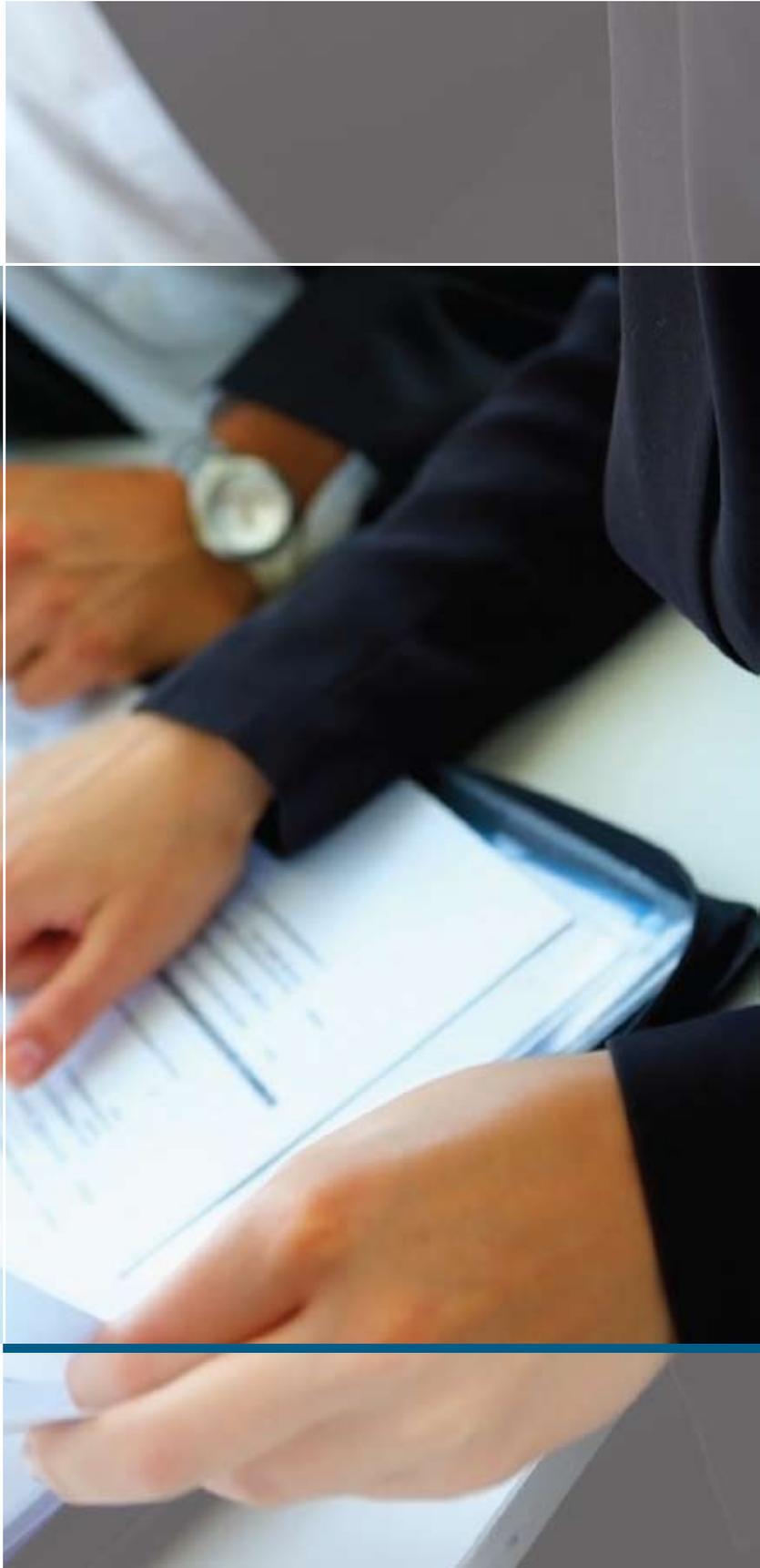
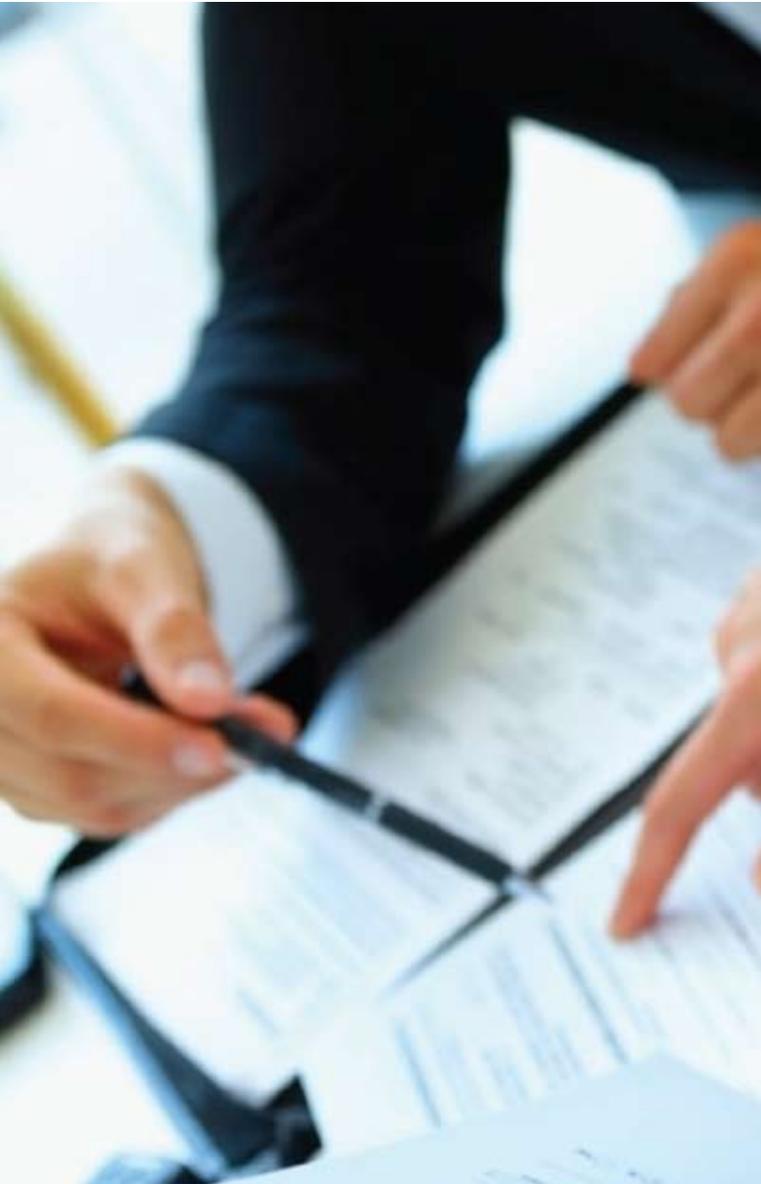


BEYOND BIAS— CULTURAL COMPETENCE AS A LAWYER SKILL

By Nelson P. Miller



FAST FACTS:

A lawyer's cultural competence goes beyond avoiding bias. To serve diverse clients, lawyers should have special communication and interpersonal skills. Those skills can be taught and learned.

American popular culture judges in terms of “bias” the quality of relationships between cultures and classes. A good person is defined to be one who is free of cultural, ethnic, and class bias. A bad person exhibits bias—perhaps a Don Imus against African Americans or an Al Sharpton or Mel Gibson against Jews (to take celebrated recent examples).

The problem for lawyers is that the bias model is one of purity, not performance. The litmus test of bias allows us to draw comfort from simply not saying the wrong thing. It has nothing to do with how we actually perform as professionals in complex interactions with individuals of diverse cultures and classes. The comfort we draw in not exhibiting bias is an obstacle to real lawyer skill. It tells us that as long as we have not said anything wrong, we are acceptably professional. In truth, good lawyers—culturally sensitive and aware lawyers—employ considerable skill. Cultural competencies can be taught. Indeed, they are taught to educators, translators, social workers, nurses, missionaries, and a host of others who deal with diverse populations. By and large, they are not taught to lawyers.

Cultural competencies cover a wide range of areas. Communication is primary. It is important how we speak and listen. Communication varies. What is understood and appreciated in one household will not be understood and may instead be offensive in another household. And it is not only communication that varies. So, too, do individual cognition, individual and family resources, cultural references, and relationships.

Lawyers should possess cultural competencies in at least those five areas. Lawyers who possess and exercise these skills are able to meaningfully serve diverse populations. They can serve black and white, rich and poor, educated and uneducated, helping each to draw on their available skills and resources without mistakenly misjudging any to be uncommunicative or unintelligent. Lawyers who do not possess and exercise these skills cannot serve diverse populations effectively.

Take as an example the different language registers clients of different cultures may employ. A language “register” is the form or level of language (intimate, casual, consultative, formal, or frozen) that a speaker uses, indirectly indicating preferences in the way the speaker wishes to treat the relationship with the listener. Lawyers ordinarily speak in a consultative register, but many clients do not. An effective lawyer adjusts to the client’s register, not the other way around, because register is closely connected to hidden rules and cognitive practices within various cultures.

Thus, in some pro bono work at a local Hispanic center, the lawyer spoke only English. The client was a shy Guatemalan

woman whose first language was a dialect, but who also spoke just enough Spanish to communicate in that second language. The translator was a pert Mexican Spanish-speaker who spoke English as a second language, but did not speak the Guatemalan dialect. Although he could not understand the Guatemalan client’s Spanish, the lawyer quickly discerned from her hesitancy and tearfulness that she was probably communicating only in an intimate (child to parent) or at best casual (close friend to close friend) register. The lawyer quickly adjusted accordingly, speaking much more like a parent or friend than the lawyer would have when using the typical consultative register with which all lawyers are familiar. Lawyers typically render legal advice in a consultative, not intimate or casual, register.

The problem was that the Mexican translator had not recognized the shift in registers, or if she had recognized it, was unwilling to accommodate the shy Guatemalan client. This much the lawyer could tell from the client’s confusion and the air of superiority the translator was exhibiting. The translator was (as the observing translator-trainer explained it later) dressing up the lawyer’s words into flowery and important-sounding messages that the client was unable to grasp and process. The observing translator-trainer had to intervene and employ the appropriate intimate and casual register to successfully salvage the consultation. Competence in cultural communication, of course, does not mean being able to work with translators. The incident simply shows how important language register is and how roles and expectations can interfere with sensitive communication.

Take another example from the area of cultural reference. The narrator of the *Planet Earth* television series makes an important cultural reference when she intones (in that dry seriousness typical of the genre) that it is a matter of “luck” that the Sun/Earth relationship has remained so stable over billions of years. A lawyer making a similar comment about the “luck” involved in some event would already have appeared foolish and insensitive to what some low-income clients would more reasonably regard as extremely improbable but clearly providential events.

Thus, listen carefully to a client’s answer to the greeting, “How are you?” The response “I am blessed” is a low-income, minority client’s clearly intentional deviation from the majority culture’s standard answer of “fine” or “good.” It is a hint to the finely attuned ear, or in some cases a declaration against the obstinate dominant culture, that the client is a person not of fate but of faith. It would be insensitive for the lawyer to think the response weird or unintelligent, when instead it is a reflection of a highly developed ethic having potentially important consequences to the consultation.

Is it indeed significant that we notice these differences about our clients? It was significant to one. The lawyer met the pro bono client in a cubicle off the soup kitchen’s day room, where patrons could get identification, a locker, a haircut, and mail, shower, and use a washer-dryer. The homeless client, a middle-aged and quite weary African-American male,

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nonetheless responded to the lawyer's greeting with "I'm blessed. How are you?" The consultation then ensued about child support that had accumulated while the client was incarcerated for better than a decade. At its conclusion, the client rose appreciatively but wearily, saying that, in the end, he was concerned about the drugs and prostitutes tempting him on the streets. It was not a complaint, but an almost-silent plea without expectation of response.

But the lawyer then remembered the client's faith expressed in the greeting. So as the client turned to leave, the lawyer said simply: "Ah. There is no temptation except that which..." The client stopped, turned back, brightened noticeably, and completed the verse, saying he had not thought of it (powerful advice for anyone in the client's situation) since his release from prison 10 weeks before. There now seemed little doubt that the client would stay sober another night—a greater victory for the client and community, perhaps, than anything else the lawyer and client might have accomplished that day.

Here, then, are some tips on cultural competence. Although the examples have been in pro bono settings and with elderly clients, these competencies can be just as important in law-firm settings with paying clients. Please keep in mind, though, that if you are serving a client who is from a culture different from your own, you have already demonstrated the first cultural competency, which is willingness. Consider the following recommendations to increase your cultural competency:

- **Introduce yourself** in a manner that puts the client at ease. Always say your name. Anonymity appears aloof, insular, uncaring, and arrogant. Make eye contact, unless the client studiously avoids eye contact, and smile. If the client appears ready to offer a handshake, offer a handshake first. If the client is reluctant to offer a handshake, do not embarrass the client with an extended hand. Accept that there are hidden rules of interaction you do not know.
- **Understand intimate and casual register** and communicate accordingly. Not all clients share your verbal skills and interests. They may speak in indirect and generalized fashion and using frequent nonverbal assists. Participate with frequent verbal acknowledgments ("mm-hmm," "yeah, I know," etc.), behavioral prompts (nodding, smiling, etc.), and emotional responses (shared interest, sorrow, satisfaction, etc.). Do not force a client to say something the client wishes to avoid saying. Respect the circular nature of casual register. Avoid power struggles over language. Use calm, nonjudgmental, adult voice, never commanding or scolding in parent voice, and never defensive or emotional in child voice. Appreciate the client's humor. Use metaphor and story as a guide. Draw diagrams. Recognize cultural references. Accept and employ them to contextualize and communicate solutions.
- **Ask why the client is here** before making any assumptions. Ask open-ended questions, like "What worries you?" or "What do you want to happen?" Respect the client's freedom and personality. Be wary of assuming that the client has purely legal goals. Legal goals may be enmeshed in social, political, moral, financial, familial, ethical, personal, and spiritual goals, or legal goals may be absent. Assist with more than purely legal goals when your life experience enables you. Refer the client for other help with nonlegal goals. Think in terms of broad, team solutions while helping the client avoid negative influences. Legal solutions are not the only solutions.
- **Listen to the client** rather than your own judgment about what is important. Let the client decide. Do not dismiss the client's hopes, goals, expectations, and objectives, even when you would choose different objectives. Active pursuit of an unrealistic but safe goal can serve the client by indirectly achieving more useful objectives. Listen for words that seem out of place to you. They may be clues to a resource, habit, or understanding on which the client can draw for solutions. Develop a context for the client's situation—whether personal, medical, legal, family, or social.

prepared to pick up on a small parting comment to address new legal issues at what you thought the conclusion of the session.



Develop factual content when you see a legal issue that you can help address. Clients may express emotions and opinions, leaving it to you to prompt for relevant facts.

- **Watch the client** with an eye sensitive to the client's reactions. Summarize the client's goals and your advice on how to achieve them. If the client does not share your confidence in the solution you proposed, you may not have understood the client properly, or you may have assumed that the client has capabilities and resources that the client does not have. Continue to listen, ask, summarize, suggest, and generate other options until the client appears satisfied with your advice. What seems to you to be readily achievable may in fact not be for reasons only the client can appreciate. Suggest and teach coping strategies. Gently let the client know that you are offering bridges out of negative situations.
- **Break down steps** into manageable components. Think of each step that a larger task requires and then explain those steps for the client. Clients of poverty may lack the ability to break larger tasks down into manageable components. Help the client do so. When the steps become too many, stop, return to the first step that the client can understand and follow, and then plan another consultation for the rest of the steps. Watch for signs that the client is overwhelmed or frustrated. Assign to the client only those tasks that the client believes are clearly manageable. Model self-talking through procedures, but also propose role models. Clients of poverty can benefit more through mentors and relationships than through systems and actions. Be a coach, not a commander, judge, or taskmaster. Speak about choices and consequences. Help the client identify cause and effect (impulse and consequence) relationships.
- **Confirm the plan** that you have developed. Ask the client if the client would like you to write it down. If you do write it down, print in a clearly legible handwriting and number the steps. Clients may lack the planning and initiating skills that you possess. Help them prioritize and plan. Then help them record the plan in a manner that they can understand and use. Help them confirm that the plan will lead them toward their objective. Ensure throughout that they believe that they have the resources available to follow the plan. Do not plan anything for which the client lacks the resources. Solutions are not systems. They are relationships leading to small steps in the right direction. But also limit your responsibility. Be responsible *to* them for the steps you accept that you will perform. Make it clear to them what you are and are not going to do for them. But do not be responsible *for* them.
- **Express hope and optimism** about the client's situation, no matter how dire it may seem to you. Building and maintaining hope is essential for clients who have few resources.

You may indeed have a client whose legal situation cannot be addressed. But through your discussion of it and your continuing relationship with the client, the client may develop other objectives that are achievable. Be frank in your advice, but do not destroy the client's confidence. Stress the client's internal assets—perhaps the client's perseverance and tenacity, or the client's knowledge of truth, or the client's faith and ethics.

- **Listen for a parting request** from the client. The consultation does not end until the client has left. Just because you think it is over does not mean it is over. Some clients will use the consultation time simply to develop trust and understanding and only introduce the important matter when you think the consultation is over. It is not always about what you think it is about. Be prepared to pick up on a small parting comment and to address new legal issues at what you thought was the conclusion of the session. Be sure to elicit any lingering concerns with a question like, "Is there anything else we should talk about?"
- **Tell the client when you are next available** for further consultation, especially if time did not permit you to answer all of the client's questions and address all of the client's legal issues. To clients with limited resources, the relationship with you is more important than the service you rendered. Clients get out of poverty not through service, but through relationship. Letting the client know that you value the relationship may contribute more to the client's situation than any legal service you are able to provide. If you cannot be a mentor, then think of and offer one. ■

Sources and Suggested Reading: Payne & Krabill, *Hidden Rules of Class at Work* (Aha Process, Inc, 2002); Payne, *Understanding Learning: The How, the Why, the What* (Aha Process, Inc, 2001); Payne, DeVol & Smith, *Bridges Out of Poverty: Strategies for Professionals and Communities* (Aha Process, Inc, 2001); Payne, *A Framework: Understanding and Working with Students and Adults from Poverty* (Texas: RFT Pub, 1995); Bryant, *The five habits: Building cross-cultural competence in lawyers*, 8 Clin L R 33 (2001); *Initial Interview Protocol*, Thomas M. Cooley Law School Clinics.



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