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Cultural Competency and the Practice of Law in the 21st Century

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In an increasingly diverse society, it is quickly becoming imperative for estate planning attorneys to be culturally competent to effectively serve their evolving and diverse clients.

“Culture is like the air we breathe—it is largely invisible and yet we are dependent on it for our very being. Culture is the logic by which we give order to the world.”

—Raymond Carroll, *Cultural Misunderstandings: The French-American Experience 2* (1988)

Traditionally, an estate planning attorney would help clients—usually an All-American family of a husband, a wife, and a few kids—create a plan for the future, which could include trust agreements, wills, and powers of attorney for finances and health care. As long as the attorney was fulfilling his duties, such as the duties to be competent, prompt, and diligent, he was considered to be effective counsel to his clients. In the past, attorneys could simply attend continuing legal education courses to fulfill these duties. Now, the United States is home to over 350 languages, U.S. Census Bureau, *Census Bureau Rel. No. CB 15-185*, Nov. 3, 2015, with over 13.3% of the population born outside of the United States. Sandra Colby & Jennifer Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2016* (Mar. 2015). The client demographic that requires estate planning services is changing quickly. In today’s society, estate planning attorneys can serve same-gender couples with adopted children, couples without children, immigrant families, and other nontraditional clients. In an increasingly diverse society, it quickly is becoming imperative for estate planning attorneys to be culturally competent to effectively serve their evolving and diverse clients. This article attempts to demystify the meaning and purpose behind the concept of cultural competency and explore some ways in which attorneys can achieve it.

The Importance of Cultural Competency

Becoming culturally competent is important, not only because it is the right thing to do, but also because inevitably it will affect the attorney’s business and is the mandate of the American Bar Association. ABA Center for Professional Responsibility, Model Rule of Professional Conduct (Model Rule) 1.1: Competence.

As mentioned above, the potential client base for estate planning attorneys is becoming increasingly diverse because of new laws and Supreme Court decisions, an increase in immigration and international investments, and an evolving society, among other factors. This means that for estate planning attorneys to stay relevant and continue serving new clients effectively, cultural competency will be key.

Cultural competency also plays an important role in civility and professionalism in the legal community. As the demographic of the legal profession catches up with society, the number of attorneys of color, attorneys with disabilities, LGBT attorneys, and women attorneys will continue to increase. In 2000, only 28% of lawyers were women, and in 15 years, that percentage has increased only to a mere 35%, but it does continue to increase. In 2000, 89% of all attorneys self-identified as “White, Not Hispanic,” and less than 11% of attorneys self-identified as minorities. This percentage has not increased by much, and in 2014, 12% of attorneys self-identified as minorities. American Bar Association, *Lawyer Demographics*, www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf. Although the increase in diversity within the profession is slow, it is steady. In interacting with colleagues in the profession, all attorneys will need to learn how to interact with cross-cultural colleagues to build a reputation as a respectful and culturally aware professional.

The ABA’s Model Rule 1.1 addresses competence and mandates that “a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rule 1.1: Competence. Model Rule 1.3 states that “a lawyer shall act with reasonable diligence and promptness in representing a client.” Model Rule 1.3: Diligence. This Model Rule is further explained in comments, which state that “a lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” *Id.* Keeping the interests and wishes of the client in mind is especially important in estate planning, where often the true application and effect of the attorney’s work becomes known after the client is deceased.

In 2008, the ABA also adopted Goal III, which aims to eliminate bias and enhance diversity. Goal III aims to “promote full and equal participation in the association, our legal profession, and the justice system by all persons and to eliminate bias in the legal profession and justice system.” American Bar Association, *ABA Mission and Goals*, www.americanbar.org/about_the_aba/aba-mission-goals.html.

The ABA has made it clear through the Model Rules, adoption of Goal III, and other initiatives that cultural competency, by any name, is its mandate within the profession and outside of it. In addition, one of the most important reasons for attorneys to become culturally competent is because cultural competency will play an important role in the future of the profession and society.

What Cultural Competency Means

According to the National Center for Cultural Competence (NCCC), cultural competence “embraces the principles of equal access and non-discriminatory practices in service delivery.” National Centre of Cultural Competence, *Conceptual Frameworks/Models, Guiding Values and Principles*, <http://nccc.georgetown.edu/foundations/frameworks.html>. For legal professionals, cultural competency has been defined more specifically as “the ability to adapt, work and manage successfully in new and unfamiliar cultural settings.” Sylvia Sevens, *Cultural Competency: Is There an Ethical Duty*, Oregon State Bar Bull. (Jan. 2009). Cultural competency can be

achieved by the counselor’s 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 organizational/societal level, advocating effectively to develop new theories, practices, policies, and organizational structures that are more responsive to all groups.

Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 Int’l J. Legal Info. 22, 24 (citing D.W. Sue & G.C. Torino, *Racial-Cultural Competence: Awareness, Knowledge, and Skills*, in 2 Handbook of Racial-Cultural Psychology and Counseling: Training and Practice 3, 8 (R.T. Carter ed., Wiley 2005)).

The concept of cultural competency is a broad one in its scope. The best way to understand and apply it practically is to understand the legal needs of each client as an individual. The practice of cultural competency is driven in service delivery systems by *client preferred choices*, not by culturally blind or culturally free interventions. Id. Estate planning attorneys often develop relationships with clients, and these relationships are most efficient when they recognize that estate planning is primarily service-based. This means that understanding the needs and wishes of each client, and understanding how those needs and wishes are informed by the client’s culture, can help the attorney be effective.

To be mindful of a client’s cultural background, it is important to be mindful of the characteristics that can define different cultures. Culture is often described as the combination of a body of knowledge, a body of belief, and a body of behavior. National Institutes of Health, *Cultural Respect*, www.nih.gov/clearcommunication/culturalcompetency.htm. Culture refers not only to the superficial features of a person, such as his appearance, but also refers to a person’s personal identity, language, thoughts, communications, actions, customs, beliefs, values, and institutions, which often are specific to ethnic, racial, religious, geographic, or social groups. Id.

Although appearances and linguistic differences are clear indicators that there may be a need for heightened cultural awareness, other characteristics, such as personal identity,

can be difficult to ascertain. One example of this is simply the way that we refer to people. If a client introduces herself using a certain name or in another specific way, keep that in mind. Be mindful of the way a client refers to herself, and if you are unsure of how to refer to her, ask instead of assuming.

In defining cultural competency and the broad scope that it covers, the foremost thing to keep in mind is to treat each client as an individual without applying cultural stereotypes.

Implicit Bias in the Profession and Practice

Any discussion of cultural competency calls for a mention of implicit bias. Implicit bias is the unintentional or unaware act of grouping persons or things into categories that can lead to discriminatory behaviors.

We naturally assign people to various social categories based on salient and chronically accessible traits, such as age, gender, race, and role. Just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from experience with other people, some of them direct (that is, real-world encounters), but most of them vicarious (that is, relayed to us through stories, books, movies, media, and culture).

Although shorthand schemas of people can be helpful in some situations, such schemas also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. ABA Section of Litigation Implicit Bias Initiative, *What Is Implicit or Unconscious Bias*, www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/what-is-implicit-bias.html, quoting Jerry Kang, *Implicit Bias: A Primer for Courts*, prepared for the National Campaign to Ensure Racial and Ethnic Fairness of America's State Courts (Aug. 2009), www.americanbar.org/content/dam/aba/migrated/sections/criminal_justice/PublicDocuments/unit_3_kang.authcheckdam.pdf.

The danger of implicit bias lies in the lack of self-awareness because it can present itself and allow discrimination not only in situations of conflict, such as in litigation, but also in situations without conflict, such as in interactions with clients from certain backgrounds. Implicit bias can lead to a lack of effort and, sometimes, a violation of an estate planning attorney's duties of diligence and competence because she used past experience, rather than the client's individual wishes and desires, in representing the client. For an estate planning attorney, taking the test for implicit bias, called "Implicit Association Test," which is available on-line, can be a vital first step toward becoming self-aware and culturally competent.

Practice Tips

In addition to taking the Implicit Association Test, some easy practice tips can help estate planning attorneys conduct their daily interactions with colleagues and clients in a more culturally competent way.

Appreciate Individuality and Focus on Needs

When a potential client walks in for her first meeting and the attorney begins to learn about the client, it can be tempting to find similarities with that potential client's culture or background. Sharing the one or two greetings the attorney may know in the potential client's native language, or saying that the attorney likes the food from the client's country of origin can seem like a fun and harmless way to connect, especially because, at first blush, both interactions seem like compliments. Remember, however, that each client is an individual and is more than the language they speak or the food from their country. These interactions may be appropriate once the attorney has started building a relationship, but try to connect on the basis of the client's individual needs and the reason for which she sought your counsel, rather than stereotyping her, whether positively or negatively.

One of the many reasons it is important to focus on needs, rather than background, is because certain behaviors and decisions that are taken for granted in the attorney's culture may be unacceptable in the client's culture. If a client thinks the attorney is aware of the client's culture and may judge or negatively stereotype her for straying from her culture, then the client may not feel as comfortable sharing her true needs and wishes with the attorney. Gauge the client's comfort level, and build a relationship before bringing any stereotypes into the relationship.

Value Diversity

Diversity is a catchall word for the notable characteristics in a person. Diversity has many avatars, and learning how to convey information to diverse clients can be a career-defining action. A little bit of research and understanding can go a long way. Conveying information to a client so that it is easily understood is an invaluable skill, whether conveying to someone with limited English proficiency or literacy skills, an individual with disabilities, or someone who has never before dealt with an attorney.

Similarly, valuing diversity within the legal profession is just as important. Attending diverse bar association events can be the first step in learning cultural competency in the legal profession. LGBT bar associations, ethnic bar associations, and religious bar associations are generally safe places to ask questions about diverse groups to increase cultural competency.

Communicate

Communication is key for all attorneys, but for estate planning attorneys, it is especially important because usually clients are preparing for their death or disability, and the interactions with the practitioner can be life-altering for the clients and their families. Communication includes listening actively, assessing the client's body language, and asking questions to understand the clients' needs better. Begin by asking about the client's legal needs first, and set boundaries in conversation, along with a personable tone. Then assess each client's reaction and comfort level before asking questions that could be perceived as personal, such as country of origin, family background, education, and so on. In certain situations, such as discovery during litigation, questions about background may be inevitable. In transactional work, such as business law or estate planning, the same questions can seem irrelevant and intrusive. This can lead to distrust, especially in clients who come from backgrounds in which law enforcement and legal counsel are perceived as more intimidating than helpful, whether in another country or in a disadvantaged neighborhood.

Engaging and staying attuned to each client's boundaries and comfort level can provide a solid foundation on which to build and nurture relationships based on trust and mutual respect.

Conclusion

In an increasingly diverse society, attorneys no longer will be able to maintain competence simply by attending CLE courses. Understanding diversity and learning about cultural competency is becoming more and more important. Cultural competence is a developmental process that evolves over an extended period, which means that estate planning attorneys have the opportunity to learn and improve the way in which they interact with clients. The foundation of cultural competency is not conforming to an arbitrary standard; rather, it is recognizing the needs and individuality of each client and recognizing that each client brings a unique set of values and beliefs. It is the attorney's duty, as the client's legal counsel, to respect and act according to each client's values and beliefs.