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DIVERSITY AND CULTURAL COMPETENCE IN CLAIMS

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This panel discussion focuses on the role cultural diversity plays in three arenas: communication with claimants, evaluation of claims, and juror impacts. The panel does not address increased inclusion in the legal or claims professions.

I. The changing face of the United States

Although race is not a proxy for cultural diversity, it is often the most outwardly recognized factor. Other diversity “factors” are generally identified as religion, gender, gender preference, gender identity, age, physical ability, education level, socioeconomic level.

Youth is strongly correlated with racial diversity. Our preschools are estimated to be 5x more diverse than the nursing homes.¹ There is an unprecedented population increase of minority children.² Although Hispanic births (not immigration) are driving this rapid increase, Asian populations also increased dramatically in 2000-2010.³ The most racially/ethnically diverse states are noted to be California, Hawaii and New Mexico.

Religious diversity is also increasing. Although 78 % of the population identify as being a member of a Christian religious faith, at least two faith paths are growing rapidly. Due to immigration and fertility. The US Muslim population is expected to double between 2010 (from 0.8%) to 2030 (1.7%).⁴ Additionally, the “nones”, those persons with no religious identity, are expected to grow to 20% in next five years.

Other “diversity factors” out there? Physical size? ADHD? With children or childless.

¹ Jennifer Langston, *The Northwest's Global Appeal*, www.daily.sightline.org/2012/7/26/

² Johnson, Kenneth M., “New Population Projections Reflect Slower Growth and Increasing Diversity” (2014). The Carsey School of Public Policy at the Scholars Repository. Paper 230.

³ 2010 US Census Bureau, www.census.gov/2010census/

⁴ The Future of the Global Muslim Population, [www.pewforum.org/2011/01/27.](http://www.pewforum.org/2011/01/27/)

II. Rules of Professional Conduct and Diversity

State RPC's address our responsibilities as lawyers in different ways, usually through 8.4 misconduct, or through commentary to that rule.

ABA Model Rule 8.4 comment c: [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

Washington RPC 8.4 addresses this in two sections, advising that it is professional misconduct to:

(g) commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16;

(h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments.

Oregon RPC 8.4(a)(7) it is professional misconduct for a lawyer to, "in the course of representing a client, engage in conduct that knowingly manifests bias or prejudice based upon race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, disability or socioeconomic status."

Arkansas RPC 8.4 commentary

[3] Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such discriminatory conduct, when directed towards litigants, jurors, witnesses, other lawyers, or the court, including race, sex, religion, national origin, or any other similar factors, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a

discriminatory basis does not alone establish a violation of this rule. This subdivision does not prohibit a lawyer from representing a client accused of committing discriminatory conduct.

District of Columbia RPC 8.4 commentary. A lawyer violates (d) by offensive, abusive or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, or socioeconomic status.

New York: unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding;

A number of states do not address at all. These include Georgia, Alaska, Alabama, Kentucky, North Carolina, Pennsylvania.

Other related RPCs

RPC 1.1: “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

RPC 1.2 – requires a lawyer to consult with client regarding objectives and abide by the client’s decisions.

RPC 1.4 – requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed choices about the representation.

III. Communication and Cross Cultural Competency.

Cultural groups and cultural norms can be based on a variety of characteristics: ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, scent, other physical appearance. Not all differences have the same degree of importance.

Cross cultural communications/reactions take place in three spheres: the cognitive, behavioral and emotional.⁵

One of the most frequently cited sources for assistance is The Five Habits of Cross Cultural Lawyering.⁶

⁵ Justin D. Levinson and Peng, Kaiping, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law’s Actual Cause and Foreseeability Inquiries*; Southern California Interdisciplinary Law Journal, 13:2 (2004).

⁶ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L. Rev. 33 (2001); see also Nelson P. Miller, *Beyond Bias – Cultural Competence as a Lawyer Skill*, Michigan Bar Journal (June 2008).

Consider Degrees of Separation and Connection. Identify possible similarities and differences that may affect thought process and reasoning.

The Three Rings. Identify and analyze the possible effects of similarities and differences between the claimant, the decisions maker and the lawyer.

Parallel Universes. Look for multiple or alternative explanations for behavior and judgments.

Pitfalls, Red Flags and Remedies. Conscious planning for interviews and process of communication, recognizing when a miscommunication is occurring and then addressing it.

The Camel's Back. The ability to monitor your own reactions and bias.

IV. Evaluating the claim

What is the reasonable person? Cultural impact on damages

Saavedra v. Korean Air Lines, 93 F.3d 547 (9th Cir. 1996). Court upheld loss of support claim by parents for adult son's death though not currently financially dependent on him. A Japanese anthropology expert testified that parents would expect support in the future as part of cultural norms.

Salinas v. Fort Worth Cab and Baggage. 725 S.W.2d 701 (Texas 1982). Jury allowed to consider damages for wife's disclosure to husband of having been orally sodomized where such act is prohibited in plaintiff's culture.

And what about religion?

Food. *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481 (2014). Forcing employees to consume employer supplied meals containing animal by-products or go hungry may be actionable where consuming such food violates employee plaintiffs' sincerely held religious beliefs.

Appearance. *EEOC v. Abercrombie and Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013). Claimant asserted she was not hired because store determined that her hijab would violate the company's "Look" policy and claimant had not requested accommodation.

V. Dealing with Jurors

Bias against your client. FRE 606(b) permits jurors to testify about an outside influence improperly brought to bear on any proceeding. *See also Levinger v. Mercy Medical*, 139 Idaho 192 (2003). Racial bias expressed by even one juror may deny right to impartial trial.

Bias against a culturally different advocate. *Turner v. Stime*, 153 Wn.App. 581 (2009). Juror racial bias improperly affected the verdict where jurors referred to plaintiff lawyer of Japanese

ancestry as “Mr. Myagi” and “Mr. Kamikazi” and likened a defense verdict to repayment for Pearl Harbor Day.

Discussion Topics:

1. You are administering a third party worker’s compensation program. The claimants, who are Caucasian, are complaining of reverse discrimination by African American claims handlers when claims are denied. What needs to be/can be done?
2. You are evaluating a case of wrongful death for a homeless woman. It appears to you that regardless of liability, there are limited damages because of her socioeconomic status. How can you evaluate this?
3. You are investigating a medical negligence claim in a remote Alaska community where the community is insular and suspicious of outsiders. What factors should you consider and can they be addressed effectively?