying and Prioritizing Interests and Objectives

63 Id.
64 Brest & Krieger, supra note 12.
65 Turoff, supra note 11.
66 Brest & Krieger, supra note 12.
67 Id.
68 Id.
Phase 1 of the Policy Delphi also supports step 2 of the deliberative decision-making process: the identification and prioritization of interests and objectives. From the list of problem statements generated by each individual panelist, the facilitator develops a combined list of all problem statements and distributes it to the entire panel.69 As noted above, problem statements represent potential frames for viewing the problem facing the company and indirectly designate the goals, objectives and solutions that the decision-makers will consider.70 To prioritize interests and objectives, panelists apply a rating to each problem statement individually using the 4-point importance (priority or relevance) scale noted in Appendix A. The statement with the highest rating becomes the central problem statement to guide the remainder of the Policy Delphi analysis.

3. Developing Courses of Action

Phase 2 of the Policy Delphi supports step 3 of the deliberative decision-making process: developing courses of action. The development of a central problem statement supports efforts to generate possible options (courses of action) that targeted to the specific problem. A list of proposed options for responding to a government inquiry or options for mitigating or preventing the future reoccurrence of the crisis is of little value when the central problem under examination by the panel is associated with litigation. In this early phase of the Policy Delphi, idea generation, rather than idea analysis, is the fundamental key.71 Panelists should avoid evaluating whether their proposed options are suitable, inadequate, or flawed. As the panel will evaluate all proposed options in detail during the subsequent phases of the Policy Delphi, the main focus in phase 2 is the development of as complete a list of options as possible.

4. Assessing Courses of Action

The remaining phases of the Policy Delphi, phases 3 through 6, support step 4 of the deliberative decision-making process: assessing courses of action. In phase 3, the panelists rate each statement along the dimensions of: desirability, feasibility, importance, and confidence (see Appendix A). Panelists also supply a justification to support each rating. Although phase 3 is the most labor intensive phase of the Policy Delphi process, it is also the most important. The ratings (and justifications in support) collected in phase 3 provide the critical foundation for phases 4, 5, and 6. The ratings solidify the initial positions of each panelist with respect to each course of action and demonstrate whether there is a high level of agreement or disagreement on each action. The justifications in support provided by each panelist enable the other panelists to consider facts, views, or assumptions used by individuals in support of their positions (phase 4). In phases 5 and 6, the panelists conclude the Policy Delphi by considering each other’s justifications as they reevaluate their own rankings along the desirability, feasibility, importance, and confidence dimensions one final time.

5. Choosing/Implementing Optimal Course of Action

69 Only the facilitator knows the identity of the individual who proposed each problem statement.
70 Brest & Krieger, supra note 12.
71 Turoff, supra note 11.
The results of the Policy Delphi provide the broadest possible array of solutions to the problem as determined by the panel, as well as the strongest possible opposing views (and supporting evidence) related to those solutions. Once panelists reevaluate their own rakings along the four dimensions in phase 6, the revised list provides critical information to support the development of dependency diagrams and decision trees.

B. Minimizing Challenges of Group Decision-Making

Alongside promoting deliberative decision-making, the Policy Delphi also provides a mechanism for minimizing the challenges to group decision-making posed by barriers to creative problem solving. To help minimize the effects of cognitive barriers (associated with embracing the first solution that comes to mind) on decision-making, the Policy Delphi exposes them to a wide variety of different perspectives, forces them to rate (and justify their ratings) those different perspectives along four distinct dimensions, and reevaluate their initial views of those different perspectives based on the ratings and justifications of other panelists. As the rating scale associated with each dimension does not include a neutral position, each panelist must consider each perspective until he or she can take a position for or against it. To help minimize the effects of social barriers (associated with embracing a safe solution to avoid looking foolish) on decision-making, participants in the Policy Delphi communicate with the central facilitator but not with each other. The facilitator is the only person who knows which panelist proposed which idea. The effect is to reduce the possibility that the proposer of an idea or evaluation, rather than the substance of the idea or evaluation itself, will be the central focus of any assessment. The Policy Delphi minimizes the effects of personal barriers (associated with the differences in creative aptitudes from panelist to panelist) by establishing a structured process incorporates the unique strengths and perspectives of each individual panelist into a collective, and rigorous, group analysis of each potential solution to the problem.

IV. ADMINISTERING THE POLICY DELPHI

A. Forming the Panel

Formation of the panel is a critical first step to conducting a Policy Delphi. The Policy Delphi may accommodate panels of all sizes, ranging from less than 10 participants to more than 80 participants. An in-house legal department with 10 or more attorneys has sufficient numbers to form a panel. For in-house legal departments with less than 10 attorneys, outside counsel may also occupy positions on the panel. Although the focus of the present article centers on using the Policy Delphi to support the analysis of options related to litigation decisions, the organization may also choose to include other members of the CMT, such as managers, executives, or directors, on the panel as well. As litigation decisions have systematic effects across the organization, business strategy considerations affect litigation strategy decisions. Including managers, executives, and other non-attorneys on the Delphi panel will better infuse consideration of the company’s overall goals and objectives into the analysis.

72 Cegielski et al., supra note 54.
73 Che K. Che Ibrahim et al., Development of a Conceptual Team Integration Performance Index for Alliance Projects, 31 CONSTRUCTION MGMT. & ECON. 1128 (2013).
74 Robinson et al., supra note 8.
B. Assigning the Facilitator

A facilitator must oversee administration of the Policy Delphi. The tasks of the facilitator are to prepare and distribute questionnaires to collect the necessary data, gather responses from each panelist, collate the received data, and generate the next questionnaire for distribution to the panel. Upon completion of the Policy Delphi, the facilitator will share the final results of the analysis with the panel. Although the facilitator must be trustworthy and organized, it is not necessary that he or she be a member of the in-house legal department or the CMT.

C. Administering the Questionnaires

1. Developing the Central Problem Statement

The goal of the initial questionnaire is to assist in developing a central problem statement. To generate as diverse an array of problem statements as possible, a possible approach for the initial questionnaire is to include a single, open-ended question: What is the problem facing the company as a result of the incident (that led to the organizational crisis)? The initial questionnaire should include instructions reminding panelists to orient their problem statements in the context of litigation and to generate as many potential problem statements as possible. The facilitator will collect completed initial questionnaires from the panel, combine the problem statements into a new (second) questionnaire, and distribute it to the panel. Panelists then rate each problem statement on the second questionnaire using the 4-point importance (priority or relevance) scale noted in Appendix A. The statement with the highest importance rating, representing the most important statement in the eyes of the panel, becomes the central problem statement to guide the remainder of the Policy Delphi analysis.

2. Developing the Courses of Action

The third questionnaire contains open-ended questions designed to solicit possible courses of action in response to the central problem statement. Similar to the initial questionnaire, the goal of the third questionnaire is for the panelists to generate as many possible solutions as possible. To avoid panelist fatigue, it is recommended that the third questionnaire contain a mix of no more than 5 or 6 open-ended questions. To stimulate the generation of the widest possible array of proposed solutions, it is also recommended that the open-ended questions reflect a broad scope, such as: What offensive tactics will address the central problem? What defensive tactics will address the central problem? What critical elements must be included in any plan to address the central problem? Open-ended questions that reflect too narrow a scope on specific aspects of the litigation process, such as questions related to forum selection or settlement, risk excluding important solutions from consideration.

75 SurveyMonkey provides an efficient means to administer questionnaires electronically, collect, and collate the resulting data.
76 The statement with the highest importance rating is the statement with the highest frequency (occurrence) of ‘4’ ratings. If two statements have the same frequency, the facilitator may ask panelists to rate both statements on the 4-point confidence (in validity of argument or premise) scale noted in Appendix A as a tiebreaker.
The facilitator will collect the completed questionnaires and develop a fourth questionnaire containing the combined solutions proposed by all panelists. It is recommended that the facilitator randomize the order of the items on the fourth questionnaire. Panelists then rate each proposed solution along the dimensions of desirability, feasibility, importance, and confidence (see Appendix A), as well as supply justifications to support each rating. It is recommended that the facilitator limit each justification to no more than 50 words. The facilitator once again collects the questionnaire from each panelist and prepares a fifth (and final) questionnaire for distribution to the panel.

Preparation of the fifth questionnaire is the most labor intensive part of Policy Delphi process for the facilitator. For each proposed solution, the facilitator calculates the frequency of ‘4’ ratings for the dimensions of desirability, feasibility, importance, and confidence for inclusion in the fifth questionnaire. It is recommended that the facilitator convert the frequency for each dimension to percentage of agreement to facilitate easier consideration by the collective panel.77 The facilitator will also include panelists’ justifications in connection with their ratings for each of the proposed solutions. The instructions associated with the fifth questionnaire will ask panelists to consider the percentage agreement associated with each solution, review the justifications provided by the other panelists, and reevaluate their initial ratings on each item.

D. Applying the Results to Dependency Diagrams and Decisions Trees

Dependency diagrams and decisions trees are important tools for identifying the considerations, outcomes, and uncertainties that characterize litigation decision-making in the context of an organizational crisis. Depending on the nature of the crisis faced by the organization, dependency diagrams and decision tree may reflect dozens of decisions and hundreds of factors. As the reliability of dependency diagrams and decision trees is contingent on the data, perspectives, assumptions, and assessments on which they are built,78 it is critical that such decision-making tools encompass all material alternatives in a sound manner. The Policy Delphi acts as a mechanism to identify every major alternative, bring out points of agreement and disagreement into the open, clarify positions and simplify arguments, assess the strength of evidence connected with each alternative, and assess the suitability of each alternative.79 By using the Policy Delphi to support the development of dependency diagrams and decision trees in the context of litigation decision-making, in-house legal departments will receive increased assurances that: (a) analysis and assessments are based on an accurate characterization of the central problem facing the organization; (b) dependency diagrams and decision trees include the broadest range of considerations relevant to the central problem; and (c) decision-maker(s) will receive a list with the strongest conceivable viewpoints in support of, and in opposition to, possible any solutions to the problem (along with supporting justifications).80 Application of the Policy Delphi will also help to ensure that cognitive barriers, social barriers, and personal barriers do not lead to inadvertent exclusion of viable alternatives or considerations from the final list of possible solutions. Finally, use of the Policy Delphi will help

77 For example, if every panelist applies a ‘4’ rating to the importance scale for a proposed solution, that solution will reflect a 100% agreement among the panelists as to the importance of that solution. If every panelist applies a ‘1’ rating to the importance scale for a proposed solution, that solution will reflect a 100% agreement among the panelists as to the unimportance of that solution (and suggest the discard of that solution from future consideration).
78 Brest & Krieger, supra note 12.
79 de Loë et al., supra note 10.
80 Turoff, supra note 11.
ensure that recommendations submitted to the crisis management team will reflect the best course of action from a legal standpoint as well as align with the guiding policies and action plans that support the company’s overall competitive strategy.

V. CONCLUSION

All organizations encounter crises, crises that derive from a broad array of incidents. Regardless of the incident(s) leading to the organizational crisis, however, crisis management teams must confront a variety of short-term and long-term legal considerations. Decisions related to the pursuit or defense of litigation represent a critical area in short-term crisis management decision-making. A diverse array of legal and business considerations affect efforts by in-house counsel to recommend appropriate course of action involving litigation matters to organizational crisis management teams. The growing complexities and challenges presented by litigation decisions require new approaches to legal decision-making in the crisis management context. In-house counsel must make recommendations that represent the best course of action from a legal standpoint and align with guiding policies and action plans that support the company’s overall competitive strategy. Dependency diagrams and decision trees represent two measures that enable in-house counsel to satisfy these dual objectives by better integrating systematic, risk-analysis into legal decision-making. Dependency diagrams and decision trees, however, are subject to a major limitation: their reliability is contingent on the data, perspectives, assumptions, and assessments on which they are built. The Policy Delphi addresses this limitation by serving as a mechanism to: (a) identify every major alternative; (b) bring out points of agreement and disagreement into the open; (c) clarify positions and simplify arguments; (d) assess the strength of evidence connected with each alternative; and (e) assess the suitability of each alternative.81 The end result of the Policy Delphi is to provide decision-maker(s) with the strongest thinkable opposing views (and supporting evidence) on any solution(s) to the problem.

81 de Loë et al., supra note 10.
Appendix A

Desirability (Effectiveness or Benefits) Scale

(4) – Very Desirable: extremely beneficial, will have positive effect and little or no negative effect, justifiable on its own merit
(3) – Desirable: beneficial, will have positive effect and little or no negative effect, justifiable in conjunction with other items
(2) – Undesirable: harmful, will have a negative effect, justified only as by-product of very desirable item
(1) – Very Undesirable: extremely harmful, will have major negative effect, not justifiable

Feasibility (Practicality) Scale

(4) – Definitely Feasible: no R&D required, no hindrance to implementation
(3) – Possibly Feasible: some R&D required, some indication item is implementable
(2) – Possibly Unfeasible: significant unanswered questions, some indication item is unworkable
(1) – Definitely Unfeasible: all indications are negative, unworkable, cannot be implemented

Importance (Priority or Relevance) Scale:

(4) – Very Important: direct bearing on major issue, first-order priority, must be resolved or dealt with
(3) – Important: significant impact but not until other items are treated, second-order priority, does not have to be fully resolved
(2) – Slightly Important: little importance, third-order priority, not a determining factor to major issue
(1) – Unimportant: no relevance, no priority, should be dropped as an item to consider

Confidence (In Validity of Argument or Premise) Scale:

(4) – Certain: low risk of being wrong, most inferences drawn from this will be true
(3) – Reliable: some risk of being wrong, some incorrect inferences can be drawn
(2) – Risky: substantial risk of being wrong, many incorrect references can be drawn
(1) – Unreliable: great risk of being wrong, no use basis for a decision

See Turoff, supra note 11.
SHOULD AN AGENT BE LIABLE FOR ORDINARY NEGLIGENCE WHEN LIABILITY IS TRANSFERRED TO THE PRINCIPAL?

NICHOLAS C. MISENTI*

INTRODUCTION

A well-established common law rule provides that an agent who commits a tort while acting on behalf of a principal is personally liable for that tort, even when liability is transferred to the principal under the doctrine of Respondeat Superior.¹ This can be termed "Agent Liability".² Agent Liability is so fundamental that it has been termed "black letter law."³

A limited challenge to Agent Liability has occurred in Canada and Australia, in cases involving director liability for patent infringement.⁴ This limited challenge was met with outrage by at least one commentator.⁵ The idea that someone could be excused from liability for tortious conduct is accepted as so extreme that no one even dares mention the possibility. Agent Liability is essentially considered sacrosanct. Most research on the law of agency has focused on Respondeat Superior, to the exclusion of Agent Liability, even though the topics are interrelated. For all of these reasons, there has been no serious examination of or challenge to Agent Liability.⁶ However, when the rationale for Agent Liability is examined, the rationale does not withstand scrutiny. Accordingly, Agent Liability should be abolished.

* J.D., CPA. Assistant Teaching Professor of Business Law, Quinnipiac University, Hamden, CT


² Hereafter, "Agent Liability" refers to this doctrine.


⁶ In addition to a lack of scholarship on the topic, business law texts typically devote at least one chapter to Agency law, but completely omit the topic of Agent Liability
I. THE RATIONALE FOR AGENT LIABILITY

An agent who commits a tort is personally liable for that tort even though he was acting within the scope of the Principal's business at the time of the tort; i.e., even though the Principal is also liable under Respondeat Superior. The rationale for this rule is as follows:

1. A person should be responsible for torts he commits, as a matter of principle;
2. Agent Liability encourages responsible conduct;
3. A tort committed by an agent is no different than a tort committed by a person who is not acting as an agent;
4. The injury to the victim of a tort is the same, regardless of whether the other party was acting as an agent at the time;
5. Holding the agent liable along with the principal maximizes the chances the injured party will recover damages.

II. THE RATIONALE FOR AGENT LIABILITY DOES NOT WITHSTAND SCRUTINY

The rationale for Agent Liability does not withstand scrutiny for the following reasons:

1. Agent Liability is inconsistent with the original intent of the doctrine of Respondeat Superior;
2. Agent Liability is inconsistent with transference of contract liability from agents to principals under agency law;
3. Agent Liability is inconsistent with statutes that relieve federal and state government employees from liability for ordinary negligence when liability is transferred to the government;
4. Agent Liability is inconsistent with the Economic Loss Doctrine, which relieves agents from personal liability for ordinary negligence when contract liability is transferred to the principal;
5. Abolishing Agent Liability would eliminate the inequity that results now when owner/agents, acting on behalf of a separate legal entity, are held liable for ordinary negligence, despite limited liability shields;

7 THE RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 7.01 (2006)
8 Comment b. to RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 7.01 (2006).
6. Attempts to take advantage of Abolishing Agent Liability would be easily controlled by the nonrecognition of sham agency relationships, the doctrine of piercing of the veil of limited liability, and mandatory insurance requirements, which exist under current law or could be expanded;

7. Abolishing Agent Liability is consistent with general tort theory.

III. AGENT LIABILITY IS INCONSISTENT WITH THE ORIGINAL INTENT OF THE DOCTRINE OF RESPONDEAT SUPERIOR

A. The Original Intent of Respondeat Superior

Under the doctrine of Respondeat Superior, a principal is liable for ordinary negligence committed by the agent when the agent was acting within the scope of his employment.\(^9\) Agent Liability developed in the context of this doctrine.

Respondeat Superior appears to have originated in ancient Rome, where masters were held vicariously liable for the acts and omissions of their slaves.\(^10\) Hence, the original term for the doctrine, the Master-Servant Rule. The practical rationale for the rule was simple: A slave could not pay damages, so the principal was substituted for the agent. Another rationale for the rule was that the master had dominion and control over the servant, who did not exist apart from the master.\(^11\) One way of looking at the rationale is that if liability applied against the agent, there would be no reason for Respondeat Superior, and the doctrine would not have evolved.

Ancient Rome did not apply the Master-Servant doctrine in a universal way. However, the doctrine also was applied on a very limited basis in the case of free persons. The male head of a household was liable for the acts and omissions of family members.\(^12\) The rationale here was no different than the situation involving slaves. Based on the principle of patria potestas, the head of household had absolute authority over family members. For example, all property acquired by family members belonged to the head of household. Thus, no recovery could be had against members of the household, who had no real existence outside of the head of the household.\(^13\)

Noteworthy was the fact that liability only applied against the master, and not against the servant: i.e., the transfer liability to the principal relieved the agent from liability. This make sense because liability of the master was substituted for that of the servant. Holmes summed up these principles this way:

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\(^9\) THE RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 204 (2006)
\(^10\) O. W. Holmes, Jr., Agency, 4 Harv. L. Rev. 345, 350 (1891)
\(^11\) Id at 351
\(^12\) Id at 363
\(^13\) Id at 350
If a servant, although a freeman, was treated for the purposes of the relation as if he were a slave who only sustained the persona of his master, it followed that when the master was liable, the servant was not.  

**B. Early English Law**

Early English law clearly followed this principle. Holmes states that "There seems to have been a willingness at one time to accept the conclusion. It was said under James and Charles I. that the sheriff only was liable if an under-sheriff made a false return, 'for the law doth not take notice of him'". Similarly, in an early English case it was stated that “if the servant of an innkeeper sells wine which is corrupt, knowing this, action of deceit lies not against the servant, for he did this only as servant.” This is consistent with the intent of the Master Servant Rule, going back to ancient Rome.

Blackstone in his Commentaries also clearly stated the rule in this manner:

> IF a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith’s servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done, while he is actually employed in the master’s service; otherwise the servant shall answer for his own misbehavior. Upon this principle, by the common law (footnote omitted), if a servant kept his master’s fire negligently, so that his neighbor’s house was burned down thereby, an action lay against the master; because this negligence happened in his service: otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master’s immediate service, and must himself answer the damage personally.

When liability of a servant for ordinary negligence was transferred to the Master by way of the Master Servant rule, the servant was relieved from liability, but if the servant was acting in his own capacity at the time, outside the scope of the agency, such as in the case of an intentional act, the agent had personal liability. In short, under early English law, there was no such thing as Agent Liability.

**C. Evolution of Agent Liability: Story's Error**

14 *Id*, at 364
15 O. W. Holmes, Jr., *Agency*, 4 Harv. L. Rev. 345, 363 (1891)
16 1 Roll. Abr. 95 (T.), cited in O. W. Holmes, Jr., *Agency*, 4 Harv. L. Rev. 345, 364 (1891)
However, things would change, and not through a reasoned reevaluation of this rule. Expansion of the Master-Servant doctrine occurred in England at the end of the 17th century. It was this expansion of the Master Servant rule that indirectly led to the creation of Agent Liability. Specifically, Agent Liability developed from Judge Story's misinterpretation of Lord Holt's dictum in his dissenting opinion in Lane v. Cotton in 1701, a case in which the issue involved the Master Servant Rule, not Agent Liability.

Lane v. Cotton involved exchequer bills (short-term promissory notes issued by the British government) that were missing from a letter that was handled by a postal clerk. Potential liability of the agent (the clerk) was not an issue in the case. The only issue in Lane was whether the postmaster could be held liable for the clerk's negligence under the Master Servant rule. The court ruled such liability did not apply. The Master servant rule was still limited at that time. It was Lord Holt's dissenting opinion that received the most notoriety though. Holt suggested a broader application of the Master servant rule. However, a misinterpretation of his dictum by Justice Story would prove to be most influential. Specifically, this dictum became the basis for Judge Story's mistaken formula in his 1839 Law of Agency treatise, that an agent has personal liability for misfeasance (a negligent act), but not for nonfeasance (a negligent omission).

Story's formulation eventually was recognized as nonsensical and therefore incorrect. However, what is completely missing in all of the scholarship concerning Holt's dictum and Story's formulation is the fact that Holt appears to have actually said that a servant acting on behalf of a principal would have no liability for ordinary negligence because liability would be transferred to the principal, but a servant acting on his own at the time, outside the scope of the agency, such as by way of an intentional act, would have personal liability. This dictum then simply stated the existing law, and would have suggested no change in law. Thus, Holt said:

It was objected at the bar, that they have this remedy against Breese (who was apparently the clerk from whose possession the loss occurred). I agree, if they could prove that he took out the bills, they might sue him for it; so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, quatenus such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer.

Holt's language seems clear: If the clerk intentionally took the bills, he would personally liable, but if the bills were lost due to his negligence, liability would lie only against the postmaster. This formulation is not surprising given that the this is how Master Servant rule was intended to

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work, going back to ancient Rome, and how it applied in England at the time. Lord Holt provided another example, which underscores this point:

As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrongdoer, or rescuer.

In short, if the bailiff intentionally released the prisoner, the bailiff would be liable, but if the prisoner escaped due to the bailiff’s negligence, only his principal, the Sheriff, would be liable.

As further evidence of what Holt actually intended, consider that it's absurd to think that postal clerk could negligently open an envelope and remove the bills. A postal clerk would have no reason to open an envelope and remove the bills, except to steal the bills. Thus, what Holt was describing was an intentional act, outside the scope of the Master Servant rule, for which the clerk would be liable. Story distorted that into a negligent act. Likewise, consider how the clerk could, through a so-called an omission, cause to the bills to be removed from the envelop and go missing: Perhaps the clerk could leave the envelop on the counter, within public view and public reach, unattended, with the result that someone else could open and steal the bills. Surely, Holt would have recognized that this so-called negligent omission was really the negligent act of leaving the envelop on the counter, within public view and reach, unattended. Thus, Holt must have used the term "neglect" to mean a negligent act or omission, for which the agent would not be liable because liability was transferred to the principal under the Master Servant rule. Story distorted that into an omission.

It also must be remembered that when Holt used his dictum in his dissent he was trying to convince the majority that they were wrong not to extend the Master Servant rule in this case. One explanation of the majority for not extending the Master Servant rule is that an action applied against clerk, so an action against the Postmaster wasn’t necessary for the victim to recover damages. Holt tried to dispel this idea by explaining that an action would apply against the clerk only in the case of an intentional act. Therefore, an action against the Postmaster was necessary if the victim was to recover damages in a case that was based on negligence. The problem with Holt’s argument of course, is that it begs the question: The argument is true, but only if the Master servant rule already applies. More importantly, Holt's argument is based on the premise that the transfer of liability from the agent to the principal under the Master Servant Rule relieves the agent of liability.

How Story could make such an egregious error of interpretation is unclear. It appears that Holt was using the term "neglect" to mean a negligent act or omission, and misfeasance to mean an intentional act, what today is known as malfeasance. It appears that Story took "neglect" to mean a negligent omission. In reality, almost all negligence involves intertwined elements of acts and omissions. If someone is driving a car and fails to apply the brakes in time to avoid hitting another car, it can be said that there was a negligent act, i.e., the act of driving the car, and a negligent omission, i.e., failing to apply the brakes. However, the case would be considered to be misfeasance because the omission occurred in the context of an act, i.e., driving the car.20

20 (2001) Oxford U Comparative L Forum 1. https://ouclf.iuscomp.org/liability-for-nonfeasance-a-comparative-study/. Last accessed on April 29, 2018. This forum was based on an article that analyzed nonfeasance in its purest form, and probably the only way the term should be used, which is the general rule that there is no legal duty to help a stranger, and its justification.
The result of Story's misinterpretation and nonsensical distinction between misfeasance and nonfeasance was that Agency Liability was born and liability was imposed on agents for negligent acts for the first time in history.

**D. Influence of Story's Error**

However ridiculous Judge Story's formula was, it also was enormously influential in England and in the United States. By 1920, the distinction between nonfeasance and misfeasance, and imposition of Agent Liability for misfeasance, was widely applied throughout United States, with very few exceptions. However, at least one state during this era correctly identified the absurdity of the distinction between a negligent act and a negligent omission, holding that nonfeasance only described the limited situation where the agent never did anything to undertake his contract with the principal, and not to omissions while carrying out his contract with his principal. This clearly was the exception at that time. This exception also meant that Agent Liability applied both in the case of a misfeasance and a nonfeasance, which is inconsistent with the Master Servant rule, as stated by Lord Holt.

**E. Correction of Story's Error Compounded the Error**

The 1922 version of American Law Reports "(ALR") correctly refers to Judge Story's formula as an "error" and his supposed distinction between a nonfeasance (a negligent omission) and a misfeasance (negligent act) as "fictitious," lamenting that this was still the prevailing law at that time. However, the 1922 version of ALR compounds the error, arguing that because there is no real difference between a negligent act and a negligent omission, the distinction should no longer be recognized, with the result being that an agent should be liable for both a negligent act and a negligent omission. The error in this reasoning is somewhat understandable. If an agent is liable for a negligent act, and a negligent omission is no different, then an agent should be liable for a negligent omission as well. The flaw in this reasoning is that Judge Story's error was not limited to his imagined difference between a negligent act and negligent omission. Judge Story also erred in his interpretation of Lord Holt's dictum in Lane v. Cotton. In his dictum, Judge Story was simply stating the existing rule of law at that time: i.e., that the agent is relieved from liability for ordinary negligence (based on an act or omission), when the principal is liable under the Master Servant rule, and the agent has personal liability only when he is acting on his own, outside the scope of the agency, such as by way of an intentional act. This principle is the very foundation of the Master Servant rule. Thus, the proper correction of Judge Story's error should have been to eliminate the change that had imposed liability on an agent for a negligent act, which did not exist in the law before the error.

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The 1922 version of American Law Reports also was influential. In 1961, the distinction between misfeasance and nonfeasance was still in force in the United States, although some courts appeared to begin rendering decisions that were inconsistent with the distinction, without actually calling it into question, holding that agents liable in situations that seemed to involve nonfeasance. By 2010, the "modern rule" had developed that Agent Liability could be imposed based on misfeasance or nonfeasance.

However, today, a vestige of the distinction between misfeasance and nonfeasance still exists. An agent will be held liable for a negligent act or negligent omission that results in physical harm to a third party or damage to his property. However, generally an agent is not liable for a negligent omission that results only in economic harm to the third party. This distinction is based on the idea that in the latter case the agent owes no duty to the third party that could be the basis for personal liability. Apparently, an agent owes a legal duty not to cause physical harm or property damage to a third party, but no legal duty not to cause economic harm to a third party. This formulation is almost as nonsensical as Judge Story’s formulation.

Unfortunately, what is lost in all of this is that an agent is supposed to be relieved from liability for a negligent act or omission when liability is transferred to the principal. There was never a reasoned reevaluation of this principle. The modern rule can best be described as resulting from an error (Judge Story’s mistaken and nonsensical formulation) that was compounded by another error (abandonment of Judge Story’s formulation). To correct these errors, Agent Liability should be abolished.

IV. AGENT LIABILITY IS INCONSISTENT WITH CONTRACT LIABILITY OF AGENTS

A. Theories Supporting Transfer of Contract Liability to the Principal also apply to Tort Liability

An agent acting with actual authority has no personal liability on a contract the agent enters into on behalf of a disclosed principal. Liability on the contract is attributed to the principal, which releases the agent from personal liability. Two theories support this outcome: (1) the principal directs and controls the agent, and (2) the principal enjoys all of the benefits and suffers all of the burdens, of the contract. Thus, when the agent acts, it is really the principal acting. However, these are the same theories that support imposing tort liability on the

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26 THE RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 702 Comment d. (2006)
27 Id.
principal for the agent's negligence under Respondeat Superior. Therefore, the outcome, that the agent should have no liability, should be the same.

It's also said that in a contract involving a disclosed principal, the third party will know he is dealing with the principal, so he is expecting performance from the principal and not the agent. However, in many cases of ordinary negligence, it will be clear to the third party that the agent is acting on behalf of a disclosed principal, similar to the case of a contract with a disclosed principal. For example, assume a party enters into a contract with an LLC for construction of a house, and that the LLC is owned one individual. The individual builder will likely be on the construction site supervising construction. Clearly, the other party will understand that an LLC cannot act on its own, and that the individual builder is acting on behalf of the principal that was disclosed in the contract, i.e., the LLC. Yet, under Agent Liability, where the other party is unsatisfied with the workmanship of the construction, the individual builder can be held liable for ordinary negligence, but not on the contract.

**B. Breach of Contract and Commission of a Tort Are Not Dissimilar**

Agent Liability imposes tort liability on agents, while agency law relieves agents from liability for breach of contract. This distinction is not justified because the two situations are not dissimilar. When ordinary negligence is committed by an agent of a corporation, both the individual and the corporation will be held liable. Yet the tort will necessarily have been committed by the individual agent because a corporation can't act on its own. When a company breaches a contract, the breach also will necessarily have been committed by an individual for the same reason. In the case of a closely-held entity, the owner may very well be the agent. Yet only the entity will be held liable for breach of contract. The facts are the same with respect to commission of a tort and breach of contract, but with a different result. The same rule that applies to breach of contract should also apply to ordinary negligence that is committed by an agent: i.e., transfer of liability from the agent to the principal relieves the agent of liability.

**C. The Mentmore Manufacturing Test in Canada and Australia**

Under the "Mentmore Manufacturing Test" that is applied in Canada and Australia, courts relieve directors from liability for patent infringement that is based on ordinary negligence when liability is transferred to the principal (i.e., the corporation). This theory of liability is based partly on the realization that the agency distinction between contract and tort liability is not justified. In holding a director was not liable in one case, an Australian court noted that the situation of a tort action was really no different than breach of contract. In both cases, an individual acting on behalf of the corporation will have caused the tort or the breach of contract. Thus, the

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30 See Comments to RESTATEMENT (THIRD) OF AGENCY § 7.03 and § 7.07 (2006)
31 Id.
outcome in the tort action should be the same as the outcome in the breach of contract action: i.e., the transfer of liability to the corporation relieves the agent from liability. Thus, the court noted:

a company is an artificial person which can act only through the agency of individuals. When a company does something, there will usually be someone who has directed or procured it to be done. When a company breaches its contract, there will often be an individual whose decision has caused the company so to act.  

V. AGENT LIABILITY IS INCONSISTENT WITH THE FEDERAL TORT CLAIMS ACT

A. Agent Liability Does Not Apply to Government Employees

Under the Federal Tort Claims Act, the federal government waives its sovereign immunity from certain lawsuits that are brought based on acts and omissions of federal employees. This waiver extends to claims that are based on ordinary negligence of employees under state tort law that is committed while the employee is acting within the scope of his employment.

Significantly, the Act provides that when the federal govern waives its sovereign immunity for such a claim, the remedy against the federal government is the exclusive remedy of the plaintiff, and any civil action against the employee is precluded. In short, when liability is transferred from the agent to the principal, the agent is relieved from liability, which undermines the rationale for Agent Liability.

State laws operate in a similar fashion. For example, Connecticut law provides that actions based on ordinary negligence committed by state employees while acting within the scope of their employment must be brought against the state, and that state employees are not personally liable for these acts or omissions. Once again, the transfer of liability from the agent to the principal for ordinary negligence relieves the agent of personal liability.

B. The Federal Tort Claims Act Undermines the Rationale for Agent Liability

The rational for Agent Liability is questionable, at best, when examined in this context. Can it be seriously argued that persons should be personally liable for their own tortious conduct, as a matter of principle, but not if they are federal and state government employees? Or that

34 Keller v LED Technologies Pty Ltd. at Par. 402  
37 29 U.S.C. 2679 (b) (1)  
38 CGS 4-165  
39 Under Connecticut law, employees are not released from personal liability for acts or omissions that are wanton, reckless, or malicious. CGS 4-165. However, nothing in this paper argues for abolishing Agent Liability in these circumstances.
responsible conduct should be encouraged, but not in the case of federal and state employees? Further, if a tort committed by an agent is no different than a tort committed by a person who is not acting as an agent, and the injury to the victim of a tort is the same, regardless of whether the other party was acting as an agent at the time, wouldn’t these rationales also apply to federal and state government employees?

The Federal Tort Claims Act, and similar state statutes, undermine the rationale for Agent Liability. These Acts also demonstrate that a similar statutory mechanism can be adopted to relieve an agent of liability for ordinary negligence when liability is transferred to the principal in all cases. Moreover, these Acts provide significant evidence that while, at first glance abolishing Agent Liability may seem radical, Agent Liability can be abolished without negative consequences that many would predict.

VI. AGENT LIABILITY IS INCONSISTENT WITH THE ECONOMIC LOSS DOCTRINE

A. The Economic Loss Doctrine Defined

Many claims of personal liability result from a dispute related to an underlying contract, and involve only economic damages, where one party is unsatisfied with the performance of the other party. In this situation, the Economic Loss Doctrine applies, and an action can only commence for breach of contract. Any tort action is precluded. If an agent with actual authority enters into contract on behalf of a disclosed principal, liability on the contract is attributed to the principal, who is the only party to a breach of contract action. Where the agent committed ordinary negligence in connection with the contract, Agent Liability would impose personal liability on the agent. However, the Economic Loss Doctrine bars any ordinary negligence claim against the agent or against the principal. The result is that the attribution of contract liability from the agent to the principal relieves the agent from liability for ordinary negligence. The Economic Loss Doctrine has been summarized as follows:

a plaintiff may not recover damages under a negligence claim when the plaintiff has suffered no personal injury or property damage. The economic loss rule prevents recovery for negligence when the duty breached is a contractual duty and the harm incurred is the result of the failure of purpose of contract. The economic loss rule prevents a plaintiff who is not in privity of contract with a defendant from maintaining an action for negligence based on purely economic losses.

The doctrine began in California in 1965, in the context of strict liability action involving the sale of goods. In that case, the California Supreme Court applied the doctrine and barred an

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41 § 56 65 C.J.S. Negligence Sec. 56.
42 Franklin Grove Corp. v. Drexel, 936 A.2d 1272 (R.I. 2007); 65 C.J.S. Negligence § 56
45 Seely v. White Motor Co., 403 P.2d 145 (CA 1965)
action in strict liability against the manufacturer of a truck that overturned, damaging the truck but
caus[ing] no personal injuries or other property damage. The court held that only an action for breach
of contract could be maintained because breach of contract remedies would be sufficient to
compensate the plaintiff.

The Economic Loss doctrine is limited to cases where the dispute between the parties is
based on an existing contract, and where only economic damages, or damages to the property
that is the subject of the contract, are involved. Thus, the doctrine does not bar ordinary
negligence claims based on personal injuries or damage to other property, because tort law is
thought to better address damages in this case.\textsuperscript{46} Abolishing Agent Liability would preserve this
outcome because a tort action could still be permitted against the principal where personal
injuries or other property damage were involved. Thus, abolishing Agent Liability is consistent
with the Economic Loss Doctrine.

\textbf{B. The Economic Loss Doctrine Undermines the Rational for Agent Liability}

The fact that the Economic Loss Doctrine relieves an agent from personal liability for
ordinary negligence calls into question the rationale that underlies Agent Liability. If someone
should be personally liable for his own tortious conduct, as a matter of principle, shouldn’t this
also apply when they negligently cause economic damages? Moreover, if responsible conduct
needs to be encouraged, by way of the imposition of personal liability on agents who commit
ordinary negligence, wouldn’t this also be true of agents who negligently cause economic
damages? Likewise, if a tort committed by an agent is no different than a tort committed by a
person who is not acting as an agent, and the injury to the victim of a tort is the same, regardless
of whether the other party was acting as an agent at the time, wouldn’t these rationales also apply
to agents who negligently cause economic damages? Clearly, too, the rationale for Agent
Liability of maximizing possible recovery of damages by holding two parties liable is untenable,
given that the Economic Loss Rule limits an action to a claim for breach of contract against one
party, i.e., the principal.

\textbf{C. The Economic Loss Doctrine is not a Substitute for Abolishing Agent Liability}

While the Economic Loss Doctrine is inconsistent with Agent Liability, it's existence is
not a reasonable substitute for abolishing Agent Liability. The doctrine is mired in
inconsistencies and is therefore wholly unsatisfactory as it's applied. For example, the Illinois
Supreme Court has since applied the doctrine to preclude tort claims based on services contracts,
in addition to sale of goods contracts, and thus to preclude negligence actions against an
architect\textsuperscript{47}, and an engineer.\textsuperscript{48} Notwithstanding, the Court has held that the doctrine is
inapplicable as a defense in a malpractice action against an accountant.\textsuperscript{49}

\begin{flushright}
\textsuperscript{46} \textit{See}, \textit{e.g.}, \textit{Moorman Mfg. Co. v. Nat'l Tank Co.}, 91 Ill. 2d 69, 435 N.E.2d 443, (1982)
\textsuperscript{47} 2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346 (Ill. 1990)
\textsuperscript{48} Fireman's Fund Ins. Co. v. SEC Donohue, Inc., 679 N.E.2d 1197 (Ill. 1997)
\textsuperscript{49} Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d 503, 515 (Ill. 1994)
\end{flushright}
Similarly, the Texas Supreme Court has held that the doctrine applies to service contracts as well as sale of goods contracts, and thus barred actions in negligence and negligent misrepresentation against an architect for malpractice. The Court, however, has held that the doctrine does not bar a tort action based on malpractice actions against an accountant, or against a lawyer.

Unlike Illinois and Texas, the Florida Supreme Court has held that the Economic Loss Doctrine does not bar a malpractice action against an engineer.

Wisconsin has not extended the doctrine to service contracts. In similar factual scenarios, Maryland has applied the doctrine to bar claims for negligent misrepresentation, while Florida has held that the doctrine doesn’t apply to negligent misrepresentation claims. While Illinois and Texas hold that the doctrine prevents tort actions against architects and engineers, the South Carolina Supreme Court has held otherwise, saying "We see no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties."

Inconsistencies in how the doctrine is applied also exist in the same jurisdiction. Texas has barred an action against an architect, but allowed an action against a plumber, without explaining the distinction. In both cases, allegations of unsatisfactory workmanship led to damage to a home.

In summary, the Economic Loss Doctrine undermines the rationale for Agent Liability. However, because of its severe shortcomings, it is not substitute for abolishing Agent Liability.

VII. ABOLISHING AGENT LIABILITY WOULD ELIMINATE INEQUITIES THAT APPLY TO OWNER/AGENTS OF SEPARATE LEGAL ENTITIES

A. Agent Liability Supersedes Liability Shields

The standard LLC limited liability shield typically provides that a member or manager of an LLC is not personally liable solely by reason of being a member or manager. Thus, Section 304(a) of the Uniform Limited Liability Company Act of 2006 (Last Amended 2013), provides that:

A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a

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51 Grant Thornton LLP v. Prospect High Income Fund, 314 S.W.3d 913 (Tex. 2010)
52 Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 783 (Tex. 2006)
53 Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999)
54 Ins. Co. of N. Am. v. Cease Elec. Inc., 688 N.W.2d 462 (WI Year)
55 Morris v. Osmose Wood Preserving, 667 A.2d 624 (MD 1995)
56 Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 738 (11th Cir. 1995)
57 See 2314 Lincoln Park W. Condo. Ass'n, (fn. 35); Fireman's Fund Ins. Co (fn. 36); LAN/STV (fn. 36)
60 Chapman Custom Homes, Inc. v. Dallas Plumbing Co., 445 S.W.3d 716 (Tex. 2014)
debt, obligation, or other liability of the company solely by reason of being or acting as a member or manager." (emphasis added).

This language also is found in other states that have not adopted the Uniform Limited Liability Company Act.

The majority rule provides that the limited liability shield allows for personal liability to be imposed on a member based on his personal conduct, because liability in this situation is not based on his status as a member. The Comment to Section 304(a) of the Uniform Limited Liability Company Act (2006) (Last Amended 2013) refers to this interpretation as "the overwhelming weight of the case law. Simply put, Agent Liability governs the outcome. This same rule applies in the case of corporate limited liability shields.\textsuperscript{61}

B. The Illinois LLC Exception to the Majority Rule

There is one exception to the majority rule, which involves the Illinois LLC. In Puleo v. Topel, the Illinois Appellate Court held that an LLC member who entered into contracts on behalf of a dissolved LLC could not be held personally liable on the contracts due to the LLC limited liability shield, even though personal liability would apply in the case of any other type of business entity based on agency law.\textsuperscript{62} Illinois case law is based on a unique LLC limited liability shield, as well as a unique history leading to the current version of the shield.\textsuperscript{63} The court has also held that a member could not be personally liable for obligations incurred on behalf of an LLC after the company was involuntarily dissolved.\textsuperscript{64} In 2011, the court held that member could not be held personally liable for debts incurred on behalf of an LLC prior to its formation, even though under the law of agency, the defendant would be personally liable for a contract he executed on behalf of the unformed LLC.\textsuperscript{65} In a 2009 case, a federal trial court applied the Puleo holding and dismissed a negligence action against an LLC member.\textsuperscript{66} In a 2009 case, a federal trial court applied the Puleo holding and dismissed a negligence action against an LLC member.\textsuperscript{67} In 2013, the Illinois appellate court went further, and barred actions against members and managers based on fraud. It held that the manager of a limited liability company that sold condominium units to purchasers was not personally liable to purchasers for alleged fraud committed during the sale of the units because the LLC"s articles of organization did not contain a provision for manager liability, and the manager never consented in writing to such a provision.\textsuperscript{68}

In short, in Illinois a member or manager of an LLC has the power to avoid personal liability for tortious conduct simply by not agreeing to assume personal liability in the Articles of Organization. Illinois case law is based on a unique LLC limited liability shield, as well as a unique

\textsuperscript{62} See RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 604 (2006)
\textsuperscript{63} See Nicholas C. Misenti, Personal Liability for Commission of a Tort: A Significant, and Often Overlooked, Exception to Limited Liability in the LLC and Corporation Volume 8 Southern Journal of Business and Ethics 11 (2016)
\textsuperscript{64} Puleo v. Topel, 856 N.E.2d 1152, 1157 (Ill. App. 2006)
\textsuperscript{65} Carollo v. Irwin, 959 N.E.2d 77 (Ill. App. 1st 2011)
\textsuperscript{68} Dass v. Yale, 3 N.E.3d 858 (Ill. App. 1st 2013)
history leading to the current version of the shield.69

B. The Illinois LLC Exception is Unique

The Wisconsin appellate Court had ruled that the Wisconsin LLC shield insulated members and managers from personal liability for tortious conduct.70 However, this decision was overturned by the Wisconsin Supreme Court.71 In an unpublished decision, the Kentucky Supreme Court also held that Kentucky LLC shield insulated members and managers from personal liability for tortious conduct.72 The Court reasoned in part that "an LLC cannot act except through its representatives", so to hold otherwise would essentially make members and managers personally liable by default when disputes arose with third parties.73 However, in response, the Kentucky legislature amended 2010. 275 KRS 275.150 by adding Section (3), which provides that the LLC limited liability shield "shall not affect the liability of a member, manager, employee, or agent of a limited liability company for his or her own negligence, wrongful acts, or misconduct."74

In 2012, the South Carolina Supreme Court described the issue of personal liability of LLC members and managers for tortious conduct as "a question of first impression in this State", before holding that no immunity was provided by the LLC limited liability shield.75 However, in 2013, the Court revisited the case, and withdrew this decision.76 The Court found there were insufficient allegations that could support personal liability of the LLC's members and managers, and concluded "We therefore find it unnecessary to reach the novel issue of whether the LLC Act absolves an LLC member of personal liability for negligence committed while acting in furtherance of the company business."77 However, it's clear that the court's original decision represents the majority rule that applies in every state, except Illinois.78

Thus, the Illinois LLC is unique among separate all legal entities. There are no exceptions that are recognized under LLC law in any other jurisdiction, and no exceptions that are recognized under corporate law in any jurisdiction, including Illinois.79

C. The Illinois LLC Exception is Limited in Scope

Moreover, the protection afforded by the Illinois LLC is not as robust as first appears. A separate statute that applies to clearly establishes that there are no exceptions to Agent Liability in the case of professional LLC's in Illinois.80 The sheer breadth of the definition of "professional

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73 Id. at *4
74 See 2010 Acts Ch. 133 § 31
77 Id. at 773
78 Whether the Puleo doctrine prevents imposition of personal liability on a member based on piercing of the veil of limited liability is unsettled. See
79 See
80 805 Ill. Comp. Stat. Sec 185/35(a)
services" in Illinois is problematic for anyone who wants to take advantage of the Illinois super business entity. 805 Ill. Comp. Stat. Sec. 185/5 defines professional services to include any "profession to be licensed by the Department of Financial and Professional Regulation." Essentially, any occupation that requires a state license is included in the definition. This amounts to approximately 127 different occupations, including many that wouldn’t ordinarily be thought of as professional services, such as barbers, nail technicians, alarm installers, roofers, etc. 81 This significantly limits the Illinois LLC as a shield against Agent Liability.

D. Agent Liability Creates Inequities for Small Business Owners

The result is that limited liability shields produce inequitable results for owners of separate legal entities, especially small business owners. Personal involvement in the business is an absolute necessity in a separate legal entity, given that the separate legal entity as a person is a legal fiction. Thus, the entity must necessarily act thorough agents. In the case of small businesses, it will almost certainly be the owner who is the agent. Case law demonstrates that Agent Liability triggers personal liability of the owner based on the most minimal involvement of the owner. Such cases are myriad. Two examples should suffice to establish the point.

E. Jennings v. Smith

Jennings v. Smith82 illustrates how fairly simple allegations of personal involvement in carrying out a contract can create an exception to the limited liability shield. In Jennings, the plaintiffs had contracted with Smith's corporation to build a home. The home developed a number of structural issues due to settlement of the soil. The plaintiffs brought suit against Smith personally for negligent construction and fraudulent concealment. The trial court granted Smith’s Motion for Summary judgment. In reversing the trial court's decision on the negligent construction count, the Court said:

Catherine Hohlstein, a real estate agent, testified that she had seen Smith personally instructing a worker in how to repair a leak in the basement and a crack in the garage floor. Jennings testified that she had seen Smith personally supervising workers repairing leaks in the garage walls, repairing cracks and correcting settlement problems in the driveway, constructing the rear deck, and filling sinkholes in the property. Given this evidence, if a jury found the corporation negligent in constructing or repairing the house, it could also find Smith personally liable for such negligence because he specifically directed or participated in the construction and repairs. See Brown, supra, 212 Ga. App. 275, 441 S.E.2d 876 (reversing grant of summary judgment to corporate officer on claim of negligent construction); Weir v. McGill, 203 Ga. App. 431, 432-433(3), 417 S.E.2d 57 (1992).83

82 487 S.E.2d 362 (GA App. 1997)
83 Id. at 364
It's clear an LLC or corporation can't construct a house on its own, which means that in virtually all cases that involve a closely-held corporation or LLC a shareholder or member will be exposed to allegations of tortious conduct if the homeowner is unsatisfied with the result, which isn’t that uncommon. For the small business owner, the limited liability shield may prove to be worthless because he will likely have been directly involved in carrying out the entity's contracts. This isn’t the expectation of most people, and raises a serious issue of fairness in how the limited liability shield operates. More importantly, it demonstrates the inequitable result Agent Liability produces.

F. The Trump University Case

Low, et al. vs. Trump University, LLC., et. al.\textsuperscript{84} provides another good example. The Trump University case was brought against both Trump University, LLC, and Donald Trump personally, for alleged fraud, negligent misrepresentation, and various common law and statutory causes of action in connection with the marketing and operation of Trump University. The case essentially grew out of customers' disaffection with the information and advice provided by programs they purchased.

Even a complex business structure offers no defense to potential personal liability due to allegations of tortious conduct. Trump set up a sophisticated business structure to operate the program. According to the Complaint, Trump University, LLC, which later became The Trump Entrepreneur Initiative LLC, ran the university. Trump University, LLC, in turn, was part of the Trump Organization, a conglomerate of companies of which Donald Trump is Chairman of the board of directors, President and CEO. Money from Trump University, LLC was distributed to Donald Trump through, in the words of the plaintiffs, two "shell" companies, namely DJT University Managing Member LLC (currently DJT Entrepreneur Managing Member, LLC), and DJT University Member, LLC (currently DJT Entrepreneur Member LLC).\textsuperscript{85} This structure did not change the outcome when the court denied Donald Trump’s personal Motion for Summary Judgment, which proves the second principle.

The Complaint was 84 pages long and contains allegations of misstatements by the LLC, with whom the plaintiff's contracted, and Donald Trump’s personal participation in organizing, promoting, and running the programs.\textsuperscript{86} A significant portion of Donald Trump’s Motion was based on what he described as his limited involvement in Trump University, LLC:

Mr. Trump replies that – even though he reviewed and approved advertisements, had an ownership stake in TU indirectly through two other limited liability companies (of which he is the controlling member), and periodically reviewed TU financial statements – Mr. Trump is not personally liable because he did not control the day-to-day operations of TU.\textsuperscript{87}

\textsuperscript{84} The case was formerly known as Makaeff, et al v. Trump University, LLC, et al. Litigation documents also are available at http://www.trumpuniversitylitigation.com/Home/Documents. Last The case was pending in the United States District Court for the Southern District of California. Docket No. 3:10-cv-00940. A jury trial was set for after the 2016 presidential election. After Trump win the election, the case was settled for $25 million. See https://www.cnn.com/2018/04/10/politics/trump-university-settlement-finalized-trnd/index.html. Last accessed May 1, 2018.
\textsuperscript{85} Id at ¶ 32 and 34
\textsuperscript{86} Id at ¶ 65
\textsuperscript{87} Order Granting in Part and Denying in Part Defendants' Motions for Summary Judgment, Nov. 18, 2015, p. 18
The court's decision denying Donald Trump's Motion essentially came down to the allegations of Donald Trump's personal participation in promoting and running the program. In denying the Motion with respect to the plaintiffs' UCL, FAL, and CLRA claims, the court said:

Plaintiffs point to the following connections between Mr. Trump and TU:
(1) Mr. Trump is the founder and Chairman of TU, and authorized TU to use his name, feature Mr. Trump’s quotes, image, logo, and signature; (2) TU’s print advertisements, email correspondence, letters, and TU website content prominently feature Mr. Trump’s quotes, image, logo, and signature; (3) Mr. Trump reviewed and authorized advertisements; (4) Mr. Trump personally financed TU and reviewed financials; and (5) Mr. Trump represented that he hand-picked the TU instructors and mentors. (ECF No. 386 at 30.)

Thus, "the Court concludes that Plaintiffs have raised a genuine dispute of material fact as to whether Mr. Trump can be personally liable for the alleged misrepresentations and misconduct." Concerning the issue as to how Donald Trump could be held personally liable when the university was operating as an LLC, the court cited the common law rule that an agent is liable for his own tortious conduct, irrespective of the fact that his principal may also be liable under Respondeat Superior, and despite a limited liability shield:

See also Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734 (9th Cir. 1999) (“A corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf.”) (internal quotation marks and citation omitted) . . .

Trump’s personal involvement in the enterprise appears to have been minimal at best, and hardly noteworthy. This is not unexpected. It would be hard to believe that with the breadth and scope of all of Trump's business dealings, he would have been personally involved to any significant extent in the Trump University enterprise. In short, minimal allegations of personal involvement may be sufficient to trigger personal liability for tortious conduct, based really on the other party's dissatisfaction with the outcome of the contract. With respect to the small business owner who is operating a closely held LLC or corporation, more extensive personal involvement can be expected. The result essentially is a wholesale exception to limited liability when one party is dissatisfied with the other party's performance, which seems unfair at best.

It's hard to believe that founding an LLC, acting as its Chairman, personally funding an LLC, or looking over its financials, amounts to evidence of personal involvement that can trigger Agent Liability, but that is the state of the law. The real culprit is Agent Liability. Agent Liability doesn’t reduce, but instead increases costs to society by encouraging frivolous litigation against owner/agents of separate legal entities.

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88 Id. at p. 22  
89 Id. at p. 23  
90 Id. at p. 22
G. Cases in Canada and Australia Question the Fairness of Agent Liability in this Context

Cases in Canada and Australia acknowledge this unfairness in the context of liability of corporate directors. Under the "Mentmore Manufacturing Test" that was developed in Canada, directors are personally liable for patent infringement based on intentional conduct. However, the test relieves directors from liability for patent infringement that is based on ordinary negligence when liability is transferred to the principal (the corporation):

A corporation is an abstraction; a creature of statute. It can carry out acts only because the law attributes to the corporation certain actions of its directors and officers. Thus a corporation can interfere with the rights of a third party only when the acts constituting the unlawful interference are attributed to the corporation. There is a reason why, in that circumstance, the law should not impose liability both on the corporation for unlawful interference and separate liability on the director or officer for procuring that interference.91

This same test is also applied Australia.92 The traditional "Performing Right" test that has been used in these cases has been criticized because "In the extreme, but familiar, example of the one-man company, that would go near to imposing personal liability in every case."93

VIII. ABOLISHING AGENT LIABILITY: SAFEGUARDS

A. Piercing of the Veil of Limited Liability

Critics might argue that abolishing Agency Law would lead to agents creating sham agency relationships with separate legal entities to escape personal liability. However, a sham agency relationship will not be recognized under current law. The doctrine of piercing the veil of limited liability is more than adequate to prevent such behavior, if it did occur. If the agent and principal are one in the same, there is no agency relationship. There are a multitude of theories that support piercing of the veil of limited liability. These theories include fraud, inadequate capitalization, failure to observe company formalities, and comingling the business and finances of the entity and the owner to such an extent that there is no distinction between them.94 By definition, any agency artifice that was designed to avoid liability would involve an undercapitalization of the principal, and thus be ineffective.

Most cases where a separate legal entity isn’t recognized involve “(i)mproper conduct . . . in cases in which the corporation was a mere device or sham to accomplish some ulterior

92 See, e.g., Keller v LED Technologies Pty Ltd, 268 ALR 613 (Vic. Dist. Austr. Ct. of Appeal 2010)
93 Id. at Para. 387
94 51 Am. Jur. 2d Limited Liability Companies § 20
purpose ... or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose.”

Of course, piercing of the veil makes the owners of the entity liable, not non-owner agents. It could be argued that agents might attempt to thwart piercing of the veil by disguising ownership of the principal through other entities. Cleary, that wouldn’t be effective. "Courts will look through the screen of corporate entity to individuals who compose it in cases in which corporation is a mere device or sham to accomplish some ulterior purpose, or is a mere instrumentality or agent of another corporation or individual owning all or most of its stock, or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose.”

Piercing of the veil of limited liability applies equally to LLC’s, possibly with the exception of failing to follow "corporate formalities", such as holding or formally waiving annual meetings of shareholders and directors, which are requirements that do not apply to LLC’s. In all other respects, the doctrine is the same, meaning an LLC could not be used for this purpose either. There also is no reason that these same principles wouldn’t collapse a sham agency between an agent and a real person, in addition to an artificial person.

Further, a sham agency relationship would be unlikely occur with respect to publicly-traded companies, or large closely-held entities. Thus, if it occurred, it would be on a small scale. In addition, a sham agency would be highly unlikely to be effective whether or not Respondeat Superior applied. A sham agency would be the product of intentional wrongdoing, and Respondeat Superior normally wouldn’t apply because the conduct would be outside the scope of the agency. If the conduct were within the scope of the agency, the principal and the agent would be independently liable based on their intentional misconduct. Thus, either way, what may at first glance appear to be an issue actually is not an issue at all.

B. Mandatory Insurance Requirements

Mandatory insurance requirements, either imposed statutorily (such as mandatory auto insurance with minimum liability requirements, or medical malpractice insurance), or through contract (such as errors and omissions policies that are required by banks of lawyers who represent them in real estate closings), especially for higher risk activities, are another way that would defeat any attempts to take advantage of the abolishing Agency Law. These requirements exist now, but could be expanded if necessary in the future. For example, the party who contracted with the builder for construction of a home in Jennings v. Smith could easily have required to the builder to show proof of liability insurance in connection with the contract. In fact, it would be standard practice for a bank providing a construction mortgage to require proof of insurance from the builder as a condition of the loan.

IX. ABOLISHING AGENT LIABILITY IS CONSISTENT WITH GENERAL TORT THEORY

95 Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1320 (11th Cir.1998)
96 Aztec Motel, Inc. v. State ex rel. Faircloth, 251 So.2d 849, 852 (Fla.1971)
97 See §304(b) and Comment to §304(b) of the Uniform Limited Liability Company Act of 2006 (Last Amended 2013)
98 See fn. 78, supra
A. Theories of Tort Liability

Two common theories supporting liability for tortious conduct are "deterrence" and "achieving corrective justice between the parties." Deterrence has largely been explained in economic terms, i.e., reducing costs to society. Proponents of each theory have sought undermine the other theory, suggesting that each theory has its shortcomings. Gary Schwartz developed a mixed theory supporting liability for tortious conduct that makes analogies to criminal justice and combines both theories. Abolishing Agent Liability is consistent with both theories, and Schwartz’s mixed theory. Abolishing Agent Liability does not mean abolishing liability for tortious conduct because the principal would still be liable under Respondeat Superior. Deterrence and corrective justice would still occur.

B. Abolishing Agent Liability and Deterrence

Some still would argue that Abolishing Agent Liability would impair deterrence. However, someone advancing that argument must be called on to show that elimination of Agent Liability for millions of government workers by the Federal Tort Claims Act has led to a rash of irresponsible conduct by these employees. Or that Abolishing Agent Liability under the Economic Loss doctrine has caused irresponsible behavior. Or that the elimination of all personal liability for members and managers of an Illinois LLC, even for intentional misconduct, has led, in any significant way, to irresponsible behavior and costs to society.

Further, deterrence is a function of much more than personal liability. An agent who commits a tort that makes his principal liable under Respondeat Superior would face repercussions by his employer. A simple example would be a truck driver who crashes his truck due to his negligence. The driver would almost certainly face discipline by his employer, if not outright termination, depending upon the injuries and damage he caused. Damage to reputation is another factor than attenuates bad behavior.

Moreover, the deterrent effect of personal liability is questionable because, on average, most people do the right thing, guided by conscious and a reasonable assessment of the situation. A good example of this is a 1996 study of highway traffic that was conducted in Michigan. The study found that, on average, drivers exceeded the posted speed limit on highways, despite the supposed deterrent effect of fines for speeding, and that drivers travelled at what they deemed to be a reasonable speed, slowing down in areas with obstacles, turns, and traffic congestion, and speeding up in other areas. In the words of the authors:

By and large, those results lend credence to the argument that motorists drive at speeds that they feel are appropriate, apparently independent of the posted speed. On urban-55 segments, where drivers are more confined by the geometric

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100 Id.
101 Id.
102 Id.
103 See http://www.usroads.com/journals/aruj/9709/ru970901.htm. Last accessed on April 29, 2018
characteristics and more likely to encounter congestion, speeds are considerably slower than in fringe-55 areas, which are more open and less congested.\textsuperscript{104}

This is not to say that there aren’t some people who would try to take advantage of the situation where Agent Liability doesn’t exist. However, it does mean that any problem would be much smaller than some would imagine.

Abolishing Agent Liability also would be expected to decrease, not increase, costs to society because it would discourage frivolous lawsuits, thus improving deterrence. The multiple counts in the Complaint in Low, et al. Vs. Trump University, LLC., et. al.\textsuperscript{105} proves this principle. The Complaint included counts for:

1. Violation of California’s Unfair Competition Law (”UCL”);
2. Violation of California’s False Advertising Law (”FAL”);
3. Violation of California’s Consumers Legal Remedies Act (”CLRA”);
5. Violation of New York’s consumer protection statute, Section 349 of NY’s General Bus. Law;
6. Violation of Florida’s consumer protection statute and elder abuse law, Florida Deceptive and Unfair Trade Practices Act (”FDUTPA”);
7. Violation of Florida’s Misleading Advertising Law (”MAL”);
8. Negligent Misrepresentation;
9. Fraud;
10. False Promise;
11. Unjust Enrichment;
12. Money had and Received;
13. Breach of the Covenant of Good faith and Fair Dealing (against Trump University, LLC only); and
14. Breach of Contract Dealing (against Trump University, LLC only).\textsuperscript{106}

What arguably was just a breach of contract case against Trump's LLC was expanded into a 14 count Complaint, with 12 of those counts alleged against Donald Trump personally. While a number of these counts are statutory, five counts (8-12) are based on alleged tortious conduct by Donald Trump. It’s a given that we live in a litigious society. It’s also a common practice for plaintiff’s lawyers to use a "shotgun" approach such as this in pleading, and include as many counts as could possibly be imagined, sounding in contract, tort, and alleged statutory violations, against many parties as possible. Everyone understands what elder abuse is. To allege that Trump was guilty of elder abuse in this case is an insult to what is a real issue in our society. Agent Liability is one cause of excess litigation.

\textsuperscript{104} Id.
\textsuperscript{105} The case is currently pending in the United States District Court for the Southern District of California. Docket No. 3:10-cv-00940. A jury trial is set for after the 2016 presidential election. The case was formerly known as Makaeff, et al v. Trump University, LLC, et al. Litigation documents also are available at http://www.trumpuniversitylitigation.com/Home/Documents
\textsuperscript{106} Compl. ¶ 20
\textsuperscript{107} See Counts 4 and 6 in the Complaint
B. Abolishing Agent Liability and Corrective Justice

Some would also argue that Abolishing Agent Liability would impair corrective justice. However, the fact that the principal would still be liable contradicts this argument. The elimination of Agent Liability for government employees under the federal Torts Claims Act, and for private employers under the Economic Loss doctrine, also undermines this argument. Someone making this argument should be required to produce evidence that these practices have impaired corrective justice. Outside of these areas, compensation of the victim of ordinary negligence is virtually guaranteed by the doctrine of Respondeat Superior in the case publicly traded corporations, or larger private corporations. Piercing of the veil of limited liability and insurance would both help ensure compensation to the victim in other cases.

CONCLUSION

Agent Liability did not exist in early England. It developed from an error, which was compounded by another error. Under the Master Servant rule, an agent is supposed to be released from liability for ordinary negligence when liability is transferred to the principal. There was never an intent that both the principal and the agent be held liable. Scholarship concerning Agent Liability is lacking because the focus has been on Respondeat Superior, and because excusing someone from liability for ordinary negligence is considered so extreme there has been reluctance to even bring up the subject. However, when the rationale for Agent Liability is examined, it does not withstand scrutiny. Accordingly, Agent Liability should be abolished.