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THE ETHICAL COMPASS: It's A Small World After All:¹ Cultural Competence for Advocates in Dispute Resolution Processes

By Elayne E. Greenberg



Cultural competence has become an ethical mandate for all neutrals and advocates who use dispute resolution. Even though conflict is a universal phenomenon, our expression and choice of how to resolve conflict is culture specific. As our world becomes increasingly smaller, and flatter,² and our law practices become

globalized, ethically responsible attorneys are recalibrating their ethical compass and replacing their ethnocentric lens with a culturally relative lens. Yes, even if you are a New York attorney who disavows any international practice and remains steadfastly tethered to the N.Y. Rules of Professional Conduct, you still need to be culturally competent. After all, one out of three New Yorkers is foreign-born,³ increasing the likelihood that your client-base will include clients from other cultures. And, even if your clients are not from a different culture, it is likely that your commercial clients will be engaging in our globalized business world with individuals and corporations from other cultures, extending your practice to global markets. Let's not forget that as the attorney, you bring your own cultural values to the table.⁴

Culture shapes our values, our beliefs, our communication, and our responses to conflict. Attorneys must understand how a client's culture influences the dynamics of the attorney-client relationship⁵ and conflict resolution choices⁶ if we are to provide competent legal representation and fulfill our ethical obligations in attorney-client communication,⁷ allocation of attorney-client responsibility,⁸ and attorney client counseling.⁹ This is a two part series. In Part One, I will address cultural competence as an ethical mandate. Specifically, I will address how attorneys should consider a client's culture as one determining factor when communicating, counseling and making strategic decisions about dispute resolution. Then, in Part Two which will appear in a subsequent edition of this journal, I will discuss how international ethical practice and codes interface with and challenge the N.Y. Rules of Professional Conduct.

Clients may belong to many cultures and subcultures that impact how they interpret conflict, communicate about the conflict, relate to their lawyers, and engage in conflict resolution processes. It is likely that your client concomitantly belongs to several cultures, including: his or her country of birth, gender, religion, the community of residence, professional or business community, and any

other affiliations that have their own distinct culture. One challenging task is to figure out the culture or cultures that influence your client. Moreover, your client may have different cultures of influence in the different contexts of the attorney/client dynamics.

Adding to the challenge of understanding our clients' culture, lawyers interpret their clients' behavior through their own cultural lens.¹⁰ After all, lawyers, too, are members of different cultures. According to Milton J. Bennett, a noted scholar on culture, individuals will interpret the different cultural behavior of others based on where the interpreter himself is in his own development of intercultural sensitivity.¹¹ Bennett offers that an individual's evolution of cultural tolerance evolves on a spectrum from ethnocentric to ethnorelative stages. Beginning with the ethnocentric stage of denial, continuing on to the stages of defense, minimization, acceptance, and adaptation, the most interculturally sensitive finally reach the ethnorelative stage of integration.¹² In the stage of integration, the individual is able to respectfully interpret the meaning of differences among cultures, suspending judgment of whether the difference is good or bad.¹³

In his "Wheel of Culture Map," Chris Moore illustrates how the dynamics of culture influence the problem-solving behavior of all participants.¹⁴ According to Moore, in any negotiations, there is a dynamic interplay between culturally specific attitudes and behavior and the broader social context in which the negotiation takes place.¹⁵ Culturally specific attitudes that are influenced by a culture's broader environment and social context include: *views of relationship, cooperation; competition and conflict; communication's basic approach to negotiation; use of third parties; roles and participation; time and space; and outcomes.* These culturally specific attitudes are shaped, in part, by *the history, the natural environment and social structures* of a culture that comprise the broader environment and social context if any given culture. Additionally, the broader environment and social context that influence culture specific attitudes and problem-solving behavior also include: *a culture's needs and interests; sources and forms of power; and situations, problems and issues.* Thus, in Moore's framework, we see how an understanding of a given culture's broader environment and social context may influence aspects of negotiating behavior.

John Barkai offers another analytical framework¹⁶ to help discern your client's cultural influences. Barkai has synthesized the work of cross-cultural scholars such as Hall and Hofstede and identifies cultural dimensions that

practitioners might consider when communicating with clients: *high or low context; power-distance; individual vs. collectivism; masculinity vs. femininity; ambiguity tolerance; short-term vs. long-term orientation.*

Is your client communicating from a high context or low context culture?

People from low context cultures such as the U.S., Northern and Western Europe, Canada and Australia often communicate in a direct and explicit manner, saying what they mean.¹⁷ Consequently, the listener is less likely to listen beyond the spoken words to understand what is actually being communicated. In direct contrast, communication with individuals from high context cultures such as those from China, India, Mexico and Japan requires the attorney to listen beyond the spoken word and understand the non-verbal importance of history, symbolism, group participation, principles and hierarchy.¹⁸ Therefore, when your client says, “yes” or “no,” the utterance may mean what is actually said or may mean something else, in part, determined by whether your client is from a high or low context culture.

How are hierarchical relationships or power valued in that culture?

High distance power cultures like Latin and South America, Arab countries and the Philippines conduct themselves in a way that respects leadership and hierarchy in decision making.¹⁹ Low distance power cultures such as the U.S., Great Britain, Australia and Israel are about mutuality and equality.²⁰ Your client’s perception of hierarchical relationships may influence the lawyer-client relationship, shaping how the client treats you and how they would like to be treated.

Does your client place greater value on the self or the group?

Individuals from an individualistic culture like the U.S. are likely to place greater value on the individual when contemplating options to resolve conflict.²¹ Individuals belonging to collectivist societies tend to place greater value on options that will benefit their group or society, rather than the individual. This cultural dimension may influence who are the appropriate people to participate in the conflict resolution forum and which remedies might be acceptable.

Is your client from a culture that values masculinity or femininity?

For some of you, the terms masculinity and femininity may evoke other meanings beyond the intended distinction in this context between assertiveness and cooperativeness.²² Masculine cultures, such as those in Japan, Germany, the United States, Mexico and Arab countries, reinforce qualities such as competition, achievement, power, and accumulation of wealth.²³ In direct contrast, feminine cultures, such as those found in Scandinavian countries,

Thailand and South Korea, characteristically focus more on cooperation, relationships and security.²⁴ Again, this cultural dimension might shape the choice of conflict resolution forum, the way your client engages in conflict resolution and the favored options to be considered.

Does your client come from a culture that favors specificity or ambiguity?

Cultures have different tolerance for structure and ambiguity. High uncertainty avoidance cultures such as Japan, Spain, Greece, South Korea and Portugal all have rule-oriented cultures that respect laws, rules and control.²⁵ Characteristic of such cultures that favor specificity and avoid ambiguity, people prefer structure and predictable ritual in dispute resolution processes.²⁶ In fact, unfamiliar behavior is likely to breed mistrust.²⁷ Cultures such as those in India, the U.S., China and Denmark are more comfortable with engaging in free-flowing exchange without adhering to clearly defined rules.²⁸ Astute attorneys will understand that dispute resolution processes such as negotiation or mediation should be tailored to accommodate your client’s preference for degree of structure.

Is your client from a culture that has a long-term or short-term orientation?

Cultures with long-term orientation, such as many Asian countries, revere tradition, a strong work ethic, and lifelong personal networks.²⁹ Such cultures are buoyed by the belief that if you sacrifice now, you will be rewarded in the future.³⁰ On the other end of the spectrum, cultures with short-term orientation, like many Western countries, believe their efforts should produce immediate results.³¹ More rapid change is sought, not rules or traditions which would stall progress.³² Expectedly, those from long-term and short-term cultures may have antagonistic interactions, with short-term countries viewing those from long-term cultures as stodgy and old world, while those from long-term cultures viewing those from short-term cultures as irresponsible.³³

Integrating these discrete cultural dimensions into our legal practice, we appreciate that our client’s culture and our own culture have practical ethical implications. For example, attorneys who are complying with Rule 1.2(a), the Scope of Representation and Allocation of Authority Between Client and Lawyer,³⁴ may find that the objectives and means of client representation may also be culturally influenced by a client’s preference for relationships that are egalitarian or hierarchial; allegiance to outcomes that favor the interests of the individual or the group; conduct that is predominantly assertive or cooperative; and outcomes that promote immediate or long term gains.

In another example, Rule 1.4 B,³⁵ addressing attorney/client communication, implicitly requires attorneys to discern the cultural nuances of their clients’ communications to fully understand a client’s objectives and to ensure that a client has given informed consent to their representa-

tion choices. One critical determinant in ensuring effective communication is whether your client is from a high context or low context culture. Moreover, when complying with Rule 1.4B(a)(2),³⁶ which requires attorneys to consult with their clients about the means by which the client objectives are to be accomplished, culturally sensitive attorneys might also want to discuss which are their client's preferred dispute resolution forums given their client's cultural preferences for structure or ambiguity.

By way of a third illustration, when an attorney is acting as advisor according to Rule 2.1,³⁷ the attorney must also be cognizant of how not only of the law, but how the moral, economic, social, psychological and political factors are all culturally infused considerations. The history and other value-laden cultural determinants might shape the advice an attorney gives the client.

Conclusion

Cultural heterogeneity is a practice reality. In order to comport with the true spirit and intent of the ethical mandates, advocates must consider how a client's culture, as well that of the advocate, might shape the attorney-client relationship. Culture is more than one item to consider on the attorney to-do-list. Rather, culturally sensitive lawyers need to assess on an ongoing basis how cultural influences are impacting the ever-changing dynamics of the attorney/ client relationship. As our world gets increasingly smaller, cultural competency has become an ethical requisite for attorneys who use dispute resolutions.

Endnotes

1. RICHARD M. SHERMAN AND ROBERT M. SHERMAN, *IT'S A SMALL WORLD (AFTER ALL)* (1964).
2. See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Farrar, Straus and Giroux 2005).
3. *The Newest New Yorkers 2000*, New York City Department of City Planning Population Division (charting the distribution population by nativity for the year 2000).
4. See Milton J. Bennett, *A Developmental Approach to Training for Intercultural Sensitivity*, 10 INT'L J. INTERCULTURAL REL. 179 (1986).
5. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.4 (1983) (requiring that lawyers explain a matter to the client in such a way that the client understands and in a way that permits the client to make informed decisions regarding the representation).
6. See *id.* (requiring the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished").
7. See *id.* (discussing the lawyer's ethical obligations regarding client communications).
8. See *id.*
9. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983) (discussing the lawyer's ethical obligations regarding her role as counselor).
10. See BENNETT, *supra* note 4.
11. *Id.* at 182.
12. *Id.*
13. See *id.* at 186
14. CHRIS MOORE AND PETER WOODROW, *HANDBOOK OF GLOBAL AND MULTICULTURAL NEGOTIATION*, p. 23 (2010).
15. See *id.*
16. See John Barkai, *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution*, 8 PEPP. DISP. RESOL. L.J. 403 (2007–2008).
17. See *id.* at 408.
18. See *id.* at 408–09.
19. See *id.* at 412.
20. See *id.*
21. See *id.* at 413.
22. See *id.* at 415.
23. See *id.* at 415–16.
24. See *id.*
25. See *id.* at 417.
26. See *id.*
27. See *id.*
28. See *id.*
29. See *id.* at 418.
30. *Id.*
31. See *id.* at 418–19.
32. See *id.*
33. See *id.* at 419.
34. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) ("Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."); see also MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (1983) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."); see also MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983) ("A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."); see also MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").
35. See MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (1983) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").
36. See MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (1983) ("A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished.").
37. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological and political factors that may be relevant to the client's situation.").

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