Embracing Diversity and Being Culturally Competent is No Longer Optional

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I. Introduction.

The ranks of attorneys, traditionally white males, have grown to include females and minorities. Although the 2010 United States census identified that nearly one-third of the United States population is comprised of minorities, with Hispanic/Latinos at 16.3%, African-Americans at 12.6%, and significant percentages of Pacific Islander, American Indian, and Asian American populations the attorney ranks do not represent the country’s population.5 For several years, law firms have sought to increase the number of minorities and women at their firm with varying success. For years the litmus test for inclusiveness of others was simply not saying the “wrong” thing or laughing at “incorrect” jokes. Today’s lawyer and law firms must go beyond avoiding bias by avoiding politically incorrect jokes or statements or merely recruiting them into one’s firm. This paper will outline steps that a firm can follow to retain its minority attorneys.

Additionally, lawyers today have an increasingly diverse potential client base due in part to technology, travel, and global business expansion. Lawyers also increasingly

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operate outside of our country’s borders. A growing number of law firms have offices, lawyers and operations worldwide. According to the National Law Journal the largest 250 US law firms employed 15,231 lawyers in their foreign offices in 2007, an increase of more than 11% from the year before.

The minority populations in this country have grown and are expected to continue to grow. And although the current legal profession is a mono-cultural institution, the parties that lawyers have and will represent are multi-cultural. A lawyer must be culturally competent in order to fulfill his professional duty of competent, diligent, and zealous representation and to avoid possible disciplinary action. Such representation, indeed, depends on the lawyer understanding his client, the client’s interest, and that interest vis-à-vis his adversary’s interest. Absent cultural competence, a lawyer will fail to meet his professional duties. This paper will also point to areas that an attorney must be aware of when representing the folks from other cultures.

II. Diversity: Show Me Don’t Tell Me

Diversity:
1: the condition of having or being composed of differing elements: variety; especially: the inclusion of different types of people (as people of different races or cultures) in a group or organization
2: an instance of being composed of differing elements or qualities: an instance of being diverse.
Merriam-Webster Dictionary

Some law firms tout the diversity in its ranks almost as much as the firm’s latest court victory. However for all the raving about diversity in the legal profession, the Institute for Inclusion in the Legal Profession reports that the percentage of minorities inched up from 9.7 percent in 2000 to 11.6 percent in 2009. According to NALP statistics quoted in the same institute study, minorities composed 19.5 percent of associates nationwide in 2010. Moreover a glaring gap between minority partners and associates continues to exist. Minorities comprised only 6.3 of the partnerships, about the national average.

In 2010, NALP compiled demographic data from law firms that diversity among associates fell. For lawyers as a whole, representation of both women and minorities declined slightly. Minorities account for 12.4 percent of law firm attorneys in 2010, down from 12.59 percent last year. The number of women attorneys has dipped to 32.69 percent from 32.9 percent in 2009. The study found that fewer minority women practicing in law firms--6.20 percent compared to 6.33 percent in 2009.6

While some point to the country’s recession as the culprit for the declining numbers, the statistics reveal a more basic problem. Firms may not be doing enough to retain the minority associates it recruits.

6 Ed Shanahan, Law Firms + Recession = Declines in Diversity? AM Law Daily (November 4, 2010)
Diversity is a Journey Not a Recruitment Goal

Recruiting minorities is not sufficient to ensure a diverse law firm. Having a politically correct environment is also not enough to assure diversity. Diversity should be viewed as an integral part of the law firm that requires an ongoing effort. The firm must have the commitment and a strategy at all levels from new associate to equity shareholder. Firm cultures need to be inclusive and this make take continuous training to ensure that diversity efforts are viewed without resentment, jealousy or perceived as a phase.

- **Work assignments**

  Work assignments are not created equal. Some work assignments develop careers while others do not. Firms need to look at how assignments are distributed and ensure that minorities are provided with the same opportunities to develop their skills and generate substantial fees.

- **Mentorship**

  An assigned mentor (who is held accountable by the firm for its mentoring assignment) is critical to the retention and development of a young minority attorney. The minority attorney will benefit from a formal assignment of mentor who can guide associate through firm culture and provide an excellent sounding board for the associate.

- **Training**

  Some minorities work under the misguided impression that they have to work twice as hard to merit praise. Many forego training in order to bill. Many do not appreciate or make time for valuable training (which refines skills and develops new ones).

- **Creating networking and business development opportunities**

  Creating a book of business is difficult for many and this is especially true for those who do not have the connections to business. A substantial book of business will make the minority associate a better candidate for partner.

- **Creating trial teams and case teams that reflect diversity**

  This guarantees that different firm members (who may not socialize together) work as a team. A team, in which everyone brings different strengths, will breed more cohesiveness and instills loyalty.
• **Obtaining feedback from the minority associates**

  Assuring a non intimidating environment will garner honest feedback. Some firms, despite the best intentions, may exhibit unconscious bias. Feedback is essential in combating any false assumptions and stereotypes that exists.

• **Articulating and setting goals and objectives**

  A committee should be established, consisting of both associates and shareholders, to monitor the firm’s objectives.

• **Recognition of diversity events**

  Associates and shareholders should be recognize for participating in diversity events and have such time credited at least in part towards the billable hours goal.

• **Dealing efficiently with stereotypes**

  The firm should take measures to ensure that work or assignments are not made based on mistakes or assumptions based on race, gender or national origin.

### III. Defining Cultural Competency.

Cultural competency covers numerous areas and has been defined in a variety of ways. For example, cultural competency has been defined as something “more than embracing diversity and promoting inclusion. [It] is the ability to adapt, work and manage successfully in new and unfamiliar cultural settings.”[^7] Others have turned to the medical profession, where cultural competency already has been integrated into the curriculum, to define “cultural competency” as “the ability of organizations and systems to function and perform effectively in cross-cultural situations[,] . . . [as] a set of congruent behaviors, attitudes, and policies that come together in a system, agency or among professionals that enables effective work in cross cultural situations.”[^8] Similarly, cultural competency, as applied to legal professionals, has been defined as:

> The ability to engage in actions or create conditions that maximize (sic) the optimal development of the client and client systems. [It] is achieved by the counselors acquisition of awareness, knowledge, and skills needed

to function effectively in a pluralistic society (ability to communicate, interact, negotiate, and intervene on behalf of clients from diverse backgrounds) and on an organization/societal level, advocating effectively to develop new theories, practices, policies, and organization structures that are more responsive to all groups.\(^9\)

One way to understand cultural competency is to understand our country’s legal culture. It is worth recognizing that the legal profession is a mono-cultural institution. It is predominantly comprised of privileged, white, able-bodied, middle-class men.\(^10\) Thus, attorneys as a group are not generally representative of the larger American society. And in today’s society where minorities are at least one-third of the population, culturally competent lawyers are more than ever wanting. But cultural competency is more than being unbiased;\(^11\) it is beyond accepting diversity in the workforce, far from merely promulgating anti-discrimination policies, or providing pro bono services. Cultural competency requires the lawyer to take the affirmative step to acquire the sensitivity and understanding of what is the “other,” and learn the means to bridge the differences in order to competently represent a client’s interest, regardless of whether the “other” is the lawyer’s client or adversary.

Cultural competency is a practical skill that can be learned,\(^12\) and which today’s lawyers should acquire given the changing face of our society and legal workforce. A lawyer, thus, has a duty to become culturally competent in order to become the diligent, competent, and zealous advocate that is expected of him or her to be.

**Relevant Model Rules**

Although nothing in the ABA model rules explicitly addresses cultural competency, the following rules imply that a lawyer must be culturally competent when the circumstances require it:

- Rule 1.1 states, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”\(^13\)

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\(^10\) Per the ABA, there were 1,225,452 licensed lawyers in 2010, comprised of White lawyers at 88.1%, Black lawyers at 4.8%, Hispanic lawyers at 3.7%, and Asian Pacific American lawyers at 3.4%. ABA Market Research Dept’, *Lawyer Demographics* (2011), available at [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.pdf-2011-06-29](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.pdf-2011-06-29).


• Rule 1.3 states, “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” A comment to the rule explains, “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures required to vindicate a client’s cause or endeavor. A lawyer must also act with zeal in advocacy upon the client’s behalf.”

• Rule 1.4 states, “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Tips

• Communication

Communication is the essential. Never make assumptions regarding your client based on stereotypes or one’s knowledge about the client’s culture. The client needs to outline the parameters of the representation. If the attorney does not speak the client’s knowledge, it is critical that a translator is retained. Having a staff member translate without assuring the translator’s proficiency level can be a receipt for disaster. Additionally, many cultures require that a foundation of trust be built. This may take many more meetings than a typical client would need.

• Listen and Look for Signs

Having a client say they understand and nod does always mean that one is being understood or that the client agrees. There are many factors that influence the client that have nothing to do with the facts of the case including the client’s spouse, children, community, religion, immigration status, and work. Avoiding community gossip may be of more import than obtaining full monetary relief. Fear related to immigration status cannot be ignored or dismissed even for those who are naturalized.

• Not All Interpreters are the Same

Working with interpreters takes practice. There are two types of translations: simultaneous and non simultaneous. The client’s may be easily distracted. Practicing with hopefully the interpreter that is going to be used is important. Assuring that the right dialect (Mixteco Alta versus Mixteco Costa Baja) or the right type of language (Puerto Rican Spanish versus Mexican Spanish) is also critical. The client needs to understand what is being said in a hearing or deposition.

16 Model Rules of Prof’l Conduct R. 1.4(b) (2010).
The interpreters will not interpret what is being said but instead translate the words. If your client is asked what kind of retaliation he suffered after his protected activity he may say none. However if he asked what did the employer get back at you after you complained the answer may be very different.

Finally, an interpreter may appear that does not speak the language fluently or even proficiently. If the attorney does not speak the language that is being translated in the hearing or deposition a staff person or even a second interpreter needs to be present to ensure that the translations or being done correctly.

If there are key words for example pistol you should all agree on what the word will be.

Wrong translations are a challenge. In a deposition the objection should say the word one is objecting to in English. The court reporter is not transcribing anything in a foreign language. It is best to object to the translation and have the question asked and answered again. Most interpreters will refocus and the translation is typically correct the second time. If there are multiple problems with the translator, the deposition should be stopped and continued another day. In a trial, counsel needs to set ground rules; the federal judge will typically not allow objections before a jury.

- **Flexibility**

A low wage worker (witness or client) may have limitations that one typically does not encounter. For example, there have been limitations on driving distances, child care, family responsibilities and work. An attorney may want to meet at odd hours, drive to a different location to meet or start the depositions at an unusual time.

- **Immigration Status**

Some counsels have been known to inquiry when status is not relevant in order to harass, intimidate or embarrass the witness or claimants. This can be avoided with early and effective protective orders. For an undocumented claimant one should be aware of the availability of T and U visas and the client should be sent to an immigration attorney.

**IV Conclusion**

Diversity in the firm at all levels is indicative of the commitment of that particular firm and the firm understanding that diversity is an integral part of the firm’s business. The duties to provide competent and diligent representation suggest that a lawyer has to be knowledgeable of cultural differences and its transparencies within any cross-cultural relationship, either with the client or adversary. A lawyer’s own beliefs of what is efficient or even necessary to bridge the cultural differences or diversity, without
anything more, will fail and result in undue embarrassment to himself, his client, and witness and a potential lost of business.