



## Ethics in Legal Negotiation: A Cross-Cultural Perspective

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***Editors' Note:** From Chinese and American perspectives, the authors consider a Chinese negotiation class, when presented with an ethical problem or two, as a lens. They examine the implications of the students' decisions for Chinese negotiations, particularly in an environment of law practice. In turn they use these as the basis for an analysis of the larger implications of a rapid and disorienting series of recent changes in Chinese law and legal practice.*

### Introduction

The *Rethinking Negotiation Teaching* Conference held in May of 2011 in Beijing presented numerous opportunities to expand one's view of negotiation and the issues presented from a variety of international perspectives. One such opportunity was the privilege of watching a negotiation class and observing both the students negotiating and the classroom debrief. The particular negotiation simulation raises issues of disclosure – both whether disclosure is required under the law and whether it is mandated by some set of moral values. The negotiation and the debriefing led to a discussion among conference participants

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of differences between the United States and China, which proved quite interesting. This essay expands on that conversation. First, we outline in more detail what we observed during the class. Second, we discuss the current situation in China in terms of ethics codes, requirements, and education. Finally, we offer suggestions on teaching cross-cultural negotiation in both the United States and China, given the differences in approach.

### **An Ethics Class Within a Chinese Negotiation Class**

Conference participants observed a negotiation class taught by our colleagues Andrew Wei-Min Lee and Vivian Feng Ying Yu at Peking University. The class is taught in English, and the students who are taking the class are obviously some of the best and brightest – Peking is the one of the best universities in China, and all of the students we met already spoke beautiful English. This was all the more impressive since their English-speaking skills were all classroom-taught and not from travels abroad or endless television watching.

The class negotiated a version of the DONS simulation from Harvard's Program on Negotiation.<sup>1</sup> In this case, lawyers are negotiating a settlement between a woman and the man whom she infected with a deadly disease (think early-day AIDS with no cure). He has quit his job and has given away all of his possessions. The catch is that the man was just tested again and, it turns out, does not actually have the disease. He is in the 0.1 percent of the population that is immune. He tells his lawyer not to tell the other lawyer or the woman, because he wants her to suffer and pay him as much as possible. On the woman's side of the negotiation, it turns out that she has recently inherited a significant amount of money, and does not want this fact shared with the other side. She wants to protect the money to support her young daughter after she herself dies from the disease. Should either of the lawyers reveal their "secret" in the negotiation? (For those of you who are not familiar with the simulation, STOP: What would *you* do?)

The students negotiated – in English – in a courtyard of the university, with four or five conference participants observing each negotiation. They then discussed the negotiation with those observers, as Professor Lee rotated among the groups to get a sampling of the content. After ten to fifteen minutes of discussion, all the groups reconvened in the classroom for a large group debriefing led by Professor Lee.

In the small groups, the visiting observers responded to the way each negotiation developed. They were not given instructions on topics to cover in the debriefings, and some participants were not famil-

iar with the DONS problem. As a result, the content of the discussion probably varied among the groups. In both small groups in which co-authors of this chapter participated, conversation centered on how the students had approached the negotiation, what they were trying to accomplish, and the thought process behind their choices. These negotiations had quickly moved to haggling over very specific monetary terms. The observers explored other possible, mostly interest-based, approaches with the students.

There was some discussion about the information that the lawyers had been instructed not to share, but this topic was not the dominant theme of the small group debriefing. Neither side in the negotiation had disclosed their sensitive information and all of the students said they were comfortable with this decision. They appeared to assume that they had no choice but to follow the client's instructions. The observers raised both utilitarian and strategic questions about what might have been lost by not disclosing, as well as the effects of not disclosing over the long term, when the omissions eventually would become apparent to the other side (the daughter of the dying woman would eventually learn that the boyfriend was healthy, and the lawyers would also likely interact again in other cases). Being ignorant about the professional responsibility framework for lawyers in China, however, the observers in our groups did not discuss the students' decisions to maintain secrecy in the context of ethical rules. The Chinese rules were outside the expertise of the foreign observers, and it would have seemed presumptuous to introduce U.S. or other national rules with which we were familiar.

When we returned to class, it turned out that *none* of the students in any negotiating group had revealed the information. In addition, when all of the information was revealed during the debrief, none of the students seemed perturbed or angry about this situation and how it might have affected their negotiations. Both of these results were rather different from what is often seen in U.S. classrooms when there is "hidden" information. Current U.S. contract law on fraud would void any settlement where a material fact was false – and there was consensus among the observers that the fact of the favorable test result was material.<sup>2</sup> Additionally, under U.S. rules of professional responsibility, a lawyer must correct a misimpression (the health status of the plaintiff) when that is material.<sup>3</sup> (Although the financial information of the defendant is interesting, it is not considered material under U.S. law.<sup>4</sup>) When those of us who have taught DONS or similar cases with secret information in the United States to students who do not reveal the new information (and this clearly does happen in class), we often see a shaming or backlash in the classroom discus-

sion after the negotiation. Students are generally confronted on their lies in terms of the morality of lying about the health condition, as well as suffering strategic and reputational costs when the lie is discovered.<sup>5</sup> Debrief afterwards often focuses on the law, the requirements under the rules of professional responsibility, and reputational costs. Students who have committed the lie often apologize or defend their actions (mistakenly) as required under the rules. Students who are lied to are generally not blasé but rather indignant. It was interesting to the foreign observers that this type of conversation did not occur in the classroom in China.

In addition, neither the students nor the professors in China delved into the conversation of what was required under the law or what a lawyer “should” do – this was rather different from the emphasis on external rules when the same situation gets taught in the United States. Several students emphasized that they would not do anything illegal, leaving foreign observers unsure if the settlement in this case would be fraudulent under Chinese law. Of course, it is rather difficult to draw broad conclusions about what we saw given that the law students were negotiating in a second (or third) language, in front of observers, and that the debrief was conducted in public. The students and their professors could well have been circumspect in their criticism of their peers.

Another possibility is that the questions raised in the debriefing reflected a Confucian approach to ethics that focuses on an individual’s internalization of social norms rather than an external rule set (Yu Dan 2006). Students were asked, “What did we learn about being a lawyer?”, “What did we learn about who we are now?” and “What did we learn about what kind of person we would like to be?” The last two questions in particular frame the ethical issues from the “inside out,” with a starting point of personal ethics, rather than the “outside in” of abiding by external standards.<sup>6</sup> These questions did spark a discussion that seemed similar to aspects of a classroom debrief of this topic in the United States. Many of the students discussed how being a lawyer was different in some way from their conception of themselves as a person – that you have responsibilities to your client, those duties might not agree with your personal morality, and so you need to separate them. This theme is similar to the ongoing debate in academic journals about separating your professional identity from your “regular” identity.<sup>7</sup> Students argued in class that your duty is to protect your client, and that may include lying. It was interesting, however, that one of the students did worry about his reputation among lawyers in Beijing (a city of twenty million!). This definitely brings home the point that professors often make in U.S. classes in

much smaller cities about the importance of building a good reputation in the legal market (Tinsley, Cambria, and Schneider 2006). If law students even in Beijing worry about their poor reputation for trustworthiness getting around, we should recognize that mere population size is not sufficient to shield lawyers from their poor reputations and the consequences that come from that.

### **Lawyers' Ethics and Legal Education in China**

Given this class as a backdrop, the next section discusses the framework for legal ethics in China and how it is taught. As China's legal system has been evolving in the last two decades, it is clear that the ethics rules are also evolving. Both our experience and the current state of the laws and rules outlined below are snapshots along a changing pathway.

#### ***Norms and Lawyers' Codes of Conduct***

In China, the framework for lawyers' ethics is prescribed in Article 3 of the Law of the People's Republic of China on Lawyers ("PRCL") which requires that "in practicing law, a lawyer must observe the Constitution and laws and adhere to the professional ethics and practicing disciplines of lawyers." (Law of the PRC 2007).<sup>8</sup> More detailed rules are provided in the Code of Conduct for Lawyers (Code 2004). The Code sets forth guidelines that govern the practice of law, standards for judging whether a lawyer's acts correspond with these professional requirements and the basis for imposing punishment on lawyers or law firms that violate the regulations. It contains 190 articles, of which seventeen are specifically related to lawyers' ethics. Chapter II of the Code, entitled "Professional Ethics of Lawyers," provides basic rules and duties applicable to lawyers. The requirements include obligations for lawyers to be loyal to the constitution and law, to be honest and faithful, to be diligent and devoted to their duties, to protect the interests of the clients, to safeguard the dignity of law, and to maintain fairness and justice in society according to the law and rules of confidentiality. Regarding the confidentiality obligation to the client, both the PRCL and the Code have similar provisions. Article 38 of the PRCL states

A lawyer shall keep confidential the secrets of the State and commercial and secrets of the parties concerned that he or she comes to know during his or her legal practice activities and shall not divulge the private affairs of the parties concerned except for the criminal facts and information prepared or conducted by the clients or other people which is harmful

to state security, public security or other person's physical or property safety.

Any breach of the confidentiality obligation to the client, as in "discussing commercial secrets or private affairs of a party concerned," may subject the lawyer to a suspension of the law license for three to six months and/or a monetary fine according to the Article 48 of PRCL. Article 9 of the Code also requires a lawyer to keep confidential state secrets, clients' business secrets and personal privacy. Article 59 of the PRCL maintains this confidentiality obligation for former clients as well.

As in other jurisdictions around the world, there are also exceptions to the rules governing confidentiality that sometimes permit the refusal of services or revelation of the confidential information. For example, Article 32 of the PRCL states,

[a]fter accepting authorization, a lawyer shall not, without good reason, refuse to defend or to represent a client. However, if the matter authorized violates law or the client uses the service provided by the lawyer to engage in illegal activities or the client intentionally conceals the material facts, the lawyer shall have the right to refuse to defend or to represent the client.

In addition, Article 56 of the Code permits lawyers to reveal confidential information if keeping it confidential will result in injury and other criminal conduct, or if the information is harmful to state interests. Also, Article 58 of the Code permits a lawyer to disclose a client's relevant information to protect the lawyer's rights if the lawyer is innocently involved in any client's criminal conduct during the representation process. Similarly, Article 71 of the Code requires lawyers to suggest to clients alternative courses of action, or refuse to proceed if the clients want to engage the lawyer to do something that is prohibited by the law or against the Code. Moreover, Article 19 of the Code requires lawyers not to conduct, or assist clients to conduct, any illegal or fraudulent activities, and Article 17 of the Code states, "The lawyer should not only consider law, but also consider in a proper manner regarding morality, economic, society, politics and other elements relevant to the clients when they provide legal services to clients." If lawyers are engaged in providing false evidence, concealing important facts or intimidating or inducing another with promise of gain to provide false evidence or conceal important facts, they will be subject to civil and criminal liability. In all, although lawyers need to comply with the duty of confidentiality when they provide legal ser-

vice to their clients, lawyers may not facilitate illegal and fraudulent activities; activities that harm the state and public security; or any activities that could harm other person's physical and property safety.

According to Article 46(4) of the Law on Lawyers, the ACLA and local lawyers' associations shall organize lawyers' training and education on professional ethics and practice, and conduct assessments of lawyers. In practice, the Training Section and the Commission on Professional Education of the ACLA and local lawyers' associations organize professional training both regularly and as needed. Formal training courses and legal seminars focused on different legal issues are organized by the ACLA or local lawyers' associations and are delivered by senior, experienced lawyers or by invited governmental officials who are working on legislation.

In addition to the law governing professional ethics for lawyers, China has laws that state the ethical obligations and regulate the behavior of judges, public prosecutors, notaries, and arbitrators. There are also separate, extensive codes of conduct for each of these law-related professions.<sup>9</sup> Although there is some variation among the codes of conduct and legal ethics rules for the different law-related professions, there are some rules in common. For example, giving or receiving bribes is strictly prohibited for lawyers, judges, and ADR neutrals alike.

Finally, new laws on ethics are now also part of the tests for admission to the bar. Since 2002, individuals must pass the National Judicial Examination before they can provide legal services in China (Meiners and Chen 2007). Professional ethics are part of the required subject matter tested on the examination. It is a closed-book, written exam that consists of four sections: comprehensive knowledge; the criminal and administrative legal system; the civil and commercial legal system; and case analysis. Each section is weighted equally, and lawyers' ethics accounts for less than one-tenth of the points allotted to the first section. Comparing this with the exam points allocated to other legal subjects for the bar examination, the exam points allocated to ethics questions obviously weigh much less. Thus, we would suggest adding more weight for the ethics questions in the bar examination in the future, as to some extent this signals to new lawyers the degree of importance of the professional ethics standards that they need to comply with in their future legal career.

In China, besides ethics questions on the bar examination, new lawyers are also required to take a one-month intensive legal training program designed to ensure quality of service. This includes training courses on legal ethics as well as writing and other legal subjects. The new lawyer is also required to serve one year as an intern-lawyer

in a Chinese law firm before he or she can become a practicing lawyer. During this period, the new lawyer cannot handle legal cases or provide any legal services except with the supervision of a qualified practicing attorney. After the internship period, there is a continuing legal education requirement. Every practicing lawyer is required to take a certain number of hours of training courses each year and pass an annual check to maintain her or his status as a lawyer. Failure to complete the legal training courses may impact on further renewal of lawyer's license. Any breach of the PRC lawyer's code or of the code of conduct for lawyers may also result in suspending or losing the lawyer license and/or undertaking any civil or criminal liability.

In addition to the guidance for lawyers in the law and codes described above, China also has a rich tradition of looking to cultural norms and tradition to find moral principles and guidance (Chew 2005). The concept of positive law in the form of statutes and governmental codes, termed *fa*, coexists with a strong traditional reliance on rules of proper conduct based on social and cultural norms, termed *li*. Wejen Chang (2000) describes a centuries-old debate in China between "Legalists," who emphasize predictable order and maintain that the government should rely on the dictates of *fa*, and "Confucians," who argue that the highest, most authoritative guide for behavior is the more flexible *li*, which allows rulers to exercise their discretion in the interests of the community. Confucius taught that observance of *li* would make resort to *fa* unnecessary. While upholding *li*, Confucius denigrated the role of law (*fa*) and legal process. He said, "I can hear a court case as well as anyone. But we need to make a world in which there is no reason for a court case." Confucius believed "that law can convict and execute people, but it cannot teach humanity, kindness, benevolence and compassion" (Rin 1997).

Chinese tradition and culture emphasizes social harmony and a stable social order. The difference, for example, between how mediation has worked in China and in the United States demonstrates these different goals. Mediation in the West has often focused on settlement based on satisfying individual interests, while mediation in China has focused on restoring harmony (Phillips 2009). While the modern view in China is that a robust legal system will definitely help achieve that goal, law in the sense of codes is not regarded as omnipotent, even in the face of societal changes that have accompanied rapid economic development. No matter how robust and mature the legal system is, many do not see it as a guarantee of a safe, stable life and work environment. The extensive promulgation of legislation in many areas may even have contributed to misimpressions in the West about the actual extent of legal change that has occurred (Feinerman

2000: 304–305). Given the discretion of governmental officials consistent with the tradition of *li*, there is a degree of uncertainty about interpretation and enforcement, and there exists, in general, a “discrepancy between what a literal reading of the laws might indicate and the effective meaning of the law” (Chew 2005: 62). And although the legal system is changing in China, the role of personal relationships in a system with a Confucian emphasis on governance by ethics over governance by rule means that personal relationships can be important in how the law is applied (Rivers 2010).

### *Ethics Education in Chinese Law Schools*

It is hard to draw a map of ethics education in Chinese law schools because of the difficulty of collecting information from over 600 law schools and law departments and the lack of nationwide uniform standards for curriculum design for elective courses.<sup>10</sup> Therefore, this discussion is somewhat ad hoc, and is based on the authors’ experiences with individual law schools and discussions with law professors. It considers three aspects of legal ethics education: how the course fits into the curriculum; the scope of the course and who teaches it; and available textbooks.

There is a great deal of variation among Chinese universities in the teaching of legal ethics. Some universities do not teach the subject; some devote a portion of another legal course to the topic of ethics; and some offer an independent course devoted entirely to legal ethics. The second pattern is perhaps most prevalent in China.

Even among the law schools that offer an independent legal ethics course, there is no unified practice. These schools include the China University of Political Science and Law, Beijing Normal University, Jilin University School of Law, and the Renmin University School of Law.<sup>11</sup> For example, the Jilin University School of Law offers a thirty-two hour course (two credits) that is required for the more than 300 undergraduates each year, but it does not offer a comparable course for graduate students. In contrast, the Renmin University of China Law School not only offers a thirty-six hour course (two credits) that is required for undergraduates, but it also has a separate elective course for the Juris Master program graduate students. These courses do not focus exclusively on the topic of lawyers’ ethics, but incorporate the subject into a course that covers legal professional ethics more broadly. These courses, with names such as “Legal Ethics” or “Legal Professional Ethics,” cover the ethical rules applicable to judges, prosecutors, notaries, and arbitrators as well as those designed for practicing lawyers.

There is also variation regarding who teaches legal ethics courses. At China University of Political Science and Law, the practice is to either designate a full-time law professor to teach the course or to invite external legal practitioners to teach together with law school professors. At Beijing Normal University, the semester-long legal ethics courses are taught by invited lawyers, judges, or legal governmental officials. The school believes these legal professionals will bring more practical legal experience and, through the analysis of real cases, law students will gain a better understanding of the importance of learning and observing the legal ethics rules.

There are a number of textbooks edited by Chinese law faculty available for teaching legal ethics courses (see, e.g., Zhang Shihuan 1988; Cao Hong Da 1991; Li Jianhua and Cao Gang 2002; Wang Jinxi 2002; Benson 2008; Liu Zhenghao 2010). These textbooks present the basic principles and norms of legal ethics and the interpretation of these norms. They also provide Chinese and foreign cases and supplementary readings for the students to discuss. In addition, some material on Western legal ethics is available in translation (see O'Dair 2007; Luban 2010).

## Implications for Teaching Legal Ethics <sup>12</sup>

### *The Challenge for Chinese Law Schools in Lawyers' Ethics Education*

Although Chinese law schools have established prototypes of a course in lawyers' ethics, they still face challenges to clarify the objectives of the course and to improve its quality and effectiveness.

As professional legal education in China is still at an initial stage, the objectives and functions of teaching legal ethics are not clear. Due to the rapid economic and social transformation over the past few decades, China's legal profession and legal education have undergone dramatic changes. Three decades ago, Chinese lawyers were identified by statute as "state legal workers" (see Provisional Regulation of the People's Republic of China on Lawyers, promulgated in 1980).<sup>13</sup> That emphasis on serving the state changed in the Law of the People's Republic of China on Lawyers, promulgated in 1996, which identified lawyers as "practitioners who provide legal service for society." More recently, the emphasis has changed again, in the Law of the People's Republic of China on Lawyers promulgated in 2007, to identify lawyers as "practitioners who provide legal service for a client" (Huang 2010). If one stops to unpack their implications, these changes are radical.

At the same time, Chinese legal education has also gone through four stages of development: the full restoration and rapid development period (1978-1987); standardization period (1988-97); large-scale expansion period (1998-2002); and the adjustment period (2003-present) (Ji 2010). To date, the Chinese legal profession and legal education have moved forward on a path of specialization and professionalization. As part of that trend, teaching legal professional ethics has come to be considered as important in legal education as legal knowledge and skills (Xu 2007; Huo 2007). But what is the relationship between legal ethics and the legal profession? Can educating lawyers about legal ethics rely solely on completing a course? How, and to what extent, can the teaching of legal ethics contribute to enhance the ethical thinking, self-education, and capacity for self-development of China's lawyers (Qi 2002; Zhang 2010)? Chinese law schools need to find answers to these questions if they want to achieve the goal of training the country's legal talent with a belief in the rule of law and a commitment to being loyal to law and justice.

Another challenge comes from the fact that the current quality and effectiveness of the typical course in legal ethics offered by Chinese law schools is far from ideal. When the course is an optional elective, only a small portion of students select the course, and law school graduates do not have strong professional ethics training. To solve this problem, we believe the current teaching format has to be changed at least in two aspects. One is that the courses should be designed to teach the *method and process* of resolving ethical problems, rather than instilling ethical norms. Second, and relatedly, the lecture-style teaching method should be replaced by a problem-style teaching method (Hamilton and Munson 2011a). To do this, teachers need to transform themselves from being the sole speaker in class into a role as questioner and moderator of classroom discussion. It will be important to train teachers who show promise in these skills, as well as for Chinese law schools to build up high-quality teaching teams to engage in the education and research of legal ethics.

Whether legal ethics courses are taught by law professors or external legal professionals, it is important that they combine theory and knowledge of the rules with real legal practice. This will enable law students to understand the necessity of learning the legal ethics rules and following them in their upcoming legal career. By introducing and analyzing real cases regarding the consequence of breaching legal ethics, students will not only learn what they should or should not do, they will also understand that a breach of legal ethics rules may endanger or ruin their reputation, or subject them to civil or criminal legal liability.

Another important note for those teaching Chinese lawyers who will then do business elsewhere is to make sure that Chinese lawyers understand the different ethics codes in the foreign jurisdictions. As we know, there can be significant reputational ramifications to deception even if there are no legal or other direct ethical consequences for the client or lawyer. While some Chinese lawyers may not worry about U.S. rules that do not apply to them, others might. And the effect of a poor reputation would be even more unfortunate if the Chinese lawyer did not know what was expected, and incurred reputational costs without ever considering them.

At a minimum, we hope more Chinese law schools will incorporate legal ethics courses into their curriculum. Following legal ethics rules represents, to some extent, the maturity of a country's legal system, and enhances the quality of the legal service provided by legal professionals.

### *Teaching Challenges in the United States*

In the United States, law schools have longer experience with courses in legal ethics than those in China.<sup>14</sup> Mandated after the Watergate scandal, ethics classes are required for all graduates of U.S. law schools (Pearce 1998). Almost all states also require a separate ethics exam, the Multistate Professional Responsibility Exam (MPRE), to be admitted to the bar. And versions of the Model Rules of Professional Responsibility (previously the Model Code and the Canon of Professional Ethics) date from 1908. That does not mean that there is no room for improvement in the teaching of the subject, for example, by also incorporating the topic into the fabric of substantive courses. Similarly, despite the fact that ethics rules are both taught and applied across the board, the dilemma as presented at the beginning of this article (the DONS problem) confounds a significant number of U.S. lawyers. Art Hinshaw and Jess Alberts (2009), studying lawyers' behavior, used the DONS problem as the hypothetical, when lawyers were asked to hide the fact that the client is now healthy. They found that only one-third of lawyers studied fully reject the client's desire to hide this material information, even though, in doing so, lawyers are assisting their client in committing fraud. We know that U.S. teachers must also remain vigilant in explaining the current ethics rules and law – and in understanding the psychological pull that creates ethical dilemmas for lawyers.<sup>15</sup>

This section, however, will concentrate on the challenges of legal ethics in the setting of an international practice. It is clear that as the practice of law continues to expand internationally, all nationalities need to learn about the assumptions of practice, as well as

laws and codes of conduct in other countries.<sup>16</sup> With the growth of transnational and international law practices, U.S. law schools have introduced international perspectives through new courses, study abroad programs, exposure to foreign Masters degree students, and some integration into assigned readings and discussion in traditional courses (Daly 1998; Terry 2005). Mary Daly (1998: 1249) argued that the professional responsibility course needs to incorporate the subject of international legal practice in order to prepare students to be the “first generation of global lawyers.” This argument can be extended to other courses, such as negotiation, which typically cover selected aspects of professional responsibility rules.

There are many differences among national lawyer codes of conduct, in terms of both their overall approach and their specific content. Daly (1999) contrasted the law-like enforceable nature of U.S. codes of conduct with the more general norms experienced by lawyers trained in other systems. Moreover, specific differences in the content of codes can pose thorny conflicts-of-law issues for international law firms with offices in many jurisdictions. Which professional standards should apply to a cross-border transaction involving lawyers from many countries, when there is no obvious home or host jurisdiction (Vagts 2000)? And are lawyers required to comply with the host ethical code as well as, or instead of, their home standards (Lonbay 2005)? In the area of negotiations, one can cite the contrast between the requirement of good faith in contractual negotiations, under the codes of many civil law countries, and the *caveat emptor* standard of bargaining under common law (Rubin 1995; Etherington and Lee 2007).

Other differences are rooted in the lawyer’s duty to the client, which varies even among Western countries. The U.S. legal culture is regarded as more client-centered than the culture in Europe, where lawyers have duties that are more independent of the client (Leubsdorf 1999; Moore 2005). For example, clients may not be able to waive their attorney’s conflicts of interest or professional secrecy rules (Moore 2005). In China, meanwhile, the framework of a lawyer’s duty to his or her client is developing and changing rapidly, as lawyers have over just three decades moved from being defined by statute as “state legal workers” to being defined as “practitioners who provide legal service for a client” (Huang 2010), a more client-based conception of their duties.

More specifically for teaching negotiation to U.S. students, how can teachers convey that differences in the legal environment are intertwined with cultural factors? A review of cross-cultural negotiation studies by Cheryl Rivers and Anne Louise Lytle (2007) found signif-

icant differences in the extent to which business negotiators from different countries used various ethically ambiguous negotiation tactics (EANTs) such as misrepresentation, false promises, and inappropriate information gathering. For lawyer negotiators, legal ethical codes may be more salient than for business people, but, as Laurence Etherington and Robert Lee (2007) point out, those national professional conduct rules themselves reflect shared cultural beliefs about appropriate lawyer behavior that differ from country to country and culture to culture.<sup>17</sup>

In this context, how does one teach about different understandings of lying without creating crippling stereotypes or unhelpful generalizations?<sup>18</sup> Culture can become a huge roadblock in negotiation as the two sides may have completely different beliefs for ethical obligations, especially when stereotypes exist (Nolan-Haley and Gmurzynska 2009). Additionally, when a party uses EANTs that the other side views as wrong and unethical, it will create distrust and anger between the parties (Rivers and Lytle 2007). Nolan-Haley and Gmurzynska (2009) conclude that an appropriate teaching goal is to help students become more aware of and sensitive to the fact that there are differences in cultural value patterns. They suggest discussing the examples of EANTs described in Rivers and Lytle (2007) and asking students to reflect on their own assumptions and behavioral expectations for particular groups. They also suggest a classroom inquiry based on differences in legal systems. In addition to a general awareness of differences in ethical legal traditions, it is important for a lawyer to understand the rules of wherever he or she might be practicing law as well as the evolving customary behavior – all of which are changing rapidly in China.

Similarly, students should have an introduction to the cognitive psychological factors that lead lawyers of all nationalities into ethically challenging waters. For example, bounded ethicality (in which we do not use our ethical lens unless we already view a given decision as an “ethical” decision) often leads lawyers to act in ways that are inconsistent with the ethics they have expressed.<sup>19</sup> Similarly, lawyers make forecasting errors, in which they fail to recognize how the actual pressure of a case can cause ethical issues. In other words, lawyers, like others, predict that they will act ethically when faced with a dilemma in the abstract. If, however, that dilemma actually occurs, a certain percentage of people studied do not follow their overoptimistic assumptions about how they will behave (Diekmann, Tenbrunsel, and Galinsky. 2003). Finally, many unethical actions result from “slippery slopes,” where an early ambiguous decision is used to justify later unethical actions. A better understanding of how unethical deci-

sions can be unleashed by seemingly ethical lawyers will help all law students when dealing with these issues.

## Conclusion

We again want to note how grateful we were for this opportunity to watch negotiations unfold and be permitted to use these students as our basis for reflections on ethics and cross-cultural implications. The dilemma of confidential information, loyalty to a client, and the requirement to reveal information remains a challenging discussion in the United States. To see the same dilemma presented in China gave us the opportunity to perceive this issue through the evolving norms in China. In an increasingly global professional practice, such information about varying laws, culture, ethics, and expectations is crucial.

In the United States, stories about honesty abound as “the” model for good behavior. We are raised with the apocryphal folktale of our first President, George Washington, stating that “I cannot tell a lie,” and refer to President Abraham Lincoln as “Honest Abe.” The role models in China are different, and evolving. The reemergence of Confucius, with the focus on *junzi*, a person of great integrity, might result in similar goals for lawyers (Yu Dan 2006). Yet at present, these cultural assumptions are not aligned. Lawyers in both cultures need to know this and understand this as they work in each culture. And, as the law, government, and role of lawyers continues to change in China, we know that we will need to revisit these conclusions.

## Notes

<sup>1</sup> The case was adapted from *DONS Negotiation*, available from the Program on Negotiation. Available at <http://www.pon.harvard.edu/shop/dons-negotiation/> (last accessed June 15, 2012).

<sup>2</sup> In the United States, there is, nonetheless, a substantial part of the legal population that remains unclear on the definition of a material fact. In a study by Art Hinshaw and Jess Alberts (2011) based on the DONS problem, only 19% of the lawyers surveyed agreed to a similar request by the now healthy plaintiff *not* to disclose his situation to the other side. But another 19% were not sure what they would do (Hinshaw and Alberts 2011: 29).

<sup>3</sup> Rule 4.1 of the Model Rules of Professional Conduct provides:  
Rule 4.1 Truthfulness In Statements To Others

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

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

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

<sup>4</sup> If the financial information were, for example, the basis of the deal, then this information is material. See Restatement (Second) of Contracts, Sections 161, 164, as well as Comment 2 to Rule 4.1. Since here the financial informa-

tion is not the basis upon which the parties are making the contract, it is not material.

<sup>5</sup> For example, reputation is extremely important in negotiation when uncertainty exists about the strategy the other party might use, or the level of trust. If no such indication is given, one might ask herself, what is his or her reputation? Are they a hard bargainer? Or are they relationship-based and negotiate for mutual gain? Therefore, the outcome in many negotiations will completely depend on the perceived reputations of the negotiators, and if negative, this will be at the expense of their clients (Tinsley, Cambria, and Schneider 2006. See also Glick and Croson 2001).

<sup>6</sup> We thank Jayne Docherty for this insight.

<sup>7</sup> For example, Patrick J. Schiltz (1999) maintains that most unethical behavior does not start from making a huge unethical decision but rather from the day-to-day mundane decisions in which your ethics are eroded little by little. He argues for the habit of acting ethically in all of your actions. In the business context, Anne Tenbrunsel writes that when business people view a decision as a “business” decision versus an “ethical” decision, there are similar mistakes. In other words, all day to day decisions need to be made through an ethical lens (Tenbrunsel and Messick 2004).

<sup>8</sup> The Supreme People’s Court of the People’s Republic of China, *Law of the People’s Republic of China on Lawyers*, May 22, 2002, available at <http://en.chinacourt.org/public/detail.php?id=100> (last accessed June 15, 2012).

<sup>9</sup> For example, the China International Economic and Trade Arbitration Commission (CIETAC) code of conduct for arbitrators consists of fifteen articles and the Beijing Arbitration Commission (BAC) Ethical Standards for Arbitrators (<http://www.bjac.org.cn/en/Arbitration/Standards.html>) consists of fourteen articles. The Code of Conduct for judges contains ninety-six articles and there is a separate set of legal ethics rules for judges that contain thirty articles. The public prosecutor’s ethics rules contain forty-eight articles.

<sup>10</sup> There is a standard curriculum design applied nationwide for required courses offered in Chinese law schools. In 1998, the Chinese Ministry of Education established fourteen core courses (required courses) for the legal education of undergraduates. These courses are jurisprudence, Chinese legal history, constitutional law, criminal law, criminal procedure law, civil law, civil procedure law, administrative law and procedure, economic law, commercial law, intellectual property law, international public law, international economic law, and international private law. Environmental resources law and labor and social security law were later added as required courses.

<sup>11</sup> As an example of Renmin’s commitment to teaching legal ethics, Prof. Liu Jihua spoke on “Ideas, Aims and Missions of China’s Legal Education,” “Description, Forecast and Views of China’s Legal Ethics Education” and “Education Methods on the Cultivation of International Legal Expert” respectively. Available at <http://www.law.ruc.edu.cn/commu/ShowArticle.asp?ArticleID=19375> (last accessed June 15, 2012).

<sup>12</sup> Given the variety of expertise, the suggestions on how to change the Chinese legal ethics teaching come from Professors Chen and Xiahong while the suggestions on how to change the U.S. legal ethics teaching come from Professors Schneider and Deason.

<sup>13</sup> See generally <http://www.chinalawdeskbook.com/pdf/CLD%20Ch3.pdf> (page 73+) (last accessed September 7, 2012), referring to the Provisional Regulations of the People’s Republic of China on Lawyers (adopted August 26, 1980 by the 15th Sess. of the Standing Committee of the 5th National People’s Congress), art. 1.

<sup>14</sup> China is not unique in this comparison. Laurel Terry (2000) reports that in many counties legal ethics education is not even available as an elective in law school curricula. Instead, student/lawyers are assumed to learn these principles as part of the practical training period that is required before one can become a practicing lawyer.

<sup>15</sup> For more articles on improving effectiveness of teaching ethics in legal education, see Browne, Williamson, and Barkacs (2006); Hamilton and Monson (2011b); and Donner (2010).

<sup>16</sup> For further reading on global perspectives and initiatives (including European Union directives, the General Agreement on Trade in Services, and developments in multi-disciplinary and multi-jurisdictional practices) that have the potential to affect domestic professional responsibility policies, see Terry (2005; 2007).

<sup>17</sup> It may be important to distinguish between differences in the framework established for negotiation by national legal cultures (and rules) and cultural influences on how individuals from different cultures operate in those legal settings. Interestingly, in the Chinese legal environment, Cheryl Rivers (2010) found that business negotiators from *both* China and Australia indicated that they would not always adhere to Chinese law. Her exploratory study suggests that negotiators' predictions about enforcement of the law and their sense of the significance of the breach were more important factors for both sets of negotiators than their national cultural background.

<sup>18</sup> For further reading on understanding the differences in ethics as it relates to lying, see Lachman (2007) and Schiltz (1999).

<sup>19</sup> For more on "bounded ethicality," see Bazerman (2011).

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