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# Cultural Competency: A Necessary Skill for the 21st Century Attorney

Travis Adams

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# The William Mitchell Law Raza Journal

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# **The William Mitchell Law Raza Journal**

**-ARTICLE-**

**Cultural Competency: A Necessary Skill for the 21st Century Attorney**

*By Travis Adams*

## I. INTRODUCTION

An effective lawyer must possess skills for cross-cultural engagement by developing cultural competency. Cultural competency, like other legal skills, requires a disciplined approach to viewing the world from different perspectives. When beginning law school, many first year law students are challenged to let go of the belief that “there is **one** right answer” to legal problems. Law students are typically high achievers, accustomed to good grades, correct answers, and getting problems “right.” After countless hours of studying and later being corrected in lecture halls by law professors, eventually most law students succumb to their training and stop seeing the law like an algebraic equation and instead consider legal problems from different perspectives. Legal professors facilitate this by playing “devil’s advocate”, asking students to argue the side they disagree with, and changing fact patterns on the spot in order to increase the complexity of a legal situation. Whether Torts, Property, Contracts, Criminal, Legal Writing or Constitutional Law, students are taught how to analyze and argue the law from different perspectives.<sup>1</sup>

Arguing the law from different perspectives is an essential aspect of advocacy and part of our responsibility to zealously advocate for our clients.<sup>2</sup> Effective advocacy involves more than a mastery of the law but also a deep understanding of the client and the facts surrounding the legal matter. In a tort case for negligence, a plaintiff’s attorney will tell the story of a plaintiff who was careful, vulnerable, responsible, and victimized. Using the same facts, the defense will characterize the plaintiff as clumsy, reckless, greedy, and opportunistic. A skilled attorney can tell the most compelling story using the substantive law within the rules of evidence and procedure.

Advocacy requires an ability to see different perspectives because it is by nature a cross-cultural experience.<sup>3</sup> Culture is the summation of an individual’s ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical attributes,

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<sup>1</sup> Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY AND THE LAW 47, 47 (Kimberly Holt Barrett & William H. George eds., 2005).

<sup>2</sup> ANN. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2011)

<sup>3</sup> BRYANT & PETERS, *supra* note 1, at 47.

marital status, and a variety of other characteristics.<sup>4</sup> The law is its own culture with values, attitudes, and norms of behavior.<sup>5</sup> Any law student who has tried to communicate to friends and family “how class was today” understands this cross-cultural exercise. The world of proximate cause, appellate briefs, reasonableness standards, and motion hearings create a context for a law student that is unfamiliar to the outside world. For this reason, awareness, knowledge and skills involving how to navigate cultural difference are essential to the practice of law, even when the client and the attorney come from similar social locations and cultural groups. However, when an attorney and his or her client come from different cultural groups, effective advocacy utterly depends on cultural competency. As one scholar puts it, “to be effective in another culture, people must be interested in other cultures, be sensitive enough to notice cultural differences, and then also be willing to modify their behavior as an indication of respect for the people of other cultures.”<sup>6</sup>

This paper argues that cultural competency is an essential skillset for the 21<sup>st</sup> century attorney who seeks to deliver effective advocacy and serve justice. This paper begins by defining cultural competency and applies the definitions to the work of a lawyer. Arising from foundations of good anthropological and ethnographic practice, molded in professional standards of medicine, mental health, social work, and law, cultural competency demands self-awareness, immersion, repeated revision, open-mindedness, resistance to stereotyping, and attention to detail.<sup>7</sup> This paper uses Milton Bennet’s Intercultural Development Continuum (IDI) as a way to discuss and measure cultural competency. The IDI, an assessment tool used to survey individuals in order to measure their ability to engage in and recognize cultural differences, is a widely respected approach to cultural competency.<sup>8</sup> While no tool is perfect or all encompassing, this paper’s goal is to use a tool already accepted by a broad base of institutions in education, business, social services and other fields as a safe place to begin the conversation. By connecting

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<sup>4</sup> *Id.* at 48.

<sup>5</sup> *Id.* at 47.

<sup>6</sup> D. P. S. Bhawuk & Richard Brislin, *The Measurement of Intercultural Sensitivity Using the Concepts of Individualism and Collectivism*, INT’L J. INTERCULTURAL REL. 413, 416 (1992).

<sup>7</sup> *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 682 (2008).

<sup>8</sup> Intercultural Database Inventory, *Bibliography of Publications On the IDI* available at <https://www.idiinventory.com/pdf/bibliography-of-publications.pdf> (Last visited May 31, 2013).

the fields of cultural competency and lawyering, I argue that there is a growing need for training law students to be culturally competent.

Next, this paper will explore four central reasons for why cultural competency is essential to the 21<sup>st</sup> century attorney. First, we will look at the social and economic realities that continually make the legal world more multicultural and globalized than ever before. Second, this paper explores the tendency of individuals and groups to prefer homogenous spaces and favor that which is similar to them. Third, this paper will explore the prevalence of cultural competency in other disciplines to demonstrate how the legal world is falling behind in this area when compared to similar professions such as social work, education and medicine. Lastly, this paper will discuss the areas of the profession best served by cultural competent advocacy.

An analysis of cultural competency would not be complete without the recognition and serious consideration of the author's social location and context. Such cultural self-awareness is considered in social science to be the key to multicultural competence, especially for an attorney, because an attorney's awareness of his or her own culture allows for a more accurate understanding of cultural forces that affect him or her as a lawyer, his or her client, and the interaction of the two.<sup>9</sup> I am a 26-year-old, white, heterosexual male from a middle class background. I am approaching my final year of law school and the majority of my legal training has occurred in the criminal and child protection realm. Only in the last five years have I been trained in cultural competency. I am grateful and indebted to have mentors and teachers who are culturally diverse to help me along in this journey. Without their mentorship, this paper, which marks an early checkpoint in a long journey of discovery, would not be possible.<sup>10</sup>

## II. WHAT IS CULTURAL COMPETENCY?

A wide range of academic and professional fields have studied cultural competency. As a result the concept has generated different definitions and tools for measurement.<sup>11</sup> Cultural competency tools use generalized benchmarks that signify an individual's competency development stage. Culture and personal development can seem like hard to pinpoint, lofty

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<sup>9</sup> Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 369 (2005).

<sup>10</sup> Thank you specifically to Lawrencina Oramalu-Mason, Shawn Moore, and Roberta Jones.

<sup>11</sup> This paper will use the definition and continuum created by the Intercultural Development Inventory. See [www.idiinventory.com](http://www.idiinventory.com).

terms. The measurement tools discussed in this section will allow us to explore cultural competency and the law with a set of consistent terms and measurements.

Cultural competency<sup>12</sup> is the ability to accurately understand and adapt behavior to cultural difference and commonality.<sup>13</sup> A cultural competency tool, places individuals on a continuum that identifies their cultural competency ranging from a monocultural mindset on one end to an intercultural or global mindset on the other.<sup>14</sup> The Development Model of Intercultural Sensitivity (DMIS) uses “stages” in order to explain patterns that emerge from systematic observations.<sup>15</sup> The most important theoretical concept for cultural competency is that all experience is constructed.<sup>16</sup> For instance, a middle aged lawyer walking down the street who witnesses a man rob another man at gunpoint will experience that event differently than a young child. Similarly, a European American person who happens to be in the vicinity of a Hmong New Year celebration may not have anything like the same experience a Hmong person has at the same event; assuming that the European American has no “Hmong” categories in her brain to construct that experience. As a result, the European American will likely create a meaning for the Hmong New Year event using one’s own cultural experience.

It is important to keep in mind that cultural knowledge is not the same as cultural competence. An American Christian may have a broad knowledge of the religious practices of an Indian Hindi but will still experience and relate to every aspect of an Indian Hindi through the cultural lens of an American Christian. The brain typically fits every experience into a familiar category.<sup>17</sup> The less developed a person’s cultural competency level the fewer categories available to categorize and the more details of culture ignored or overgeneralized.<sup>18</sup> It is much like a search function on a computer. Each time we have a new experience something in our brain goes back in time and searches through our life history. When our brain finds a file that is

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<sup>12</sup> This paper uses the term “cultural competency.” For the purposes of this paper, “cultural competency” the same meaning as “cross-cultural competency” and “intercultural competency.”

<sup>13</sup> Milton Bennett, *Becoming Interculturally Competent*, In Wurzel, J. (Ed.) (2004). *Toward Multiculturalism: A Reader in Multicultural Education* 62, 72 (2004).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Julia Ann Gold, *ADR Through A Cultural Lens: How Cultural Values Shape Our Disputing Processes*, J. DISPUTE RESOLUTION 289, 293 (2005).

<sup>18</sup> James W. Bagby, *Cross-Cultural Study of Perceptual Predominance in Binocular Rivalry*, 54 J. ABNORMAL AND SOC. PSYCHOL. 331, 331-34 (1957).

similar to the new experience it associates the new experience with the closest corresponding file. Then we react to the new experience accordingly.

We interact with other disciplines much the same way. Before a student enters law school he or she may read a legal case and the only “file” the student’s brain uses is “law”. However, after three years of law school the same student will read that same case law and create much more specific categories by which to file that case in her brain. What she once saw as just “law” will now be seen as “a Supreme Court case,” “a Justice Stevens decision,” “constitutional law,” “First Amendment issue,” “free speech,” “time place manner restriction.” When trained, the brain will categorize law, with greater particularity and appreciation for the distinct differences that exist within each legal situation. With respect to cultural differences, as one becomes more interculturally competent, nuances in communication style, gender roles, conflict style, perceptions of authority, ethics, and other aspects of culture become more evident. Sometimes it seems incredible “how deep the rabbit hole goes.”<sup>19</sup>

Like the person with very few cultural “categories,” an ethnocentric mindset makes sense of cultural differences and commonalities based on one’s own cultural values and practices.<sup>20</sup> A person with this mindset would allow his or her stereotypes to make broad inferences about the situations he encounters and would have less complex perceptions and experiences of cultural difference and commonality.<sup>21</sup> He or she may be able to recognize cultural differences such as food and clothing but may not notice deeper cultural differences such as conflict styles or relationship statuses.<sup>22</sup>

On the other end of the spectrum, an ethnorelative mindset makes sense of cultural differences and commonalities based on one’s own *and* other cultures’ values and practices. This person does not make broad stereotypes but would notice cultural patterns in order to recognize cultural difference.<sup>23</sup> A truly ethnorelative mindset allows one to express their alternative cultural experience in culturally appropriate feelings and behavior.<sup>24</sup> These abilities make people much more likely to engage in, rather than to avoid, cultural difference.

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<sup>19</sup> *The Matrix*. 1999. (Warner Brothers film 1999) (quoting Morpheus).

<sup>20</sup> BENNETT, *supra* note 13, at 62.

<sup>21</sup> *Id.* at 72.

<sup>22</sup> *Id.* at 63

<sup>23</sup> *Id.* at 68-69.

<sup>24</sup> *Id.* at 70.



In the legal setting, a person with a monocultural mindset would likely struggle interviewing a client who perceives time differently. For instance, a witness may not be accustomed to orienting a story based on hours, days, months, or years. If the lawyer comes from a culture where stories are told in a linear time-related manner, the monocultural mindset lawyer may perceive the client's failure to provide certain information as uncooperative, unintelligent, or untruthful.<sup>25</sup> A person with an intercultural mindset would be quicker to recognize how a client's cultural difference may impact the client's storytelling. A cultural competent lawyer sees organizing and assessing facts as a cultural difference and not a deficit in character or intelligence.<sup>26</sup>

### *Applying the DMIS continuum to advocacy*



**Figure 1 DMIS Continuum**

The Intercultural Development Inventory creates different stages along the spectrum ranging from ethnocentric to ethnorelative.<sup>27</sup> In order from the most monocultural mindset to the most intercultural, the developmental stages are *Denial*, *Defense*, *Minimization*, *Acceptance*, and *Adaptation*.<sup>28</sup> The first three, *Denial*, *Defense*, and *Minimization*, are ethnocentric orientations, while people in *Acceptance* and *Adaptation* have ethnorelative orientations.<sup>29</sup>

Remember that to practice law inherently involves cross-cultural engagement, moving from one stage of the DMIS to the next would directly impact a lawyer's advocacy. The purpose of this paper, and more specifically this section, is to appreciate the importance of culturally

<sup>25</sup> GOLD, *supra* note 17, at 298.

<sup>26</sup> BRYANT & PETERS, *supra* note 1, at 47.

<sup>27</sup> BENNETT, *supra* note 13, at 62.

<sup>28</sup> *Id.* at 72.

<sup>29</sup> *Id.* at 62.

competent lawyering and to notice how advocacy strengthens as a lawyer moves up the DMIS continuum.

First, in *Denial*, one's own culture is experienced as the only real one and other cultures are ignored or vaguely identified.<sup>30</sup> A *Denial* lawyer may avoid focusing on aspects of the client's story that feature cultural difference or perhaps completely avoid working in fields of law or geographic areas with culturally different people. The *Denial* lawyer may see culture in very simple categories such as "race" or "deserving or undeserving" of economic inequity.<sup>31</sup> However, as the client's situation becomes more complex and dynamic, thus falling outside of the superficial categories created by the *Denial* lawyer, the lawyer may begin to ignore or avoid facts that fall outside of the client's experience. There is literally no field of law where ignoring cultural details would not impair an attorney's practice.

In the next stage, *Defense*, other cultures are recognized yet viewed negatively and the person's own culture is perceived as being the only one that is "normal."<sup>32</sup> Recently, feminist and black liberation theorists have used the term "cultural imperialism" to describe this practice of normalizing one's own cultural expressions while viewing cultural differences in others as lacking and negative.<sup>33</sup> In this way, a *Defense* prosecutor may have biases against people from a minority cultural group. These biases could cause the prosecutor not to trust people from this cultural group as much and seek more strenuous penalties for crimes than the prosecutor would seek for people of the prosecutor's own cultural group.<sup>34</sup> Unfortunately, it is very common among prosecutors to take advantage of the fact that so many people in our society are in the *Defense* DMIS stage. In one gang-related criminal case in Minnesota involving an African-American defendant, African-American defense witnesses, and an all white jury, the prosecution had accentuated its gang theory by arguing to the jury "[T]he people that are involved in this [defendant's] world are not people from your world ... these are the defendant's people."<sup>35</sup>

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<sup>30</sup> *Id.* at 63.

<sup>31</sup> *Id.* at 64.

<sup>32</sup> Alan S. Gutterman, *Training leaders to identify and cope with cultural diversity*, in BUS. COUNSELOR'S GUIDE TO ORG. MGMT. § 44:26 (2012).

<sup>33</sup> Iris Marion Young, *Five Faces of Oppression*, in Diversity, MULTICULTURALISM AND SOCIAL JUSTICE 35, 42 (2002).

<sup>34</sup> William E. Martin & Peter N. Thompson, *Removing Bias from the Minnesota Justice System*, in BENCH & B. MINN. 16, 18, (2002).

<sup>35</sup> State v. Vue, 606 N.W.2d 719 (Minn. Ct. App. 2000)

*Defense*<sup>36</sup> orientations oftentimes occur much more subtly and less overtly prejudiced. Imagine a *Defense* attorney must represent her client in a business contract negotiation with another foreign business whose native culture features significantly different communication or negotiation habits from the attorney's cultural background. The foreign business representative does not exhibit behavior that the *Defense* attorney associates with politeness or friendliness even though this is exactly what the foreign business representative understands to be polite in his own cultural mindset. A *Defense* attorney would be at risk of labeling the foreign business representative as "uncivilized" or "less developed" rather than using a culturally different relational style.<sup>37</sup> Even worse, the attorney could likely misinterpret the foreign business as unwilling to negotiate or untrustworthy in character. This could have a negative impact on the client.

Next, individuals in *Minimization*, tend to emphasize similarity and the cross-cultural applicability of economic, political, philosophical, or even behavioral traits.<sup>38</sup> A person in *Minimization* may recognize superficial cultural realities such as food, language, or clothing but still utilizes one's own cultural patterns as central to an assumed universal reality. Using the business negotiation example from before, a *Minimization* lawyer may overestimate their appreciation for the home culture of the foreign business and be relatively tolerant. However, because the *Minimization* lawyer does not see her own culture clearly, if the negotiation goes poorly and conflict arises, the *Minimization* lawyer will still judge the other business's use of a different conflict resolution style as "lacking" or a poor choice.<sup>39</sup> This is because the *Minimization* lawyer still sees the world through an ethnocentric lens and fails to see deeper cultural differences such as philosophy, ideology, and, in this case, conflict style.<sup>40</sup> Lawyers involved in cross-cultural depositions, client interviews, or cross-examinations are likely to cause

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<sup>36</sup> Within *Defense*, is a subcategory of *Reversal*. A person in *Reversal* exhibits all of the same characteristics as *Defense*, only backwards. In *Reversal*, people have negative value judgments on their own cultural group and have positive value judgments on other cultures.

<sup>37</sup> BENNETT, *supra* note 13, at 65.

<sup>38</sup> *Id.* at 67.

<sup>39</sup> *Id.* at 68.

<sup>40</sup> *Id.* at 67.

communicative misunderstandings if they view or treat people from different cultures as being “generally more similar to themselves than dissimilar.”<sup>41</sup>

*Acceptance* marks the DMIS stage where an individual takes a more globalized or ethnorelative perspective and one’s own culture is experienced as just one of a number of equally complex worldviews.<sup>42</sup> In her article on the “Five Habits of Culturally Competent Professionals” scholar Kimberly Barrett recommends taking time to review the major influences and processes in one’s socialization—the role that family, friends, media, and the broader socio-historical, cultural environment have played in influencing one’s views of groups other than one’s own.<sup>43</sup> Similarly, an *Acceptance* attorney working in a child protection setting for the first time and having his first client interview with a family would likely ask very different questions than an attorney in an ethnocentric DMIS stage would ask. The *Acceptance* attorney would be aware of how his own cultural context has informed his assumptions about a family unit. As a result, the attorney would assume less about the family norms and ask questions that demonstrate a broader and more complex understanding of how families can form themselves. The *Acceptance* attorney will have significant advantages in communication as well. Instead of viewing the whole world through the prism of American cultural archetypes, the *Acceptance* attorney will remember that more than one meaning may exist for verbal and nonverbal messages communicated between people from different cultures.<sup>44</sup>

Unlike the *Denial* or *Defensive* attorney, the *Acceptance* attorney will be able to understand the difference between himself and the family he is interviewing while seeing them as equally human.<sup>45</sup> However, this does not mean the *Acceptance* attorney must lose all sense of ethics because “everything is relative.”<sup>46</sup> Instead, by truly accepting the relativity of values within cultural context, and experiencing the world as organized by different values, the

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<sup>41</sup> William Haskins, *Pitfalls in Intercultural Communication for Lawyers*, 16 TRIAL DIPLOMACY J. 71, 74 (1993).

<sup>42</sup> BENNETT, *supra* note 13, at 68.

<sup>43</sup> Kimberly Holt Barrett and William H. George, *Psychology, Justice, and Diversity: Five Challenges for Culturally Competent Professionals*, 6 (Sage Publications 1999).

<sup>44</sup> Nina Ivanichvili, *The Person Behind the Face: A Lawyer's Guide to Cross-Cultural Depositions Minnesota's Attorneys Are Increasingly Likely to Be Deposing Someone Whose Native Language Is Other Than English. Knowing How to Use an Interpreter*, BENCH & B. MINN., 22, 26 (2004).

<sup>45</sup> BENNETT, *supra* note 13, at 68.

<sup>46</sup> *Id.* at 69.

*Acceptance* attorney is able to maintain an ethical commitment in the face of cultural relativity.<sup>47</sup> Cultural relativity does not mean ethical relativity, and an *Acceptance* attorney in the child protection scenario would be able to distinguish between how one's personal ethical commitment to protecting children and the cultural relativity of parenting styles.

A person in the last DMIS stage of cultural competency, *Adaptation*, can empathize with other cultures to the extent that he or she yields culturally appropriate perceptions and behaviors.<sup>48</sup> Further, in *Adaptation*, a person retains his own cultural identity without assimilating to another culture. People in *Adaptation* have the acute ability to recognize patterns of cultural behavior, enabling allow them to define themselves broadly. Milton illustrated this when he described someone in *Adaptation* as having a, "German critical, Japanese indirect, Italian ironic, African American personal in addition to a primary European Male explicit style."<sup>49</sup> To the extent that each behavior emerged from a real connection to the various cultures, they would all be authentically you.<sup>50</sup> Another excellent example comes from Christine Zuni Cruz, a self proclaimed "community lawyer" within Indigenous communities.<sup>51</sup> She describes how she moves in and out of cultural behaviors as an attorney,

"The three voices I speak in: native, lawyer, and clinician provide different perspectives. As native, I speak as a native person living within my native community; as lawyer, I speak from my experience in working within the community; as clinician, I speak combining the above voices, seeking to improve the lawyering done in the name of, on behalf of, for, and with native peoples and native nations. These voices inform my discussion of community and culture. The basis of my ideas stem from my experience of being part of a distinct native community, long served by lawyers and a profession external to the community. My perspective on community comes from my work within my own pueblo, and within other pueblos both as a lawyer and a judge. My perspective on culture is closely related to community, but it is also informed by the work I engaged in over several years to revise the New Mexico Children's code to provide greater cultural protection for native children and youth."<sup>52</sup>

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<sup>47</sup> W.P. Berry, *Forms of Intellectual and Ethical Development in the College Years: A Scheme*. (Jossy-Bass 1970).

<sup>48</sup> BENNETT, *supra* note 13, at 70.

<sup>49</sup> *Id.* at 71.

<sup>50</sup> M.J. Bennet and I. Castiglioni, *Embodied Ethnocentrism and the Feeling of Culture: A Key to Training for Intercultural Competence*, in HANDBOOK OF INTERCULTURAL TRAINING 249, 249 (2004).

<sup>51</sup> Christine Zuni Cruz, *(on the) Road Back in: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 560 (1999).

<sup>52</sup> *Id.*

Cruz is aware of the different cultural contexts she moves in and out of and does not place a value judgment on one community over another based upon cultural behaviors. Further, Cruz has an appreciation for how her different cultural experiences have shaped her. The awareness of one's own cultural identity is essential for moving into the ethnorelative orientations of the DMIS.

The *Adaptation* attorney is best suited for the work of a lawyer because she can function as a “cultural chameleon”: recognizing cultural differences and quickly picking up on acceptable and/or advantageous behaviors.<sup>53</sup> The *Adaptation* attorney has the capacity to better communicate within the typical cross cultural attorney-client relationship because she can put herself “in the client’s shoes”.<sup>54</sup> Furthermore, the *Adaptation* attorney has a greater capacity to practice various legal disciplines and recognize the nuances in each field and cooperate with a variety of judges in each unique courtroom environment. He or she will more quickly observe and adapt to patterns of all kinds, something all lawyers seek to do. While all of these benefits exist within a relatively homogenous cultural world, the *Adaptation* attorney’s greatest strengths and societal impact will be the result of the attorney’s ability to work with a diverse range of clients and be able to perform zealous advocacy on their behalf.

Cultural competency is especially essential during depositions, a time where the *Adaptation* attorney’s skills are put to the test.<sup>55</sup> Nina Ivanichvili is CEO of [www.LanguageAlliance.com](http://www.LanguageAlliance.com), a firm specializing in legal translation and interpretation in over 80 languages.<sup>56</sup> She designed a CLE called “A Lawyer's Guide to Cross-Cultural Depositions” in which she describes scenarios that test a lawyer’s ability to recognize cultural difference.<sup>57</sup> In one scenario, Ivanichvili describes an American attorney deposing a well-dressed, middle-aged, non-English-speaking woman in a civil lawsuit where the attorney is trying to establish the cost of the woman’s clothing. The woman has had several jobs, is wearing decent clothing, and is middle aged. These attributes could lead the attorney to assume similarities between the woman and her American counterparts with regards to the woman’s independence— financially or otherwise — from her husband. However, this woman is originally from a small, male-

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<sup>53</sup> See Bennett, *Becoming Interculturally Competent*, 70.

<sup>54</sup> *Id.*

<sup>55</sup> IVANICHVILI, *supra* note 44, at 26.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

dominated village and does not know what her articles of clothing cost because her husband makes all the purchasing decisions in the family. The *Adaptation* attorney would be slower to make assumptions of cultural similarity. The *Adaptation* attorney would instead ask questions like, “Who handles the money in your household?” or “Who in your family purchases clothes?” Furthermore, the attorney would pick up on social cues and communication patterns such as responsiveness, silence, and social taboos in order to make the otherwise potentially timid deposed woman more comfortable and honest.<sup>58</sup>

In the same way a law student receives training to recognize the difference between a tort law fact pattern and a contract law fact pattern, so too must a lawyer learn to identify cultural differences. The DMIS continuum assumes that contact with cultural difference generates pressure on an individual to change one’s worldview. If an attorney worked at a firm where successful attorneys consistently used different approaches, it would become increasingly difficult for her to believe in only one system for drafting motions. Similarly, the more we understand how many different ways there are to live, the less ethnocentric our worldview becomes. Attorneys better serve their clients interests by understanding culturally learned differences, recognizing commonalities between themselves and others, and acting on their insight in culturally and legally appropriate ways.<sup>59</sup> This paper will develop this concept further in the next section where we will go beyond simply providing examples of the DMIS development stages and instead explore how cultural competency impacts the legal profession.

### III. WHY SHOULD AN ATTORNEY BE CULTURALLY COMPETENT?

An attorney should be culturally competent in order to better represent his or her client and also to better serve justice. This next section will address both the practical and ideological arguments for training attorneys to be culturally competent. The ideological arguments come from the author’s perspective that an attorney has the ethical responsibility to be more than just a “hired gun” who gives the client total autonomy.<sup>60</sup> Instead, the attorney has a role to provide ethical advice and at times become an agent of social change. The arguments presented focus on

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<sup>58</sup> *Id.*

<sup>59</sup> Mitchell R. Hammer, *Intercultural Development Continuum*, DEVELOPING INTERCULTURAL COMPETENCE, (December 28, 2013), [www.idiinventory.com](http://www.idiinventory.com).

<sup>60</sup> THOMAS L. SHAFFER AND ROBERT COCHRANE JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 2 (6th ed. 2009).

the culturally competent attorney's enhanced advocacy skills as well as the attorney's greater capacity to serve justice.

**A. *Increasingly Diverse Country; Increasingly Global World***

The economic and sociological realities of 21<sup>st</sup> century make United States more culturally and racially diverse than at any other time in history. Dramatic increases in ethnic minority populations in the United States are leading to a demographic shift that will place whites in the minority racially, while collectively, people of color will become the majority. According to the 2010 U.S. Census Bureau, non-Hispanic Whites made up 65% of the country and are projected to make up 46% in 2050. Already in 2010, whites were the minority in four U.S. states Hawaii, California, Texas, and New Mexico (New York is only 58% white and Florida is 57% white).<sup>61</sup>

The changing domestic demographics are not the only cause for growing diversity among an American lawyer's client base. Practicing law in the 21<sup>st</sup> century means working in a globalized economy where our world grows increasingly integrated due to the rapid exchange of information, capital, and prevalence of free trade. Most of the ten largest global law firms now have more lawyers located outside their home-country office than in their home country and all of them have offices outside their home country.<sup>62</sup> Moreover, it is not just U.S. lawyers who are exporting their services to other countries; foreign lawyers have imported their services into the United States in increasing numbers. For example, between 1993 and 2003, U.S. exports of legal services grew 134%, but imports grew 174%.<sup>63</sup> As future lawyers, law students must be familiar with the norms and ethical rules governing these foreign lawyers, as well as possess the skills to navigate working in a global practice. Our education must include perspectives on advocacy from lawyers in the global south, i.e. South Africa; the global east, i.e. China; the global north, i.e. Germany as well as here in the global west. We get a fuller picture of the different advocacy strategies and perspectives when we encounter different cultural lenses. This makes us stronger attorneys.

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<sup>61</sup> Projections of the Population by Sex, Race, and Hispanic Origin for the United States: 2010 to 2050" U.S. Census Bureau. Retrieved 2010-10-24.

<sup>62</sup> Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463, 495 (2005) (citing *The Global 100*, Am. Lawyer, (2004)).

<sup>63</sup> Laurel S. Terry, A, "How To" Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course, 51 ST. LOUIS U. L.J. 1135, 1138 n.9 (2007).



The Supreme Court acknowledged the importance of creating culturally competent legal professionals amidst our changing social landscape. In *Grutter v. Bollinger*, the Court endorsed the University of Michigan's affirmative action policy because diversity is 'essential' to quality education, preparation for work in a global economy, cross-racial understanding, and decreasing prejudice.<sup>64</sup> A core premise of this endorsement is that 'the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.'<sup>65</sup> While exposure to diverse people in ideas through a diverse student body serves an essential role in developing culturally competent law students, many scholars recognize field work and service learning as an essential role in developing cultural competency and cross cultural lawyering skills.<sup>66</sup> Service learning, practicums, and clinic experience in culturally diverse environments must be a part of a culturally competent attorney's training.

In reality, regardless of where one lives and what type of law one practices, you clients will come from different cultural backgrounds. The way the world and our country are developing means greater cultural diversity in our pool of clients, judges, juries, co-counsels and witnesses.

#### **B. *Cultural Competency's Prominence in Other Professional Disciplines***

Other similar professional and academic disciplines devote significantly more attention and training to cultural competency than the legal field. Today, scholars in the area of business, education, nursing and social work are all expanding their understanding of cultural competency, and seeking to build cultural competency in their professionals.<sup>67</sup> The legal world is similar to these other disciplines in terms of the populations served and the benefits gained from cultural competency. For example, lawyers, like a doctors, counselors, social workers, and psychologists need to identify cultural bias when it emerges and to document the influence of adverse

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<sup>64</sup> 539 U.S. 306, 332 (2003).

<sup>65</sup> Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 370 (2005).

<sup>66</sup> Kathleen Kelly Janus & Dee Smythe, *Navigating Culture in the Field: Cultural Competency Training Lessons from the International Human Rights Clinic*, 56 N.Y.L. SCH. L. REV. 445, 446 (2012)(Clinicians have looked to human rights clinics, and particularly international fieldwork, as a way to advance clinical pedagogy and cross-cultural training).

<sup>67</sup> Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 Int'l J. Legal Info. 22, 23 (2011).

circumstances in the lives of their clients that are related to prejudice.<sup>68</sup> Even so, the law lags behind these other disciplines because it closely resembles dominant American culture and its value of “universalism”.<sup>69</sup> Our court system, legal doctrines, and law schools are entrenched in the universalist belief that what is right is right, regardless of the circumstances or who is involved.<sup>70</sup> To a universalist, fairness means treating everyone the same, and one should not make exceptions for family, friends, or members of one's in group.<sup>71</sup> Furthermore, universalists believe it is important to put feelings aside and look at situations objectively and that people and systems should avoid making exceptions to rules.<sup>72</sup>

Social work is an example of a related field that has integrated cultural competency training as a central part of its training. The National Association of Social Workers Standards for Cultural Competence in Social Work Practice (“NASW Standards”) require that “social workers shall have and continue to develop specialized knowledge and understanding about the history, traditions, values, family systems, and artistic expressions of major client groups served.”<sup>73</sup> Standards of performance for disciplines such as social work show that the view of culture as often rooted in ethnicity and nationality but defined overall by much more—including all social groups and subgroups with which an individual associates—is now well-established in the professional world.<sup>74</sup> Similarly, attorneys cannot be blind to the social groups and subgroups to which their clients identify. The clients’ legal issues, expectations of their attorney, communications with their attorneys, perceptions of the legal system and desired outcomes are all based on the clients’ cultural identities. Lawyers, like social workers, doctors, or psychologists must be able to fully know who their client is.

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<sup>68</sup> Kimberly Holt Barrett & William H. George, Psychology, Justice, and Diversity: Five Challenges for Culturally Competent Professionals, 6 (2005).

<sup>69</sup> GOLD, *supra* note 17, at 302.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Nat'l Ass'n of Social Workers, *NASW Standards for Cultural Competence in Social Work Practice, Cultural Competence*, available at [http://www.naswdc.org/practice/standards/NASW\\_CulturalStandards.pdf](http://www.naswdc.org/practice/standards/NASW_CulturalStandards.pdf) (Last visited Apr. 10, 2012).

<sup>74</sup> *See* NASW Standards, at Introduction.

**C. *A Practice Area Recognizing the Need for Cultural Competency- Death Penalty Mitigation***

Death penalty mitigation is one area of legal practice with an established record of using culturally competent advocacy. Here, culturally competent advocacy typically comes in the form of telling the defendant's culturally relevant story, or what is sometimes called the defendant's social history.<sup>75</sup> In recent years, the Public Interest Litigation Clinic and the University of Missouri-Kansas City School of Law in cooperation with seasoned capital litigators and mitigation specialists across the United States created The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases ("Supplementary Guidelines").<sup>76</sup> The Supplementary Guidelines seek to identify high standards for capital punishment defense predominantly by adding a mitigation specialist who is adept at describing the social history and cultural context of the client's worldview.<sup>77</sup>

These methods are becoming the norm in capital cases. For example, in *Wiggins v. Smith* the United States Supreme Court stated that trial counsel's failure to investigate the defendant's life history "fell short of the professional standards that prevailed," noting that a social history investigation was "standard practice."<sup>78</sup> The history of capital cases has shown that defendants are frequently cast by prosecutors to be inhumane or people who fall outside of the societal norm.<sup>79</sup> In fact, the Supreme Court has stated repeatedly that the Constitution requires, in all but the rarest of capital cases, that the person in charge of sentencing be allowed to consider "as a mitigating factor, any aspect of a defendant's character or record [...] that the defendant proffers as a basis for a sentence less than death."<sup>80</sup>

Legal scholar Craig Haney argues that one of the most common successful tools to advance a capital sentence is to alienate the defendant from the jury.<sup>81</sup> Cultural information properly used to explain the defendant to the jury, on the other hand, presents a "reality of

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<sup>75</sup> Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1454 (1997).

<sup>76</sup> Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693 (2008).

<sup>77</sup> *Id.*

<sup>78</sup> 539 U.S. 510 (2003).

<sup>79</sup> HANEY, *supra* note 75, at 1454.

<sup>80</sup> Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)).

<sup>81</sup> HANEY, *supra* note 75, at 1454.

personhood.”<sup>82</sup> Cultural information and cultural context can overcome one of the great barriers to humanizing a defendant before a jury: stereotyping. Stereotyping of the defendant is a danger whenever evidence is presented about the defendant's life.<sup>83</sup> However, effective advocacy that communicates the context of the defendant's upbringing, challenges, and other life details encourage jurors to understand the defendant's view of the world and his or her actions.<sup>84</sup>

In the context of mitigation, culturally competent investigation is more than an admirable and desirable skill—it is a standard of performance.<sup>85</sup> However, the advocacy practices described in the Supplementary Guidelines in Death Penalty Mitigation are easily transferred into other areas of practice.<sup>86</sup> According to the DMIS continuum, the less developed a person's cultural competency, the more likely a person is to view people from their own culture as “real humans.”<sup>87</sup> The process of alienating a defendant from the jury utilizes the ethnocentric worldview, which views cultural difference as a negative rather than a value-neutral characteristic. As a result, defendants' pay the price for more than guilty conduct, but also their perceived “otherness”.

**D. *Ethnocentrism limits the attorney's ability to tell her client's story***

The telling of stories holds an important role, not just in capital punishment mitigation, but also in the legal system as a whole. The courts are a place where many of the activities making up social life within that society simultaneously are represented, contested, and inverted.<sup>88</sup> When working cross culturally, a lawyer's cultural competency will be tested when the facts may be undisputed, but the meaning of the facts offer a completely different explanation for “what happened”. Two federal cases provide excellent examples of the necessity of cultural competency when it comes to telling the story of the “other”.

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<sup>82</sup> Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 547 (1995).

<sup>83</sup> *Id.* at 553.

<sup>84</sup> Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 922 (2008).

<sup>85</sup> *Id.* at 896.

<sup>86</sup> O'BRIEN, *supra* note 76, at 693.

<sup>87</sup> BENNETT, *supra* note 13, at 63.

<sup>88</sup> Gerald Torres and Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 4 DUKE L.J. 625 (1990).

First, in *Mashpee Tribe v. Town of Mashpee*, lawyers were faced with a decision on how to tell the plaintiff's story.<sup>89</sup> In this case, the Mashpee Tribe filed a land claim suit against United States government to recover tribal lands alienated from them in violation of the Indian Non-Intercourse Act of 1790.<sup>90</sup> This Act prohibited the transfer of Indian tribal land to non-Indians without approval of the federal government. However, in order to have standing to sue the Mashpee had to first establish that they were a federally recognized Tribe.<sup>91</sup> While this seemed like a rather straightforward legal issue, the challenges the court faced in its efforts to define "Indian Tribe" were complex. The Mashpee's strategies in sustaining themselves as a people played against them in the court of law. These strategies included: fighting wars against the Europeans, using controlled and selective methods of assimilation into white culture, mixing with other races, and selling their land. Confusingly, the Mashpee were ruled to not be a Tribe in 1790, ruled to be a tribe in 1834 and 1842, but again were ruled not a tribe in 1869 and 1870.<sup>92</sup> After forty days of testimony from tribal members, historians and social scientists, the Mashpee's case was dismissed because the tribe was ruled to not have maintained a "tribal identity" throughout its history.

The challenge of establishing federal tribal recognition for the Mashpee was insurmountable for two reasons. First, the Mashpee were forced to fit the story of their tribe into a language that did not give meaning to their history and social practices.<sup>93</sup> Telling their legal story required using Eurocentric tools of the English language, the rules of evidence, and legal precedent. Requiring a particular way of telling a story not only strips away meaning but also causes certain culturally significant events to appear unintelligible to the culturally incompetent.<sup>94</sup> The Mashpee lacked the technical language to effectively communicate their tribal identity within the Western Eurocentric understanding of the community.

Second, as stated before, the facts of this case were not disputed, but their meaning was viewed entirely different. The Mashpee viewed their story as one of cultural survival and support

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<sup>89</sup> 447 F. Supp. 940 (D. Mass.) 1978, *aff'd sub. Nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1<sup>st</sup> Cir.), cert. denied, 444 U.S. 866 (1979).

<sup>90</sup> Torres and Milun, *Translating Yonnonndio by Precedent and Evidence*, 633.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 55.

<sup>93</sup> *Id.* at 54.

<sup>94</sup> *Id.*

that they were in fact a tribe.<sup>95</sup> However, to the court those same facts proved that the Mashpee no longer existed as a “separate” cultural group and as such, the Mashpee were divested from their land.<sup>96</sup> Regardless of whose fault it was, in the end the Mashpee lost their case because their narrative did not fit into the dominant narrative’s ethnocentric legal definition of a “tribe.”

In the second case, *City of Richmond v. J.A. Croson Co.*, the Supreme Court struck down a Richmond ordinance that set aside thirty percent of the subcontracting work on city construction jobs for minority firms because the ordinance denied white contractors “equal protection of the laws”.<sup>97</sup> Legal scholar Thomas Ross describes this case as an excellent example of how judges, like all advocates, rely on storytelling to communicate one’s worldview.<sup>98</sup> Justice Scalia’s concurring opinion and justice Marshall’s dissent each describe a different story, picking and choosing which facts to tell the reader, in order to communicate their ideology on affirmative action. Scalia tells a story from his cultural location, using symmetry as the standard for justice.<sup>99</sup> In his Eurocentric view, equal protection is the same law whether drawn for whites or blacks and that principal endures any argument of a historical reality.

Marshall’s dissent, tells the story of racism.<sup>100</sup> He tells the story of Richmond endorsing state-sponsored racism for centuries and now it finds itself in a place in need of a remedy.<sup>101</sup> Marshall’s opinion is deeply specific and contextual to Richmond’s history and political climate.<sup>102</sup> However, Marshall’s critique of the other Justice’s opinions and their lack of empathy to the experience of racism is the most powerful aspect of his opinion. Marshall writes:

The majority’s view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies lack of political maturity on the part of this Nation’s elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.<sup>103</sup>

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<sup>95</sup> *Id.* at 57.

<sup>96</sup> *Id.* at 58.

<sup>97</sup> 109 S. Ct. 706 (1989).

<sup>98</sup> Thomas Ross. “The Richmond Narratives”. 68 TEX. L. REC. 381 (1989).

<sup>99</sup> *Id.* at 44.

<sup>100</sup> *Id.* at 49.

<sup>101</sup> *Id.*

<sup>102</sup> 109 S. Ct. 706, 742-745 (1989)(J. Marshall dissenting).

<sup>103</sup> *Id.* at 754.

Two Court Justices wrote entirely different opinions. One was founded on the perceived universal principal of “fairness as symmetry.” The other was deeply contextual and deeply personal. Both of the opinions reflect the cultural background of the Justices. While Justice Scalia masks cultural subjectivity through claims of objective principle, Justice Marshall quite plainly speaks about the history of racism and admonishes his fellow jurists for lacking any sense of that same perspective. Seeing the most brilliant legal minds end up in such entirely different places during one opinion demonstrates the power and significance of culture. The *City of Richmond v. J.A. Croson Co.*, should serve as a reminder that while the law may seek to be neutral, our lives and worldviews are not. The culturally competent attorney is one who recognizes how our own cultural context influences one’s storytelling and makes objectivity impossible.

#### IV. CONCLUSION

The DMIS model of understanding cultural competency provides an essential tool for attorneys in the 21<sup>st</sup> century to advocate effectively and justly. I hope this paper can be used to foster greater conversation about how the IDI, and cultural competency in general, can and should be used to train attorneys.

If the 2012 election taught us anything, it was that political power within the American democracy could not be achieved by appealing solely to the cultural plurality in this country. Other narratives are gaining systemic power by building critical mass. We are a country of many cultures, within an economy pushing us into regular interaction with the global world. We must start now to train attorneys prepared to recognize cultural difference and navigate its intersection with the law. Only with these skills can an attorney truly see a client’s full humanity and advocate for his or her legal rights.