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## Five Habits for Cross-Cultural Lawyering

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## FIVE HABITS FOR CROSS-CULTURAL LAWYERING<sup>1</sup>

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Practicing law is often a cross-cultural experience. The law, as well as the legal system in which it operates, is a culture with strong professional norms that give meaning to and reinforce behaviors. The communication style of argument predominates, and competition is highly valued. Even when a lawyer and a non-law-trained client share a common culture, the client and the lawyer will likely experience the lawyer–client interaction as a cross-cultural experience because of the cultural differences that arise from the legal culture.

In addition to these cultural differences, we know that the global movement of people, as well as the multicultural nature of the United States, creates many situations where lawyers and clients will work in cross-cultural situations. To meet the challenges of cross-cultural representation, lawyers need to develop awareness, knowledge, and skills that enhance the lawyers' and clients'

capacities to form meaningful relationships and to communicate accurately.

This chapter, and the habits it introduces, prepares lawyers to engage in effective, accurate cross-cultural communication and to build trust and understanding between themselves and their clients. Section 1 identifies some ways that culture influences lawyering and the potential issues that may arise in cross-cultural lawyer–client interactions. Section 2 identifies the principles and habits that are skills and perspectives that can be used to identify our own cultural norms and those of our clients and to communicate effectively, knowing these differences. As one anthropologist has recognized, there is “a great distance between knowing that my gaze transforms and becoming aware of the ways that my gaze transforms.”<sup>2</sup> To help lawyers identify the ways their gaze transforms and the cultural bridges that are needed for joint work between lawyers and clients, we have developed five habits for cross-cultural lawyering.

### CULTURE AND THE ROLE IT PLAYS IN LAWYERS' WORK

To become good cross-cultural lawyers, we must first become aware of the significance of culture in the ways in which we make sense out of the world. 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 through which we give meaning to the world.<sup>3</sup> Our culture is learned from our experiences, sights, books, songs, language, gestures, rewards, punishments, and relationships that come to us in our homes, schools, religious organizations, and communities.<sup>4</sup> We learn our culture from what we are fed and how we are touched and judged by our families and significant others in our communities. Our culture gives us our values, attitudes, and norms of behavior.

Through our cultural lens, we make judgments about people based on what they are doing and saying. We may judge people to be truthful, rude, intelligent, or superstitious based on the attributions we make about the meaning of their behavior. Because culture gives us the tools to interpret meaning from behavior and words, we are constantly attaching culturally based meaning to what we see and hear, often without being aware that we are doing so.<sup>5</sup>

In this chapter, when we talk about cross-cultural lawyering, we are referring to lawyering where the lawyer's and the client's ethnic or cultural heritage comes from different countries, as well as where their cultural heritage comes from socialization and identity in different groups within the same country. By this definition, everyone is multicultural to some degree.<sup>6</sup> Cultural groups and cultural norms can be based on ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin color, or a variety of other characteristics.

This broad definition of culture is essential for effective cross-cultural lawyering because it teaches us that no one characteristic will completely define the lawyer's or the client's culture.<sup>7</sup> For example, if we think about birth order alone as a cultural characteristic, we may not see

any significance to this factor. Yet if the client (or lawyer) comes from a society where "oldest son" has special meaning in terms of responsibility and privilege, identification of the ethnicity, gender, or birth order alone will not be enough to alert the lawyer to the set of norms and expectations for how the oldest son ought to behave. Instead, the lawyer needs to appreciate the significance of all three characteristics to fully understand this aspect of the client's culture.

A broad definition of culture recognizes that no two people have had the exact same experiences and thus no two people will interpret or predict in precisely the same ways. People can be part of the same culture and make different decisions while rejecting norms and values from their culture. Understanding that culture develops shared meaning and, at the same time, allows for significant differences helps us to avoid stereotyping or assuming that we know that which we have not explored with the client. At the same time that we recognize these individual differences, we also know that if we share a common cultural heritage with a client, we are often better able to predict or interpret, and our mistakes are likely to be smaller misunderstandings.

When lawyers and clients come from different cultures, several aspects of the attorney-client interaction may be implicated. The capacities to form trusting relationships, to evaluate credibility, to develop client-centered case strategies and solutions, to gather information, and to attribute the intended meaning from behavior and expressions are all affected by cultural experiences. By using the framework of cross-cultural interaction, lawyers can learn to anticipate and name some of the difficulties they or their clients may be experiencing. By asking ourselves as part of the cross-cultural analysis to identify ways in which we are similar to clients, we identify the strengths of connection. Focusing on similarities also alerts us to pay special attention when we see ourselves as "the same" as the client so that we do not substitute our own judgment for the client's through overidentification and transference.

#### Establishing Trust

Lawyers and clients who do not share the same culture face special challenges in developing a

trusting relationship where genuine, accurate communication occurs. Especially where the culture of the client is one with a significant distrust of outsiders<sup>8</sup> or of the particular culture of the lawyer, the lawyer must work hard to earn trust in a culturally sensitive way. Similarly, cultural difference may cause the lawyer to mistrust the client. For example, when we find the client's story changing or new information coming to light as we investigate, we may experience the client as "lying" or "being unhelpful." Often this causes us to feel betrayed by our client's sanctions.

Sometimes when a client is reacting negatively to a lawyer or a lawyer's suggestions, lawyers label clients as "difficult." Professor Michelle Jacobs has warned that white lawyers interpreting clients' behavior may fail to understand the significance of racial differences, thereby erroneously labeling African American clients as "difficult." Instead, the lawyer may be sending signals to the client that reinforce racial stereotypes, may be interpreting behavior incorrectly, and therefore may be unconsciously failing to provide full advocacy.<sup>9</sup>

In these situations, lawyers should assess whether the concept of insider-outsider status helps explain client reactions. Where insider-outsider status is implicated, lawyers must be patient and try to understand the complexities of the relationship and their communication while building trust slowly.

### Accurate Understanding

Even in situations where trust is established, lawyers may still experience cultural differences that significantly interfere with lawyers' and clients' capacities to understand one another's goals, behaviors, and communications. Cultural differences often cause us to attribute different meanings to the same set of facts. Thus one important goal of cross-cultural competence is for lawyers to attribute to behavior and communication that which the actor or speaker intends.

Inaccurate attributions can cause lawyers to make significant errors in their representation of clients. Imagine a lawyer saying to a client, "If there is anything that you do not understand, please just ask me to explain" or "If I am not

being clear, please just ask me any questions." Many cultural differences may explain a client's reluctance to either blame the lawyer for poor communication (the second question) or blame himself or herself for lack of understanding (the first question). Indeed clients from some cultures might find one or the other of these results to be rude and therefore be reluctant to ask for clarification for fear of offending the lawyer or embarrassing themselves.

Cultural differences may also cause lawyers and clients to misperceive body language and judge each other incorrectly. For an everyday example, take nodding while someone is speaking. In some cultures, the nodding indicates agreement with the speaker, whereas in others it simply indicates that the listener is hearing the speaker. Another common example involves eye contact. In some cultures, looking someone straight in the eye is a statement of open and honest communication, whereas a diversion of eyes signals dishonesty. In other cultures, however, a diversion of eyes is a sign of respect. Lawyers need to recognize these differences and plan for a representation strategy that takes them into account.

### Organizing and Assessing Facts

More generally, our concepts of credibility are very culturally determined. In examining the credibility of a story, lawyers and judges often ask whether the story makes "sense" as if "sense" were neutral. Consider, for example, a client who explains that the reason she left her native country was that God appeared to her in a dream and told her it was time to leave. If the time of leaving is a critical element to the credibility of her story, how will the fact finder evaluate the credibility of that client's story? Does the fact finder come from a culture where dreams are valued, where an interventionist God is expected, or where major life decisions would be based on these expectations or values? Will the fact finder, as a result of differences, find the story incredible or evidence of a disturbed thought process or, alternatively, as a result of similarities, find the client credible?

The way different cultures conceptualize facts may cause lawyers and clients to see

different information as relevant. Lawyers who experience clients as "wandering all over the place" may be working with clients who categorize information differently than the lawyer or the legal system. If a lawyer whose culture is oriented to hour, day, month, and year tries to get a time line from a client whose culture is not oriented that way, she may incorrectly interpret the client's failure to provide the information as uncooperative, lacking intelligence, or, worse, lying.<sup>10</sup> A client who is unable to tell a linear time-related story may also experience the same reaction from courts and juries if the client's culture is unknown to the fact finders.

#### Individual and Collective

In other settings, the distinction between individual and collective cultures has been called the most important concept to grasp in cross-cultural encounters.<sup>11</sup> Understanding the differences between individual and collective cultures will help lawyers see how they and clients define problems, identify solutions, and determine who important players are in a decision.<sup>12</sup>

Lawyers who explore differences in individual and collective cultures may see different communication styles, values, and views of the roles of the lawyer and client. In an individualistic culture, people are socialized to have individual goals and are praised for achieving these goals. They are encouraged to make their own plans and "do their own thing."<sup>13</sup> Individualists need to assert themselves and do not find competition threatening. By contrast, in a collective culture, people are socialized to think in terms of the group, to work for the betterment of the group, and to integrate individual and group goals. Collectivists use group membership to predict behavior. Because collectivists are accepted for who they are and feel less need to talk, silence plays a more important role in their communication style.

Majority culture in the United States has been identified as the most individualistic culture in the world.<sup>14</sup> Our legal culture reflects this commitment to individualism. For example, ethical rules of confidentiality often require a lawyer to communicate with an individual client in private if confidentiality is to be maintained and may prohibit the lawyer from representing

the group or taking group concerns into account to avoid potential conflicts.<sup>15</sup> Many client-empowerment models and client-centered models of practice are based on individualistic cultural values.

Here is an example of how a result that appeared successful to the lawyers can nevertheless be unacceptable when taken in the context of the client's collective culture. In this case, lawyers negotiated a plea to a misdemeanor assault with probation for a battered Chinese woman who had killed her husband and who faced a 25-year sentence if convicted of murder. The client, who had a strong self-defense claim, refused to plead to the misdemeanor charge because she did not want to humiliate herself, her ancestors, her children, and their children by acknowledging responsibility for the killing. Her attorneys did not fully comprehend the concept of shame that the client would experience until the client was able to explain that the possibility of 25 years in jail was far less offensive than the certain shame that would be experienced by her family (past, present, and future) if she pled guilty. These negative reactions to what the lawyers thought was an excellent result allowed the lawyers to examine the meaning of pleas, family, responsibility, and consequences within a collective cultural context that was far different than their own.<sup>16</sup>

#### Legal Strategy and Decision Making

In another case, attorneys—whose client was a Somali refugee seeking political asylum—had to change their strategy for presenting evidence in order to respect the client's cultural and religious norms. Soldiers had bayoneted her when she resisted rape, and she was scarred on a breast and an ankle. To show evidence of persecution, the plaintiff would have had to reveal parts of her body that she was committed, by religion and culture, to keeping private. Ultimately the client developed a strategy of showing the injury to the INS lawyer who was also female.<sup>17</sup> This strategy, challenging conventional legal advocacy and violating cultural norms of the adversarial system, allowed the client to present a case that honored her values and norms.<sup>18</sup>

Immigrant clients often bring with them prior experiences with courts or interactions with governments from their countries of origin that influence the choices they make in their cases. Strategies that worked in their country of origin may not be successful here. For example, clients from cultures that punish those challenging governmental action may be resistant to a lawyer's suggestion that a Supplemental Security Income (SSI) benefits appeal be taken, challenging the government's decision to deny a claim. Conversely, those who come from societies where refusal to follow government requirements is a successful strategy may be labeled as belligerent by the court when they consistently resist or challenge the court.

Finally, cultural differences may cause us to misjudge a client or to provide differential representation based on stereotype or bias. Few lawyers engage in explicit open racial or cultural hostility toward a client. However, if recent studies in the medical field have relevance for lawyers, we need to recognize that even lawyers of goodwill may engage in unconscious stereotyping that results in inferior representation. Studies in the medical field show that doctors are less likely to explain diagnoses to patients of color and less likely to gather significant information from them or to refer them for needed treatment.<sup>19</sup> Although no studies of lawyers to our knowledge have focused on studying whether lawyers engage in discriminatory treatment, two recent studies have identified differential treatment by the legal system based on race. One study done by Child Welfare Watch shows that African American children are far more likely to be removed from their home, put in foster care, and left there longer than similarly situated white children.<sup>20</sup> Another study showed that African American juveniles received disproportionate sentences when compared with similarly situated white youths. In each of these legal studies, lawyers—as prosecutors, representatives, and judges—were deeply implicated in the work that led to the differential treatment.

Once a cultural difference surfaces, we can see stark cultural contrasts with clear connections to lawyering choices. In hindsight, it is easy to see the cultural contrasts and their effect on the clients' and lawyers' challenges to find

acceptable accommodations to the legal system. In the moment, however, cases are more difficult, and the differences and similarities are more subtle and, at times, invisible. The following sections give you some insights into how to make this more visible.

### Culture-General and Culture-Specific Knowledge

In addition to developing awareness of the role that culture plays in attributing meaning to behaviors and communication, a competent cross-cultural lawyer also studies the specific culture and language of the client group the lawyer represents. Culture-specific knowledge, politics, geography, and history, especially information that might shed light on the client's legal issues, relationship with the lawyer, and process of decision making will assist the lawyer in representing the client better. As the lawyer develops culture-specific knowledge, he or she should apply this knowledge carefully and examine it on a case-by-case basis. Finally, a lawyer will have a greater capacity to build trust and connection if he or she speaks the client's language even if they do not share a common culture.

If the lawyer represents clients from a multitude of cultures, the lawyer can improve cross-cultural interactions by acquiring culture-general knowledge and skills. This culture-general information is also helpful to lawyers who are beginning to learn about a specific culture. Because learning any new culture is a complex endeavor (remember the number of years that we spent learning our own), the lawyer can use culture-general knowledge and skills while learning specifics about a new culture.

### HABIT 1: DEGREES OF SEPARATION AND CONNECTION

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The first part of Habit 1 encourages lawyers to consciously identify the similarities and differences between their clients and themselves and to assess their impact on the attorney-client relationship. The framework of similarities and differences helps assess lawyer-client interaction, professional distance, and information gathering.

The second part of the habit asks the lawyer to assess the significance of these similarities and differences. By identifying differences, we focus consciously on the possibility that cultural misunderstanding, bias, and stereotyping may occur. By focusing on similarities, we become conscious of the connections that we have with clients as well as the possibility that we may substitute our own judgment for the client's.

### Pinpointing and Recording Similarities and Differences

To perform Habit 1, the lawyer brainstorms, as quickly as possible, as many similarities and differences between the client and himself as he can generate. This habit is rewarded for numerosity—the more differences and similarities the better. A typical list of similarities and differences might include the following:

Ethnicity	Economic Status	Marital Status
Race	Social Status	Role in Family
Gender	Language	Immigration Nationality
Sexual Orientation	Religion	Education
Age	Physical Characteristic	Time
Individualistic/Collective	Direct or Indirect Communication	

With each client and case, you may identify different categories that will influence the case and your relationship. These lists will change as the relationship with the client and the client's case changes. Exhaustive lists help the lawyer make conscious the less obvious similarities and differences that may enhance or interfere with understanding.

Consciously identifying a long list of similarities and differences allows lawyers to see clients as individuals with personal, cultural, and social experiences that shape the clients' behavior and communications. In asking you to create long lists, we do not mean to suggest that all similarities and differences have the same order of importance for you or your client. For example, in interactions involving people of color and whites, race will likely play a significant role in

the interaction given the discriminatory role that race plays in our society.<sup>21</sup> In some cases, such as rape or domestic violence, gender differences may also play a greater role than in others. The connections that cause a lawyer to feel connected to a client may be insignificant to a client.

The most important thing is to make this list honestly and nonjudgmentally, thinking about what similarities and differences you perceive and suspect might affect your ability to hear and understand your client's story and your client's ability to tell it.

Another way to illustrate the degrees of connection and separation between client and lawyer is through the use of a simple Venn diagram. Draw two circles, overlapping broadly if the worlds of the client and of the lawyer largely coincide, or narrowly if they largely diverge. By creating a graphical representation of Habit 1, the lawyer can gain insight into the significance of the similarities and differences. For example, the list of similarities may be small, and yet the lawyer may feel "the same" as the client because of one shared similarity, or the lawyer may have many similarities and yet find herself feeling very distant from the client.

### Analyzing the Effect of Similarities and Differences on Professional Distance and Judgment

After creating the lists and diagrams, the lawyer can identify where the cross-cultural challenges might occur. By naming the things that unite and distance us from our clients, we are able to identify relationships that need more or less professional distance because they are "too close" or "too far." No perfect degree of separation or connection exists between lawyer and client. However, where the list of similarities is long, the lawyer may usefully ask, "Are there differences that I am overlooking? Am I developing solutions to problems that may work for me but not for my client?" By pondering these questions, we recognize that even though similarities promote understanding, misunderstanding may flow from an assumption of precise congruence. Thus, in situations where lawyers and clients have circles that overlap, the lawyer should ask herself, "How do I develop proper professional distance with a client who is so similar to me?"

In other cases, where the list of differences is long, the question for the lawyer is "Are there any similarities that I am missing?" We know that negative judgments are more likely to occur when the client and lawyer see the other as an "outsider." Thus the lawyer who identifies significant cultural differences between the client and herself will be less likely to judge the client if she also sees herself as similar to the client. Where large differences exist, the lawyer needs to consciously address the question "How do I bridge the huge gap between the client's experiences and mine?"

What does the analysis of connection and difference indicate about what we ought to share with clients about ourselves? Lawyers usually know far more about their clients than the clients know about the lawyers. Some information of similarity and difference will be obvious to a client, and other significant information will be known only if the lawyer chooses to tell the client. In thinking about establishing rapport with clients, lawyers often think about revealing information that will reveal similarities and establish connections to clients. Of course, exactly what information will cause the client to bond with the lawyer is difficult to know, as the significance of specific similarities and differences may be very different for the lawyer and the client.

### Analyzing the Effect of Similarities and Differences on Gathering and Presenting Information

Differences and similarities or assumptions of similarity will significantly influence questioning and case theory. One example of how differences and similarities in the lawyer-client dyad may influence information gathering can be seen in the way lawyers probe for clarification in interviews. Lawyers usually ask questions based on differences that they perceive between their clients and themselves. Thus a lawyer, especially one with a direct communication style, tends to ask questions when a client makes choices that the lawyer would not have made or when he perceives an inconsistency between what the client is saying and the client's actions. A lawyer tends not to ask questions about choices that a client has made when the lawyer would have made the same choices;

in such a situation, the lawyer usually assumes that the client's thought processes and reasoning are the same as his own.

For example, in working with a client who has fled her home because of spousal abuse and is living with extended family members, a lawyer might not explore the issue of family support. In contrast, had the client explained that she could not go to her family for support, the same lawyer might have explored that and developed housing alternatives. The probing occurs when the lawyer perceives the client's choices as different from the ones the lawyer might make, and therefore she tries to understand in this case why the client has failed to involve her family. The same lawyer might ask few questions about family support when she assumes that a client living with family had family support, because the lawyer would expect her own family to support her in a decision to leave an abusive spouse.

In her failure to ask questions of the first client, the lawyer is probably making a host of assumptions about cultural values that relate to the client's and the lawyer's family values. Assumptions of similarities that mask differences can lead the lawyer to solutions and legal theories that may not ultimately work for the client. For example, in assuming that the first client has family support, the lawyer in the previous example may neglect to explore other housing arrangements or supportive environments that the client needs. Family relationships are incredibly rich areas for cultural misunderstanding, and thus assumptions of similarity are perhaps even more problematic when issues of family are involved.

To identify the unexplored cultural assumptions that the lawyer may be making, the lawyer should ask what she has explored and what she has left unexplored. Reflection on the attorney-client interview allows the lawyer to identify areas where the lawyer may have missed relevant explanations of behavior.

### HABIT 2: RINGS IN MOTION

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If the key to Habit 1 is "identifying and analyzing the distance between me and my client," the key to Habit 2 is identifying and analyzing how cultural differences and similarities influence



the interactions between the client, the legal decision makers, the opponents, and the lawyer.

Lawyers interview clients to gain an understanding of the client's problem from the client's perspective and to gather information that will help the lawyer identify potential solutions, particularly those that are available within the legal system or those that opponents will assent to. What information is considered relevant and important is a mixture of the client's, opponent's, lawyer's, and legal system's perspectives.

If these perspectives are different in material ways, information will likely be presented, gathered, and weighed differently. Habit 2 examines these perspectives explicitly by asking the lawyer to identify and analyze the similarities and differences in different dyads and triads to assess the various cultural lenses that may affect the outcome of a client's case.

Like Habit 1, the lawyer is encouraged to name and/or diagram the differences and similarities first and then to analyze their effect on the case.

#### Pinpoint and Record Similarities and Differences in the Legal System–Client Dyad

The lawyer should identify the similarities and differences that may exist between client–law and legal decision maker–law. As in Habit 1, the similarities and differences can be listed or can be put on a Venn diagram. In many cases, multiple players will influence the outcome and should be included when identifying the similarities and differences. For example, a prosecutor, a prospective jury, a presentence probation officer, and a judge may all make decisions that influence how the client charged with a crime will be judged and sentenced. Or a forensic evaluator in a custody case may play a significant role in deciding the outcome of a case. Therefore, at various points in the representation, different, important players should be included in the diagram of similarities and differences.

For example, a forensic evaluator in examining a capacity to parent may look for signs of the parent's encouragement of separation of parent and child. In cultures that do not see this kind of separation as healthy for the child, the

evaluator may find little that is positive to report. For example, the parent may be criticized for overinvolvement, for practices such as sharing beds with children, or for failing to tolerate "normal" disagreements between child and parent. Lawyers should identify the potential differences that exist between the client and decision makers and focus on how to explain the client's choices where they differ from the evaluator's norms.

In thinking about how differences and similarities might influence the decision makers, lawyers often try to help clients make connections to decision makers to lessen the negative judgments or stereotyping that may result from difference. To the extent that lawyers have choices, they may hire or suggest that the court use expert evaluators that share a common culture or language with the client. Cross-cultural misunderstandings and ethnocentric judgments are less likely to occur in these situations. By checking with others that have used this expert, lawyers can confirm that, despite their professional education, the expert has retained an understanding and acceptance of the cultural values of the client. When the client and decision makers come from different cultures, the lawyer should think creatively about similarities that the client shares with the decision makers. By encouraging clients and decision makers to see similarities in each other, connections can be made cross-culturally.

In addition to focusing on the decision makers, the lawyer should identify the cultural values and norms implicit in the law that will be applied to the client. Does the client share these values and norms, or do differences exist?

#### Pinpoint and Record Similarities and Differences in the Legal System–Lawyer Dyad

The lawyer should also focus on the legal system–lawyer dyad and assess the similarities and differences between herself and the legal system. To what extent does the lawyer adopt the values and norms of the law and legal decision makers? How acculturated to the law and legal culture has the lawyer become? In what ways does the lawyer see the "successful" client the same as the law and legal decision makers.

and to what extent does the lawyer have different values and evaluations? Understanding the differences and similarities between the lawyer and the legal system players will help the lawyer assess whether her evaluation of the case is likely to match the legal decision maker.

Again the lawyer can list or create a diagram that indicates the similarities and differences. By studying these, the lawyer can develop strategies for translation between the client and the legal system that keeps the client and her concerns central to the case.

### Pinpoint and Record Similarities and Differences of Opponents to Legal Decision Makers/Clients/Lawyers

The cultural background of an opposing party may also influence the outcome of a case. By listing or diagramming similarities and differences of the opponent with the various other players involved in a case, the lawyer can assess a case and design creative solutions. Often in settling cases, lawyers look for win-win solutions that meet the needs of clients and their adversaries. For example, in assessing the possibility of resolving a custody case, a lawyer may want to know what the norms of custody are in the opposing party's culture and the extent to which the opposing party still embraces these values. How might gender norms about who should have custody influence the opponent's capacity or willingness to settle the case? Will the opponent be the only decision maker in resolving the case, or might the extended family, especially the grandparents, be the people who need to be consulted for the settlement to take place. All these factors and more should be included in a lawyer's plan for negotiation.

### Reading the Rings: Analyze the Effect of Similarities and Differences

After filling in the diagrams and/or making the lists of the different dyads, the lawyer can interpret the information to look for insights about the impact of culture on the case and potential successful strategies. The lawyer's goal in reading the rings is to consciously examine influences on the case that may be invisible but will nonetheless affect the case.

The following questions may help identify some of those insights:

*Assessing the legal claim:* How large is the area of overlap between the client and the law?

*Assessing cultural differences that result in negative judgments:* What are the cultural differences that may lead to different values or biases, causing decision makers to negatively judge the client or the opponent?

*Identifying similarities that may establish connections and understanding:* What does a successful client look like to this decision maker? How similar or different is the client from this successful client?

*Assessing credibility:* How credible is my client's story? Does it make "sense"? To what extent is knowledge of the client, her values, and her culture necessary for the sense of the story? How credible is my client? Are there cultural factors influencing the way the client tells the story that will affect her credibility?

*Identifying legal strategies:* Can I shift the law's perspective to encompass more of the client's claim and desired relief? Do my current strategies in the client's case require the law, the legal decision maker, or the client to adjust perspectives?

*Identifying bones to pick with the law:* How large is the area of overlap between the law and myself?

*Identifying how my biases shape the inquiry:* How large is the area of overlap between the lawyer-client, lawyer-law, and client-legal system circles? Notice that the overlap is now divided into two parts: the characteristics relevant to the legal case that the lawyer shares with the client and those relevant characteristics that the lawyer does not share with the client. Does my client have a plausible claim that is difficult for me to see because of these differences or similarities? Am I probing for clarity using multiple frames of reference—the client's, the legal system's, the opponent's, and mine? Or am I focused mostly on my own frame of reference?

*Identifying hot-button issues:* Of all the characteristics and perspectives listed on the rings, which loom largest for me? Are they the same ones that loom largest for the client? For the law?

Habit 2 is more cumbersome than Habit 1 and requires looking at multiple frames of reference at once.<sup>22</sup> However, lawyers who have used Habit 2 find that it helps them to focus when a case or client is troubling them. The lawyer can identify why she has been focusing on a particular aspect of a case even when that aspect is not critical to the success of the case. She may gain insight into why a judge is bothered by a particular issue that is presented in the case. In addition, lawyers might gain insight into why clients are resisting the lawyer's advice or the court's directive and are "uncooperative." Lawyers might also begin to understand why clients often see the lawyer as part of a hostile legal system when a high degree of overlap between the lawyer and the legal system is identified.

What can the lawyer do with the insights gained from reading the rings or lists? Lawyers can ask whether the law and legal culture can be changed to legitimate the client, her perspective, and her claim. Can the lawyer push the law or should she persuade the client to adapt? Hopefully, by discovering some of these insights, the lawyer may be better able to explain the client to the legal system and the legal system to the client.

### HABIT 3: PARALLEL UNIVERSES

Habit 3 helps a lawyer identify alternative explanations for her client's behavior. The habit of parallel universes invites the lawyer to explore multiple alternative interpretations of any client behavior. Although the lawyer can never exhaust the parallel universes that explain a client's behavior, in a matter of minutes the lawyer can explore multiple parallel universes to explain a client's behavior at a given moment.

For example, if a lawyer has a client in a custody dispute who has consistently failed to follow a court order to take her child for a psychiatric evaluation, the lawyer might assume that her client has something to hide. Although the client tells the lawyer she will do it, it remains undone. A lawyer using parallel universe thinking can imagine many different explanations for the client's behavior: the client has never gone to a psychiatrist and is frightened; in the client's experience, only people

who are crazy see psychiatrists; going to a psychiatrist carries a lot of shame; the client has no insurance and is unable to pay for the evaluation; the client cannot accept that the court will ever give the child to her husband, who was not the primary child caretaker; the client may fear that she will be misinterpreted by the psychiatrist; or the client simply did not think that she needed to get it done so quickly.

Using parallel universe thinking, the lawyer for a client who fails to keep appointments can explore parallel universe explanations for her initial judgment that "she does not care about the case." The behavior may have occurred because the client lacked carfare, failed to receive the letter setting up the appointment, lost her way to the office, had not done what she promised the lawyer she would do before their next appointment, or simply forgot about her appointment because of a busy life.

The point of parallel universe thinking is to get used to challenging oneself to identify the many alternatives to the interpretations to which we may be tempted to leap on insufficient information. By doing so, we remind ourselves that we lack the facts to make the interpretation, and we identify the assumptions we are using. The process need not take a lot of time; it takes only a minute to generate a number of parallel universe explanations to the interpretation to which the lawyer is immediately drawn.

Parallel universe thinking would cause the lawyer in the introductory example to try to explore with the client why she is resistant or to talk to people who share the client's culture to explore possible cultural barriers to her following the court's order.

Parallel universe thinking is especially important when the lawyer is feeling judgmental about her client. If we are attributing negative inferences to a client's behavior, we should identify other reasons for the behavior. Knowledge about specific cultures may enlarge the number of explanations that we can develop for behavior. Parallel universe thinking lets us know that we may be relying on assumptions rather than facts to explain the client's behavior and allows the lawyer to explore further with the client or others the reasons for the behavior. This exploration may also be helpful in explaining the client's behavior to others.

By engaging in parallel universe thinking, lawyers are less likely to assume that they know why clients are doing what they are doing when they lack critical facts. Parallel universe thinking also allows the lawyer to follow the advice of a cross-cultural trainer who suggests that one way to reduce the stress in cross-cultural interactions is to ask, "I wonder if there is another piece of information that, if I had it, would help me interpret what is going on."<sup>23</sup>

#### HABIT 4: RED FLAGS AND REMEDIES

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The first three habits focus on ways to think like a lawyer, incorporating cross-cultural knowledge into analyzing how we think about cases, our clients, and the usefulness of the legal system. Habit 4 focuses on cross-cultural communication, identifying some tasks in normal attorney-client interaction that may be particularly problematic in cross-cultural encounters as well as alerting lawyers to signs of communication problems.

Good cross-cultural interaction requires mindful communication where the lawyer remains cognitively aware of the communication process and avoids using routine responses to clients. In cross-cultural communication, the lawyer must listen deeply, carefully attuned to the client and continuously monitoring whether the interaction is working and whether adjustments need to be made.

Habit 4 is accomplished in the moment and requires little planning for the experienced lawyer. The lawyer can identify ahead of time what she will look for to spot good communication and "red flags" that will tell her that accurate, genuine communication is probably not occurring.

In addition to paying attention to red flags and corrective measures, culturally sensitive exchanges with clients should pay special attention to four areas: (1) scripts, especially those describing the legal process; (2) introductory rituals; (3) client's understanding; and (4) culturally specific information about the client's problem.

##### Use Scripts Carefully

The more we do a particular activity, the more likely we are to have a "script." Lawyers

often have scripts for the opening of interviews, explaining confidentiality, building rapport, explaining the legal system, and other topics common to the lawyer's practice. However, a mindful lawyer uses scripts carefully, especially in cross-cultural encounters, and instead develops a variety of communication strategies to replace scripts and explore understanding.

##### Pay Special Attention to Beginnings

A lawyer working with a client from another culture must pay special attention to the beginnings of communications with the client. Each culture has introduction rituals or scripts as well as trust-building exchanges that promote rapport and conversation. A lawyer who is unaware of the client's rituals must pay careful attention to the verbal and nonverbal signals the client is giving to the lawyer. How will the lawyer greet the client? What information will be exchanged before they "get down to business"? How do the client and lawyer define "getting down to business"? For one, the exchange of information about self, family, status, or background is an integral part of the business; for another, it may be introductory chitchat before the real conversation takes place. If an interpreter who is familiar with the client's culture will be involved with the interview, the lawyer can consult with the interpreter on appropriate introductory behavior.

##### Use Techniques That Confirm Understanding

Both clients and lawyers in cross-cultural exchanges will likely have high degrees of uncertainty and anxiety when they interact with someone they perceive to be different. The lack of predictability about how they will be received and their capacity to understand each other often leads to this uncertainty and anxiety. To lessen uncertainty and anxiety, both the lawyer and the client will be assisted by using techniques that consciously demonstrate that genuine understanding is occurring. Active listening techniques, including feedback to the client rephrasing his or her information, may be used to communicate to the client that the lawyer understands what the client is saying.<sup>24</sup>

In addition to giving the client feedback, the lawyer should look for feedback from the client that she understands the lawyer or is willing to ask questions if she does not understand. Until the lawyer knows that the client is very comfortable with a direct style of communication, the lawyer should refrain from asking the client if she understands and instead probe for exactly what the client does understand.

### Gather Culture-Sensitive Information

How do we gather information that helps us interpret the client within her cultural context? In the first instance, the lawyer should engage in "deep listening" to the client's story and voice. For reasons identified in Habit 1, the lawyer, in question mode, will often be too focused on his or her own context and perspective. When exploration of the client's values, perspective, and cultural context is the goal, the lawyer needs to reorient the conversation to the client's world, the client's understandings, the client's priorities, and the client's narrative. Questions that get the client in narrative mode are usually the most helpful.

Questions that ask the client how or what she thinks about the problem she is encountering may also expose differences that will be helpful for the lawyer to understand the client's worldview. What are the client's ideas about the problem? Who else has the client talked to and what advice did they give? What would a good solution look like? What are the most important results? Who else besides the client will be affected? Consulted? Are there other problems caused by the current problem? Does the client know anybody else who had this problem? How did they solve it? Does the client consider that effective?

If the client has come from another country, the lawyer should ask the client how this problem would be handled in the client's country of origin. For example, in many legal cultures, the lawyer is the "fixer" or the person in charge. In contrast, most law students in the United States are taught client-centered lawyering, which sees the lawyer as partner, and our professional code puts the client in charge of major decisions about resolving the case.

### Look for Red Flags That the Interaction Is Not Working

What are the red flags that mindful lawyers pay attention to in assessing whether the conversation is working for the client and lawyer? Red flags that the lawyer can look for include the following:

- The client appears bored, disengaged, or even actively uncomfortable;

- the client has not spoken for many minutes, and the lawyer is dominating the conversation;

- the lawyer has not taken any notes for many minutes;

- the client is using the lawyer's terminology instead of the lawyer using the client's words;

- the lawyer is judging the client negatively;

- the client appears angry; or

- the lawyer is distracted and bored.

Each lawyer and client and each lawyer-client pair will have their own red flags.

The first step is to see the red flag and be shaken out of complacency. "Uh-oh, something must be done." The next step is the corrective one. This must be done on the spot, as soon as the red flag is seen. The general corrective is to do anything possible to return to the search for the client's voice and story.

### Explore Corrective Measures

In creating a corrective, the lawyer should be careful to use a different approach than the one that has led to the red flag. For example, if the client is not responding to a direct approach, try an indirect approach. If the call for narrative is not working, ask the client some specific questions or ask for narrative on a different topic.

Other suggested correctives include

- turning the conversation back to the client's stated priority;

- seeking greater detail about the client's priority;

- giving the client a chance to explain in greater depth her concerns;

- asking for examples of critical encounters in the client's life that illustrate the problem area;

exploring one example in some depth;

asking the client to describe in some detail what a solution would look like; and

using the client's words.

Again, these are only a few examples of many correctives that can be fashioned. Encounter by encounter, the lawyer can build a sense of the red flags in this relationship and the correctives that "work" for this client. Client by client, the lawyer can gain self-understanding about her own emblematic red flags and correctives that specifically target those flags. Red flags can remind the lawyer to be aware of the client and to be focused on the client in the moment. With reflection, the red flags can help the lawyer avoid further problems in the future.

#### HABIT 5: THE CAMEL'S BACK

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Like the proverbial straw that breaks the camel's back, Habit 5 recognizes that, in addition to bias and stereotype, there are innumerable factors that may negatively influence an attorney-client interaction. A lawyer who proactively addresses some of these other factors may limit the effect of the bias and stereotyping and prevent the interaction from reaching the breaking point. Once the breaking point has been reached, the lawyer should try to identify why the lawyer-client interaction derailed and take corrective actions or plan for future corrective action.

Consider the case of a woman client with a horrible story of torture, whom the lawyer had very limited time to prepare for in an asylum trial (she lived out of town). During their conversation, the woman spoke in a rambling fashion. The lawyer, just back from vacation, was thinking angry thoughts toward the client. In the extreme stress caused by time pressure and by listening to the client tell about some horrible rapes that she had suffered, the lawyer fell back on some awful, old conditioning: against people who are of a different race, people who are overweight, and people who "talk too much."

In the midst of these feelings, which were causing the lawyer shame, what can the lawyer do to put the interview back on track and prevent a collision? This lawyer, like all lawyers,

had biases and stereotypes that he brought to this attorney-client interaction. Research on stereotypes indicates that we are more likely to stereotype when we are feeling stress and unable to monitor ourselves for bias. By identifying the factors contributing to the negative reactions and changing some of them, the lawyer could prevent himself, at least sometimes, from acting on the basis of his assumptions and biases.

For example, the lawyer in the previous situation can take a break, have some food and drink, and identify what is interfering with his capacity to be present with the client before he resumes the interview. This, however, requires that the lawyer accept his every thought, including the ugly ones, and find a way to investigate and control those factors that are simply unacceptable in the context of lawyering. Knowing oneself as a cultural being and identifying biases and preventing them from controlling the interview or case are keys to Habit 5 thinking.

Over time, lawyers can learn to incorporate the analysis that they are doing to explore bias and stereotype into the analysis done as part of Habit 1. In addition to biases and stereotypes, straws that break the lawyer's back frequently include stress, lack of control, poor self-care, and a nonresponsive legal system. Final factor analysis identifies the straws that break the lawyer's back in the particular case and corrective steps that may work to prevent this from happening.

For example, assume that a lawyer, after working with a few Russian clients, begins to stereotype Russians as people who intentionally communicate with a lack of candor with lawyers. Habit 5 encourages this lawyer to be extra mindful when interviewing a Russian client. Given her biases, there is a higher likelihood that the lawyer will not find herself fully present with this client. In addition to using the other habits, the lawyer can improve the communication by controlling other factors (hunger, thirst, time constraints, and resource constraints), knowing that she is at greater risk of misunderstanding this client.

The prudent lawyer identifies proactively factors that may impede full communication with the client. Some she cannot control: pressure from the court, lack of resources, bad

timing, excessive caseload. But some she can: the language barrier (through a competent interpreter), her own stress (through self-care and adequate sleep, food, and water), and the amount of time spent with the client (increase as needed).

Habit 5 thinking asks the lawyer to engage in self-analysis rather than self-judgment. A lawyer who has noticed a red flag that recurs in interactions with clients can brainstorm ways to address it. Likewise, a lawyer who has noticed factors that tend to be present at particularly smooth encounters with clients can brainstorm ways to make more use of these advantages. By engaging in this reflective process, the lawyer is more likely to respond to and respect the individual clients.

#### NOTES

1. This work grows out of a joint collaborative process that was conceived in conversations in the early 1990s and began as a project in fall 1998 with a concrete goal of developing a teaching module about cross-cultural lawyering. Ultimately that project resulted in these materials for use in clinical courses, which we first presented at the 1999 CUNY Conference, "Enriching Legal Education for the 21st Century. Integrating Immigrant Perspectives Throughout the Curriculum and Connecting With Immigrant Communities." This work has also contributed to a chapter written by Jean Koh Peters in the supplement to her book, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*.

Many wonderful colleagues, students, and staff from CUNY and Yale aided us in the development of this work. The Open Society Institute, Emma Lazarus Fund, provided support for the conference, our work, and the publication of these materials.

2. R. Carroll, *Cultural Misunderstandings* 3 (University of Chicago Press 1988). Others have referred to this as "conscious incompetence," where the individual recognizes that cross-cultural competence is needed, but the person has not yet acquired the skills for this work. See W. S. Howell, *The Empathetic Communicator* 30-35 (1982).

3. Carroll, *Cultural Misunderstandings* 2. Objective culture includes that which we observe including artifacts, food, clothing, and names. It is

relatively easy to analyze and identify its use. Subjective culture refers to the invisible, less tangible aspects of behavior. People's values, attitudes, and beliefs are kept in people's minds. Most cross-cultural misunderstandings occur at the subjective culture level. See K. Cushner & R. Brislin, *Intercultural Interactions* 6 (Sage Publications 1996), p. 6.

4. Those who grew up in cultures in the United States that prized individualism and self-reliance can identify specific experiences from their childhood that helped them develop these traits, such as paper routes and baby-sitting jobs and proverbs such as "God helps them who help themselves" and "The early bird catches the worm." Cushner & Brislin, *Intercultural Interactions*, p. 7. Not all who grew up in the United States share this commitment to individualism; significant cultural groups in the United States prize commitment to community. They might have heard "Blood is thicker than water."

5. Ethnocentrism occurs when a person uses his own value system and experiences as the only reference point from which to interpret and judge behavior.

6. Cushner & Brislin, *Intercultural Interactions*, p. 10.

7. Critical feminist race theorists have established the importance of intersectionality in recognizing, for example, that women of color have different issues than white women or men of color. The intersectionality of race and gender gives women of color different vantage points and life experiences. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1249 n. 29 (1991); see also Melissa Harrison and Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, Columbia Journal Of Gender and Law (1996), 387, 403. Professors Montoya and Harrison discuss the importance of seeing multiple and changing identities.

8. The insider/outsider group distinction is one of the core themes in cross-cultural interactions. K. Cushner & D. Landis, The Intercultural Sensitizer, in *Handbook of Intercultural Training* 189 (2d ed.; D. Landis and R. Bhagat eds., 1996). Historical struggles between native countries of the lawyer and client or situations where lawyer's or client's native country has dominated the other's country can create difficult power dynamics between lawyer and client.

For example, racial discrimination both historical and current by Anglo-Americans against African Americans can have significant influences on the lawyer-client relationship. *Infra*, note 32.

9. Michelle Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U.L. Rev. 345, 372 (1997).

10. Harrison and Montoya, *supra* note 4, at 160. For example, after discussing the scholarship on lawyer as translator or ethnographer, Professor Zuni Cruz invited Esther Yazzie, a federally certified Navajo translator, to describe and enact the skills necessary to work successfully with language interpreters. "Ms. Yazzie's presentation debunked for all of us the idea that languages are transparent or that representations of reality somehow exist apart from language. One of several examples cited by Ms. Yazzie involved different conceptualizations of time: 'February' translated into Navajo as 'the time when the baby eagles are born.' Certainly, this is a temporal concept more connected to nature and to place than a word such as 'February' and, as such, is a different construct."

11. Cushner & Brislin, *Intercultural Interactions*, *supra* note 14, at 302.

12. Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 Clin. L. Rev. 557, 580-584 (1999), *supra* note 5, at 580-584, tells a number of stories illustrating difference in individualistic and community-focused lawyering and how culture influences the choices that lawyers make.

13. Cushner & Brislin, *Intercultural Interactions*, *supra* note 4 at 302.

14. Hofstede 1980 and 1991 as cited in Cushner & Brislin, *Intercultural Interactions*, *supra* note 4, at 302. Other nations that rank high on this dimension are Australia, Canada, Great Britain, the Netherlands, and New Zealand. Nations that score high on collectivism are primarily those in Asia and South America.

15. See also Kimberly O'Leary. Using "Difference Analysis" to Teach Problem-Solving, Clin. L. Rev. 65, 72 (1997), at 72. Professor O'Leary points to both the ethical rules and concepts of standing as limiting lawyers' conceptions about who is involved in a dispute. Following our presentation at the 2000 AALS Clinical Teacher's conference, Peter Joy alerted us to a contemplated change in California professional responsibility rules on confidentiality, allowing the

privilege to be maintained when family members or others were part of the interview process.

16. This scenario was told to me by Professor Holly Maguigan, who for years has represented a number of battered women in criminal cases. In this case, her students worked with a lawyer from the Legal Aid Society. These lawyers were significantly aided by the advocates of the New York Asian Women's Center who perform both language and cultural translations. The New York Asian Women's Center is a community-based organization that works with a diverse group of Asian women in assisting them to deal with issues of intimate violence. For a more detailed analysis of the difference between individualism and collectivism, see Cushner & Landis, *Handbook of Intercultural Training*, note 11 *supra*, at 19.

17. Peter Margulies, *Re-framing Empathy in Clinical Legal Education*, 5 Clin. L. Rev. 605 (Spring 1999). Margulies also presented this case at the 1999 CUNY Conference, "Enriching Legal Education for the 21st Century, Integrating Immigrant Perspectives Throughout the Curriculum and Connecting With Immigrant Communities."

18. The classic fact finder, the judge, never saw the evidence. The adversary learned about the evidence not from the lawyer, but from the client, and the adversary, not the advocate, presented the evidence to the court.

19. See Jacobs, *People From the Footnotes*.

20. *Race, Bias & Power in Child Welfare*, Child Welfare Watch, Spring/Summer 1998, Number 3. Child Welfare Watch is funded by the Child Welfare Fund and produced by City Limits Community Information Services, Inc.

21. The legal system's focus on the protection of individual rights and personal liberties reflects the essential and pervasive cultural value of individualism. The American values of free-market competition, decentralized and minimized government intervention, and laissez-faire economics are mirrored in the adversarial process. The American legal model, including the "rules of the game," fosters competition between largely autonomous and self-interested, zealous advocates in a winner-take-all scheme.

22. Because Habit 2 requires the exploration of multiple frames of reference, Jean came up with the rings as a way to assess the perspectives and analyze where there was overlap of all three perspectives and where there were differences. Not everyone comfortably uses the diagrams or thinks in the visual



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ways that diagramming encourages. Habit 2 can be done with lists, filled-in Venn diagrams, or other imaginative ways that help the lawyer concretely examine the cultural differences and similarities that are involved in a case.

23. R. Brislin and T. Yoshida, *Intercultural Communication Training: An Introduction* (Sage Publications, 1994).

24. I do not know how the recommendation that we engage in active listening by identifying the emotional content of the client's communication works for clients from more indirect cultures. One might hypothesize that a client who would be reluctant to directly name the way she is feeling may feel uncomfortable with the lawyer giving feedback of the emotional content of the message.