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Report Regarding the 2011 Pacific McGeorge Workshop on Promoting Intercultural Legal Competence (The “Tahoe II” Conference)

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Report Regarding the 2011 Pacific McGeorge Workshop on Promoting Intercultural Legal Competence (The “Tahoe II” Conference)

Franklin A. Gevurtz*

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I. INTRODUCTION

On August 8, 2011, the Pacific McGeorge Global Center for Business and Development (the “Global Center”) sponsored a workshop at Squaw Valley, California, near Lake Tahoe. At this workshop, thirty-nine professors from universities in the United States and abroad met to discuss how to promote intercultural legal competence in law school students. This Report provides a summary of these discussions.

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This workshop builds on a workshop at the same location sponsored by the Global Center in August 2005. (For convenience, I will adopt the convention of calling the 2005 workshop the “Tahoe I Conference” and the 2011 workshop the “Tahoe II Conference”). At the Tahoe I Conference, professors from thirty-one law schools in the United States and Canada met to discuss how to introduce international, comparative and transnational law¹ issues into the core law school curriculum. The premise behind the Tahoe I Conference was that increasing globalization makes exposure to such issues important to the vast majority, if not all, of law school students.

The focus of the Tahoe I Conference was on how to introduce students to substantive law topics in international, comparative and transnational law. This substantive law focus, however, is incomplete in that it is a necessary, but not a sufficient, response to the impact of globalization. Law does not exist as simply a body of abstract rules, and lawyers do not operate as impersonal actors dealing with inanimate objects. Rather, law operates through institutions as part of society and culture, and lawyers engage in interpersonal dealings. Hence, an attorney’s ability to deal with clients, parties and officials, as well as with other attorneys, from different countries, and to handle disputes and transactions crossing national borders, requires more than knowledge of international law and of different nations’ legal rules; it also requires competence in dealing with the legal systems and broader cultures in which these persons and rules operate. The organizers of the Tahoe II Conference labeled this competence “intercultural legal competence.”²

To say that globalization makes it important for law schools to develop intercultural legal competence in their students raises the thorny question of how a law school curriculum achieves this goal. Indeed, the challenge of promoting intercultural legal competence among law school students might be greater than the challenge involved in exposing most or all law school students to substantive international, comparative and transnational law. Hence, the Global Center decided to build upon the success of the Tahoe I Conference, which provided a comprehensive exploration of the goals and means of introducing most or all law school students to international, comparative and transnational law, by sponsoring a similar workshop that would explore the goals and means of law schools promoting intercultural legal competence in their students.

1. By “transnational law,” I am referring to those jurisdictional and choice of law issues arising with cross-border transactions and disputes, which are not topics of comparative or international law per se (albeit they often go under the rubric of “private international law”).

2. *International Legal Competence Initiative*, MCGEORGE SCH. OF LAW, http://mcgeorge.edu/Faculty_and_Scholarship/Centers_and_Institutes/Global_Center_for_Business_and_Development/Global_Center_Conferences_Speakers_and_Events/Intercultural_Legal_Competence_Workshop.htm (last visited Oct. 15, 2012). The interviews are available for viewing online. Pacificmcgeorge, *Intercultural Legal Competence Workshop*, YOUTUBE (June 19, 2012), http://www.youtube.com/watch?v=1epGp3T_VgY&feature=youtu.be&noredirect=1.

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As befit the different focus of the two Tahoe conferences, the composition of the participants was different (albeit, with some overlap). Reflecting the Tahoe I Conference's objective of seeking ways to incorporate substantive international, comparative and transnational law issues into the core curriculum, we selected participants for that workshop based upon their dual expertise in international, comparative and transnational law and in core law school subjects such as contracts, torts, and constitutional law. Reflecting the Tahoe II Conference's different objective of seeking ways to promote intercultural legal competence, we selected participants (who are listed below) for this workshop based upon their expertise in broader cultural and systemic differences relating to law and in how law school curricula can respond to those differences. We also broadened the background of the group beyond domestic law professors to include, as well, academics from different disciplines (e.g., anthropology) and law faculty who could bring expertise in dealing with legal systems and culture in Africa, Asia, Europe, and Latin America. Hence, the participants represented a cross section of professional and national cultures.

TABLE 1
LIST OF PARTICIPANTS³

Raquel Aldana, Professor of Law and Director, Inter-American Program,
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Christopher L. Blakesley, The Cobega Law Firm Professor of Law,
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Emeritus and Faculty Director, Miller Institute for Global Challenges &
the Law, University of California Berkeley School of Law

Barry E. Carter, Professor of Law and Director, Center on Transnational
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3. Affiliations listed as of the time of the conference.

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Linda E. Carter, Professor of Law and Director, Legal Infrastructure and International Justice Institute, University of the Pacific McGeorge School of Law

Jack J. Coe, Jr., Professor of Law, Pepperdine University School of Law

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Vivian Curran, Professor of Law, University of Pittsburgh School of Law

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Margaret E. Montoya, Professor of Law and Senior Adviser to Executive Vice President, UNM Health Sciences Center, University of New Mexico School of Law

Rachel Moran, Dean and Michael J. Connell Distinguished Professor of Law, University of California Los Angeles School of Law

Laura Nader, Professor, University of California, Berkeley

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Robert J. Reinstein, Clifford Scott Green Professor of Law, Temple University Beasley School of Law

Leticia Saucedo, Professor of Law and Director of Clinical Legal Education, University of California Davis School of Law

Barbara A. Schatz, Clinical Professor of Law, Columbia Law School

Carole Silver, Professor of Law, Indiana University Maurer School of Law

Susan Sample, Associate Professor and Director Institute for Cross-Cultural Training, University of the Pacific

Symeon C. Symeonides, Alex L. Parks Distinguished Professor of Law and Dean Emeritus, Willamette University College of Law

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Gregory S. Weber, Professor of Law, University of the Pacific McGeorge School of Law

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Laura Wen-Yu Young, Managing Partner, Wang and Wang

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Following the format that worked well for the Tahoe I Conference, the Tahoe II Conference consisted of a mix of plenary and small group discussions in which participants engaged in two tasks—one directed at goals and the second directed at means. With respect to goals, we hoped to identify the added knowledge, skills and values, beyond simply knowledge of potentially relevant international and foreign laws, and beyond that necessary for legal practice generally, that are necessary for attorneys to deal effectively with parties, attorneys, officials, and the like from other nations and to represent clients in transactions and disputes which occur, at least in part, outside the borders of their home nation. In this manner we planned to define more precisely “intercultural legal competence” and to establish assessable outcomes that a curriculum directed toward achieving intercultural legal competence should produce. To provide background for this effort at identifying outcomes, we began with perspectives from outside the legal academy. We showed a video recording from interviews that we conducted of highly successful individuals engaged in transnational legal practice in different contexts.⁴ In these interviews, we asked what skills, knowledge and values, beyond substantive law, are necessary to deal with persons from, and matters involving, different nations. To gain interdisciplinary perspective, we had a pair of presentations. One, from Professor Laura Nader of the University of California, Berkeley, an anthropologist whose work on law and culture is classic,⁵ provided a critical perspective on power dynamics in intercultural dealings. The other, from Professor Susan Sample of the University of the Pacific’s School of International Studies, who leads Pacific’s program of promoting intercultural skills in its overall student body, provided an introduction to intercultural communication and its possible impact on legal practice.⁶ Thereafter, we conducted a discussion among all the participants in which we sought to come up with a list of desired learning outcomes for educational programs aimed at promoting intercultural legal competence in law school students.

Turning from goals to means, the second part of the workshop began with a presentation by Rachel Moran, Dean of the U.C.L.A. School of Law, who brought together the various threads from the session on goals and provided

4. Pacificmcgeorge, *supra* note 2. The interviewees included: Katharine C. Baragona, Esq., Sr. Infrastructure Finance Specialist, Finance, Economics and Urban Development, The World Bank Group; Justice Richard J. Goldstone, Retired Justice of the Constitutional Court of South Africa; Carol M. Mates, Esq., Retired Principal Counsel, IFC; Winfried H.A.M. van den Muijsenbergh, Esq., Attorney at Law/Advocaat Loyens & Loeff;; Fernando Pombo, Lic. Past President, International Bar Association, Founding Partner, Gomez-Acebo & Pombo; Dr. Hansjürgen Schnur, Esq., Dr. Schnur Anwaltskanzlei Law Firm; Joseph Smallhoover, Membre des Barreaux de Paris, Californie et Pennsylvanie, Partner, Bryan Cave LLP.

5. See LAURA NADER, *LAW IN CULTURE AND SOCIETY* (1969). For a written version of Professor Nader’s presentation to the conference, see Laura Nader, *Law and Intercultural Competence*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 123 (2013).

6. For a written version of Professor Sample’s presentation to the conference, see Susan Sample, *Intercultural Competence as a Professional Skill*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 117 (2013).

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initial thoughts regarding possible means to promote intercultural legal competence.⁷ There followed break-out group and plenary discussions in which the participants suggested ideas for courses, programs, and pedagogies (all of which I group under the label “curricular vehicles”) designed to achieve the learning outcomes specified for intercultural legal competence. Recognizing that there are a variety of techniques for achieving such learning outcomes, we sought to produce a menu of curricular vehicles from which law schools might draw.

As with the Tahoe I Conference, our goal was to produce a report⁸ that would summarize the ideas generated by the workshop regarding both the goals to be achieved, in this case by promoting intercultural legal competence, and the various means for achieving these goals. It has been my privileged assignment to prepare this report, which will follow this two-part structure of discussing goals (or outcomes), in Part II of this Report, and means (or curricular vehicles), in Part III of this Report.

II. OUTCOMES FOR INTERCULTURAL LEGAL COMPETENCE

We take it as a given that lawyers engaged in transnational practice—whether this involves their principal area of practice or just the occasional dispute or transaction—must possess the same basic knowledge, skills and values necessary for domestic practice. As a general counsel of a major multinational corporation once explained to students at Pacific McGeorge, before an attorney can engage in transnational practice, he or she must have a thorough understanding of his or her own country’s legal rules and system, as well as possess the analytic abilities expected of all attorneys. Beyond this, an attorney engaged in transnational practice presumably must have an understanding of those aspects of public and private international law and of foreign laws that will impact his or her practice. While these are necessary prerequisites for an attorney to engage in transnational practice, the premise behind the Tahoe II Conference is that they are not sufficient. In addition, attorneys who deal with clients, parties and officials, as well as with other attorneys, from different countries, and who handle disputes and transactions crossing national borders, must possess competence in dealing with the legal systems and broader cultures in which these persons and rules operate—what we have labeled intercultural legal competence.

Yet, what exact skills, knowledge and values are entailed in intercultural legal competence? Before one can design a curriculum to achieve such competence, presumably one should identify some assessable outcomes that

7. For a written version of Dean Moran’s presentation to the conference, see Rachel Moran, *When Intercultural Competency Comes to Class: Navigating Difference in the Modern American Law School*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 109 (2013).

8. For the report from the Tahoe I Conference, see Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267 (2006) [hereinafter *Tahoe I Report*].

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students should achieve. Not surprisingly, identifying these outcomes is a daunting task, made more challenging by the fact that it turns out there are different overarching objectives for achieving intercultural legal competence. Hence, the discussion at the Tahoe II Conference explored both specific learning outcomes for intercultural legal competence, as well as overarching goals (meta-outcomes) for seeking intercultural legal competence.

A. Meta-Outcomes

A problem that often plagues intercultural communication involves “framing”, which refers to the prism of priorities, philosophies and assumptions through which different persons view a particular situation.⁹ While any two different persons may approach a given situation from different frames, this is more likely to be the case when persons are from different nations and cultures.¹⁰ So, to use an example given in business,¹¹ managers of a multinational corporation’s subsidiaries in different countries may view the same crisis situation—in this example, the discovery that one of the company’s products may be dangerously defective—through different frames of what is the central concern presented by this event; in this example, managers in the United States instinctively focused on avoiding liability for the company in the event of litigation; managers in Japan instinctively focused on avoiding adverse consequences for company’s employees; while managers in Argentina instinctively focused on limiting danger to consumers. Miscommunication and frustration results, as it did in this example, when each person automatically assumes that all other persons are approaching the situation with the same frame.

The discussion at the Tahoe II Conference of student learning outcomes to be achieved by promoting intercultural legal competence unintentionally ended up providing an example of this sort of framing problem. Different participants approached the identification of these student learning outcomes from quite different frames of what their overarching goals were. Fortunately, the discussion was able to clarify the different frames from which different participants operated. Since such different frames are likely to be duplicated among the faculty members of each law school that seeks to promote intercultural legal competence among its students, this clarification of overarching goals (what I have labeled “meta-outcomes”) provided an unexpected added value to the discussion and to this Report.

9. See Brian H. Spitzberg & Gabriella Changnon, *Conceptualizing Intercultural Competence*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE 2 (Darla K. Deardorff ed., 2009).

10. See *id.* at 32.

11. DVD: The Cross Cultural Conference Room (Intercultural Resource Corporation 2002) (on file with author), available at <http://www.irc-international.com/content/cross-cultural-conference-room>.

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1. Utilitarian versus Instrumentalist Goals

The first set of different overarching goals or meta-outcomes revealed by the discussion at the Tahoe II Conference involved what some of the participants at the conference labeled “utilitarian” versus “instrumentalist” goals.¹² The utilitarian goal in this context refers to the goal of a professional school to graduate competent practitioners of the profession—in the case of law schools, to graduate competent attorneys. Hence, the purpose behind learning outcomes for intercultural legal competence from the standpoint of those operating with such a utilitarian frame was to graduate students able to successfully perform the various functions that attorneys perform in society, such as negotiating contracts or litigating disputes, when dealing with persons from different nations and cultures and with transactions and disputes involving different legal systems.

By contrast, those participants who had what became labeled as instrumentalist goals sought intercultural legal competence in order to achieve greater access to justice and social justice for persons from underrepresented or less dominant nations and cultures. One participant, who is actively involved in the effort by her university’s medical school to promote intercultural competence among medical school students, used that context to provide a good explanation of the instrumentalist objective. Specifically, in the medical school context, concern with intercultural competence stemmed from studies which showed disparities in health outcomes for patients from different racial and ethnic groups.¹³ The objective of promoting intercultural competence among doctors is to produce better health outcomes for patients from racial and ethnic groups that were experiencing poorer outcomes. Similarly, the instrumentalist objective for intercultural legal competence seeks to address the poorer outcomes in terms of access to justice and social justice for persons from underserved or less dominant cultures and nations created by cultural and national differences between attorneys and other parties with whom the attorneys deal.

At first glance, one may be tempted to see the utilitarian versus instrumentalist division as simply about two sides of the same coin and dismiss this whole discussion as entirely academic. So, to stay with the medical school example, a utilitarian goal of producing more competent doctors and an instrumentalist goal of producing better patient outcomes through education that promotes intercultural competence would seem entirely convergent. In the legal context, convergence of the two goals exists, as one participant explained,

12. In retrospect, this labeling is subject to the complaint that instrumentalist goals are, literally speaking, utilitarian in the sense that they seek a particular result. Nevertheless, “instrumentalist” versus “utilitarian” became the terminology used by participants, who understood the intended meaning in the context of the discussion.

13. See Rohini Anand & Indra Lahiri, *Intercultural Competence in Health Care*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE, *supra* note 9, at 387, 390-91.

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because, for an attorney to serve the underserved, he or she must understand the culture of clients in underserved groups.

On the other hand, lawyers are not medical doctors and improved professional competence in intercultural settings may not translate into improved access to justice and social justice outcomes for persons from underserved and less dominant nations and cultures. Indeed, some participants raised the concern that greater intercultural legal competence possessed by attorneys representing persons and institutions (such as multinational corporations) from more dominant nations and cultures could further prejudice persons from underserved and less dominant nations and cultures. Specifically, as asserted by one participant, the desire to work in firms engaged in transnational business transactions is what commonly triggers law student interest in courses and programs designed to develop intercultural legal competence. At the same time, such transnational business transactions are what commonly trigger contacts between different cultures that involve attorneys. Often, as this participant continued to explain, attorneys engaged in transnational business practice represent extractive industries (e.g., mining, oil and gas) operating in less developed countries and such attorneys can use their intercultural legal competence to aid these extractive industries (for example in acquiring mining or drilling rights) when dealing with persons in other nations and with other cultures. Greater success from the standpoint of this sort of client may not equal greater access to justice and social justice for those in the nations in which the attorney deals. This is not to say that those participants with an instrumentalist objective were advocating non-engagement in the world or had an anti-globalization stance. Rather they were concerned that attorneys engaged in transnational practice did so in a way that promotes respect for the will and culture of local peoples.

Of course, this sort of concern that law students will use their skills after graduation in the service of more privileged persons and institutions is hardly limited to intercultural legal competence.¹⁴ Still, this result may go more with the territory and be more acceptable for some parts of the law school curriculum, such as courses in tax or corporate finance, but, at the same time, the phenomenon creates greater unease in an area like intercultural legal competence.

In the end, there was a widespread desire among participants to reconcile these two goals by concluding that students should be exposed to the importance of achieving access to justice and social justice for persons from underserved populations and less dominant nations and cultures. Moreover, borrowing somewhat from the medical model, one participant proposed as a desired outcome that, at the very least, lawyers with intercultural legal competence

14. See generally ABA COMM'N ON LOAN REPAYMENT & FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE (2003), available at http://www.americanbar.org/content/dam/aba/migrated/legal_services/downloads/lrap/lrapfinalreport.authcheckdam.pdf (finding that law student loan debt inhibits young attorneys from pursuing public service careers because salaries are lower in public sector law than in private sector law).

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representing multinational corporations and the like should seek to do as little harm as possible when dealing with those from underserved and less dominant nations and cultures. In fact, this might aid corporate clients by minimizing conflict. All told, greater sensitivity by attorneys to the viewpoints of persons from less dominant nations and cultures, which should be a part of intercultural legal competence, hopefully will promote such a “first, do no harm” attitude even in those attorneys representing persons and entities from more dominant nations and cultures.

2. Transnational versus Domestic Contexts

A second set of different goals involved geographic context: Specifically, is the focus on attorneys engaged in transnational practice or does the focus also include attorneys engaged in domestic practice? Because the Global Center organized the Tahoe II Conference, and because the educational mission of the Global Center focuses on educating attorneys for practice in an era of increasing globalization, the organizers of the conference approached the matter from the perspective of achieving intercultural legal competence for attorneys engaged in transnational practice. (We recognized, however, that this could include the occasional dispute or transaction with a cross-border dimension as opposed solely to legal practices specializing in transnational matters.) Many participants noted, however—and, indeed, the organizers of the conference were aware—that, with an increasingly diverse domestic population, intercultural legal competence is also important for attorneys whose practice is entirely domestic.

This question of geographic reach impacts both the percentage of its student body to which a law school should direct its curriculum aimed at achieving intercultural legal competence, as well as the scope of that curriculum. Specifically, if the focus is on intercultural legal competence for students interested in transnational practice, then the fraction of students one seeks to reach is narrower (essentially those interested in transnational practice) and the scope of the topic is broader (encompassing differences in legal traditions, philosophies, and institutions between different nations) than if the focus includes domestic practice (in which case intercultural legal competence is important for all students, but the scope of the topic might, for the most part, only involve cultural differences among groups in the lay population, but not the differences in legal institutions and philosophies between different nations).

Actually, the participants engaged in considerable discussion regarding what fraction of the student body becomes the target for a curriculum seeking to develop intercultural legal competence assuming one’s focus is on preparing students for transnational practice. The provocative assertion by one participant that such a focus essentially meant students interested in transnational business practice in large law firms triggered this discussion. Many participants rejected this view even when staying with a focus on transnational rather than domestic

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practice. They argued that the idea that transnational practice entailed only large law firm business practice was entirely too narrow. Among areas in which attorneys could expect to engage in cross-border disputes and transactions, participants named immigration law, family law¹⁵ and criminal law¹⁶—and could also have listed personal injury¹⁷ and employment law¹⁸—in all of which small law firms practice. Participants also listed environmental law,¹⁹ constitutional law,²⁰ and, of course, public international law (including human rights litigation)²¹ as practice areas with a transnational component.

Turning to a domestic focus, many participants noted the importance of intercultural legal competence for attorneys who must increasingly deal with clients and parties from other cultural backgrounds, even though living in the United States. This has been a focus in clinical legal education for some time.²² In this context, the instrumentalist goal becomes particularly pronounced, since many of those underserved by attorneys and at a disadvantage in access to justice in the United States are members of groups with cultures different from most attorneys in the United States.²³ Of course, cultural differences between an attorney and clients or other parties with whom the attorney must deal in the domestic context are not limited to those based upon ethnicity or national origin. The client or party's occupation, age, education and the like can establish cultural attributes that may impact dealings with the attorney.²⁴

Several participants also raised another outcome even for students who plan only to practice in a domestic context after graduation. Viewing relationships between law and broader institutions and culture through the prism of seeing these relationships in other nations gives students a greater sensitivity to these relationships in the domestic context and thereby can produce attorneys with

15. *E.g.*, ANN LAQUER ESTIN & BARBARA STARK, GLOBAL ISSUES IN FAMILY LAW 1-3 (2007) (discussing various areas in which transnational disputes may arise in family law).

16. *E.g.*, LINDA E. CARTER, PETER J. HENNING & CHRISTOPHER L. BLAKESLEY, GLOBAL ISSUES IN CRIMINAL LAW 1-2 (2007) (discussing various areas in which transnational disputes may arise in criminal law).

17. *E.g.*, JULIE DAVIES & PAUL T. HAYDEN, GLOBAL ISSUES IN TORT LAW 2-4 (2007) (illustrating some areas of potential cross-border personal injury practice).

18. *E.g.*, SAMUEL ESTREICHER & BRIAN LANDSBERG, GLOBAL ISSUES IN EMPLOYMENT DISCRIMINATION LAW 16 (discussing transnational employment discrimination cases).

19. *E.g.*, STEPHEN C. MCCAFFREY & RACHAEL E. SALCIDO, GLOBAL ISSUES IN ENVIRONMENTAL LAW 1 (2009) (discussing various areas in which transnational disputes may arise in environmental law).

20. *E.g.*, BRIAN K. LANDSBERG & LESLIE GIELOW JACOBS, GLOBAL ISSUES IN CONSTITUTIONAL LAW 2 (2007) (discussing various areas in which transnational disputes may arise in constitutional law).

21. *See, e.g.*, DAVIES & HAYDEN, *supra* note 17, at 27 (discussing litigation brought under the Alien Tort Statute in the United States for violation of international law).

22. *E.g.*, Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 33 n.2 (2001) (describing development of materials for teaching cross-cultural lawyering in clinics).

23. *See, e.g.*, NAT'L ASIAN AM. PAC. LEGAL CONSORTIUM, THE SEARCH FOR EQUAL ACCESS TO JUSTICE: ASIAN AMERICAN ACCESS TO JUSTICE PROJECT REPORT (2000), available at <http://www.advancingequality.org/files/access.pdf>; AM. BAR ASS'N, *Lawyer Demographics* (2011), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf.

24. *See, e.g.*, Bryant, *supra* note 22, at 41.

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greater competence for domestic practice. As one participant explained, she wants her students to develop a “world view” in which they understand that law is not autonomous of culture—in other words, that culture influences law and that law influences culture.²⁵ By seeing this relationship in the broader international context, students come to understand their own legal culture. This is a variation of the theme developed in the Tahoe I Conference that exposing students to foreign laws enabled them to better understand their own law²⁶—only, in the intercultural legal competence context, the exposure goes beyond substantive legal rules to encompass different philosophies of law, different modes of legal reasoning, different institutional structures, and the different societal contexts which both produce and result from this difference in laws and institutions.

3. Assumptions About Lawyers and Legal Education

A final set of frames that impact the identification of specific learning outcomes for intercultural legal competence involves assumptions about the role of lawyers and goals of legal education. Once again, it was necessary to clarify, or even challenge, these assumptions held by different participants before the discussion could proceed to specific learning outcomes.

a. The Role of Lawyers

The need to address assumptions about the role of lawyers is inherent in the very concept of intercultural legal competence. A simple definition of intercultural legal competence, particularly from the standpoint of those operating with a utilitarian professional school frame, is the ability of a lawyer to perform successfully the various functions that attorneys perform in society when dealing with persons from different nations and cultures and with transactions and disputes involving different legal systems. Embedded within this definition, however, are assumptions about the functions performed by attorneys. As became apparent during the discussion of learning outcomes, many of these assumptions about the role of attorneys are only accurate for some nations and cultures and not for others.

One example of culture based assumptions about the role of attorneys occurred in the comments of a couple of participants about the role of intercultural legal competence in enabling attorneys to perform what these participants viewed to be the “leadership” role of attorneys in society. This

25. *E.g.*, LAWRENCE ROSEN, *LAW AS CULTURE* (2006); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *YALE J.L. & HUMAN.* 3 (2001).

26. *See Tahoe I Report*, *supra* note 8, at 274.

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brought a rebuff from some other participants, who noted that the concept of lawyer as a leader is part of culture in the United States and not shared in many other nations. By contrast, in many other nations, leaders are commonly engineers by training. This is often a function of educational systems in which the students with the best test scores upon graduating the equivalent of high school in United States' parlance seek degrees in areas such as engineering, while those with lower scores enter college to study law. As one participant put it, her family from Turkey could not understand why someone with her academic credentials would study law.

Other participants raised a second example of culture specific assumptions about the role of lawyers. This involved the concept of advocacy. In the United States, and perhaps other common law nations, we speak of the attorney's obligation of "zealous advocacy."²⁷ Such zealous advocacy, however, may not reflect an appropriate conception of the role of an attorney in an inquisitorial, rather than an adversarial, system. As an example, one participant recounted a situation in which he represented the U.S. government in a matter in which it retained French counsel (an *avocat*) to represent it in a French tribunal. The French *avocat* presented the position of the U.S. government, but then proceeded to point out problems with this position. This upset the U.S. government officials—who were used to the concept of zealous advocacy as expected of an attorney in the United States and unaware of the possibly different role envisioned under the inquisitorial system for a French *avocat*.

One impact of these different assumptions about the role of lawyers, that this report will return to later, is that they obviously can create difficulties for attorneys dealing with attorneys from other countries when the attorneys operate under different assumptions as to the lawyers' role. Avoiding miscommunication that can result—as illustrated by the example of the French *avocat* and his U.S. client—is one specific outcome for intercultural legal competence. Of relevance to the present discussion of meta-outcomes, however, is that competency in dealing with other cultures and legal systems—and, accordingly, the specific learning outcomes sought for intercultural legal competence—depends upon the expected roles of the attorney, which can differ in different cultures and legal systems. So, for example, intercultural legal competence sufficient for an attorney in a culture which does not view the attorney's role to include leadership and zealous advocacy would disappoint in a culture in which clients and society expect such roles of their attorneys. Indeed, recognition of this fact may itself be one specific outcome necessary for intercultural legal competence.

27. *E.g.*, MODEL RULES OF PROF'L CONDUCT pmb. para. 2 (2004) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

*Global Business & Development Law Journal / Vol. 26**b. Realistic Goals for Legal Education*

The question of how much one can realistically expect to accomplish in legal education forms the final piece of the framework for specific learning outcomes regarding intercultural legal competence—as, indeed, it must form part of the framework for setting learning outcomes for other aspects of legal education. So, for example, in a perfect world one might have a goal that students interested in transnational practice should be immediately capable of successfully interacting with clients, parties, attorneys and officials from any other nation or culture, as well as handling disputes and transactions involving any other legal system. Yet, such an expectation would be no more realistic than an expectation that law students, immediately upon graduation, should be capable of successfully performing as lead counsel in a highly complex trial or in carrying out a multi-billion dollar corporate acquisition.

The comments from one participant put the matter in perspective. This participant was born and educated in Europe, has close relatives living in Japan, and (he did not mention, but I will add) is a leading figure in comparative law in the United States. Yet, he stated that he would not be comfortable in his ability to avoid missteps in dealing with the legal or broader culture in, say, Latin America, without having lived there for some years. Indeed, one of the insights from comparative law is that truly understanding a nation's laws and legal culture might take years of living in that nation.²⁸ Drawing out the curricular implications of these observations, another participant gave an important warning in regard to setting realistic goals: Attempting to do too much can lead to accomplishing too little in that it can give students the wrong impression of what they have learned—specifically, students might reach the potentially dangerous conclusion that they know more about dealing with persons from other nations and cultures and with other legal systems than they do.

A metaphor from another participant provided the conference with an idea for a realistic overarching goal with respect to intercultural legal competence learning outcomes. He recalled his experience years earlier as a business attorney, who occasionally had to deal with transactions in which complex tax implications played a potentially important role.²⁹ The general business attorney in this situation typically is not familiar with the details of the relevant tax law; but he or she should be familiar with enough tax law to spot possible issues, know when to bring in tax experts, and be able to communicate with such

28. See, e.g., UGO A. MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, *SCHLESINGER'S COMPARATIVE LAW* (7th ed. 2010); e.g., Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 451, 458 (2009); Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 51 (1998).

29. For an examination of tax considerations involved in various business transactions, see FRANKLIN A. GEVURTZ, *BUSINESS PLANNING* (4th ed. 2008). I should note, however, that I was not the former business attorney who drew this metaphor.

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experts. Similarly, attorneys engaged in transnational matters should understand enough about non-U.S. legal systems and cultures to be able to communicate with non-U.S. attorneys, who can provide the more specific expertise on those systems and cultures. As put by one participant, the idea is to train students to sensitivity rather than to any specific country or culture. In other words, as with much of legal education, the goal is for students to know the questions to ask, rather than to have all the answers.

A couple of participants added the important observation that realistic outcomes need not be an all or nothing affair. Instead, different learning outcomes may be appropriate for different students, depending upon the students' career interests and expectations. (This, of course, is implicit in the division of the curriculum at law schools generally into required and elective courses, with required courses producing outcomes thought necessary for every student and electives producing outcomes for students pursuing certain areas.) So, in the area of intercultural legal competence, familiarity with basic concepts of intercultural communication when dealing with persons from different cultures in one's own nation, plus perhaps some awareness of the relationship of law to institutions and culture, could be a suitable learning outcome for all students, including those planning to avoid any semblance of transnational practice. At the same time, more ambitious learning outcomes involving greater familiarity with the different legal systems and philosophies found in other nations could be appropriate for students interested in transnational practice.

B. Specific Learning Outcomes

The preceding discussion of establishing realistic goals pushes back against the notion that there should be a lengthy and ambitious set of specific learning outcomes for intercultural legal competence education in law school. Instead, it may be more appropriate to frame even the specific learning outcomes for intercultural legal competence in broad minimalist terms, recognizing that such goals sound far simpler to achieve than they are. This result should not be surprising. After all, the essential learning outcome for at least the first year, if not more, of legal education is the ability to perform legal analysis.³⁰ The ability to perform legal analysis competently would seem like a modest outcome to seek, yet it is disappointing how many law students never master it.

30. See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION (2007) [hereinafter THE CARNEGIE REPORT] (describing "the first year of law school's emphasis on well-honed skills of legal analysis").

*Global Business & Development Law Journal / Vol. 26**1. Open-Mindedness*

Numerous observations by the participants at the conference made clear that one essential learning outcome for intercultural legal competence is what I will label “open-mindedness.”³¹ While a number of participants referred to the need for openness or to be open to other systems, one participant provided a helpful alternate formulation of the same concept by explaining that attorneys possessing intercultural legal competence must be able to see the world through the perspective of others. Helpful as this elaboration is, the concept of open-mindedness, like the term “legal analysis,” entails a much more involved cognitive process than communicated by a simple term or formulation. Fortunately, the discussion at the conference provided a framework for going further.

In many ways, open-mindedness is a deconstructive thought process in which individuals become aware of assumptions that stand in the way of their suitable adaptation when dealing with persons from other cultures and nations and when dealing with other institutions and systems. This thought process begins—as put by a transnational business attorney in one of the videotaped interviews viewed by the participants—with the admonition that an attorney should assume that everything he or she thinks he or she knows about other cultures and legal systems is probably wrong. In other words, as expressed by a couple of participants, students must be taught to be provisional in their thinking about culture.

Being provisional in thinking about culture is not the same thing as being ignorant of other cultures and systems. Indeed, a number of participants commented on the problem of widespread ignorance among law students (and indeed among the population at large) in the United States of other cultures. This, in part, is a function of limited knowledge of history and geography by law students in the United States;³² despite the fact that entering law school in the United States typically requires an undergraduate college degree.³³ Such ignorance does not produce open mindedness or an ability to adapt to other cultures and institutions, since misconceptions can quickly fill the void—whether those misconceptions involve perceptions of other cultures’ inferiority (an instinctive first response to cultural difference); overly romantic notions of other

31. See, e.g., Spitzberg & Changnon, *supra* note 9, at 33 (“Openness (withholding judgment)” identified as an attitude for intercultural competence). Formulations of this concept sometimes pair openness with inquisitiveness. *Id.*

32. See, e.g., Mark A. Ashwill & Duong Thi Hoang Oanh, *Developing Globally Competent Citizens*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE, *supra* note 9, at 141, 146 (describing ignorance of world geography by persons and young persons in the United States).

33. AM. BAR ASS’N, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2012-2013 37 (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_5_2012_2013_aba_standards_and_rules.authcheckdam.pdf.

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cultures' superiority; or a superficial assumption that all cultures are essentially the same that ignores important differences.³⁴ Media portrayals often contribute to such cultural misconceptions.³⁵ For example, one participant noted how cultural ignorance and misconceptions are not confined to persons in the United States; specifically, persons outside the United States often have misconceptions about U.S. culture because of media portrayals of life in the United States that focus on crime and the like (as in many television shows and movies).

An important aspect of open-mindedness noted by a number of participants comes from a conscious understanding of one's own culture and the assumptions and modes of thinking that are part of one's culture.³⁶ One participant encapsulated this concept by identifying a lawyer's cultural self-awareness as a specific outcome for intercultural legal competence. As the discussion made clear, legal culture may be different in different nations and legal systems. So, as discussed above, the notions of lawyer as leader and of zealous advocacy are part of legal culture in the United States, but not in many other nations. Not only do legal cultures differ between different nations, but the legal culture within a nation may have cultural features that differentiate it from the broader culture within the nation.³⁷ As one participant put it, "thinking like a lawyer" is itself a culture. Before a lawyer can appreciate and adapt to differences from his or her legal culture, he or she must step back and appreciate the various assumptions, values and resulting behaviors of his or her own legal culture, which persons operating in the culture otherwise largely take for granted.³⁸

Another aspect of open-mindedness noted by a couple of participants is to avoid the assumption of homogeneity within culture. As one participant put it, "culture is a set of rules somebody claims to own but each person has." People within a common culture tend to spread in a statistical curve around common cultural midpoints rather than all reflecting the exact same cultural norms.³⁹ A couple of examples illustrate the point. Different cultures often reflect "collectivist" (putting greater value what is good for the group) versus

34. *E.g.*, Milton J. Bennett, *A Developmental Approach to Training for Intercultural Sensitivity*, 10 INT'L. J. INTERCULTURAL REL. 179 (1986) (describing various phases in which persons react to unfamiliar cultures by denigrating the other culture, overly praising the other culture, or disregarding differences in cultures).

35. *E.g.*, Stella Ting-Toomey, *Intercultural Conflict Competence as a Facet of Intercultural Competence Development*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE, *supra* note 9, at 100, 113.

36. *E.g.*, Janet M. Bennett, *Cultivating Intercultural Competence*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE, *supra* note 9, at 121, 127 ("to develop our own cultural self-awareness through understanding our cultural patterns . . . can we begin exploring the gap between our values, beliefs, and behaviors and those of others?").

37. *See, e.g.*, THE CARNEGIE REPORT, *supra* note 30, at 186 (describing the consequence of legal education as producing "a striking conformity in outlook and habits of thought among legal graduates").

38. *See, e.g.*, CRAIG STORTI, *Intercultural Competence in Human Resources*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE, *supra* note 9, at 272, 277 (stating that people typify their culture without consciously thinking about it and therefore often do not know their own culture).

39. *Id.*

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“individualist” (putting greater value on what is good for an individual) values.⁴⁰ Also, different cultures often follow communication styles identified as “low context” (persons typically mean what they say) or “high context” (persons typically do not mean what they say, but instead expect the recipient of communication to deduce from context meanings often quite different from what was said).⁴¹ This does not mean, however, that everyone within such a culture will share the same values or follow the same communication styles.⁴² Some persons within a society with collectivist values may nevertheless have individualist values (and vice versa), while some persons in a society with low context communication styles may communicate more in a high context manner (and vice versa). What this means is that, while it is useful for persons to understand the cultural midpoints in a society in which they will be dealing, it is critical for students to learn that they should not stereotype all persons within any culture.

Race raises a related problem, since stereotyping can involve race and culture. As observed by one participant, there is a common danger of conflating issues of culture and race. While there are sometimes correlations between differences in race and culture, these are not the same things.⁴³

Considerable discussion that related to open-mindedness addressed the need for students to adopt a “sense of humility” when dealing with matters of culture. A number of participants pointed out how, in intercultural dealings, it is important for students to think about power dynamics and exceptionalism. This can involve both intercultural and intra-cultural dealings. Power dynamics in intercultural dealings often result, as explained by a participant, in persons from less dominant cultures feeling pressure to adapt to more dominant cultures.⁴⁴ So, for example, people from the United States often know little about other cultures and expect persons from other cultures to adapt to U.S. culture.⁴⁵ Within a culture, as explained by another participant, people feel pressure to comply with the norms of those in the culture’s majority.⁴⁶ Also, power imbalances and

40. *E.g.*, Ting-Toomey, *supra* note 35, at 105.

41. Robert T. Moran, William E. Youngdahl & Sarah V. Moran, *Intercultural Competence in Business*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE, *supra* note 9, at 287, 300. So, to repeat an example mentioned by a transnational practitioner in the videotaped interviews viewed by the participants, an attorney’s advice that a client “should consider” a particular course of action means something quite different in a low context communication culture (where it would mean simply that the client should think about undertaking the suggested course of action), and a high context communication culture (where the attorney is really advising the client to do the recommended action).

42. JEAN M. BRETT, NEGOTIATING GLOBALLY 22-23 (2001).

43. Mark Nathan Cohen, *Culture, Not Race, Explains Human Diversity*, in ANTHROPOLOGICAL PERSPECTIVES 46 (1998), available at http://www.anth.uconn.edu/classes/anth220_f02/sec_05/pdf/cohen98.pdf.

44. *See, e.g.*, Camille Hall et al., *Black Women Talk About Workplace Stress and How They Cope*, 43 J. BLACK STUD. 207, 216 (2012).

45. *E.g.*, Ashwill & Oanh, *supra* note 32, at 145-48 (discussing American ignorance of other cultures and assumptions that other nations should adopt our culture as superior).

46. *See, e.g.*, Hall et al., *supra* note 44, at 217; Roberta Rosenthal Kwall, *Creativity and Cultural*

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notions of hierarchy based upon various groupings, such as gender, age, etc., are part of many cultures.⁴⁷ Being aware of such power dynamics helps avoid miscommunication and facilitates intercultural competence. As an illustration of this, one participant explained that persons with lower status or power in inter- or intra-cultural dealings may use silence as a way of communicating.⁴⁸ Hence, placing too much attention on voice—in other words, paying more attention to those who speak up—both risks missing important communication and leads to cultural domination.⁴⁹ All told, open-mindedness entails avoidance of behaviors exhibiting cultural domination. As one participant put it, one must learn to defer to persons in other cultures as also having expertise.

A significant part of the cognitive process of open-mindedness arises from the need to counteract the unconscious operation of cultural incompetence. As one participant explained, research by medical professionals has found that problems with intercultural competence operated at an unconscious level.⁵⁰ This participant further explained that, in the medical field, addressing unconscious barriers to intercultural competence often led to the adoption of checklists.⁵¹ Indeed, if one goes back through the various cognitive processes discussed in regards to open-mindedness, an overarching theme is to bring to the surface often unconscious assumptions and attitudes. So, applying the idea of checklists, open-mindedness may be said to involve the following more specific outcomes:

- Provisional thinking about legal systems and culture (recognizing that what you think you know is often wrong);
- Self-awareness of your own system and culture;
- Avoiding the assumption of homogeneity of persons within a culture;
- Avoiding conflating race and culture; and

Influence in Early Jewish Law, 86 NOTRE DAME L. REV. 1933, 1936 (2011) (stating that culture is both shared “among those with a common cultural framework as well as contested from within.”).

47. E.g., Gert Jan Hofstede, *The Moral Circle in Intercultural Competence*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE, *supra* note 9, at 85, 93 (describing differences in hierarchical versus smaller power distance cultures).

48. E.g., BRETT, *supra* note 42, at 11 (giving an example).

49. This is not to say that the culture based significance of silence in communication is always a reaction to power imbalances. As an amusing example, one transnational practitioner in the videotaped interviews shown at the conference relayed a story about a meeting in Poland. He and his German clients showed up at the appointed time and place only to find that the Polish counterparties were not there. Upon inquiry, he learned that the custom among Polish business persons is to set a meeting, re-confirm the meeting, and re-confirm the meeting a second time; without which it is assumed that the meeting is canceled.

50. Larry Purnell, *The Purnell Model for Cultural Competence*, 11 J. MULTICULTURAL NURSING & HEALTH 2, 9 (2005).

51. *Id.* at 10-12.

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- Awareness of power relationships within and between cultures and approaching culture with a sense of humility to offset the impact of power relationships.

2. *Framework for Observation and Adaptation*

It did not take long—indeed, it began with the first comment in the at-large discussion—for the participants to put their finger on an essential outcome for intercultural legal competence: Does the attorney know what to do when he or she encounters a new culture for the first time; or, to be more precise, can the attorney avoid critical missteps and adapt when dealing with persons from nations or cultures, or handling matters involving legal systems, with which he or she has had little prior experience? If an attorney lives in, or deals with, a culture or legal system for years, one would hope that the attorney would eventually adapt intuitively to the culture or system. In an era of increasing globalization, as well as increasing diversity of the population within a nation, however, attorneys often will not have the luxury to spend years living in a culture or observing another legal system before they must deal effectively with persons from that culture or with that legal system. Hence, a learning outcome looking at initial, or at least early, adaptation is highly important.

This ability to adapt requires open-mindedness; but it requires more. A number of participants pointed out that it requires a template by which the attorney can observe and adapt. As explained by several participants, giving the attorney a list of things to look for can hopefully shorten the time it takes for the attorney to acquire competency in dealing with persons from a particular culture and matters involving a particular legal system. Such a template gives the attorney tools to discover what is necessary to understand about another culture;⁵² what questions to ask clients and the like. This can also hopefully reduce miscommunication or other problems pending the attorney acquiring greater familiarity with the culture or legal system. The participants made a number of stabs at creating such a template. In the end, this effort remains a work in progress. Nevertheless, the discussion provided various elements from which further efforts can build.

One list of things that an attorney should be on the lookout for when dealing with persons from other nations and cultures involves various attributes of culture generally.⁵³ The discussion produced a number of examples of such attributes. This report earlier pointed to differences in communication styles.⁵⁴

52. See, e.g., Bennett, *supra* note 36 at 126-31 (discussing use of cultural maps as a template for comparing cultures for the purpose of acquiring intercultural competence).

53. *Id.* at 126 (listing various attributes of culture, including non-verbal behavior, communication styles, values, interaction rituals, conflict styles, cognitive and learning styles, and identity development).

54. See *supra* Part.II.1.

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Such differences not only involve the contrast between high context (meaning what you say) versus low context (relying on context to invoke meaning) approaches, but also encompass differences between highly emotionally expressive (more gestures, more impactful language) versus more emotionally restrained (fewer gestures, less impactful language) styles.⁵⁵ Language is an obvious attribute of culture impacting communication. Several participants pointed out the unfortunate reality that many students and lawyers in the United States only speak English, which creates a problem of understanding and dealing with another culture when the student or lawyer does not speak the language of that culture.⁵⁶ A couple of participants further pointed out that translators do not cure this problem, as translators miss nuances and distance the listener from the speaker.⁵⁷ Another attribute of culture, also mentioned earlier, is the difference in value systems that frame the way those in a culture view a situation.⁵⁸ This includes not only the collectivist versus individualistic values mentioned earlier, but also the difference between cultures placing greater value on money (material things) versus cultures placing greater value on non-material things.⁵⁹ Yet another attribute of culture mentioned earlier involves hierarchy and power relationships—with contrasts between more hierarchical and egalitarian cultures and the basis for power relationships (e.g., age, gender, ethnicity, wealth, education). As mentioned both in the taped interviews from attorneys in transnational practice, and by a participant, cultures differ in their sense of time—punctuality, patience, and the like.⁶⁰

Another list identified by the discussion involves attributes of the legal system (the legal culture). Among the obvious attributes are the legal tradition (common law, civil law, Islamic law, etc.), which, in turn, impacts legal philosophy and reasoning within a system,⁶¹ as well as the system's legal institutions and processes (e.g., adversarial versus inquisitorial trials).⁶² The

55. E.g., THOMAS KOCHMAN, *BLACK AND WHITE STYLES IN CONFLICT* 1-5 (1981) (discussing techniques used as a white man researching black language and culture).

56. See generally Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. Rev. 999 (2007).

57. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1201 (1993); e.g., Ahmad, *supra* note 56, at 1002-03.

58. E.g., Hofstede, *supra* note 47, at 92-94 (discussing differences in value systems between individualism/collectivism, power distance, masculinity/femininity, uncertainty avoidance, and long-term/short-term orientation).

59. See, e.g., Xin Liu, *Chinese Money Habits—How My Culture Influences My Attitude Towards Money*, WISEBREAD (Mar. 5, 2008), <http://www.wisebread.com/chinese-money-habits-how-my-culture-influences-my-attitudes-toward-money>.

60. E.g., Peter Ogom Nwosu, *Understanding Africans' Conceptions of Intercultural Competence*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE, *supra* note 9, at 158, 171.

61. E.g., JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 2 (2d ed. 1985).

62. See, e.g., William T. Pizzi, *Soccer, Football and Trial Systems*, 1 COLUM. J. EUR. L. 369, 374-77 (1995).

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participants pointed to a number of more subtle attributes as well. For example, several participants noted, as discussed earlier, that lawyers play different roles in different societies, and, indeed, the legal system plays a different role in different societies.⁶³ For instance, as explained by one participant, in some societies (the United States), persons commonly view filing a lawsuit as a preface to negotiation, whereas in other societies, (China) persons view the filing of a lawsuit as a “declaration of war” that will cut off negotiation and is only a last step to take after negotiation fails.⁶⁴ Differences in the ethics rules governing attorneys—for example, Chinese law requires a defense attorney to divulge client confidences in a criminal case⁶⁵—also contribute to differences in legal cultures. Beyond this, different systems of legal education in different countries, as noted by one participant, further differentiate legal cultures.⁶⁶

While these lists of cultural and legal system attributes provide a template for observation, several participants attempted to go further. They sought to create a template for adaptation by formulating a framework under which law students could consider the impact of the various cultural and legal system attributes in the contexts in which attorneys function and on the tasks performed by attorneys. As one participant suggested, such a framework might consist of a matrix in which the various attributes of culture and of legal systems form one axis and the various contexts in which attorneys function form a second axis. This allows exploration of how the various attributes impact the various contexts in which attorneys perform. So, for example, students might consider how cultural and legal system differences impact contexts involving dispute resolution (whether this involves trial, arbitration or negotiated resolution); they might consider how these attributes impact transactions (including negotiation and documentation); they might consider how these attributes impact client relations and communication; and they might consider how these attributes impact the lawyer’s understanding of a nation’s law. Another participant suggested contextualizing the impact of various attributes of culture and of legal systems by looking at various relationships or roles of attorneys. These relationships and roles include: attorneys with clients (including not just narrow attorney-client communication, but more broadly the attorney’s role of representing clients); attorneys with attorneys (including professional service); attorneys with society

63. JAMES E. MOLITERNO & GEORGE C. HARRIS, *GLOBAL ISSUES IN LEGAL ETHICS* 1 (2007).

64. See, e.g., John L. Graham & N. Mark Lam, *The Chinese Negotiation*, in *HARVARD BUSINESS REVIEW ON DOING BUSINESS IN CHINA* 1, 8 (2004).

65. Leah M. Christensen, *A Comparison of the Duty of Confidentiality and the Attorney-Client Privilege in the U.S. and China: Developing a Rule of Law*, 34 *T. JEFFERSON L. REV.* 171, 185 (2011).

66. Stephen E. Hendrix, *Restructuring Legal Education in Guatemala: A Model For Law School Reform In Latin America?*, 54 *J. LEGAL EDUC.* 597 (2004); see generally Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 *FORDHAM INT’L L.J.* 1039 (2002); see generally Jasper Kim, *Socrates v. Confucius: An Analysis of South Korea’s Implementation of the American Law School Model*, 10 *ASIAN-PAC. L. & POL’Y J.* 322 (2009).

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(including the “leadership function”); and an attorney with him- or herself (as in career goals and satisfaction). Yet another effort involved looking at various aspects of communication—e.g., listening, speaking, gathering information—and asking how the various cultural and legal system attributes impact these aspects of communication. All of this enables students and attorneys to perform what one participant labeled a “thought experiment”—to ask what changes when a legal transaction or dispute (say a simple negligence action) involves more than one nation (or culture). So, as in an example suggested by this participant, students can see how the different concepts and expectations about contracts in the United Kingdom versus the Netherlands impact both law and practice.

A couple of participants added yet an additional aspect to a framework for adaption. This would consist of various generally helpful approaches to dealing with intercultural situations. For example, actions that “get people out of their box”—as illustrated by one participant’s use of drinking in Russia as a way to break the ice—can be a handy tool in intercultural situations. Another such generally helpful approach to intercultural situations comes from the advice of this participant that persons should not try to disguise their own cultural background.⁶⁷

Not surprisingly, the goal of producing one consensus framework for observation and adaption when dealing with different nations’ legal and general cultures and legal systems eluded a single conference. Subsequent to the conference, however, members of the faculty at Pacific McGeorge used many of the ideas generated at the conference in preparing a template to guide students participating in legal internships outside their home country in observing differences in legal systems and culture. This template is attached as an appendix to this report.⁶⁸

II. CURRICULAR VEHICLES TO PROMOTE INTERCULTURAL LEGAL COMPETENCE

The discussion at the Tahoe II Conference produced numerous ideas for courses, programs, and pedagogies (curricular vehicles) to promote intercultural legal competence. It is possible to divide these curricular vehicles into two conceptual categories: (1) classroom transmission of knowledge concerning culture and its impacts on law and legal practice, as well as concerning different legal systems among nations; and (2) curricular vehicles which seek to have the students actually experience the impact of different cultures and legal systems.

67. One can also reformulate all these ideas into the knowledge, values (or attitudes), and skills rubric for learning outcomes. Hence, students should develop knowledge of their own general and legal cultural lens as well as of various aspects of general and legal culture; they should develop an attitude of openness to other cultures and the willingness to admit ignorance and ask questions, and the skill to apply the acquired knowledge to develop working relations with persons from, and otherwise adapt to, other general and legal cultures.

68. See *infra* Appendix.

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Of course, these approaches are not mutually exclusive,⁶⁹ but rather this division serves simply as a way to organize and clarify the basic approaches. These approaches face a number of challenges, both in common and distinct to each approach.

A. Classroom Coverage of Intercultural and Systemic Topics

A number of proposals during the session on curricular vehicles involved adding to the content of existing courses, or introducing new courses into the curriculum, that would involve classroom transmission of knowledge concerning culture and its impacts on law and legal practice, as well as concerning different legal systems among nations. While these proposals are more straightforward in their pedagogy—which presumably would be, for the most part, readings and lecture—they nevertheless raise questions as to what topics to address, and what courses should address these topics.

There was not time in the conference to develop comprehensive syllabi of topics involving culture, the relationship of culture to law and legal practice, and different legal systems among nations, to which courses should introduce students. Nevertheless, the participants mentioned many such topics from which one could begin to construct syllabi. The earlier discussion of outcomes identified many of these topics. Specifically, in discussing a template for observation and adaptation, participants mentioned a number of attributes of culture generally—including communication styles, value systems, hierarchy and power, and relation with time—with which students should become familiar. This discussion also referenced various aspects of legal systems and legal cultures in different nations, including legal traditions and institutions, the role of lawyers and law in different societies, and national differences in legal education. Describing these cultural and systemic differences, and evaluating their impact on the functions of attorneys, provides a list of topics to cover. In addition, going back to the instrumentalist goal for intercultural legal competence, this list of topics could include moral and ethical issues related to corporate social responsibility, cultural dominance, and legal imperialism. All told, as put in one proposal, courses should give students a background on law and culture and the wide variety of cultural approaches to law, have students recognize cultural bias of their own tradition, and raise values questions regarding law and society.

Participants had a number of ideas for courses that could serve as vehicles for covering these topics. Some of these ideas entailed creating new courses. Some

69. So, for example, one break-out group at the conference developed an integrated proposed curriculum to promote intercultural legal competence. This began with adding completion of various intercultural courses, such as anthropology, to the criteria for admitting students into law school; followed in the first year of law school by introduction of various law and culture (e.g., anthropology) topics into required courses; followed by a comparative perspectives course in the second year of law school; followed by a clinical intercultural experience in the third year of law school.

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of the new course ideas fit within the “Law and . . .” framework, such as courses in Law and Anthropology, Law and Sociology, and Law and Linguistics, or, more broadly, a perspectives course that would combine these topics with skills of cultural awareness. Other course ideas focused on achieving access to justice and social justice, such as a course in International Poverty Law. Another proposal was for a comparative law course that would examine the role of attorneys in solving social problems. This would include examining the available remedies, as well as the accessibility of attorneys and legal institutions, in different countries in order to address various social problems.

As an alternative to conventional semester or quarter long scheduling and structure, some participants suggested compressed (one or three-week) offerings of such courses. For example, one proposal at the conference called for a one-week intensive course at the beginning of the second year that would cover both substantive topics in international and comparative law (giving the students a framework of the various laws from the sub-national to the international that may be applicable to a given problem) and topics in law and culture (giving students a framework of the relationship of law and culture and of legal culture). This intensive course would use a specific problem (say a contract problem) as a vehicle around which to organize coverage of the various topics, and would look at the problem both from the standpoint of a non-U.S. party dealing with U.S. laws and institutions, and a U.S. party dealing with non-U.S. laws and institutions.⁷⁰

Other ideas added coverage of various law and culture and legal systemic topics to existing courses. Comparative Law courses offered an obvious candidate. Indeed, many of these topics may already be covered in Comparative Law courses, depending upon the instructor and the books or materials used.⁷¹ An expanded Professional Responsibility course that would look at the role of lawyers and legal culture in different nations provided another option for working off existing courses. Another idea was to introduce cultural and systemic issues pervasively throughout law school courses. This builds off the approach of introducing substantive international, transnational, and comparative law into traditional law school courses⁷² and expands this into introducing the relationships of law and culture and broader systemic differences impacting various areas of law. For example, introducing into a corporate law course a comparison of two judicial decisions dealing with executive compensation—one

70. The idea of a compressed course that works with a problem raising international issues is somewhat similar to Georgetown’s “Week One” program occurring during the winter break of the first year. *Week One: Law in a Global Context*, GEORGETOWN LAW, <http://www.law.georgetown.edu/academics/academic-programs/jd-program/specialized-programs/week-one-law-in-a-global-context.cfm> (last visited Oct. 18, 2012).

71. E.g., MATTEI, RUSKOLA & GIDI, *supra* note 28.

72. See generally *Tahoe I Report*, *supra* note 8 (describing pervasive approach to introducing international and comparative law through traditional core law school courses).

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from Delaware⁷³ and one from Germany⁷⁴—can show how application of the same nominal rule of corporate law yields different results when applied by judges from different legal and broader cultures—one of which (Germany) values income equality and tolerates greater government interference in the private sector, and one of which (the United States) places greater value on wealth maximization and less government regulation of private ordering.⁷⁵

B. Experiential Approaches Geared Toward Intercultural and Systemic Topics

Numerous other proposals during the session on curricular vehicles sought to have the students actually experience the impact of different cultures and legal systems. Some of these proposals used traditional techniques of experiential legal education, while some proposals entailed other educational experiences through which students interacted with persons from other cultures and legal systems.

A number of proposals for curricular vehicles to promote intercultural legal competence involved traditional methods of experiential legal education such as simulations, clinics, and externships. Turning first to simulations, one participant suggested immersion in simulations in which the students must deal with different legal systems or the cultures of hypothetical parties as a means to reach more of the curriculum and more students than reached by live client clinics. Indeed, several of the proposals for courses transmitting knowledge about law and culture incorporated simulations involving the need for students to address transnational or cross-cultural problems. Another participant noted that medical schools provide a state of the art model when it comes to using simulations as a means for students to experience human interactions in professional practice, including the potential intercultural aspects of such interactions. In their simulations, medical schools employ sophisticated videos, as well as having students engage in in-person interactions with professional actors playing roles of patients.

A number of participants noted that live client clinics provide students opportunities to develop intercultural competence. By dealing with actual human clients, clinics teach students how to listen and empathize with a client, including those from different cultures. Moreover, clinics have developed techniques (including checklists) to deal with intercultural aspects of legal practice (at least domestically).⁷⁶ A question is how to expand the clinical intercultural experience into international dealings. One suggestion was to cooperate with The Global

73. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006).

74. Bundesgerichtshof [BGH] [Federal Court of Justice], Dec. 21, 2005, 21 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOF IN STRAFSACHEN [BGHST] 470 (Ger.), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&Datum=2005-12-21>.

75. For a discussion, see Franklin A. Gevurtz, *Disney in a Comparative Light*, 55 AM. J. COMP. L. 453 (2007).

76. E.g., Bryant, *supra* note 22.

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Alliance for Justice Education (“GAJE”), which promotes clinical education worldwide.⁷⁷

Overseas externships in which students must work in a different legal culture and system obviously provide a significant opportunity for students to learn about different legal cultures and systems through direct experience in the practice of law. Many law schools arrange such internships for their students.⁷⁸

Other approaches to having students experience the impact of different legal cultures and systems involve interacting with people from such cultures and systems, even if the interaction does not involve legal practice—as with simulations, clinics and externships. A number of proposals at the conference involved efforts to have domestic students interact with students from other countries. Interaction of domestic students with students from other countries is potentially a significant benefit from the growing number of foreign LL.M. students in law schools in the United States. Indeed, interaction among students from different cultures even from within the United States is a recognized rationale behind considering diversity in law school admissions.⁷⁹

Still, a number of participants pointed out that it is not enough simply to have students from different nations or cultures in the same school or even the same classes in order for sufficient interaction to occur. In fact, in a survey of U.S. J.D. students conducted as part of the Law School Survey of Student Engagement (“LSSSE”), the J.D. students reported limited interaction with foreign LL.M. students.⁸⁰ Around a third of the responding students were unaware that their schools even had foreign LL.M. students enrolled, while most reported that their principal interaction with foreign LL.M. students occurred simply in that they may sit in the same class.⁸¹ Only one-fifth reported frequent interaction with foreign students in class, and about seventy percent reported no frequent interaction with foreign students in studying or completing assignments outside of class.⁸²

A number of proposals dealt with the lack of interaction by suggesting that schools establish courses in which U.S. J.D. students must work with foreign LL.M. students. This joint work might involve a problem on which the students must work together—thereby combining the simulation method with the real life intercultural experience of working on a legal problem with persons trained in a

77. GLOBAL ALLIANCE FOR JUST. EDUC. (Nov. 19, 212), <http://www.gaje.org/>.

78. *E.g.*, *Transnational Business Practice Track Two*, MCGEORGE SCH. OF LAW, http://www.mcgeorge.edu/Future_Students/LLM_and_JSD_Programs/LLM_Programs/LLM_in_Transnational_Business_Practice/Transnational_Business_Practice_Track_Two.htm (last visited Oct. 18, 2012).

79. *E.g.*, *Gutter v. Bollinger*, 539 U.S. 306, 328 (2003).

80. *See* LAW SCH. SURVEY OF STUDENT ENGAGEMENT, 2011 ANNUAL SURVEY RESULTS, NAVIGATING LAW SCHOOL: PATHS IN LEGAL EDUCATION 14 (2011), *available at* http://www.lssse.iub.edu/pdf/2011/2011_LSSSE_Annual_Survey_Results.pdf.

81. *Id.*

82. *Id.* at 15.

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different legal system and culture. One participant described the impact of this approach when used in a summer program in China involving law students from China, the United States, and Germany. Through this interaction, students grew to appreciate the strengths and weaknesses of the different legal education and resulting legal culture of students from different countries. Specifically, at the beginning of the program, both students from the United States and the Chinese students noted the superior knowledge of legal rules possessed by the Chinese students as a result of the focus of Chinese legal education on learning rules of law. At the end of the program, the Chinese students commented favorably on the creativity and problem solving capabilities of the students from the United States, which results from the interactive analytical methodology of legal education in the United States.

In order for such a course to work, it must attract a sufficient number of both foreign LL.M. and U.S. J.D. students. One proposed alternative to offering an elective that would be sufficiently attractive to both sets of students is to establish a required course. Specifically, one participant from a law school with a very large foreign LL.M. student population relative to its domestic J.D. student enrollment proposed a required course in which all second year J.D. students and all LL.M. students would work together on joint projects involving, say, corporate or family law. In these projects, the U.S. students would need to rely on the foreign LL.M. students to provide guidance on the LL.M. students' home countries' laws, much as would U.S. attorneys dealing with foreign attorneys, while the foreign LL.M. students would need to rely on the U.S. students for guidance on U.S. law, much as would foreign attorneys dealing with U.S. attorneys.

U.S. students may not only experience interaction with persons from different legal cultures by dealing with foreign law students, but they might also gain such experience by taking courses with foreign law faculty. Accordingly, among the proposals at the conference was to recognize the utility of having foreign law professors visit at U.S. law schools not only as a resource to teach particular areas of non-U.S. law in which the foreign professors may have expertise not found on the faculty of the host school, but also as a resource for allowing students to interact with persons from a different legal culture. Making this proposal more practical, a participant pointed out that differences in the academic year between that in the United States and that in many other nations can allow foreign law professors to teach mini courses of one or more weeks in length.

Another proposal was to use guest speakers as a means for students to interact with persons from different cultures. For example, one participant described the use of Navajo speakers, who explained to students the Navajo

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cultural inhibitions regarding discussing death, which make end of life planning difficult.⁸³

A number of participants pointed out that study abroad can provide students with experiences interacting with persons from other cultures and legal systems, including with non-U.S. students and professors, and with the broader community in another country. Some participants contrasted exchange programs in which students study in foreign institutions, with overseas programs operated by U.S. law schools (typically for a few weeks during the summer), as far as the degree to which these opportunities provide students with an intercultural experience. In the case of overseas summer programs operated by U.S. law schools, some participants pointed out that achieving a useful intercultural experience may call for considering the composition of the student body (ensuring a substantial proportion of non-U.S. students), the composition of the faculty (having non-U.S. law professors), and the degree to which the program forces U.S. students to interact with persons from other countries rather than retreating into a “comfort zone” of interacting largely with other U.S. law students and observing another country as would a tourist. Another proposal short of actually sending students overseas in order to gain the advantage of classes with foreign students and professors would be to establish courses employing distance education technology.⁸⁴

Many of the participants noted that an important, if not critical, component of gaining intercultural legal competence through encountering other cultures and systems is for students to reflect upon their experiences. This is a lesson from clinical legal education, in which clinicians not only build reflection into their model of learning through observation, information, experience and reflection,⁸⁵ but also, as explained by one participant, commonly seek to develop life-long habits of self-reflection that students will carry with them throughout practice. Such reflection furthers the goal of “learning for transfer”—in other words, that students take from the experience of handling one task or case general lessons that they can apply to handling different matters.⁸⁶

The participants recognized that learning for transfer was particularly critical for intercultural legal competence. Many of the proposals for students to experience interaction with other cultures or legal systems—such as study abroad or overseas internships—only give the students experience dealing with a single

83. See Ben Daitz, *With Poem, Broaching the Topic of Death*, N.Y. TIMES (Jan. 24, 2011), <http://www.nytimes.com/2011/01/25/health/25navajo.html?pagewanted=all>.

84. I confess a strong sympathy with this proposal as it reminds me of the television commercial for Cisco’s video conferencing technology in which the actress, Ellen Paige, visits an elementary school classroom “going on a field trip to China” via a video conference hookup.

85. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 66-67, 172-73 (2007), available at http://law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf.

86. See David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191 (2003).

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other culture or legal system. Students must then be able to use their encounter with one country's culture or legal system (beyond that of the students' home country) to gain a sense of differences in legal culture; thereby developing sensitivity to cultural and systemic differences and a checklist for observation and adaption from that experience. As one participant expressed in a bit of hyperbole, the goal is to say: "If one has a case on the moon with alien beings for judges, one should be able to figure out how to handle it."

Reflection during which the student places his or her experience within a framework for recognizing changes in legal and general culture from country to country equips the student to go from encountering one culture to developing a general tool kit for adaption. Indeed, testing by the University of the Pacific's School of International Studies shows for undergraduate students that one important element in establishing intercultural sensitivity is to have a reentry course following overseas programs in which students reflect upon what they observed in their experience abroad.⁸⁷ At the conference, there were suggestions that such a reentry course could not only bring together the students who undertook overseas exchange programs or internships, but also could involve alumni and LL.M. students to provide additional perspective. Beyond such a reentry course, having students keep journals during their overseas program is an important element for student reflection.⁸⁸

Participants pointed out some limitations on reflection when it comes to promoting intercultural legal competence. One participant noted that reflection is often culturally biased; for example, reflection in U.S. culture is often geared to considering how one could be more efficient, whereas reflection in Hindu culture is geared toward dealing with incompleteness. Another participant noted that the typical undergraduate students' approach to reflecting upon their experiences in studying abroad focuses on the students' personal growth (in other words, how the experience caused the students to grow in their individual maturity) as opposed to cultural observations (such as noticing power and gender dynamics in the nation where the students studied). This suggests the need for careful guidance of the reflection.

One final proposal for having students experience other cultures is to have students take classroom or experiential courses in languages other than the language of the student's home country (other than in English for U.S. students). Indeed, this is often a motivation for LL.M. students coming to study in the United States.⁸⁹

87. SUSAN G. SAMPLE, *STUDY ABROAD AND THE INTERNATIONAL CURRICULUM: ASSESSING CHANGES IN INTERCULTURAL COMPETENCE* 8 (2010), available at http://www.mcgeorge.edu/Documents/Conferences/Sample_Study_Abroad_and_the_International_Curriculum.pdf.

88. See STUCKEY ET AL., *supra* note 85, at 152 (discussing the importance of faculty interaction with internship students, including through journals, generally).

89. See Carole Silver, *The Variable Value of U.S. Legal Education in the Global Legal Services Market*, 24 GEO. J. LEGAL ETHICS 1, 29 (2011).

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C. Challenges Facing the Curricular Vehicles

The discussion at the Tahoe II Conference raised a number of challenges faced by the various curricular vehicles for promoting intercultural legal competence. Many involved resources, while others involved external constituencies. The participants recognized the importance of taking into account such challenges in order to ensure that proposals for promoting intercultural legal competence were, as one participant put it, “dean friendly.”

Law school faculty is obviously a critical resource needed for most of the curricular vehicles proposed for promoting intercultural legal competence. Participants at the conference pointed to a couple of potential challenges with respect to faculty: the first being the faculty’s capability and the other being the faculty’s willingness.

Several participants pointed to limitations on the capabilities of law school faculty to undertake various courses and programs to promote intercultural legal competence. To begin with, one participant warned that law professors in the United States largely come from the same legal and national culture, limiting their ability to do intercultural teaching in which students need to be exposed to people from radically different legal and other cultures. Moreover, many law professors may have limited knowledge about other legal systems and legal cultures, much less the general attributes of culture, intercultural communications, or the relationship of law and culture. This suggested to a number of participants that not just law students, but also law teachers, should be exposed to other nations’ cultures and legal systems and to various attributes of culture and the relationship of law and culture. In other words, law schools should promote cross-cultural competence among their faculty. One common suggestion toward this end was to encourage faculty to teach overseas in programs that provide significant interaction with other cultures and to require that the courses taught in such programs be in comparative or international (rather than U.S.) law.

The other challenge involves faculty support for promoting intercultural legal competence. One participant opined that for such efforts to be successful there must be a “from the ground up” approach in which faculty design and take ownership of courses. Another participant provided an example of this need for faculty buy-in. This involved proposals for promoting intercultural legal competence by requiring a course or courses. The experience with required courses designed to achieve a specific objective is that different faculty will teach the same course differently, with the result that some students, who take the course from an instructor less committed to the objective or methodology, may not obtain the sought after outcome.

Some participants pointed to the role of recent law school hiring patterns in producing faculties which may have limited capability and willingness to undertake programs to promote intercultural legal competence. Specifically,

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increased hiring based upon interdisciplinary expertise—at least if focused on fields such as economics as opposed to fields such as anthropology—may produce a faculty with little expertise or interest in the relationship of law and culture, matters of legal tradition or culture, or the “soft skills” of intercultural communication and the like. This discussion, in turn, provoked a lively debate between a pair of participants who have served as law school deans. One argued that the only way in which to obtain faculty with a sufficient interest and expertise to undertake programs to promote intercultural legal competence was to hire new faculty, and, accordingly, adoption of large scale curricular initiatives aimed at achieving this outcome could only take place once a critical mass of new hires with this focus replaced departing faculty who lacked interest in the area. Another dean disagreed, giving as an example this dean’s law school, where a large number of faculty members, who were not originally hired with any particular interest in international and comparative law, have incorporated international and comparative law into their teaching and scholarship. This dean also expressed concern that an approach relying on new hires would take too long to implement, especially in a climate of reduced law school hiring.

As mentioned above, some participants suggested the use of law professors from schools outside of the United States as a resource for promoting intercultural legal competence. One participant pointed out that this requires thoughtful use of non-U.S. law professors, not to just bring in such faculty to teach the same courses U.S. faculty could teach or that simply focus on substantive non-U.S. law. Some participants mentioned concerns with the cost and risk with non-U.S. law professors; albeit, the risk of negative student evaluations of non-U.S. law professors could, in fact, demonstrate that students were forced to deal with someone from a different legal and other culture, while, as mentioned earlier, compressed courses during off times for non-U.S. law schools may allow for lower cost visits.

As mentioned earlier, foreign LL.M. students may be a resource that can be used in classes to promote intercultural legal competence. Participants raised a couple a caveats here, however. LL.M. students may come from the elites in other countries⁹⁰ and therefore might give U.S. students a skewed view of the culture of those countries. Moreover, sometimes LL.M. students may not have as much understanding of their own legal culture as one would expect.

Similarly, the suggestion of having speakers from, or students otherwise interact with, persons from communities with different cultures is a possible resource, but also has limitations. One participant, who has used this approach, raised the difficulties in obtaining cooperation from persons in such communities because the communities feel that they have been mistreated by other academics

90. This is more likely if the LL.M. student comes from a country in which English language capability is not widespread and so only persons from the elites will have the necessary English language skill to study for an LL.M. in the United States.

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in the past; as, for example, indigenous populations who felt betrayed by social science researchers in the manner in which the research was used.

Another resource required for promoting intercultural legal competence is books or materials. While materials may be available for some courses to introduce intercultural issues,⁹¹ this seems to be an area in which there is considerable need.

As the discussion makes evident, many of the resource issues with promoting intercultural legal competence stem from the fact that intercultural competence involves other disciplines, such as anthropology, sociology, history, geography and foreign languages. A number of participants pointed out that this fact raises a question as to how far law schools should go into these other subjects, which, in turn, produced a discussion of the role of undergraduate education as a preparation for law school. One participant from a law school outside of the United States commented that this discussion may show the utility of the approach to legal education in most of the world, where law is an undergraduate degree.⁹² In a university in which students study law as an undergraduate major, students can take courses in anthropology, sociology, history, geography, foreign language, and the like, from other departments in the university, thereby eliminating the need for law schools to provide the courses from a faculty not specializing in these fields. In the United States, law students normally have an undergraduate degree, leading some participants to suggest that U.S. law schools could achieve the same result if they were to require students to have completed courses in anthropology, sociology, foreign language, and the like, as a prerequisite for admission to law school.

As mentioned above, overseas study is a potentially very useful vehicle for promoting intercultural legal competence. An obvious resource limitation here is the cost for students to attend such programs. As a participant pointed out, this cost limits which U.S. students can participate in these programs without financial assistance.

Other challenges to efforts to promote intercultural legal competence come from constraints external to the law school. For example, participants pointed to a couple of such barriers when it comes to overseas externships. One such limit may exist by virtue of American Bar Association law school accrediting standards that one participant complained limit the use of externships at non-governmental organizations (“NGOs”) that do not perform legal work—albeit, another participant suggested avoiding this problem by doing legal work under the supervision of an attorney for the benefit of the NGO.⁹³ Another participant

91. E.g., Bryant, *supra* note 22; LAWRENCE M. FRIEDMAN ET AL., *LAW IN MANY SOCIETIES* (2011); MATTEI, RUSKOLA & GIDI, *supra* note 28.

92. E.g., *Think Outside the States - the Pros and Cons of Studying the Law at Oxford and Cambridge, Why Study Law at Oxbridge*, YALE UNDERGRADUATE L. REV. (Aug. 19, 2011), <http://yulr.org/think-outside-the-states-%E2%80%93-the-pros-and-cons-of-studying-the-law-at-oxford-and-cambridge/>.

93. We investigated this topic after the conference and discovered a lack of clear authority on the

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pointed out that the goals of civil society organizations at which students might do overseas internships differ from the goals of legal education; specifically that such organizations often lack the resources to supervise students not doing useful work. This can be a particular problem in an internship in which students must work in a language other than English, where even students fluent in the relevant language for general purposes may lack the capability in using the relevant language in legal contexts so as to produce acceptable written legal work product. The challenge presented by other languages also may limit many students' ability to study in non-English speaking countries. On the other hand, one participant noted that the spread of legal English as the language of international business transactions, while facilitating the ability of U.S. law students to take overseas classes or externships, undercuts the intercultural learning that comes from being forced to communicate in a language other than English.

Mention of accrediting standards leads naturally into discussion of qualifying students for admission to practice. Hence, it was not surprising that participants noted that some faculty and law schools will be concerned with teaching items, like intercultural legal competence, that are not tested on the bar examination. More broadly, one participant noted the need to be wary of unintended consequences from initiatives such as developing curricular vehicles for promoting intercultural legal competence. As an example of unintended consequences, this participant recounted that when Japanese law schools switched to a graduate school model, the outcome was that lower tier schools, because of pressure to ensure students passed bar examination, began teaching to the bar exam. In the context of intercultural legal competence, the earlier discussion of outcomes had already raised the worry of unintended consequences that might result from greater intercultural competence for attorneys who represent entities that may use their power to the detriment of those from less dominant cultures.

The final challenge addressed by the conference was ensuring that the curricular vehicles actually achieve the sought after outcomes. This raises the topic of assessment, both of assessing the individual achievement of the students who participate in the programs or courses and assessing the overall impact of the programs and courses. One participant suggested that the general university could help its law school with regard to assessment, and, indeed, one participant who directed a university's overall (as opposed to just the university law

question. The ABA standard governing field placements for credit by law schools (Standard 305(e)) and the interpretations of this standard do not contain any statement that the placement must be at an institution performing legal work—or, for that matter, that the work must be supervised by an attorney or even involve legal work. An official with the ABA Section on Legal Education stated that the requirement that the student's work be law related was implicit in a placement for which the student receives credit toward the J.D.

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school's) intercultural competence effort, noted that there are tests that measure students' general intercultural competence.⁹⁴

IV. CONCLUSION

The Tahoe II Conference revealed the importance, scope and complexity of promoting intercultural legal competence among law school students. The task of determining the learning outcomes sought for such an endeavor required considering both the overall goals for desiring this end and the basic parameters of what it means for an attorney to possess intercultural legal competence. There are a variety of possible courses, programs and pedagogies to achieve these outcomes, all of which present challenges in implementation. It is not surprising that this conference and report will not represent the last word on this subject. Hopefully, the Conference and Report mark a significant milestone on the path.

94. For a discussion of various tests measuring aspects of intercultural competence, see Alvino E. Fantini, *Assessing Intercultural Competence*, in THE SAGE HANDBOOK OF INTERCULTURAL COMPETENCE, *supra* note 9 at 456, 465-75.

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APPENDIX
Pacific McGeorge Overseas Internship
Intercultural Legal Competence Topic Outline

I. LITIGATION

[If you work on projects involving litigation, observe for the following:]

A. *Decision to initiate litigation*

1. *Cultural attitudes toward litigation (litigiousness)*

[Compare the willingness of clients to sue and attorneys to recommend bringing a lawsuit in your home and host countries. For example, do parties view a lawsuit as a last resort or as simply a prelude to serious negotiations?]

2. *Alternatives*

a. *Social safety net*

[Compare the degree to which social insurance systems and other financial support reduces the likelihood of a lawsuit in your home and host countries.]

b. *Alternate dispute resolution*

[Compare the extent to which clients and attorneys use alternatives to formal litigation in court to resolve disputes (including arbitration and mediation) in your home and host countries.]

c. *Regulatory and criminal actions*

[Compare the extent to which clients and attorneys complain to government regulators or seek criminal prosecution in lieu of, or in addition to, filing a civil lawsuit in your home and host countries.]

d. *Advocacy beyond the legal system*

[Compare the extent to which attorneys and parties in your home and host countries engage in advocacy in forums outside the legal system in order to achieve objectives in dispute situations, and the strategies followed when they do so—including organizing stakeholder groups, lobbying government and non-government actors, media strategies, social pressures, and employing self-help remedies.]

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3. Costs and access to judicial dispute resolution

[Compare the manner in which attorneys are paid and costs assessed in civil litigation (e.g., loser pays, contingency fees), as well as the amount of these expenses, in your home and host countries and the impact of any difference on the decision to initiate, and the conduct (including settlement) of, a lawsuit. Compare also the availability of legal aid, legal insurance and other manners of financing legal services.]

4. Investigation and initiation of criminal proceedings

[If your internship involved criminal prosecutions or regulatory enforcement, compare the role of police and prosecutors in investigating a possible crime in your home and host countries. Compare also the approach in your home and host countries to deciding whether to initiate a criminal prosecution or commence an enforcement action.]

B. Pre-trial procedure

1. Overview of differences

[What procedures in civil litigation did you encounter in your host country that struck you as the most different from procedures in your home country? What procedures in civil litigation in your home country do you think would strike the attorneys in your host firm as the most usual?]

2. Complex litigation

[Did you work on any case involving class actions, shareholder claims, bankruptcy proceedings, consolidated actions, or on actions that would have involved such proceedings if brought in your home country? If so, compare the procedures you encountered with the way in which such matters are handled in your home country.]

3. Forum shopping

[Compare avenues available and efforts expended by attorneys to have lawsuits tried in “favorable” courts in your host and home countries. Consider how favorably or unfavorably the attorneys with whom you worked would have viewed undertaking any cases upon which you worked in the courts of your home country as opposed to where this litigation took place. Consider how favorably or unfavorably attorneys in your home country would have viewed undertaking litigation in the courts in your host country.]

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4. *Formal initiation (pleading)*

[Compare differences in the contents required of complaints in your home and host countries. Consider how any differences impacted the ability to bring a lawsuit and the conduct of lawsuits once brought. Compare the degree to which factual investigation takes place before or after the formal initiation of the lawsuit and the impact of this difference.]

5. *Factual investigation (discovery)*

[Compare the manner in which attorneys conduct factual investigation to prepare for trial in your home and host countries. Compare the availability of formal discovery (i.e. the ability to depose witnesses under oath, gain access to documents, and demand opposing parties answer written interrogatories under legal compulsion). Consider the impact of differences in factual investigation and discovery on the cost of litigation, the incentives of parties to settle, and the ability of parties to hide facts critical to the litigation.]

6. *Pre-trial judicial decisions*

[Compare procedures for resolving the litigation or specific issues within the litigation prior to trial (e.g., summary judgment) in your home and host countries.]

7. *Expediiousness (delay)*

[Compare the length of time it takes from filing a complaint to (i) trial, (ii) obtaining a final judgment and exhaustion of appeals, in your home and host countries. Consider the causes and impacts of any differences.]

8. *Settlement*

[Compare the process and results of settling lawsuits in your home and host countries. Did you observe differences in the timing of settlement negotiations, the processes followed in negotiating a settlement, or the substantive terms in the settlement in your host country from what you have observed in your home country? If your internship involved criminal prosecutions or regulatory enforcement actions, compare the presence of plea bargaining or other settlement techniques in your home and host countries, including the acceptability of such devices and the approval required for any such resolution.]

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C. Trial

[Do trials in your host country employ an adversary or inquisitional system, or something else? How does this compare to trials in your home country? Among specific differences, compare the use of lay jurors, legal professionals as jurors, or no juries in trials, as well as the ability to compel the appearance of witnesses through subpoena, in your home and host countries. Consider the impact of any differences in trials in your home and host countries on preparing for trial, the manner in which attorneys deal with witnesses outside of court, the length of the trial, and the degree to which you think the trial reached an accurate determination of disputed facts.]

D. Appeals

[Compare the processes for appeal in your home and host countries. Compare the length of time consumed by the appeals process in your home and host countries and the impact on the parties of the delay in the final resolution of the litigation. Compare the differences in grounds for appeal.]

E. Judgments

[Compare the manner in which courts compute damage awards, and the typical size of such awards, in your home and host countries. If your internship involved criminal prosecutions or regulatory enforcement, compare the severity of sanctions commonly imposed for similar wrongdoing in your home and host countries. Compare the enforcement of awards in civil actions and the degree to which defendants fully incur sanctions in criminal and regulatory matters. Consider the impact of any differences.]

F. Role of other parties

[Compare the role of other stakeholders in the litigation—as, for example, victims of the crime in the case of a criminal prosecution—in the proceeding in your home and host countries.]

II. TRANSACTIONAL

[If you work on transactional projects, observe for the following:]

A. Scope of attorney's role (business and strategic decisions)

[Compare the willingness of attorneys aiding clients in business transactions in your home and host countries to depart from a narrow role of giving legal

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advice and drafting legal documents to become also involved in considering broader business and strategic issues.]

B. Papering the deal

[Compare the degree to which contracts in your home and host countries contain terms dealing with remote contingencies or leave such matters for later resolution.]

C. Risk aversion

[Compare the degree to which attorneys advise their clients to take or avoid actions close to the line of prohibited regulation in your home and host countries, and the degree to which clients engage in conduct close to such a line in your home and host countries.]

D. Compliance norms

[Compare the extent to which “a deal is a deal” or modifications or non-performance of contracts is negotiable in your home and host countries.]

III. LEGAL PHILOSOPHY

A. Sources of law

[Does your home country follow a Common Law, Civil Law, or some other legal tradition? What about your host country? Compare the hierarchy of respect shown to various sources of law (e.g., constitutions, statutes (codes), court opinions, expositions by learned authorities), as well as the analysis of legal issues, that result from (or may seem inconsistent with) differences in legal tradition in your home and host countries. Compare also the acceptance of informal sources of law (e.g., custom, norms, soft law codes), the authority of international law, and the influence of the laws of other nations, in your home and host countries. Compare how common it is that, and the approach taken when, more than one jurisdiction’s laws might govern a transaction or dispute in your home and host countries.]

B. Legal uncertainty

[Compare the willingness of attorneys in your home and host country to reach the conclusion that there is no answer to a given legal question.]

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C. Rules versus standards

[Compare the degree to which the law in your home and host countries provides precise rules governing the situations upon which you worked or instead provides broad standards which attorneys and decision makers must apply case-by-case to such situations. Consider the impact of any differences on the conduct of the parties and attorneys.]

IV. LEGAL ETHICS AND ORGANIZATION OF THE PROFESSION

A. Ethical Rules

[Did you encounter any actions by attorneys in your host country that would be considered unethical for an attorney in your home country, but were permissible for attorneys in your host country? Did you encounter any situations in which ethics rules barred actions by attorneys in your host country that would have been considered ethical in your home country?]

B. Structure of the profession

1. Admission to practice

[Compare the requirements for admission to practice in your home and host countries. Compare the scope of the license that an attorney obtains upon admission to practice in your home and host countries, both in terms of geographic reach (national versus state or province) and terms of the type of practice allowed (e.g., barristers versus solicitors). Consider the impact of any differences on the availability, cost and quality of legal services.]

2. Bar organizations

[Compare the structure and power of bar associations in your home and host countries. Consider the impact of any differences on the availability, cost and quality of legal services, the relationship between attorneys and clients, as well as the respect for the rule of law in society]

3. Structure of practice

[Compare the degree to which attorneys in private practice work as solo practitioners or in law firms and the size and structure of law firms in your home and host countries. Compare also the extent to which attorneys work in government, corporations, and other settings, the roles attorneys have in such

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settings, and the relative attractiveness of various legal careers, in your home and host countries. Consider the reasons for, and impacts of, any differences.]

V. DEALINGS WITH OTHERS

A. *Clients*

1. *Sources and nature of clients*

[Compare the nature of the clients represented by your host firm with the clients that a similarly situated firm in your home country might represent. Compare also how law firms attract clients in your home and host countries.]

2. *Accepting clients*

[Compare the manner in which attorneys decide to represent a client in litigation or a transaction in your home and host countries, including who the attorneys might interview, what documents they might review, or other steps they might take. Consider the impact of any differences on access to legal representation and prospects for unwarranted legal actions.]

3. *Communications with clients*

[Compare the manner in which attorneys interacted with clients in your home and host countries. For example, consider the frequency with which attorneys communicated to clients regarding developments (or lack thereof) in the subject matter of the representation, as well as the degree to which attorneys merely give advice to clients regarding alternatives versus give directions telling the client what to do.]

B. *Dealings with other attorneys*

1. *Generally*

[Compare the manner in which attorneys interacted with other attorneys in your home and host countries.]

2. *Negotiations*

[Compare the manner in which attorneys negotiate with other attorneys, both in terms of style and strategy, in your home and host countries. Compare the extent to which attorneys argue the merits of their positions, take extreme positions, seek mutually beneficial solutions, engage in bellicose speech, threaten

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consequences, or are disingenuous. Consider the effectiveness of such style and strategy where it took place and whether it would have had greater or lesser effectiveness in the other country (i.e. your home country for what you observed in your host country and in your host country for what you are familiar with in your home country).]

C. Dealings with courts and officials

1. Respect

[Compare the manner in which attorneys interacted with judges and other government officials in your home and host countries. Did you observe any differences in the “behind the scenes” attitudes of attorneys toward judges and government officials (in other words, the extent to which attorneys, in fact, had respect for judges and government officials rather than simply showing respect as necessary)? Compare the attitudes toward the judiciary and other organs of government among the general population in your home and host countries.]

2. Regulatory burden

[Compare the amount of government regulation involved in the cases or transactions upon which you worked in your host country with the amount of regulation of the same cases or transactions in your home country. Compare the efficiency of any governmental agencies with which you dealt in your host country with the parallel agency in your home country.]

3. Rule of law and respect for law by officials and society

[Compare the extent government officials and other members of society governed their conduct in accordance with legal rules—as opposed to acting in arbitrary or corrupt manners—in your home and host countries. Consider the impact of any differences on the practice of law and the broader functioning of society, including the degree of public confidence in the administration of justice.]

D. Broader culture

[Attorneys function within a broader culture. Observe for differences between your home and host countries, both in dealings among legal professionals and in dealings among the broader population, in areas such as the following:]

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1. Communication styles

[Note any differences in how people communicate in your home and host countries (beyond simply different languages if applicable). For example, compare the degree to which communications in your home and host countries typically are “low context” (people say literally what they mean) or “high context” (the literal language used does not convey the intended meaning). Compare the style people use in talking (e.g., use of hand gestures, looking directly at the person one is talking with). Record any circumstances in which you discovered you misunderstood what someone told you or someone may have misunderstood what you were saying. Consider the extent this may have been the result of different communication styles between you and the other person, rather than simply from speaking or hearing a language which is not native to the speaker.]

2. Norms and values

[Compare the extent people in your home and host countries hold individualistic or collectivist values, desire structure and formality or flexibility and informality, prefer egalitarian outcomes or competitive rewards, define the worthiness of an activity to be based upon material (monetary) gains or on other criteria. Consider the impact of any differences on situations, if any, in which there may have been miscommunications during your internship.]

3. Group and personal differences

[Compare the extent to which differences in group identity (e.g., gender, age, race, religion, national origin, ethnicity, economic or other social status) impact personal dealings in your home and host countries.]

4. Time consciousness

[Compare the extent to which people value punctuality and efficient use of time, as opposed to taking a more relaxed approach to time, in your home and host countries. Consider any impact of such differences on your internship experience.]

E. Technology

[Compare the extent to which differences in technology, if any, between your home and host countries, impacted interactions with courts, clients and other parties, the processes of litigation, transactions, or the general practice of law.]