The Jury EXPERT
The Art and Science of Litigation Advocacy
from MAY/JUNE 2013
Volume 25, Issue 3
A publication of the American Society of Trial Consultants Foundation

Do You See What I See?

How a Lack of Cultural Competency May Be Affecting Your Bottom Line

by Michelle Ramos-Burkhart

What Is It?

First let's define it, are we talking about diversity, equity, equality or all of the above? While many people use these words interchangeably, for the purposes of this article let's define what exactly we mean when we say lawyers need to possess cultural competence.

Cultural competency is broader in scope than diversity. It includes the complex processing and understanding of values and worldviews. A culturally competent person will take into account individual cultural perspectives that inform people's behaviors and motivations. In effect, cultural competence is a professional skill that seeks to help with advocacy and communication across cultural experiences.

It also has been defined as "the understanding of diverse attitudes, beliefs, behaviors, practices and communication patterns, attributable to a variety of factors (race, ethnicity, religion, SES [socio-economic status], historical or social context, physical or mental ability, age, gender, sexual orientation, or generational and acculturation status)" (Frink-Hamlet, 2011).

OK, now that we have a handle on the definition of the cultural competency dynamic, now what? Why should it matter to a lawyer? How can it affect my revenue stream?

Making the Case

Our American demographics, as evidenced by the recent Presidential election, reflect that our population is significantly changing and subsequently so are the pools from which we select our jurors. Most law schools do not offer courses in cultural competency in the curriculum and as the data reflects, American law school populations themselves are simply not diverse. Once considered only an issue for public interest lawyers or marginalized populations, it is now relevant across all sectors as transactions and legal disputes move to a more global arena.

In a legal market that has witnessed the reduction of opportunities for recent law school graduates, this may seem a minor issue. However, it seems many are of the opinion that law students are better served and more employable with this skill set in hand coming out of law school.

Beyond law students, the legal field has its own set of issues to contend with on this subject matter. As of 2012 there are roughly 1,245,000 licensed lawyers in America. The most recent statistical data from the ABA in 2005 shows roughly 70% are male, a median age of 45-54 and 88% White (ABA, 2012). So, if we think this is not an important issue we are fooling ourselves. Our clients, communities, business partners and employees are not the same face as the majority of our attorney population in this country, let alone the new global marketplace.

There has been a significant shift in the cultural and racial make up in our legal arena. This is largely due to our country's changing demographics and due to the increasing practice of conducting business globally. This change has presumably also resulted in a new demographic in our juries and clientele. This is a new and different argument that disrupts perceptions and traditional findings and brings issues of racism and culture to the forefront like never before.

Does that juror of color perceive the White male attorney with a preconceived bias as a person who is seemingly advantaged and privileged?

Or, does the international client resent the lack of cultural sensitivity by the American attorney they are now required to work with on an international or global matter?

This could be a "*new racism*" that is important to explore and investigate and will undoubtedly contribute significantly to the psychology and legal communities.

Without question, psychological factors influence decision-making in and out of court. Because jurors rely on the same skill set for making decisions as they do in everyday life, their decisions while in court will almost always be influenced by their personal biases, emotions and beliefs. If they disagree personally with the information presented in a case, their biases and opinions will often be channeled into a decision-making response. It seems that "*what jurors hear and remember about a case will inevitably be a reflection of who they are, what they value, and what their life experiences have been*" (Anderson, 1996). The life experiences of our potential jurors and clients are not the same as jurors or clients of the past, nor of the majority of our attorneys.

Legal Perspectives

The ABA Presidential Initiative Commission on Diversity recently (ABA, 2010) outlined four rationales for creating greater diversity in the legal profession. I have chosen to briefly highlight the key phrases from the fuller document.

The Democratic Rationale: "*A diverse bar and bench create greater trust in the mechanisms of government and the rule of law*."

The Business Rationale: "*Ever more frequently, clients expect and sometimes demand lawyers who are culturally and linguistically proficient*."

The Leadership Rationale: "*The profession must be broadly inclusive and accessible to all*."

The Demographic Rationale: "*LGBT lawyers and lawyers with disabilities will rapidly increase in coming years. With respect to the nation's racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a "majority minority" country*."

While these rationales are outlined comprehensively in the full document, the challenge becomes implementation and awareness to the broader legal community. When faced with specific culturally diverse situations, culturally competent people will generally behave, react and reason more effectively than those who are not (Stevens, 2009).

In the global arena, the legal industry demands lawyers possess these critical skills for success. Technology, travel and international business (once unique) is now standard business practice. The National Law Journal 250 (250 of the highest producing law firms) reports over 13% of lawyers are based in foreign offices outside the US and that number continues to grow (National Law Journal, 2011). Solo practitioners face very similar challenges. Co-workers, vendors and employees from different cultures are commonplace in today's legal business.

Within the context of a jury case, as minority populations increase it is reasonable to expect that so will the representatives who come to court when called for jury duty. This shifting demographic is directly correlated to interactions amongst jurors and attorneys. Add to this the recent proposal from California to expand the jury pool so eligible non-citizens can serve and this potential change would have even more significant effects on the face of the jury (Guthrie-Ferguson, 2013). Will cultural bias challenge the "*automatic credibility*" of our trial lawyers, thereby challenging our existing research about how jurors perceive attorneys? (Hahn & Clayton, 1996) While the North American attorney population is reflecting some racial and gender change, that change is not nearly at the pace of the larger population. More and more business is being conducted globally and traveling across cultural barriers–will our lawyers be ready?

Scientific Perspectives

Modern psychology and specifically that of social psychology shows justice and law rest on the idea that people acting in the capacity of juror will do so with fairness and in an unbiased fashion. We know this is not always the case. Cognitive theory and its sub areas of stereotyping, critical race theory, social cognitive theory, attribution theory and situational leniency theory provide the theoretical background for evaluation and analysis of this topic. A juror bias scale (JBS) was developed by psychologists almost fifty years ago to measure biases pretrial amongst jurors (Shaw & Wright, 1964). Researchers continued

to pursue this idea of minimizing bias in a potential jury in (among many other publications) 1983, 1998, 2003, and 2005. Today, most researchers, scholars and legal professionals recognize the perfectly unbiased jury is basically impossible to construct. However, empirical scientific evidence can lend to a comprehensive pre-trial preparation and thus, the continuing efforts of academic researchers.

Legal scholars and practicing attorneys often shy away from or disregard psychological scientific studies, even though there is no question the information garnered and its applicability to their day in and day out practice holds great potential for improving the legal landscape. The persuasion strategies identified in these studies are tools that, if used effectively, can have significant impact on attitudes, behaviors and outcomes in the various roles and multiple channels in our day-to-day lives both in and out of court.

As demands for cultural competency increase how does the impact effect not just work environment but the financial bottom line for law firms in this new era? There is benefit at many levels that can be implemented from theory to practice.

From Theory to Practice

The goals of cultural competence are simple.

- The reason to become culturally competent is to effectively deliver services in a cross-cultural arenas, as well broaden financial opportunities for firms in business transactions.
- Lawyers can accomplish this by improving their awareness skills and increasing their personal cultural knowledge.
- Law firms and legal organizations must work to hire and train culturally skilled and knowledgeable people.
- Cultural competence is a personal. Everyone has a culture and everyone should consider culturally competent service in his or her transactions and practice.
- Consider "*cultural audits*" which include observation in client intakes, presentation style review, open/closing statement evaluation, in house hiring and employee practices and other business analysis to identify where cultural competency efforts need to be focused. Additional steps to consider taken from a report at the Commonwealth Fund (Wu & Martinez, 2006) suggests the following:

1. *Community representation and feedback is essential at all stages of implementation.*
2. *Cultural competency must be integrated into all levels of the business.*
3. *Changes made should be manageable, measurable and sustainable.*
4. *Making the business case for undertaking cultural competency initiatives is critical for long-term sustainability.*
5. *Commitment from leadership is a key factor to success.*
6. *Ongoing staff training is crucial.* Strategies in implementing cultural competence should begin with an internal recognition about in-group differences and then move to out-group differences. Nuanced understandings of cultural experiences, preferences and differences will help prevent stereotyping and over generalization about a particular group or culture.

Conclusion

Cultural competency is not about saying or doing everything right. Instead it is about heightening our awareness, broadening our sensitivities and being a good world citizen. Our actions will speak for themselves and efforts that are made to genuinely listen and understand one another will build trust which is the foundation of any great relationship, legal or otherwise.

If doing the right thing is not incentive enough, perhaps consider what implementing these practices can mean to your bottom line. If you aren't seriously looking at these issues in your firm and your competition is, you risk losing employees, clients and revenue. Cultural competency is here to stay, so consider leading the field by taking proactive steps to embrace the new paradigm.

Illustration by Sully Ridout of Barnes & Roberts

Michelle Ramos-Burkhart, JD, LLM is President and Senior Trial Consultant at Verdict Works, LLC based in Long Beach, California. She focuses her practice in civil and criminal defense work including focus group, mock trial, witness preparation and voir dire. She also consults in diversity and cultural competency issues for lawyers and law firms nationwide. You can read more about Ms. Ramos-Burkhart at her website.

References

American Bar Association (2010) Diversity in the legal profession: The next steps. Retrieved here .

American Bar Association (2012), Lawyer Demographics. Retrieved here.

Anderson, C.B. (1996) Inside Jurors Minds: The hierarchy of decision making. NITA Publications

Frink-Hamlet, Katherine (2011) The case for cultural competency. New York Law Journal, Last Retrieved here.

Guthrie-Ferguson, A. (2013) Why restrict jury duty to citizens. The Atlantic. Retrieved here.

Hahn, P.W., & Clayton, S.D. (1996). The effects of attorney presentation style, attorney gender, and juror gender on juror decisions. Law and Human Behavior, 20, 533-554. Rieger.

Natonal Law Journal (2011) Foreign offices data. Retrieved from: here

Shaw, M.E. & Wright, J.M. (1964) Scales for the measurement of attitudes. New York, McGraw Hill.

Stevens, S. E. (2009). Is there an ethical duty? Cultural competency. Oregon State Bar Bulletin, 69, 9–10.

Wu, E., Martinez, M., (2006) Taking Cultural Competency from Theory to Action, The Commonwealth Fund.