

Culture – The Body/Soul Connector in Negotiation Ethics

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***Editors’ Note:** Nolan-Haley and Gmurzynska note that some teachers at the 2008 Rome “Second Generation” Teaching Conference and “benchmark” course omitted ethics teaching as too complicated for the time available, while others considered it essential. They side with the latter, but then wonder what learning as to negotiation ethics actually takes place. Picking apart several common ethical problems in the light of widely divergent ethical codes for lawyers in Poland and the U.S., they conclude that it is the fact of the difference which itself best illustrates the need for ethical sensitivity, and consequently, demands a specific focus on ethics in teaching.*

Introduction

At a recent negotiation conference in Rome, two American professors discussed what skills and topics they would include in a typical, two-day negotiation program. The business school professor did not include ethics; the law school professor did. We wondered what the Rome discussion would have been like if the negotiation professors were from different countries. How much or how little ethics coverage would they include? What particular issues would be considered important? As American and Polish law professors respectively, we wondered whether cultural differences would result in any systemic differences in content. In pedagogy? We also wondered whether, at

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the end of the day, it really matters if ethics is included in a two-day negotiation program.

We conclude in this chapter that teaching effective negotiation in a global environment requires a framework for ethical decision-making, and therefore, ethics coverage *should* be part of negotiation training, whether it is a two-hour or two-day executive training program, or a two-semester course in law school or business school. If we conceptualize skills as representing the body of negotiation training, then ethics can rightfully be considered its soul, the spiritual sphere or innermost depth of one's being where a person makes moral decisions (CCC 1994). From the soul, which is infused with its own unique cultural identity, the negotiator grapples with the deepest issues of professionalism and personal morality, and from the soul she attempts to resolve them (Bernard 2009).

Acknowledging ethics as the soul of negotiation training recognizes the totality of the negotiator's personhood and explicitly honors her human dignity. Respect for human dignity reminds us that we are not training neutral technocrats, but human beings who will interact with other human beings in the human community. Beyond the spiritual sphere, ethical principles of professional responsibility distinguish legal negotiations from the morals of the market place bazaar, and provide practical guidance that may protect lawyers from disciplinary charges. We argue, therefore, that having workable guidelines to make ethical decisions in negotiation is no less important than knowing the skill sets for when to make the first offer, or how to close a deal (Fox, *Negotiation as a Post-modern Process*, in this volume).

But this claim is to state the obvious. Skills and ethics, the body and soul of negotiation training, always operate within cultural and contextual settings (Tressler 2008). In negotiation, culture matters a great deal because it may be determinative of how the negotiator perceives the ethical implications of her own, and the "other" negotiator's actions. In an era of globalization, transnational law practice, and internationalization of domestic law, students ignore cultural norms at their peril because ignorance of these norms can derail negotiations. The task for educators, therefore, is to provide negotiation students with a culturally inclusive framework for understanding ethical decisionmaking.

Culture and Negotiation Ethics

Given the considerable literature on the meaning of the term "culture," it is a daunting task to choose a single definition (Lee 2005). In this chapter we adopt Kevin Avruch's understanding of culture to

include “the socially transmitted values, beliefs and symbols that are more or less shared by members of a social group” (Avruch 2004). Despite the growing interest and literature on the interrelationship between culture and dispute resolution generally, (Chew 2004; Nolan-Haley, Abramson, and Chew 2005: 49-90), the role of culture in informing negotiation ethics remains an understudied subject. This is a significant information gap because cultural values influence a negotiator’s ethical decisionmaking. And, in cross-cultural negotiation, tensions may develop when negotiators from different cultures have conflicting views about the ethical propriety of specific behaviors. For example, in an international dealmaking transaction, American negotiators may complain that their foreign opponents are offering bribes to government officials in order to close a deal. Their opponents may explain “these are simply gifts that are always exchanged in negotiation.” Or, in a real estate transaction, Polish negotiators may complain that American negotiators’ misrepresentations of property value are lies, and the Americans may explain “this is permissible puffing under our ethical rules.” The result in both cases could leave negotiators angry, distrustful, and not well disposed towards productive negotiations.

Culturally inclusive negotiation ethics training would be helpful in both of these hypothetical cases (Abramson, *Outward Bound to Other Cultures*, in this volume). Understanding why people act in particular ways may go a long way towards producing negotiations that achieve integrative potential (Kovach, *Interplay of Culture and Cognition*, in this volume). If negotiators in cross-cultural settings understand the basis for differences in ethical decisionmaking, they may be able to avoid forming negative perceptions of the other party, as well as avoid using tactics that could anger the other party, causing them to reciprocate with aggressive tactics and ultimately disrupt or abort the negotiations (Rivers and Lytle 2007).

Legal Ethics in Law School: Polish and American Experiences

The study of negotiation ethics is part of the broader field of legal ethics, so we cannot ignore how legal ethics is taught in different countries. In this context it may even be valuable to learn what ethics or ethical standards mean in particular countries. We may discover that the scope of the term “ethics,” or even more narrowly “legal ethics,” is understood differently by parties from different countries. In general, our students will be negotiating with their foreign counterparts in the global marketplace, and it would be useful

for all students to have some exposure to how their potential opponents think about ethical issues such as conflicts of interest, confidentiality and deception.

The impact of globalization on the legal profession requires that legal educators address the cultural dimensions of negotiation ethics (Daly 1998; Etherington and Lee 2007). Different legal and cultural educational experiences may impact on a negotiator's ethical behavior. Thus, before discussing how teachers might structure culturally inclusive ethics in their negotiation courses, we briefly describe the status of legal ethics courses in two different countries based on the authors' experiences with Polish and American legal education.

Legal Ethics in Poland

Although there are still some practices in Poland reminiscent of the communist past, political and social changes beginning in 1989 and continuing with Poland's entry into the European Union in 2005 have profoundly reshaped Poland's legal profession. Today, it shares most of the characteristics of the legal profession in other European Union member states. However, teaching legal ethics in Polish law schools is a relatively recent phenomenon that developed with concern over a declining state of professionalism among lawyers, connected in many ways to massive political and economic changes which began in the late 1980s.¹

The interest of Polish law schools in teaching legal ethics was greatly accelerated as a result of a study of young lawyers' attitudes conducted by the Faculty of Law and Administration at Warsaw University in 1996-97. The study showed that over 50 percent of students thought that they could become professionally successful simply by relying on connections, and knowing the right people (Łojko 2005: 116). Forty percent of law students reported that they would not hesitate to give a bribe in order to make a deal for a client, and 20 percent said they would confirm untruthful statements if it were in their client's interest to do so (Łojko 2005: 217). In addition to the shock waves that reverberated from this study, many scandalous situations, particularly in the justice system among judges, described vividly by the press and shown in media, precipitated a much-needed and deep discussion on legal ethical issues.²

Today, legal ethics courses are taught either by members of the philosophy faculty or by law professors.³ The courses generally offer a broad philosophical understanding of ethics, but have little regard for the practical ethical problems faced by future judges, attorneys and prosecutors. Ethics courses are usually introduced during the first or second year of law school, which consists of five years of

study. In almost all cases, however, legal ethics courses are not mandatory (Jurzyk 2002: 45).⁴ Some observers believe that the law faculties still do not consider teaching legal ethics as a serious enterprise. Whether this will change with the addition of clinical programs in some of the law schools is unclear although there seems to be an increased demand for those courses. This demand is attributable to changes in the Polish legal system such as increased emphasis on the adversarial system, heightened ethical standards for lawyers, and the changing role of lawyers in judicial and non-judicial proceedings (Wortham 2006; Skrodzka, Chia, and Bruce-Jones 2008).

The law faculties' attitude towards teaching legal ethics may be, in large measure, a reflection of how lawyers are trained in Poland. After law school, those who want careers as attorneys and legal counselors are required, with few exceptions, to take three years of further training. This post-graduate training, available only to a limited number of law graduates,⁵ includes apprenticeship in courts and prosecutors' offices and working under the supervision of a senior attorney. Graduates also take several courses, including those on legal ethics and professionalism.

Legal Ethics in the U.S.

In the U.S., as in Poland, concern about lawyers' unethical conduct energized reform efforts. Following the outrageous behavior of lawyers during the Watergate scandal and its negative effect on public confidence in the legal profession, the American Bar Association (ABA) required that courses in legal ethics be taught in all ABA-accredited law schools (Pearce 1998). The new rule was met with less than enthusiastic acceptance by students and faculty alike (Pearce 1998).

Today, the study of legal ethics in the U.S. is in a somewhat paradoxical state. On the one hand, compared to Poland and many other countries (Dodek 2005; Pitel 2005), it has an ostensibly privileged place in the law school curriculum. Legal ethics, often labeled "Professional Responsibility," is a mandatory course. It is offered for two or three credits, and is taught by lawyers who are either full-time or adjunct faculty members. Students who intend to practice law in the U.S. take these courses somewhat seriously because the Multistate Professional Responsibility Examination (MPRE) is either a pre-requisite or co-requisite to the bar examination in most U.S. states.⁶ The MPRE tests law students on ethics questions from the ABA Model Rules of Professional Conduct.

The U.S. has shown a great interest in the development of legal ethics generally⁷ and in negotiation ethics specifically (Albin 1993; Wheeler and Menkel-Meadow 2004). Over the last thirty years, there has been a huge volume of scholarship, including numerous textbooks on legal ethics. Legal ethics, according to some scholars, is now a “half-way respectable field of academic scholarship” (Cramton and Koniak 1996). Due to the increased presence of American law firms outside U.S. borders, there has also been a growing interest in comparative legal ethics (Daly and Goebel 1994; Daly 1998; Hazard and Dondi 2004). Nevertheless, some legal ethics scholars continue to bemoan law students’ general disdain for legal ethics courses, as well as general disregard by academics who give the subject short shrift (Pearce 1998).

Selected Issues for Teaching Culturally Inclusive Negotiation Ethics

Whether it is at a nascent stage of development, as in the case of Poland, or in a more highly developed stage, as in the U.S., the study of legal ethics is not welcomed with the highest degree of enthusiasm. Given this general malaise, it could be that the study of culturally inclusive negotiation ethics will generate more interest by law students as they gear up for the realities of legal practice in a global environment.

To give context to our discussion of teaching culturally inclusive ethics, we focus on the issues of truthfulness and deception, topics of universal concern for negotiators. At the outset we suggest that before embarking on a cross-cultural ethics journey, students should at least be familiar with the negotiation ethics rules of their own culture. Using as an example the U.S. with its voluminous literature on negotiation ethics, there is no shortage of articles on topics such as deception, understanding the limits of puffing and bluffing, and promoting trust and honesty in negotiation (Wheeler and Menkel-Meadow 2004). The Model Code of Professional Responsibility that regulates lawyers’ conduct prohibits actual misrepresentation, but allows exceptions for puffing and bluffing.⁸ Over twenty-eight years ago, the ABA rejected rules that would have required any greater degree of truthfulness in negotiation (White 1980). Thus, in the American legal culture, “modest lies” appear to be acceptable. This might be a good opportunity to ask students how they feel about the state of honesty in the American legal profession.

Once students are familiar with their own ethics regime, we suggest two avenues of inquiry for exploring cross-cultural differ-

ences on the issues of truthfulness and deception in negotiation. The first inquiry considers cultural value patterns, and examines the extent to which they inform our understanding of ethical decision-making (Gold 2005; Gold, *Negotiating Cultural Baggage*, in this volume). For example, teachers could focus on Geert Hofstede's framework that identifies as five aspects of culture: power distance; collectivism versus individualism; femininity versus masculinity; uncertainty avoidance; and long-term versus short-term orientation (Hofstede and Hofstede 2005). Another approach for examining different cultural frameworks could be the model developed by Fons Trompenaars, identifying seven value dimensions that can be applied to different cultures: universalism and particularism; individualism and collectivism; affectivity and neutrality; specificity and diffuseness; achievement and ascriptions; sequential and synchronic; and internal and external control (Hampden-Turner and Trompenaars 1998). Alternatively, students could become familiar with the high-context, low context cultural framework described by Edward Hall and other scholars (Hall 1976; Victor 2000).

Once students have a language with which they can navigate through comparative ethics analysis, they can consider whether differences in cultural value patterns produce different attitudes towards truth-telling and deception. Two general questions to raise could be: 1) does it matter whether one is negotiating with parties within one's own culture or outside the culture?; and 2) when negotiating with a collectivist society wherein relationships matter, is deception less likely?

Cheryl Rivers and Anne Louise Lytle's study of cross-cultural negotiation ethics provides useful materials for the first inquiry. The authors examined what they label as "ethically ambiguous negotiation tactics" (EANTs) that are common in international negotiation and that have a tendency to provoke anger and mistrust. They define EANTs as "maneuvers[s] used in the course of a negotiation that may be regarded as wrong by at least some individuals who participate in or observe the negotiations" (Rivers and Lytle 2007: 4). Some examples include threatening to harm the other party or to make them appear vulnerable in front of their boss (Rivers and Lytle 2007: 5-6).⁹

A valuable aspect of the Rivers and Lytle study is their review of cross-cultural negotiation ethics research, a rich reservoir of empirical data that students can utilize for comparisons on the issue of deception. Some examples from published research reveal the following findings:

- Latin American negotiators rated false promises as significantly more appropriate than negotiators from the UK and Canada (Rivers and Lytle 2007);
- UK negotiators rated misrepresentation as significantly less appropriate than Greek, Japanese and Russian negotiators (Rivers and Lytle 2007); and
- U.S. negotiators were less approving of and less likely to use information misrepresentation and bluffing than Brazilian negotiators (Rivers and Lytle 2007).

In discussing these examples, teachers could ask students to think about what cultural value patterns might be applied to the individual negotiators. Students could also reflect on their own assumptions, and discuss whether the reported findings match their cultural assumptions of particular groups.

The second inquiry that we propose for class discussion relates to differences in legal systems. Roscoe Pound's advice in the 1930s that we explore comparative legal traditions "in the course of teaching the law of the land," is no less true when it comes to teaching ethical issues in negotiation (Glendon, Gordon, and Carozza 2008). Truth-telling implicates fact-finding, lawmaking and storytelling. How do different legal traditions conceptualize these tasks? A wonderful set of provocative questions emerge:

- Is truth-telling in negotiation more highly valued in religious-based legal systems (Bernard 2009, *Finding Common Ground in the Soil of Culture*, in this volume)?
- Is it treated differently in the adversarial and inquisitorial systems of justice? For example, some scholars have asked whether the adversary system, if less dedicated to discovering the truth than the inquisitorial system, might affect the legal practitioner's understanding of honesty as a fundamental principle of adversarial ethics (Nagorcka, Stanton, and Wilson 2005).
- Is truth-telling in negotiation based on different conceptions of the role and responsibility of the lawyer?
- How do stereotypes such as the "lying American lawyer," influence ethical decision-making by the "other" negotiator (Bucklo 2007)?
- Does the independence of lawyers from their clients in civil law systems enhance or hinder truth-telling in negotiation (Nagorcka 2005: 449)?
- To what extent does the non-accountable partisanship of the common law tradition influence truth-telling (Luban 1999)?

Following discussion of these issues, teachers could have students engage in role playing or other exercises that reflect different cultural value patterns. The de-brief can be another opportunity to engage students in the language of culturally inclusive ethics, generate discussion of cultural differences, and help them develop more sensitivity to the ethical issues raised in cross-cultural negotiation.

Conclusion

If, as we have suggested earlier, skills represent the body of negotiation teaching and ethics, its soul, then culture is the glue that links them both together. In simple terms, culture is the body/soul connector in negotiation. Our goal in teaching culturally inclusive negotiation ethics is not to make students experts in particular cultures or legal traditions. (In some situations, this may not be feasible. See Volpe and Cambria, *Negotiation Nimbleness*, in this volume). It is, rather, a more modest one, directed towards awareness. If students become aware of cultural value patterns, learn a language that expresses these patterns, and have a better understanding of different legal traditions, then hopefully, they will be able to discern with wisdom and confidence whether the “other” negotiator is a “lying, cheating foreigner” (Rivers and Lytle 2007), or, just being herself. The good news is that the “other” negotiator, trained in culturally inclusive negotiation ethics, can do the same thing.

Notes

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¹ In Poland there are two legal professions, both of which are defined in Art. 17 of the Polish Constitution as professions of public trust. Because this high standard is imposed on legal professions by the Constitution, lawyers according to their ethical codes not only have to be professional and act according to ethical rules adopted by national boards, they also have to fulfill the requirement of “high moral norms,” and must not violate the dignity of the legal profession (Izdebski 2006). The division of the legal profession, although presently of little significance, remains from the communist era before the social and political changes at the end of the eighties. Attorneys at law, professionals who had private practices, represented individuals in criminal, family, and civil cases. Legal counselors, hired by state companies, represented those companies in the courts. Today, these two professions have come much closer together. Legal counselors have the right to represent all companies in commercial cases, as well as individuals in all civil, labor, and family cases; an exception still remains for representation in criminal cases. Although most scholars predict that the two profes-

sions will be totally unified very soon, there remain two distinct bodies of law regulating the profession, and two different Boards which adopt ethical standards. According to a June 2008 survey completed by the Center for American Law Studies, more than 80 percent of the law schools in Poland introduced courses on legal ethics over the past five to six years (see The Rules on Legal Ethics and Dignity of Legal Profession, called “Attorneys’ Code of Ethics” adopted in 1998, and the unified version of the “Code” adopted by the National Board resolution number 32/2005 of November 19, 2005). Ethical codes for the legal profession are a relatively new development in Poland. Rules of ethics for legal counselors were first adopted in 1999; a unified version of the rules was adopted by the National Council of Legal Counselors by resolution nr 45/VI/2004 of March 31, 2004.

² See generally on corruption in Poland:

www.batory.org.pl/korupcja/pub/htm and

www.worldbank.org.pl/WBSITE/EXTERNAL/Countries/ECAEXT/POLAND/

³ In many cases the courses are taught by those who specialize in the philosophy of law and sociology, which may also show a different, broader approach to legal ethics than in common law countries (Jurzyk 2002: 45).

⁴ According to a quick survey done among the law students at the University of Warsaw, over 60 percent of them voted for definitely introducing a required course on legal ethics.

⁵ For example, there are 7,000 students at the Faculty of Law and Administration of the University of Warsaw, which is the largest law school in the country. This means that each year over 1,200 students graduate from that law school alone. The total number of graduates of all Polish law schools admitted to post-graduate training programs in 2008 was 1789, which included 413 admitted to become attorneys, 930 admitted for legal counselor training, and 301 admitted for notary training. Since more than half of the law graduates from the University of Warsaw will not go through post-graduate training; they are not exposed to legal ethics, unless they took a non-mandatory legal ethics course while in law school. In recent years there has been a public debate about opening the legal profession to more law school graduates and the possibility of introducing regulations which would make it possible for law school graduates to practice law without further training.

⁶ The states which do not use the MPRE include local ethics principles in their examinations. For a description of the MPRE see

<http://www.ncbex.vorg/multistate-tests/mpre>.

⁷ One example is the ABA’s Rule of Law Initiative that is responsible for developing ethics courses in eastern Europe and the Philippines, and recently published a legal ethics manual for Kosovo law students. See www.abanet.org/rol. The rule of law project is a public service project of the ABA that is dedicated to promoting the rule of law throughout the world.

⁸ Rule 4.1, ABA Model Rules of Professional Conduct provides that “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 dis-

close a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client...” The comment to Rule 4.1 gives examples of what are not considered material facts – “Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where non-disclosure of the principal would constitute fraud. ”

⁹ In an effort to understand these differences, the authors propose an interactive model that describes how culture influences a negotiator’s ethical decisionmaking (Rivers and Lytle 2007). Their model illustrates where culture has a moderating effect on four situational variables relevant to ethical decisionmaking in negotiation: organizational goals; organizational codes of ethics; the legal environment; perception of the other party including the closeness of the relationship, the relative power of the two parties, their expectation of future interaction, and the reputation of the other party.

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