

ASPEN COURSEBOOK SERIES

ESSENTIAL LAWYERING SKILLS

**Interviewing, Counseling,
Negotiation, and Persuasive
Fact Analysis**

FIFTH EDITION

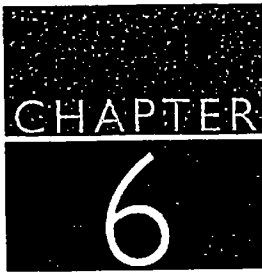
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CHAPTER
6

MULTICULTURAL LAWYERING

■ §6.1 HOW CULTURE MATTERS IN LAWYERING

A lawyer can be effective only if the lawyer understands cultural differences and knows how to recognize and deal with them. You will deal with people from widely varied cultures, regardless of the type of legal work you do. Different cultures are entitled to respect on their own terms and without stereotyping.

A culture is a body of values, customs, and ways of looking at the world shared by a group of people. A culture can be based on any of the following:

- ethnicity or race
- gender
- age
- locality or geography
- religion
- nationality or immigrant status
- disability
- sexual orientation
- income, education, or both
- occupation or the organization in which one works

Obviously, many people have sensibilities shaped by more than one culture.

If you ignore the differences among cultures—or if you think of people in cultural stereotypes—you will alienate clients, witnesses, other lawyers, and judges

and juries. You will also cut yourself off from a great deal of information, simply because different cultures communicate in different ways.

Working with people of diverse backgrounds is a skill—actually a cluster of skills.

§6.2 HOW CULTURAL DIFFERENCES CAN MATTER IN LAWYERING

Here are some ways in which cultures can differ and how that can affect how you do your job as a lawyer.

Are events viewed differently by people from different cultural contexts? A police car is following another car. The police car's siren and flashing lights go on, and both cars pull over to the side of the road. A police officer steps out and walks toward the other car. The officer plans to issue a traffic ticket and believes he is just doing his job. At least some of the police officer's expectations might arise from the organizational culture prevailing in the police department. If the driver is from a culture that does not have a troubled history with the police, the driver expects merely the unpleasant experience of receiving a traffic ticket. But what is about to happen could be perceived very differently by the driver if that person is from a culture in which contact with the police sometimes creates risks not shared by the majority U.S. culture. Either driver might be surprised by what happens when the police officer reaches the car and begins a conversation. But the cultural norms and expectations of all three of these people will affect what they say and do and how they remember the event afterward.

How is conflict viewed? In the majority U.S. culture, conflict is considered socially acceptable and even socially useful. That does not mean that every person in the majority culture enjoys conflict. Many people do not, and they will avoid conflict if they can. But conflict is not considered disgraceful in the United States. It's honorable to complain when something goes wrong. And U.S. law resolves disagreements through procedures that might be more adversarial and contentious than in any other country. Even lawyers in other common law countries are sometimes shocked by the way American lawyers behave in the courtroom.

In some other countries, however, conflict is considered disgraceful. In some cultures, anyone involved in open and public conflict is thought to have done something shameful. People in these cultures may often simply suffer a loss rather than complain officially about the person who caused the loss, especially if that person has a higher status or power of some kind. The world is not divided into conflict-tolerant cultures and conflict-intolerant cultures. Instead, cultures have a broad range of attitudes toward conflict, from those that honor conflict (such as the majority U.S. culture) to those that dishonor it, with many cultures somewhere in between. And in some cultures certain types of conflict are acceptable while others are not.

If you counsel a client whose cultural assumptions about conflict are different from yours, you might create a set of options that are entirely inappropriate for the client unless you take the cultural differences into account. And if you negotiate

confrontationally against someone who views conflict as a disgrace, you might make agreement impossible.

Is hierarchy valued? Participatory relationships between professionals and their clients (see Chapter 3) reduce hierarchy although they don't eliminate it. Participatory relations do not always seem natural in cultures where authority figures are deferred to in ways that most Americans are no longer accustomed to. It might be difficult for a lawyer to create a participatory relationship with a client from a culture where hierarchy is valued. The client might view the lawyer as an authority figure who must be given respect and deference. See §26.1.2.

Is formality valued? The majority U.S. culture is, by world standards, unusually informal. In business situations, for example, we quickly get on a first-name basis. In some cultures, this can be taken as a show of disrespect for the person whose first name you have started using. In those cultures, informality can imply that you do not take seriously the person you're talking to or the subject you're talking about. See §26.1.2.

How much do personal relationships matter? In some cultures, two business people will do a deal just because each expects to make money from the transaction. Nothing else really matters. If, after "running the numbers," each side is confident of making a profit, the deal is turned over to lawyers, who draft a long contract intended to govern the behavior of the parties in every detail. This is typical in the United States, where the contract is the entire transaction, and anything not provided for in the written contract is usually considered not part of the deal.

In other cultures, business people will spend a great deal of time getting to know each other as human beings before either mentions even the possibility of doing a deal together. Each will want a great deal of confidence that the other can be trusted. If they do agree on a transaction, the contract might be two or three pages long, specifying little. After it is signed, it will be filed away and probably never looked at again. This is typical in Latin America and many parts of Asia, where *the relationship* is the core of the deal, and later problems and confusions will be resolved through the relationship, which would be damaged by referring to the contract.

This kind of cultural difference has obvious ramifications in international business transactions. But it also matters in the everyday practice of law. For several cultures inside the United States, personal relationships are much more important than they are to the majority U.S. culture. A person from a culture where personal relationships are highly valued can experience the majority U.S. culture as cold and impersonal, which can be important if that person is a client or a lawyer in a case you are working on.

How acceptable is it to show emotion or to talk about emotion? In some cultures, it is not acceptable to discuss emotions about personal matters except with family or long-time friends in the privacy of the home. And in many cultures, including several in the United States, people do not talk about their emotions as spontaneously as many Americans do. A client might be suffering emotionally even

if the client, for cultural reasons, does not talk about it in an interview. And some clients might be made uncomfortable if their lawyer tries to express empathy too overtly. In some cultures, empathy is best expressed by subtle changes in tone of voice or facial expression rather than in words.

How much is typically said in words, and how much is left to implication or context? In the majority U.S. culture, a relatively high proportion of what one communicates is expressed in words. In some other cultures, this is considered unobtrusive or bluntly rude. In some cultures, words are carefully chosen to imply messages that are not explicitly spoken. When a person from one of these cultures deals with a person from the majority U.S. culture, the potential for misunderstandings is large. For example, the person from the majority U.S. culture might not hear the other person's implications and might become impatient, wrongly assuming that the other person is uncommunicative.

The difference is one of contexting. A low-context culture (such as the majority U.S. culture) communicates primarily through words, leaving little to be implied from the context in which the words are spoken. In a low-context culture, things that have not been spoken are probably not meant. A high-context culture communicates less in words and more by implying meaning from the context. In a high-context culture, what is *not* spoken may be as meaningful as—or more meaningful than—what is spoken. See §26.1.2.

For lawyers, there is a paradox here. In negotiation, you will have to communicate some things without saying them bluntly in words. If you say them bluntly in words, your adversary will use them against you. If you imply them, or let the context imply them, your adversary can get the message but not in a form that can be used against you. Thus, in one part of their work—negotiation—American lawyers, who otherwise may be among the wordiest and most blunt people on earth, communicate a great deal through implication and context. You will have to learn how to do that in negotiation.

What does body language communicate? There are many ways in which body language that seems natural in one culture may convey inappropriate messages in another culture. For example, one of the authors of this book grew up in a part of the United States where two groups of minority cultures coexist with the majority U.S. culture. In one of these groups, if you fail to look into another person's eyes while talking to them, you show disrespect. For many people in the other group of minority cultures, the opposite is true: to look into another person's eyes is to show *disrespect*. In the majority U.S. culture, looking into another person's eyes while talking is optional: you can do it or not do it, with no implication concerning respect.

Which is more important, the individual or the group? In the majority culture in the United States, individuals are expected to make their own decisions based on what's best for them. In some other cultures, an individual might decide on the basis of what's best for a group—the family or the community, for example. In still other cultures, a group reaches a consensus and decides for the individual, usually on the basis of the group's needs. If you are counseling a client from a culture where group needs or group decision-making prevail over individual needs

or individual decision-making, you can be helpful to the client only if you take that into account.

■ §6.3 WHY YOU SHOULD CARE ABOUT MULTICULTURAL LAWYERING

For three reasons, you should care about multicultural lawyering:

First, it is the right thing to do. If we really do center on the client, then we also should be able to respect the cultural, racial, ethnic, and gender differences that exist between us and our clients. That means that we recognize the differences and adapt to them rather than assume that the client will adapt to us. For example, we learn to listen for meaning that, in the client's culture, might be implied, even if in our own it would be expressed if intended at all. And we adapt to differences sincerely because insincerity is condescension.

Second, it's in your own self-interest to care. It's good business to respect the cultural and gender differences between yourself and your clients. A very large amount of a lawyer's work comes through recommendations by satisfied clients, and clients whose differences have been respected sincerely are that much more likely to recommend.

Third, the world is a more interesting place when we become open to cultural differences and the ways in which people from other backgrounds live and perceive what happens around them.

■ §6.4 THE RISKS OF STEREOTYPING

Stereotyping occurs when cultural characteristics are oversimplified and exaggerated and then, in that oversimplified and exaggerated form, applied to everyone who shares something of that culture. The following is stereotyping: "White Anglo-Saxon Protestants dislike emotion." The combined effect of the oversimplification, the exaggeration, and the false assumption that all persons who share the culture are alike is to trivialize, marginalize, patronize, and insult.

The opposite of stereotyping is showing respect for a culture by trying to understand it and all its complexities. Respect includes genuine curiosity and a willingness to accept the culture on its own terms rather than judging it. Respect also includes an understanding that people who share a culture might individually have different relationships to it. One person might feel immersed in her culture and its values and customs. Another person might have a much more detached relationship with her culture, adopting some aspects of it, rejecting others, and not caring or knowing about still others. Respect for another culture includes recognition of individual differences within that culture.

If you stereotype other cultures, people in those cultures can often quickly sense how you are thinking. The stereotyping will prevent you from having constructive working relationships with them. Genuine respect for a culture, on the other hand, can make it much easier for you to work with people in that culture.

§6.5 MULTICULTURAL SKILLS

What skills do you need to work with people of diverse cultural backgrounds?

You cannot memorize—in advance—every detail about every culture you might deal with professionally. There are far too many cultures for that to be possible. Instead, develop *an instinct for situations where another person's cultural assumptions may be very different from yours*. Learn to look for indications of cultural difference. And then try to figure out what would be the appropriate way for you to respond.

If you cannot memorize every detail about every culture, how can you be informed? First, learn about the other cultures that are most commonly found in the area where you will practice law. Learn not only some of their customs and values but also how people in those other cultures view your culture and the world in general. Second, when you foresee a situation in which you can do a better job if you take another person's culture into account, think carefully about what behavior on your part would be appropriate. Think also about what behavior you should avoid either because it would be stereotyping or because it might accidentally give offense in other ways. Third, if you make a cross-cultural mistake—if you create a problem because you did not understand how your behavior would be seen by people in the other culture—apologize promptly. Often, the best apologies are short and simply note that you were unaware of the cultural difference.

The most important thing is to be curious and open-minded about how other people think and act and why they think and act that way. A generous frame of mind on your part and a genuine liking for other people—and their differences—go a long way in this respect. So do flexibility, empathy, patience, and a reluctance to see things judgmentally.

It helps, also, to understand how your own culture “shapes [your] attitudes, values, biases, and assumptions about lawyering” and about social interaction and life generally.¹ How is your culture different from the other cultures you know? This is not the same as asking how those cultures are different from yours. When you ask how other cultures are different from yours, you treat your culture as normal and look for abnormalities elsewhere. Turn it around. Take another culture as normal and ask how your culture differs from that norm. More concretely, how do people in that other culture view your culture? If they were meeting you for the first time, what would they anticipate finding culturally in you?

If you ask people from other cultures, the answers may surprise you. For example, when Americans visit an office and are offered a chair, they are easily willing to move that chair to “adjust the distance” between themselves and the person with whom they are speaking, for example, or to get closer to or farther from a table. This seems so natural to us that we assume anyone in the world would do it. But in some cultures it creates discomfort and disturbs the settled order of things, and an American entering an office is considered rambunctious.²

1. Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 *Clinical L. Rev.* 369, 398 (2005).

2. Edward T. Hall, *The Hidden Dimension* 137 (1969).

After living for five years on their reservations in northeastern Arizona, Ned Hall realized that Navajos and Hopis “believed that whites were crazy, although they didn’t tell us that. We were always hurrying to get someplace [even though] that place would still be there whenever we arrived. Whites had a kind of devil inside who seemed to drive them unmercifully. The devil’s name was Time.”³

§6.6 DO MEN AND WOMEN PRACTICE LAW DIFFERENTLY?

DEBORAH TANNEN, *TALKING 9 TO 5*
124–125 (1994)

Mona Harrington writes of three women who left large law firms to start their own “alternative” firm specializing in commercial litigation. They determined to do things differently from the way things were done in the large firms where they had worked before—both in managing their relationships with each other and in doing work for their clients.

In terms of interoffice relations, in the women’s firm all partners make decisions together at meetings, have offices equal in size, and divide money earned equally among them, regardless of who brought in the client or who worked on the case. In terms of their working styles, the women told Harrington that they represent clients not by being as aggressive and confrontational as possible, but by listening, observing, and better “reading” opponents. One pointed out that in taking depositions, they get better results by adopting a “quiet, sympathetic approach,” charming witnesses into forgetting that the attorney deposing them is their adversary, than by grilling witnesses and attacking them.

Yet when interviewed by the press about their approach, these same women do not mention their different styles, not even to explain how well they work. Just the opposite, they stress that they are “tough” litigators and seasoned veterans of traditionally contentious legal settings. . . .

MONA HARRINGTON, *WOMEN LAWYERS:
REWRITING THE RULES*
186–187 (1994)

[Describing the same law firm:]

. . . Many men as well as women employ a quiet style, my interviewees agree, and some women litigators are vigorously aggressive. But they agree that on a stylistic continuum from quiet subtlety to loud antagonism, there is a gender breakdown at the extremes—quiet women, loud men—with an overlap in the middle where you find the counterexamples in both sexes. Still, adds one [partner in the firm], “. . . We’ve been in situations where the two lawyers are women and the judge is a woman. Then the court works differently. There’s less dueling going on. People don’t have their swords out. . . . It’s not a pissing contest. It’s more getting to the heart of whatever it is they’re supposed to be doing. . . .” . . .

3. Edward T. Hall, *An Anthropology of Everyday Life: An Autobiography* 218 (1992).

Says another, “We’ve had clients tell us that they thought [that before hiring us they had been] spending a lot of money on [their prior attorneys’] male ego, men showing off, wasting time. A lot of bluster and showmanship is not necessarily in the client’s best interest.”

So why don’t these women market themselves as different—subtle, psychologically astute, sensible, time-saving, wise? Why [do they talk to the media] about being tough? . . . Because, they tell me, there is no available language to describe the alternative qualities credibly within the necessarily adversarial tradition of litigation. The risk is too great that to describe themselves as different in this context is to convey that they are soft, weak, second-class, not to be trusted. One of the women says of the model of difference they’ve described, “I don’t think there’s ever been a language to talk about these things. You just have to *be* it, and develop a reputation” [based on getting results for clients].

DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND:
WOMEN AND MEN IN CONVERSATION*
14–17, 49–50 (1990)

Some men hear any statement about women and men, coming from a woman, as an accusation . . .

But it is not only men who bridle at statements about women and men. Some women fear, with justification, that any observation of gender differences will be heard as implying that it is women who are different—different from the standard, which is whatever men are. The male is seen as normative, the female as departing from the norm. And it is only a short step—maybe an inevitable one—from “different” to “worse.” . . .

Pretending that women and men are the same hurts women, because the ways they are treated are based on the norms of men. It also hurts men who, with good intentions, speak to women as they would to men, and they are nonplussed when their words don’t work as they expected, or even spark resentment and anger. . . .

. . . There *are* gender differences in ways of speaking, and we need to identify and understand them . . .

Eve had a lump removed from her breast. Shortly after the operation, talking to her sister, she said that she found it upsetting to have been cut into, and that looking at the stitches was distressing because they left a seam that had changed the contour of her breast. Her sister said, “I know. When I had my operation I felt the same way.” Eve made the same observation to her friend Karen, who said, “I know. It’s like your body has been violated.” But when she told her husband, Mark, how she felt, he said, “You can have plastic surgery to cover up the scar and restore the shape of your breast.”

Eve had been comforted by her sister and her friend, but she was not comforted by Mark’s comment. Quite the contrary, it upset her more. Not only didn’t she hear what she wanted, that he understood her feelings, but, far worse, she felt he was asking her to undergo more surgery just when she was telling him how much this operation had upset her. “I’m not having any more surgery!” she protested. “I’m sorry you don’t like the way it looks.” Mark was hurt and puzzled. “I don’t care,” he protested. “It doesn’t bother me at all.” She asked, “Then why

are you telling me to have plastic surgery?" He answered, "Because you were saying you were upset about the way it looked."

Eve felt like a heel: Mark had been wonderfully supportive and concerned throughout her surgery. . . . He thought he was reassuring her that she needn't feel bad about her scar because there was something she could do about it. She heard his suggestion that she do something about the scar as evidence that he was bothered by it. Furthermore, whereas she wanted reassurance that it was normal to feel bad in her situation, his telling her that the problem could easily be fixed implied she had no right to feel bad about it.

Eve wanted the gift of understanding, but Mark gave her the gift of advice. . . .

Lawyers have to be able to give both. Clients hire lawyers for advice and for other forms of problem solving, but many clients also expect understanding. And even if the client does not expect it, advice offered with understanding is easier to accept than advice offered without it.

This might involve speaking in two dialects almost simultaneously. Tannen points out that "because boys and girls grow up in what are essentially different cultures, . . . talk between women and men is cross-cultural communication."⁴

DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND:
WOMEN AND MEN IN CONVERSATION*
297-298(1990)

. . . The biggest mistake is believing there is one right way to listen, to talk, to have a conversation. . . . Nothing hurts more than being told your intentions are bad when you know they are good, or being told you are doing something wrong when you know you're just doing it your way.

. . . Understanding style differences for what they are takes the sting out of them.

If you understand gender differences in . . . conversational style, you may not be able to prevent disagreements from arising, but you stand a better chance of preventing them from spiraling out of control.

4. Deborah Tannen, *You Just Don't Understand: Women and Men in Conversation* 18 (1990).