

DO I REALLY UNDERSTAND? CULTURAL CONCERNS IN DETERMINING DIMINISHED COMPETENCY

Helen Y. Kim

Cultural beliefs, values, and differences play an important role in the context of client competency determinations. In this note, Helen Y. Kim explores the potential effects of culture on the attorney-client relationship. Specifically, she focuses on the salient role that cultural factors play in the client competency determinations attorneys are often forced to make. Ms. Kim first observes the growing prevalence of diminished competency concerns within the legal profession. This growing prevalence is attributable to rapid increases in both the elderly population and the ethnic minority population. She next explores the current standards employed by attorneys to make competency determinations, finding that these current standards are unclear and fail to take into account relevant cultural concerns. Ms. Kim urges cultural awareness on the part of practicing attorneys. Specifically, she proposes that a legal institution should author a guidebook highlighting typical cultural concerns and that lawyers should seek specialized cultural training.

Helen Y. Kim is Associate Editor, 2006–2007, Member 2005–2006, *The Elder Law Journal*; J.D. 2007 University of Illinois, Urbana-Champaign; B.A. 2003, University of Chicago.

The author would like to thank her family and friends for their unfailing support and encouragement. In addition, she would like to thank Professor Richard Kaplan and *The Elder Law Journal* for their help in making this note possible.

I. Introduction

Imagine that you are a lawyer interviewing a potential client, an elderly woman who attends the meeting with her adult son and asks you to draft her will. The provisions of the proposed will leave the majority of her belongings to her son, the one who is with her, and gives only small portions to her daughters. During the meeting, the elderly mother seems to understand some of the issues but does not seem to fully appreciate all the topics. The elderly mother looks toward her son for many answers, and the son attempts to do much of the talking. Although you make concerted efforts to direct the conversation to the mother, she continues to allow her son to dominate. At the end of the interview, she repeats that she adamantly wants her son to have most of the inheritance and wants him to be heavily involved in the entire process. How do you determine her competence and gauge the consequences of that determination? Would your impression and determination change if you are told she is of Asian descent? Should it change?

It is also important to recognize that many people tell different variations of the same story to different listeners because the storyteller believes that certain listeners understand with more depth and clarity as a result of their shared similar beliefs, traits, or experiences.¹ What should happen when this selective storytelling occurs in the legal context and cultural factors influence the attorney-client relationship? Attorneys must be aware of cultural differences and determine whether such differences affect their evaluation of a client's mental competence.

This note analyzes the importance of cultural differences in the context of attorney competency determinations. Part II briefly describes the anticipated growth of diminished capacity issues and emphasizes why cultural competency among attorneys must increase accordingly. Part III examines the effectiveness of current attempts to address the complexity of competency assessments. Finally, Part IV proposes that a national legal association, such as the American Bar Association (ABA), should create a thorough and detailed guidebook

1. See Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 379-80 (2005) (recounting a situation in which a client communicated different explanations for her actions to different people, and the author considered race as a possible reason for the discrepancy).

to increase cultural awareness and address recurring cultural concerns.

II. Background

A potential client's desire to obtain legal advice and an attorney's willingness to furnish such advice leads to the formation of an attorney-client relationship.² A typical attorney-client relationship is based on the presumption that the client is legally competent, which requires the ability to make decisions on important issues when properly informed and counseled.³ Because competency is a necessary requirement for retaining legal representation, an attorney who wishes to represent a client must first assess whether the client is legally competent.⁴

A. The Growing Elderly Population

Client competency is a burgeoning concern as a result of the growing elderly population and the accompanying rise in diminished competency.⁵ Although the term "elderly" is defined by many factors, such as "age, functional capacity, social involvement, and physical and mental health,"⁶ this note uses the age of sixty-five as the marker for term "elderly."⁷ The 2000 U.S. census estimates that approximately thirty-five million Americans, 12.4% of the total population,

2. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 (2000) provides:

A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.

3. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 1 (2003); *see also* BLACK'S LAW DICTIONARY 119 (8th ed. 2004) (defining competency as "[t]he mental ability to understand problems and make decisions").

4. James R. Walker, *Diminished Client Capacity: Ethical Considerations for Attorneys*, COLO. LAW., Aug. 2004, at 125, 125.

5. Jennifer Moye, *Evaluating the Capacity of Older Adults: Psychological Models and Tools*, NAT'L ACAD. ELDER L. ATT'YS Q., Summer 2004, at 3, 3.

6. Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 683 (1991).

7. *See id.* at 684 (noting that most people agree that some chronological age should be enough for the label elderly, and that sixty-five is the "traditional" retirement age).

are over the age of sixty-five.⁸ According to population projections, the U.S. elderly population will reach more than eighty-six million by 2050, or 20.7% of the total population.⁹ One explanation for this increase is the aging of the baby boomer generation.¹⁰

The growth of the elderly population will force attorneys to make an increased number of client competency decisions.¹¹ To continue representation in nonadversarial settings, lawyers must make at least two implicit determinations about their elderly client's capacity.¹² First, an attorney must decide whether the potential client exhibits the necessary legal capacity to enter into a contract for legal representation.¹³ If so, the attorney must next decide if the capacity encompasses the ability to accomplish the specific legal task of the representation.¹⁴ Typically, attorneys determine client capacity informally.¹⁵ If lawyers are not careful, they may mistakenly determine that a client possesses sufficient mental competence and informed consent.¹⁶

8. U.S. Census Bureau, Fact Sheet: Census 2000 Demographic Profile Highlights (2000), <http://factfinder.census.gov/servlet/SAFFacts>.

9. See U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN tbl.2a (2004), available at <http://www.census.gov/ipc/www/usinterimproj/natprojt02a.pdf> [hereinafter INTERIM PROJECTIONS]. For the numerical or percent change for each decade from 2000 to 2050, see *id.* at tbl.2b.

10. ABA COMM'N ON LAW & AGING & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS, at v (2005) [hereinafter HANDBOOK FOR LAWYERS].

11. *Id.* ("With the coming demographic avalanche of Boomers reaching their 60s and the over-80 population swelling, lawyers face a growing challenge: older clients with problems in decision-making capacity."); see also A. Frank Johns & Bernard A. Krooks, *Elder Clients with Diminished Capacity: NAELA's Response to Specific Case Applications and Its Development of Aspirational Standards That May Cross Professional Organizational Boundaries*, 1 NAT'L ACAD. ELDER L. ATT'YS J. 197, 198 (2005) ("Regardless of whether or not they are specialists lawyers are seeing an increasing number of older prospective clients with diminished capacity, while at the same time being confronted with the dilemma of existing clients whose capacity has begun to diminish.").

12. HANDBOOK FOR LAWYERS, *supra* note 10, at 1.

13. *Id.* (stating that the representation cannot happen if the prospective client does not possess sufficient legal capacity).

14. *Id.*

15. *Id.*

16. Johns & Krooks, *supra* note 11, at 198 ("These new wrinkled faces of capacity come in countless variations, often hidden by cosmetic makeovers that project youthful visual images and well-scripted sound bites of single words and phrases that give the appearance of informed verbal understanding.").

B. Increasing Cultural Diversity

The population of people with diverse cultural backgrounds is rising. The latest census figures show that while the entire U.S. population increased 13.2% from 1990 to 2000,¹⁷ the Hispanic population increased 57.9%,¹⁸ the African American population increased between 15.6% and 21.5%,¹⁹ the Pacific Islander population increased between 9.3% and 140%,²⁰ the American Indian population increased between 26% and 110%,²¹ the Asian population increased between 48% and 72%,²² and the Arabic or Middle Eastern population increased 62%.²³ During the same time period, the population of foreign-born residents increased 57%.²⁴

17. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE WHITE POPULATION: 2000, at 3 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-4.pdf> (stating that “the total population grew by 13.2 percent, from 248.7 million in 1990 to 281.4 million in 2000”). The brief also notes that the white population increased at a lesser rate than the total population, with a growth rate of either 5.9% to 8.6%, depending on whether respondents identified only as white or as belonging to more than one race category. *Id.*

18. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE HISPANIC POPULATION: 2000, at 2 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf> (“The Hispanic population increased by 57.9 percent, from 22.4 million in 1990 to 35.3 million in 2000.”).

19. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE BLACK POPULATION: 2000, at 3 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf> (stating that there were thirty million blacks in 1990, and by the year 2000, there was an increase of 15.6% or 21.5%, depending on whether respondents identified only as black or as belonging to more than one race category).

20. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER POPULATION: 2000, at 3 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-14.pdf> (showing that there were 365,000 Pacific Islanders in 1990, and by the year 2000, there was an increase of 9.3% or 140%, depending on whether respondents identified only as Pacific Islander or as belonging to more than one race category).

21. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 3 (2001), available at <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf> (stating that there were nearly two million American Indians in 1990, and by the year 2000, there was an increase of 26% or 110%, depending on whether respondents identified only as American Indian or as belonging to more than one race category).

22. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE ASIAN POPULATION: 2000, at 3 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf> (stating that there were 6.9 million Asians in 1990, and by the 2000, there was an increase of 48% or 72%, depending on whether respondents identified only as Asian or as belonging to more than one race category).

23. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE ARAB POPULATION: 2000, at 3 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-23.pdf> (showing an increase of 62% from 1990 to 2000).

24. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE FOREIGN-BORN POPULATION: 2000, at 2 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> (showing an increase of 57% between 1990 and 2000).

Population projections also predict continued growth among these racial and ethnic populations. The U.S. Census Bureau forecasts an increase in the African American population from 35,818,000 in 2000, to 61,361,000 in 2050.²⁵ The Asian American population is projected to rise from 10,684,000 in 2000, to 33,430,000 in 2050.²⁶ Similarly, the Hispanic population is expected to grow from 35,622,000 to 102,560,000 between 2000 and 2050.²⁷ The Census also indicates that the populations of American Indian, Native Alaskan, Native Hawaiian, other Pacific Islander, and combinations of two or more races will increase from 7,075,000 to 22,437,000 during the same fifty year period.²⁸ In comparison with the total population, the African American population is projected to increase from 12.7% to 14.6%, the Asian population from 3.8% to 8.0%, the Hispanic population from 12.6% to 24.4%, and the population of other groups from 2.5% to 5.3%.²⁹ As a result of this anticipated growth in the populations with diverse cultural backgrounds, attorneys will need to increase their own cultural competency to accurately gauge their clients' legal competency.

C. Cultural Effects on Competency Determinations

To understand the importance of cultural considerations in competency determinations, attorneys must understand the general significance of culture in their own lives.³⁰ Culture is not an abstract term that affects only people of other nationalities. Culture provides the values, attitudes, and behavioral norms for every individual.³¹ It encompasses patterns of thinking, feeling, and reacting through communal ideas and values.³² Culture guides the way people interact with others of the same or different background.

25. INTERIM PROJECTIONS, *supra* note 9, at tbl.1a.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; see also *id.* at tbl.1b for the numerical or percent change for each decade from 2000 to 2050.

30. Evelyn H. Cruz, *Validation Through Other Means: How Immigration Clinics Can Give Immigrants a Voice When Bureaucracy Has Left Them Speechless*, 17 ST. THOMAS L. REV. 811, 828 (2005).

31. *Id.* (stating that people often attach culturally based meanings to their environment without realizing it).

32. Nicole A. King, Comment, *The Role of Culture in Psychology: A Look at Mental Illness and the "Cultural Defense"*, 7 TULSA J. COMP. & INT'L L. 199, 203-04 (1999). This comment states that culture is passed on mainly by symbols, and this reflects the distinctive achievements of groups. *Id.* at 204. Furthermore, culture "includes

Moreover, culture significantly affects the way people evaluate human behavior.³³ Culture also “affect[s] our conceptions of mental illness and mental health.”³⁴ Because certain traits may indicate incapacity in one culture while being typical in another culture,³⁵ an attorney might determine that a potential client exhibits signs of diminished capacity when, in reality, the client’s actions or beliefs are common to his or her culture. In more extreme cases, cultural and language differences can result in misdiagnoses of mental illness.³⁶ To avoid misdiagnosing a potential client’s legal competency, attorneys must be culturally competent so they can recognize that their own “attitudes and beliefs can detrimentally influence [their] perceptions of and interactions with individuals who are ethnically and racially different.”³⁷

III. Analysis

Evaluating client competency can be difficult for attorneys, but it becomes even more difficult with elderly clients of diverse cultural backgrounds. To fully understand the complexity of such an evaluation, it is useful to first examine the problems encountered when determining competency absent cultural influences.

A. The Restatement and the Model Rules Provide No Clear Standard

Attorneys who work with elderly clients must frequently make legal capacity decisions when interviewing clients.³⁸ A legally incompetent person is someone who cannot “properly exercise certain indi-

the products of the behavior of others, especially others who preceded us It includes hopes and fears, beliefs and attitudes, convictions and doubts, at least to the extent that such are shared, inculcated, and transmitted from people to people.” *Id.* (citation omitted).

33. *See id.* at 204–05.

34. *Id.* at 205 (citation omitted).

35. *Id.* (“The norm of one culture is a sign of nervous pathology in the other.”) (citation omitted). “It has been suggested that the difficulty in diagnosing mental illness in non-Western cultures may be due to the lack of attention given to cultural factors[.]” and “some symptoms cannot be accepted universally as signs of abnormality because of differences in the degree of their acceptability from one culture to the other.” *Id.* at 212 (citation omitted).

36. *Id.* at 212.

37. Weng, *supra* note 1, at 372 (citation omitted).

38. HANDBOOK FOR LAWYERS, *supra* note 10, at 13.

vidual rights and legal prerogatives due to mental incapacity.”³⁹ The American Law Institute (ALI) and the American Bar Association have recently updated their guidelines for ethics and professional responsibility with the publication of the Third Restatement of the Law Governing Lawyers, the Third Restatement of Agency, and the Model Rules of Professional Conduct (“Model Rules”).⁴⁰ The Third Restatement of the Law Governing Lawyers and the Third Restatement of Agency reject the previous automatic termination rule and extends the right of a client with diminished capacity to have legal representation.⁴¹ However, the Third Restatement of the Law Governing Lawyers does not create a clear standard by which to determine competency. It states that “[d]isabilities in making decisions vary from mild to totally incapacitating; they may impair a client’s ability to decide matters generally or only with respect to some decisions at some times.”⁴² It also provides that mental incompetence should not automatically take away a client’s control so long as the client still possesses the ability to make decisions.⁴³ An attorney should attempt to maintain communication and consultation to the extent that circumstances allow in order to understand and fulfill the client’s desires.⁴⁴

The Model Rules provide that diminished capacity can result from “[age of] minority, mental impairment or . . . some other reason.”⁴⁵ The Model Rules further suggest factors to consider in a competency determination, such as “the client’s ability to articulate rea-

39. Samantha Weyrauch, *Decision Making for Incompetent Patients: Who Decides and by What Standards?*, 35 TULSA L.J. 765, 766 (2000).

40. Walker, *supra* note 4.

41. *Id.* at 126; RESTATEMENT (THIRD) OF AGENCY § 3.08 cmt. 6 (2006) (stating that under the Restatement (Second) of Agency, the loss of capacity automatically terminated actual and apparent authority, but the automatic termination rule should no longer be followed); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 31 cmt. e (2000).

42. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 24 cmt. c.

43. *Id.*

44. *Id.* (“Clients should not be unnecessarily deprived of their right to control their own affairs on account of such disabilities. . . . [W]hen a client with diminished capacity is capable of understanding and communicating, the lawyer should maintain the flow of information and consultation as much as circumstances allow. The lawyer should take reasonable steps to elicit the client’s own views on decisions necessary to the representation. . . . [E]ven when the lawyer is empowered to make decisions for the client (see Comment d), the lawyer should, if practical, communicate the proposed decision to the client so that the client will have a chance to comment, remonstrate, or seek help elsewhere. . . . [A] client with diminished capacity is entitled to make decisions normally made by clients to the extent that the client is able to do so.”).

45. MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (2003).

soning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.”⁴⁶ The comments to the Model Rules explain that “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”⁴⁷ Furthermore, many people with diminished capacity are able to manage “routine financial matters while needing special legal protection concerning major transactions.”⁴⁸ Like the Third Restatement, the Model Rules and its factors fail to create a clear standard for determining competency.

Despite the ABA and ALI guidelines, the unclear distinction between competence and incompetence can cause confusion for attorneys. For example, an attorney who observes that a client appears to be in good physical health may incorrectly assume that the client is also in good mental health.⁴⁹ It is particularly difficult to make competency evaluations of elderly people who suffer from Alzheimer’s disease or other forms of dementia.⁵⁰ Alzheimer’s disease varies in its progression, and people in the early stages may be fully or partially competent.⁵¹ The gradual and unpredictable development of mental incapacity further complicates competency assessment during the course of representation.⁵² An attorney’s competency determination does not depend solely on the development of an impairment but also on the specific transaction the client is contemplating.⁵³ Another complicating factor is that people with diminished capacity are sometimes not aware of their own impairment or, if they are, they fail to appreciate the severity of their decisional incapacity.⁵⁴ The Model Rules note these complexities but do not provide sufficient guidance on how to address them.⁵⁵

46. *Id.* at cmt. 6.

47. *Id.* at cmt. 1.

48. *Id.*

49. Walker, *supra* note 4.

50. Moye, *supra* note 5.

51. Peter V. Rabins, *Dementia and Alzheimer’s Disease: An Overview*, 35 GA. L. REV. 451, 458 (2001).

52. *Id.*

53. *Id.*

54. *Id.* at 459–60.

55. Robert B. Fleming & Rebecca C. Morgan, *Lawyers’ Ethical Dilemmas: A “Normal” Relationship When Representing Demented Clients and Their Families*, 35 GA. L. REV. 735, 740 (2001). See Linda B. Smith, *Representing the Elderly Client and Ad-*

B. General Methods of Determining Client Competency

Although the Restatement and Model Rules guidelines for competency determinations are not clear, attorneys must still make preliminary determinations of a client's competence.⁵⁶ Some commentators argue that attorneys should not evaluate capacity because they lack the formal training,⁵⁷ but attorneys continue to do so and are often only able to speculate as to their client's capabilities.⁵⁸

Some attorneys have proposed methods to aid other attorneys in making competency determinations. The analysis method, for example, focuses on the client's reasons for retaining an attorney and ability to articulate the reasons for and goals of the representation.⁵⁹ A second proposed method involves constantly reassessing the client's capacity, instead of relying on first impressions.⁶⁰ When utilizing this method, it is important to be aware of and note any changes that occur between meetings, such as differences in "behavior, ability to focus on the subject, speech patterns, and level of vocabulary."⁶¹ If a noticeable deterioration occurs, the lawyer should inquire into the client's general health and perception of the general state of the world to help assess whether the client's capacity has diminished.⁶² This method also

dressing the Question of Competence, 14 J. CONTEMP. L. 61 (1988), for a more complete discussion of how the Model Rules fail to give adequate guidance and why they confuse the issue of competence.

56. Moye, *supra* note 5; see also HANDBOOK FOR LAWYERS, *supra* note 10 ("Lawyers necessarily are faced with an assessment or at least a screening of capacity in a rising number of cases involving specific legal transactions and, in some instances, guardianship.").

57. See Fleming & Morgan, *supra* note 55, at 750; see also HANDBOOK FOR LAWYERS, *supra* note 10 ("Some might argue that without training in mental disorders of aging and methods of formal capacity evaluation, lawyers should not be making determinations about capacity.").

58. Fleming & Morgan, *supra* note 55, at 750-51 (noting that some lawyers are familiar with and adept at administering the Mini-Mental State Exam).

59. Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 LOY. U. CHI. L.J. 403, 461 (2000); see also Michael A. Kirtland & Catherine Anne Seal, *Beneficiary Deeds and Estate Planning*, 66 ALA. LAW. 118, 121 (2005) (suggesting that an attorney should inquire into a client's motive for the representation, such as a beneficiary deed).

60. Michael A. Kirtland, *Dealing with Mental Capacity Issues in Estate Planning*, 30 EST. PLAN. 192, 193 (2003).

61. *Id.* at 194.

62. *Id.* (stating that clients should be able to understand how the world affects them).

requires attorneys to watch for signs of confusion when asking simple questions and to document these observations.⁶³

C. The ABA and APA Handbook

The ABA and the American Psychological Association (APA) have addressed the difficulty of determining competency and proposed another method in their publication, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*.⁶⁴ This book offers systematic steps to help guide the competency assessment.⁶⁵

1. SIGNS OF DIMINISHED CAPACITY

At the start of the attorney-client relationship with an elderly client, a lawyer should conduct a preliminary screening of the potential client.⁶⁶ The preliminary screening for diminished capacity can be broken down into cognitive, emotional, and behavioral signs.⁶⁷ Diminished cognitive capacity includes the following signs: (1) short-term memory loss characterized by repeating statements or trouble recalling recent events; (2) comprehension problems evidenced by difficulties with paraphrasing simple concepts; and (3) difficulties understanding multiple viewpoints or change.⁶⁸ Other signs of potential diminished competency include struggling with simple math calculations, appearing disoriented in relation to time, space, or location, and trouble remembering words or names.⁶⁹

Elder law attorneys should be alert for emotional warnings of incapacity. For example, a client who is in a state of constant emotional distress that is unwarranted by the circumstances and hinders the representation may have diminished capacity.⁷⁰ Lawyers should also look for sudden and extreme emotional changes or emotional expressions that appear highly inappropriate.⁷¹ Delusional thinking, such as feeling afraid or unsafe, may be a behavioral warning that in-

63. *Id.* at 194–95.

64. HANDBOOK FOR LAWYERS, *supra* note 10, at 3.

65. *Id.*

66. *Id.* Although the book recommends three screening levels, this note discusses only the first one in depth because the other two—use of professional consultations and legal judgment of capacity—are beyond its scope.

67. *Id.* at 14.

68. *Id.* at 14–15.

69. *Id.* at 15.

70. *Id.*

71. *Id.*

dicates diminished competency.⁷² In addition, hallucinations signal the possibility that the client's decisions are not based upon reality.⁷³ Finally, attorneys might consider difficulties with grooming or hygiene as behavioral indications of diminished capacity.⁷⁴

In general, a single warning does not indicate diminished capacity, and the attorney must consider all the indicators as a whole when assessing an elderly client's competency.⁷⁵ Moreover, an attorney must ask questions to determine whether mitigating factors might explain the observed symptoms and influence the client's behavior.⁷⁶ Examples of mitigating factors are stress, grief, depression, reversible medical factors, normal mental ability fluctuations based upon time of day, hearing loss, vision loss, and individual differences.⁷⁷

In addition to evaluating an elderly client's general diminished capacity, an attorney must also determine the client's legal capacity with respect to the particular transaction at issue.⁷⁸ Evaluating capacity for a specific legal transaction requires comparing the "client's understanding with each of the functional elements of capacity set out in [the state's] statute or case law for the transaction or situation at hand."⁷⁹ Capacity for one legal action does not necessarily indicate capacity for another because standards are issue-specific.⁸⁰ In all

72. *Id.* (defining delusions as "beliefs that are unlikely to be true, such as a belief that neighbors or the government are spying on oneself"). The authors warn attorneys to be aware of potential reality-based delusions that are not indications of client incapacity, such as beliefs that relatives are stealing from them. *See id.*

73. *Id.* The authors define hallucinations as "sensory experiences in the absence of physical stimuli. . . . [that are] often auditory or visual, but can involve the other senses." *Id.* The authors also caution practitioners that recently widowed clients or those with significant hearing or vision problems could falsely appear as having troubling hallucinations. *Id.* at 15-16.

74. *Id.* at 16.

75. *Id.* at 13.

76. *Id.* at 16.

77. *Id.* at 16-17. The authors created the list of mitigating factors to indicate that these may lead to perceived warning signs of diminished capacity, but the perceived competency issue is faulty because the warning signs could disappear when the particular mitigating factor is addressed or has passed. *See id.*

78. *Id.* at 17.

79. *Id.*; *see also id.* at 5 ("[T]he definition of 'diminished capacity' in everyday legal practice depends largely on the type of transaction or decision under consideration. Depending on the specific transaction or decision at issue, as well as the jurisdiction . . . legal capacity has multiple definitions.").

80. *See id.* at 5-8 (describing illustrations of different capacity assessments, such as the necessary capacity for executing a will, making a gift, entering into a contract, conveying real property, executing a durable power of attorney, making a health care decision, entering mediation, and being subject to guardianship laws).

cases, the attorney determining specific legal competency should “present information, answer and ask questions, gently probe and query, and weigh client responses and thought processes.”⁸¹

2. FACTORS REQUIRED BY ETHICAL RULES

The ABA and APA handbook requires considerations for determining capacity to include six factors, five of which are in Rule 1.14, Comment 6 of the Model Rules: (1) “the client’s ability to articulate reasoning leading to a decision; (2) variability of state of mind; (3) ability to appreciate consequences of a decision; (4) the substantive fairness of the decision; and (5) the consistency of a decision with the known long-term commitments and values of the client.”⁸² The sixth ethical factor, the irreversibility of a decision, is not listed in the Model Rules, but it has historical roots in protecting parties from a decision that cannot be adjusted later.⁸³ As such a decision cannot be changed, an elder law attorney must be cautious and be certain that clients understand the ramifications of their decisions.

3. PRELIMINARY ASSESSMENT CONCLUSIONS

At the end of the preliminary assessment, an attorney will reach one of four conclusions regarding the potential client: (1) nonexistent or very minimal evidence of diminished capacity; (2) mild competency concerns; (3) substantial capacity concerns; or (4) lack of competency.⁸⁴ The attorney must realize that no single factor defines diminished capacity; it is the sum of the possible indicators that might signify a need for further professional evaluation of capacity.⁸⁵ For the majority of clients, an attorney will decide to continue representation without additional concern because there is no indication of diminished competency.⁸⁶ An attorney who finds slight capacity problems should consider suggesting a medical examination to determine if a medical problem might be affecting competency.⁸⁷ In cases where the conclusion is that the client has “more than mild problems” of capacity, the lawyer should proceed cautiously in any continued represen-

81. *Id.* at 18.

82. *Id.* at 18–19.

83. *Id.* at 19.

84. *Id.* at 20.

85. *Id.* at 13.

86. *Id.* at 20.

87. *Id.*

tation and consider requesting a medical check-up, a formal clinical capacity assessment, or informal advice from a clinician.⁸⁸ For clients who appear to have “severe problems” with capacity, the attorney should obtain a formal capacity evaluation, which will likely lead to a decision to withdraw representation, but only after making all reasonable efforts to protect the client’s interests.⁸⁹

D. Avoiding Ageism

Regardless of the method used to evaluate competency, the attorney should consciously try to avoid ageism when dealing with elderly clients. Ageism is age-based discrimination that portrays the elderly as “impaired, incompetent, unproductive, depressed, disengaged, inflexible, and senile.”⁹⁰ The advancement of age naturally leads to some conditions that should not be confused with indicators of incompetency. For example, some elderly people have a condition with symptoms similar to stuttering, which is characterized by word repetitions, interjections, and fillers.⁹¹ When attorneys hear this, they might assume it represents fear, tension, anxiety, or avoidance; however, this speech behavior is not necessarily abnormal or indicative of psychological uncertainty.⁹² In addition, hearing loss becomes common as people age, but it should not be confused with a loss of listening capability.⁹³ Hearing loss is a physical problem, different from the psychological problem of not listening.⁹⁴ Also, attorneys should note whether a client is avoiding a topic or simply did not hear something. Being conscious of ageism assists in determining the competency of an elderly client.

88. *Id.*

89. *Id.*

90. Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 465 (1997) (also explaining that the basis of the stereotype is the belief that aging inevitably leads to physical and mental failure). See Joan Hashimi, *Counseling Older Adults*, in *SERVING THE ELDERLY: SKILLS FOR PRACTICE* 33, 34–36 (Paul K. H. Kim ed., 1991), for a further discussion about the stereotypes and stigmas associated with advanced age.

91. BARBARA BENDER DREHER, *COMMUNICATION SKILLS FOR WORKING WITH ELDERS* 34 (2d ed. 2001).

92. *Id.*

93. *Id.* at 35–39.

94. *Id.* at 37.

E. Maintaining a Normal Attorney-Client Relationship

When representing an elderly client with diminished capacity but who is not completely mentally incapacitated, the attorney must maintain a normal attorney-client relationship to the extent reasonably possible and treat the client with attention and respect.⁹⁵ The Model Rules do not unambiguously define what constitutes a normal attorney-client relationship.⁹⁶ However, the Model Rules suggest that lawyers should account for the known desires and values of the client, consider the client's best interest, and the effects of involving family members.⁹⁷ If the representation started when the client was still competent, an attorney might have a fairly good idea of the client's general desires regarding the representation.⁹⁸ In the case of an elderly client, this approach may help an attorney notice changes that may indicate diminished capacity. Additionally, if an attorney can determine the client's goals while there is a normal attorney-client relationship, future competency misunderstandings may be eliminated.

An attorney-client relationship involving an incompetent client will include many characteristics similar to a typical legal representation, but with some necessary modifications.⁹⁹ Lawyers must be especially careful not to compromise crucial components of an attorney-client relationship, such as communication, loyalty, confidentiality, and conflicts of interest.¹⁰⁰ In light of these modified obligations and the reality that few law schools train their students to deal with mentally incapacitated clients, most lawyers are unprepared to represent incompetent clients.¹⁰¹ An attorney who fails to consider cultural effects may be in an even worse position to represent multicultural elderly clients.

95. MODEL RULES OF PROF'L CONDUCT R. 1.14(a), cmt. 2 (2003).

96. Fleming & Morgan, *supra* note 55, at 740.

97. MODEL RULES OF PROF'L CONDUCT R. 1.14(a), cmt. 5.

98. Fleming & Morgan, *supra* note 55, at 751 (noting that a "client may have been able to articulate intentions, concerns, and a general view of the legal issues involved in the representation" if representation started when the client was still competent or more competent).

99. *Id.* at 741.

100. *Id.*

101. *Id.* at 745.

F. Potential Conflicts During the Evaluation of Competency Due to the Presence of Family Members

Many conflicts may arise during a lawyer's competency evaluation that may complicate the assessment. The presence of family members during an attorney-client consultation may create a significant conflict.¹⁰² Relatives often accompany elderly people on visits to an attorney's office.¹⁰³ The Model Rules permit the presence of family members with a few restrictions.¹⁰⁴ However, the presence of family members during a client consultation could result in a conflict between the client's desires and the family members' desires.¹⁰⁵

Further complicating the issue is the need to determine which party is in fact the client.¹⁰⁶ An example of such a conflict is when an adult child and a parent suffering from dementia seek legal advice on transferring property or giving power of attorney to the adult child.¹⁰⁷ Determining the identity of the client in this situation is challenging but feasible.¹⁰⁸ A more questionable situation arises when an adult child asks an attorney for advice on drafting his or her parent's will that would declare the child to be the will's sole beneficiary at the exclusion of the other siblings. The adult child may also ask to be informed at every step of the legal representation and may even pay the fee.¹⁰⁹ This type of mixed representation scenario raises conflict-of-interest concerns if the attorney does not clarify at the start who the client is and specify the exact terms of the representation.

The involvement of a nonclient family member can also impair an attorney's ability to establish rapport and trust with the client.¹¹⁰ A

102. See Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. REV. 54 (1991), for a more detailed discussion on ethical considerations that arise when family members are present.

103. *Id.*

104. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3 (2003) (stating that family members can participate in discussions when it is necessary to assist in representation, but the attorney must maintain the client's interest above others and turn to the client to make decisions on his or her behalf).

105. Fleming & Morgan, *supra* note 55, at 745; see also MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt 3; Falk, *supra* note 102, at 54 ("[The] elder and the relative, however, may have different opinions on the legal needs of the elder.").

106. Rosenberg, *supra* note 59, at 446. Examples of common occurrences that bring up client identity questions include the creation of wills and adult children asking for advice concerning issues raised by their parents. *Id.* at 446-47.

107. See Falk, *supra* note 102, at 57.

108. See *id.* at 56-62 (discussing guidelines on how to decide who is the client).

109. See Rosenberg, *supra* note 59, at 447-48.

110. *Id.* at 449.

lawyer must delicately balance honoring the client's relationship with the accompanying relative against maintaining the integrity of the attorney-client privilege.¹¹¹ The attorney must also consider how the situation might affect the duty of confidentiality to the client, which largely depends on the characterization of the third-party nonclient.¹¹² These potential conflicts are particularly relevant to multicultural elderly clients. If the client's culture is heavily family-focused regarding decision making, then conflicts and issues of interdependence should be considered during competency determinations.

G. Cultural Identity's Effect on the Initial Determination of Mental Competency

1. DECISION MAKING

An attorney must consider a potential client's beliefs, values, and worldview for the legal representation to accurately reflect the client's desires because a client's cultural background may greatly influence the client's decisions.¹¹³ Culture may even determine who makes a client's decisions, as some cultures defer decision making to respected elders or extended family members.¹¹⁴ An attorney who fails to consider the cultural effect of decision making may also misinterpret the situation or cause the client to feel devalued.¹¹⁵

Culture is most likely to influence who makes the decisions in the context of a particular relationship. For example, research has found that Native American families are more dependent on their family members than are Anglo American families.¹¹⁶ Among Asian Americans, the dynamics of subordinate-superordinate relationships

111. *Id.* (noting that one way to create rapport is by meeting alone with the client for a portion of the meeting).

112. *Id.* at 448. The presence of a "casual, disinterested third party may automatically 'destroy' the attorney-client privilege, or his presence may be considered similar to that of a helpful translator whose presence does not destroy the privilege." *Id.* at 448-49.

113. Marty Richards, *Ethical, Spiritual and Cross Cultural Implications: Some Considerations for Elder Law Attorneys*, NAT'L ACAD. ELDER L. ATT'YS Q., Fall 1995, at 1, 4-5.

114. *Id.* at 6; *see also id.* at 5 (stating that in the context of advance directives, members of some cultures may defer decision making to their physician, extended family members, or religious leader).

115. *Id.* at 5.

116. Barbara W. K. Yee, *Gender and Family Issues in Minority Groups*, 14 GENERATIONS (1990), reprinted in AGING AND THE LAW: AN INTERDISCIPLINARY READER 32, 32 (Lawrence A. Frolik ed., 1999).

and family needs tend to take precedence over individual decision making.¹¹⁷ As a result, elders have more authority than younger family members, and men have more authority than women.¹¹⁸ When the greater family good is more important than any individual's desire,¹¹⁹ complications can arise if, for example, an adult son with an elderly mother is trying to act for the good of the whole family, but to the exclusion of other siblings. Failing to comprehend the underlying rationale of this behavior might cause the lawyer to believe the son is vindictively acting against a sibling by exerting undue influence on the mother. Thus, considering familial relationships during a competency determination is important because an attorney might otherwise misinterpret the motivations for a client's actions. If the lawyer does not appreciate that a client's dependence on and deference to other family members is a cultural norm, the attorney might mistake interdependence as a sign of inability to comprehend the situation.

One medical study examined the effect of culture on individual attitudes toward patient autonomy in making medical decisions by asking 200 subjects who were sixty-five or older how they felt about certain decisions.¹²⁰ The subjects were required to identify themselves with one of four ethnic groups: African American, European American, Korean American, or Mexican American.¹²¹

The study found that Korean Americans and Mexican Americans were less likely than members of the other groups to believe that doctors should truthfully inform patients of their diagnosis and prognosis of a serious illness.¹²² Korean Americans and Mexican Americans were also less likely to conclude that the patient should be the one making the decision to use life support and more likely to believe

117. *See id.* at 34.

118. *Id.*

119. *Id.*

120. Leslie J. Blackhall et al., *Ethnicity and Attitudes Toward Patient Autonomy*, 274 JAMA 820, 820-21 (1995).

121. *Id.* at 821. The authors of the study included equal numbers of women and men, kept a similar age distribution across the groups, and minimized selection bias by using a wide range of sites to recruit subjects. *Id.*

122. *Id.* at 823. The data showed that only 47% of Korean Americans and 65% of Mexican Americans would have told the truth about the diagnosis of a serious illness, compared to 89% of African Americans and 87% of European Americans. *Id.* at 821. Similarly, 35% of Korean Americans and 48% of Mexican Americans would have told the truth about the terminal prognosis of a serious illness, compared to 63% of African Americans and 69% of European Americans. *Id.* at 821-22.

that the patient's family should make this decision.¹²³ Furthermore, the study found that "[w]ithin the Korean-American and Mexican-American groups, older subjects and those with lower socioeconomic status tended to be opposed to truth telling and patient decision making even more strongly than their younger, wealthier, and more highly educated counterparts."¹²⁴ In contrast, age was not a factor in the European American or African American groups.¹²⁵ "[T]he primary factor related to attitude was ethnicity," and the only idea that all the groups agreed upon was the belief that the truth of the diagnosis and prognosis should be told to the family.¹²⁶ The study concluded that "the high value placed upon . . . the rights of individuals to control their destiny are not necessarily shared by all segments of American society. For those who hold the family-centered model, a higher value may be placed on the harmonious functioning of the family than the autonomy of . . . individual[s]."¹²⁷

Although this was a medical study, its findings parallel the context of the attorney-client relationship. If an attorney is not aware of the practice in some cultures of keeping certain information and decisions from the elderly, the attorney may mistakenly conclude that an adult child is exerting undue influence on his or her parent. The lawyer might not understand that it is the true desire of the elderly client for the adult child to be the primary decision maker. The attorney might conclude that the client's desire to keep the relative as an active participant in the representation is a mask for diminished capacity instead of properly attributing it to cultural beliefs.

2. BEHAVIOR

Cultural influences not only affect who makes decisions for a client but also the way a client behaves. A list of behaviors that might stem from different cultural systems include the following: speaking a different language; having limited, ungrammatical, or accented Eng-

123. *Id.* Only 28% of Korean Americans and 41% of Mexican Americans thought the patient should be the primary decision maker for the use of life-supporting technology, compared with 60% of African Americans and 65% of European Americans. *Id.* The actual data showed that 57% of Korean Americans and 45% of Mexican Americans believed the decision should lie with the patient's family members. *Id.*

124. *Id.* at 823.

125. *Id.*

126. *Id.* at 822-23.

127. *Id.* at 825.

lish; bringing others to a meeting; discounting women's opinions; refusing to shake hands with a woman; lacking facial expressions or other nonverbal feedback; avoiding eye contact; having a weak handshake; consciously withholding necessary information; lacking initiative in answering questions; standing too close; being overly familiar; and being overly formal.¹²⁸ The potential effect of these behaviors on an attorney-client relationship is that an attorney might form a bias that adversely affects the representation.¹²⁹

In addition, an attorney's own cultural beliefs can affect a client's actions. Cultural preconceptions may become self-fulfilling prophecies¹³⁰ when an attorney's attitude influences a client to react in a way that affirms the attorney's original flawed conception of the client's culture. In the context of competency determinations, an attorney whose actions or questions offend or distance the client risks misinterpreting the client's subsequent actions as signs of incompetence.

3. PERCEPTIONS OF ILLNESS

The assessment of diminished capacity is further complicated by the fact that accepted beliefs of one culture may be indicators of psychosis in another.¹³¹ The connection between culture and illness influences the "ways in which health and illness are 'defined, perceived, experienced, explained, and maintained.'"¹³² Moreover, "[h]ow someone deals with disease, incapacity, and medical treatment is inextricably bound up in their socioeconomic/religious/cultural upbringing. . . . Race, religious and cultural upbringing all impact not only on the clients', but the attorneys' own perceptions of, and responses to disease"¹³³

128. Stuart D. Zimring, *Multi-Cultural Issues in Advance Directives*, NAT'L ACAD. ELDER L. ATT'YS Q., Summer 2000, at 12, 13.

129. *Id.* (stating further that if the conflict between the client's beliefs and attorney's beliefs is so great that the attorney cannot effectively provide counsel, the attorney may have to withdraw representation).

130. See Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 378-80 (1997), for an example of a self-fulfilling prophecy in the context of job applicants of different races.

131. King, *supra* note 32, at 212.

132. Rosenberg, *supra* note 59, at 463 (quoting Jo-Anna L. Rorie et al., *Primary Care for Women: Cultural Competence in Primary Care Services*, 41 J. NURSE-MIDWIFERY 92, 92 (1996)).

133. Zimring, *supra* note 128, at 12.

Many cultural beliefs cause people to underutilize mental health services¹³⁴ because they are “ashamed to admit to psychiatric problems in themselves or in family members.”¹³⁵ As a result, culture can also hide diminished capacity. This cultural factor may lead to a breakdown in the attorney-client relationship due to the client’s withholding of relevant information or hostility in response to attempts to question mental capacity. This, in turn, may cause an attorney to decide that the client is incompetent.

H. Culture’s Effect on the Attorney-Client Relationship

Once an attorney decides that a client has the mental competency to enter into an attorney-client relationship, other problems related to culture may arise.¹³⁶ Cultural differences may lead to misunderstandings, diminishing rapport, interference with trust, or alienation of the client.¹³⁷

Culture may influence the way a client perceives the consequences of attaining legal service.¹³⁸ For example, cultures with a history of troubled interaction with government officials or professionals may view legal representation as a sign of failure or defeat.¹³⁹ This belief may erect barriers to communication¹⁴⁰ and complicate the attorney’s attempt at assessing competency.

134. See Ruth H. Gim et al., *Asian-American Acculturation, Counselor Ethnicity and Cultural Sensitivity, and Ratings of Counselors*, 38 J. COUNSELING PSYCHOL. 57, 57 (1991) (stating that studies have found that Asian Americans “underuse[] mental health services, despite evidence that their need for services is high . . . [and that] up to 50% of the Asian clients failed to return to a mental health clinic after the initial contact, as compared to 30% of the Caucasian clients.”); see also Donald R. Atkinson et al., *Mexican-American Acculturation, Counselor Ethnicity and Cultural Sensitivity, and Perceived Counselor Competence*, 39 J. COUNSELING PSYCHOL. 515, 515 (1992) (noting that Mexican Americans underutilize mental health services, even though they might need these services more than the general population, and that Mexican Americans have a counseling dropout rate of 40%, compared to 30% by Anglo Americans).

135. King, *supra* note 32, at 211.

136. Jacobs, *supra* note 130, at 346–47.

137. *Id.* at 377.

138. Richards, *supra* note 113, at 5.

139. *Id.* (noting that one example of a racial group with a history of problems with the government is African Americans).

140. *Id.*

I. The Effect of Culture on Client-Centered Lawyering

A lawyer can approach the attorney-client relationship in a number of ways. One way that is taught by many U.S. law school clinical programs is client-centered lawyering. This approach is a response to criticism that lawyers do not focus on their clients.¹⁴¹ In the client-centered approach to lawyering, four factors define a client as an “atypical or difficult client”: (1) refusal or reluctance to participate in an interview or discuss a topic; (2) communication inhibitors from a hostile client; (3) failure to make eye contact; and (4) an inappropriate lack of concern for the issue.¹⁴² This section discusses each of these factors in turn.

1. REFUSAL OR RELUCTANCE TO DISCUSS A TOPIC

The client-centered approach assumes that the client and attorney will communicate effectively and trust each other; therefore, a reluctance to talk about relevant concerns disrupts the attorney-client relationship.¹⁴³ There are many reasons, cultural or not, why a client might not frankly communicate with his or her attorney.¹⁴⁴

For example, a characteristic of Chinese culture is the fear of people with mental illness.¹⁴⁵ This cultural fear might cause clients to be hesitant about acknowledging their own declining competency. Asian Americans tend to believe that organic factors are the sources of mental illness and that mental health can be controlled by precluding morbid thoughts.¹⁴⁶ Such cultural ideals may explain why many traditional Asian Americans avoid counseling and self-disclosure.¹⁴⁷

Navajo culture provides another example of why clients may not disclose all material information. Because the Navajo believe that thoughts and language cause events to occur,¹⁴⁸ Navajo clients may

141. Jacobs, *supra* note 130, at 349–50.

142. *Id.* at 354–59.

143. *Id.* at 355–56.

144. *Id.* at 356 (listing a number of potential reasons, including “ego threat, case threat, role expectations, etiquette barriers, trauma, perceived irrelevancy, and greater need . . . bias, competing time demands, environment, memory failure, and finally unconscious behavior”).

145. King, *supra* note 32, at 208–09 (stating that Chinese people reported apprehension toward the mentally ill and avoided contact with them due to a cultural connection of mental illness with “ghosts, punishments for bad behavior of ancestors or bad thoughts”).

146. Gim et al., *supra* note 134.

147. *Id.*

148. Rosenberg, *supra* note 59, at 471.

resist talking about risks, bad news, and plans for their own incapacity.¹⁴⁹

2. COMMUNICATION INHIBITORS DUE TO A POTENTIALLY HOSTILE CLIENT

Cultural preconceptions about hostility and aggression may lead both the client and attorney to erect communication barriers. A lawyer may believe that a client's culture has a hostile tendency and, therefore, might restrain communication.¹⁵⁰ On the other hand, a client of a certain culture may have previous experiences or mental associations with the legal system that would hinder complete and open communication.¹⁵¹ In either case, such communication inhibitors weaken the attorney's ability to make an accurate assessment of capacity. The attorney may mistake anger or stubbornness for indicators of mental illness.

3. FAILURE TO MAINTAIN EYE CONTACT

An attorney may misinterpret a client's inability to maintain eye contact to indicate that the client is nervous, is lying, distrusts the attorney, dislikes the attorney, or is psychiatrically or physically ill.¹⁵² In some cultures, particularly African American, Latino, and Asian cultures, limited eye contact is not an indication of deceit or agitation.¹⁵³ An attorney who does not take this into consideration may incorrectly determine that the client is uncomfortable or not comprehending the issues.

4. PERCEIVED INAPPROPRIATE LACK OF CONCERN FOR THE SERIOUSNESS OF THE ISSUE

The client-centered model assumes a client will show an appropriate amount of concern for the issue at hand. A problem may arise when the attorney believes that a client is showing an inappropriate amount of concern for a matter that the attorney believes demands a

149. *Id.*

150. Jacobs, *supra* note 130, at 357.

151. *Id.* at 358 (noting that a black client speaking to a white attorney may put up inhibitors to communication if the client received poor treatment in the past from an attorney or if the client cannot separate the attorney from the system the client views as oppressive).

152. *Id.*

153. *Id.* at 358–59.

higher degree of attention.¹⁵⁴ However, there is no clear standard for the proper amount of concern for a particular issue. If a client decides based on cultural grounds that a particular matter is not especially serious,¹⁵⁵ it may not be the lawyer's place to determine that the client is incompetent and exhibiting a lack of concern for the issue at hand. A practitioner who decides the appropriate level of concern without reference to the client's beliefs or experiences is prone to misdiagnose competence.

IV. Recommendations

Attorneys should approach representing culturally diverse clients with an open mind and not let personal biases or beliefs affect their determinations of mental capacity. Because culture may affect a client's desires and actions, lawyers should educate themselves about their client's culture to correctly understand the goals of representation. Yet complete awareness of and sensitivity to all cultures is an unrealistic goal. The reality may be that no perfect resolution exists and misunderstandings will occur, but this should not stop attorneys from trying to become more culturally aware.

Though essential, cultural awareness alone may not be enough to enable attorneys to assess competency when working with culturally diverse clients. Cultural educational tools, coupled with awareness, can help practitioners make informed and accurate competency assessments.

A. Guidebook by a National Institution

A guidebook authored by a reputable institution, such as the ABA or ALI, would provide a consistent and well-researched resource for attorneys that would be an effective instrument to bridge the gap between cultures. By supplementing empirical studies from fields other than law with advice from culturally diverse attorneys regard-

154. *Id.* at 359.

155. *See, e.g., id.* at 359–60 (describing how the disrespect and disdain Tupac Shakur showed at his arraignment for shooting two police officers could be interpreted as inappropriate concern for the seriousness of the offense but, in reality, could be a reflection of his knowledge that the case was really about “a younger black man engaging in an armed struggle with two white men, and winning” or that the legal system does not have a sufficient interest in protecting the rights of a black man).

ing common concerns that arise out of consulting clients of similar and differing cultures, such a guidebook would create a solid starting point.¹⁵⁶ For example, if the ABA wrote a guidebook focusing on common cultural issues as a supplement to its handbook for assessing competency, it would provide a valuable resource that attorneys could use to familiarize themselves with cultural issues.

A guidebook that includes the opinions and experiences of attorneys from diverse backgrounds would partially address the criticism of client-centered counseling as allowing attorneys to make decisions about what is best for their clients without gathering input from them.¹⁵⁷ The guidebook, however, would still be susceptible to the argument that it is the privileged members of the cultures who are making decisions about what should be considered important cultural aspects for their clients.

Creating a guidebook has other potential downsides. No book will enable attorneys to perfectly understand a different culture. More importantly, a guidebook is not a substitute for learning from real-life interactions with culturally diverse people. Stereotyping may occur when an attorney depends solely on a book because a book can confine an attorney to a single conception of the client's cultural beliefs. Without personal interaction, an attorney may never realize that different people conform to the norms of their cultural heritage to different extents. Their limited conception can lead to the problem of a self-fulfilled prophecy in future client interactions.

Authoring comprehensive guidelines could be a prohibitively large project and possibly unmanageable. The authoring institution would need to devote considerable effort to decide which attorneys to consult and how to compile all the responses. Even if the institution possessed the necessary resources, no single study could cover all the important cultural and legal considerations. Furthermore, dilemmas would arise in deciding which of the vast number of cultures and sub-cultures to include.

156. See Gim et al., *supra* note 134, at 61 (suggesting that regardless of cultural differences, counselors could increase their credibility with clients by acknowledging that culture is influential in life problems); see also Atkinson, *supra* note 134, at 518 (providing study results indicating that counselors who understand ethnic minority cultures are perceived as more culturally competent).

157. Jacobs, *supra* note 130, at 351 (stating that when certain clinicians and lawyers decided that the best way of empowering the "poor and oppressed" would be to employ the client-centered method, they really did not focus on the clients because they neglected to gather much input from the relevant communities).

Another problem with composing a comprehensive guidebook is the fact that cultures continuously change.¹⁵⁸ Different generations within the same culture develop different expectations and beliefs.¹⁵⁹ This fact necessitates constant updates and may discourage an institution from authoring the guidebook.

Nevertheless, a guidebook would be a helpful tool for attorneys who are inexperienced with cultural diversity. Although a book is not a substitute for actively associating with people of diverse cultures,¹⁶⁰ it could address basic cultural considerations and alert attorneys to major differences. The awareness of cultural differences would reduce the likelihood of initial culture shock and erroneous competency determinations. If an attorney is aware that cultural differences exist, keeps an open-mind, asks open-ended questions, and is mindful of individual personal differences, a guidebook could serve as an effective complement and aid to assessing cultural competency.

B. Require Specialized Training for Elder Law Attorneys

Another possible tool to help reduce cultural misunderstandings is to require specialized training in cultural competency. For example, seminars and role-playing simulations of culturally diverse situations would allow attorneys to practice interacting with people of various cultures. Through personal exposure to other cultures, specialized cultural training would provide attorneys with a foundational understanding of cultural issues.

The medical field provides an example of how training is used to create greater cultural awareness. Medical schools utilize cultural competency curricula to address cultural awareness.¹⁶¹ These programs involve “case-based, small-group formats to explore the core cultural issues and health beliefs of various ethnic groups, . . . language barriers, . . . racism, and cross-cultural interviewing skills. Such curricula also include role play, panel discussions with

158. Richards, *supra* note 113, at 8.

159. *Id.* at 6.

160. Observing and interacting with people in their own environment enhances understanding of and sensitivity to their culture. *See id.* at 2.

161. Manish C. Champaneria & Sara Axtell, *Cultural Competence Training in US Medical Schools*, 291 JAMA 2142 (2004) (stating that the other strategy medical schools employ to increase cultural awareness is cultural immersion, which usually involves a “clinical rotation in another country or more local experience with native communities”).

patient advocates and interpreters, and simulated encounters.”¹⁶² The legal profession could mirror this model to help its members gain sensitivity and respect for cultural differences.

However, specialized training is a less practical suggestion than a guidebook. It is more costly, requires more attorney time, and would probably help only a select number of attorneys who can afford the cost and time to improve their cultural knowledge.

C. Encourage Clients to Seek Attorneys from Their Own Culture

Encouraging clients to seek legal advice from attorneys of the same cultural background would be the best way to ensure that their attorneys consider the necessary cultural factors and make the correct competency evaluations. Furthermore, there is evidence that clients feel more comfortable with professionals from their own culture.¹⁶³

Requiring clients and attorneys to have the same cultural backgrounds, however, is implausible. Cultural understanding across different ethnicities would be hindered, segregation would result, and attorneys would have no opportunity to develop cultural self-awareness. Moreover, even people of the same culture may have misunderstandings, and misdiagnoses may still occur because the determination of competency is intrinsically difficult.

V. Conclusion

To better serve clients and make accurate competency determinations, attorneys should be aware of, understand, and consider their clients' cultural influences. Raising awareness of cultural differences and their potential effect on a client's beliefs and objectives is the most effective method of combating misunderstandings based on culture in the attorney-client relationship. To raise awareness, a nationally recognized institution should author a guidebook to help lawyers navigate their interactions with culturally diverse clients. Despite substan-

162. *Id.* (citation omitted).

163. See Gim et al., *supra* note 134, at 57, 61 (presenting study results suggesting that Asian Americans prefer counselors who are racially similar and culturally sensitive, but comparing these studies with others that have yielded mixed results); Edward Watkins, Jr. et al., *Cultural Mistrust and Its Effects on Expectational Variables in Black Client-White Counselor Relationships*, 36 J. COUNSELING PSYCHOL. 447, 448-49 (1989) (indicating that black clients who were highly mistrustful of white people gave white counselors little credibility in a psychology context, thus making it hard to establish an effective counseling relationship).

tial barriers to creating such a guidebook, it would inspire attorneys to contemplate cultural considerations they might not otherwise consider. Without taking all the relevant cultural factors into consideration, attorneys may mistakenly believe they are making accurate competency determinations. Becoming culturally competent will help attorneys determine whether their culturally diverse clients are mentally competent.