

SILENCING OUR ELDERS

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Lawyers, and the practice of law generally, tend to focus on words and speech. As wordsmiths, lawyers take great pains to choose the precise word that reflects the specific meaning they wish to convey, and they pride themselves on their ability to persuade, especially in the contexts of oral advocacy in the courtroom and negotiation. Lawyers, correctly, view words and speech as powerful. But there is another powerful tool in a lawyer's arsenal that receives virtually no recognition or attention: silence. As a general matter, Americans tend to be uncomfortable with silences, and thus rush to fill them. This general societal discomfort with silence also affects interpretations of silence. In the United States, there is a tendency to view silence negatively—to view silence as being indicative of, among other things, weakness, avoidance, lack of preparation, or deception. This article employs interdisciplinary research from the fields of law, psychology, philosophy, and communication to explore the value of silence—and its overlooked power and pitfalls—particularly when silence bias overlaps with age bias.

INTRODUCTION

In law school there is a strong focus on words and speech. Law students are expected to learn to “think on their feet” through the Socratic method, whereby a student is selected at random and expected to answer question after question in a rapid-fire exchange with the professor in front of the entire class. Similarly, law students typically are required to participate in moot court, where students prepare and argue a case in front of a mock judge in order to create a simulated courtroom experience. The mock judge typically interrupts the student's oral presentation repeatedly to ask questions about the case, to which the student must respond. In these experiences, speaking, generally, as well as responding quickly, selecting the appropriate words to accurately convey the desired meaning, and speaking without pauses or hesitations are all highly valued. This emphasis on speech continues in law practice, where lawyers tend to focus on verbal communication, whether interviewing, counseling, negotiating, or engaging in courtroom practice, and whether dealing with a cli-

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ent, a third-party, or opposing counsel. However, this focus on the significance and power of the spoken word overlooks the significance and power of what remains unspoken in silence.

We do not think much about silence,¹ perhaps especially in law school and as lawyers. In the law, we tend to ignore silence, typically referring expressly to silence in one of two contexts: (1) the right to remain silent (in the criminal law context)² and (2) silence as constituting assent (in the contract law context).³ Silence is an overlooked area with tremendous potential for facilitating the practice of law and helping clients.

Although we do not always think of it in this way, silence and speech actually are not total opposites—they are part of a continuum.⁴ Pauses within the stream of speech allow each speaker to have a turn⁵—so that there can be conversations, rather than a series of individual monologues.

¹ See Richard L. Johannesen, *The Functions of Silence: A Plea for Communication Research*, 38 W. SPEECH 25, 27 (1974) (noting that “[i]n our . . . Western culture silence often is regarded as worthless (we must verbalize something)”); see also Jane C.H. Damron & Mark T. Morman, *Attitudes Toward Interpersonal Silence Within Dyadic Relationships*, 14 HUM. COMM. 183, 185 (2011) (“[S]ilence is not widely acknowledged or understood as a form of human communication. While talk is generally viewed as the primary and/or most meaningful channel for communication, silence is commonly seen simply as a pause or gap between moments of talk.”); Cheryl Glenn, *Silence: A Rhetorical Art for Resisting Discipline(s)*, 22 JAC 261, 263 (2002) (noting “the Western tendency to overvalue speech and speaking out”); J. Vernon Jensen, *Communicative Functions of Silence*, 30 ETC.: REV. GEN. SEMANTICS 249, 256 (1973) (“Our talkative culture needs to realize more fully the value and communicative functions of silence. We need to view it not as periods in which there is an absence of communication but rather as an active agent, an important vehicle for significant communication.”).

² U.S. CONST. amend. V (providing that no person “shall be compelled in any criminal case to be a witness against himself”); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“Prior to any questioning, the person must be warned that he has a right to remain silent . . .”); see also *Salinas v. Texas*, 133 S. Ct. 2174, 2178–79 (2013) (silence can be used against a defendant at trial when that defendant did not invoke the privilege against self-incrimination during a voluntary police interview before his arrest).

³ Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 1 (1995) (noting that “[m]any are familiar with [the] adage” of silence as consent); A.L.C., Comment, *When Silence Gives Consent*, 29 YALE L.J. 441, 441 (1920) (referring to “the maxim ‘silence gives consent’”). Despite this maxim, “this is not a rule of law.” 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 3.18, at 402 (Joseph M. Perillo ed., rev. ed. 1993).

⁴ ADAM JAWORSKI, THE POWER OF SILENCE: SOCIAL AND PRAGMATIC PERSPECTIVES 14 (1993) [hereinafter JAWORSKI, THE POWER OF SILENCE] (describing silence and speech as a continuum “ranging from the most prototypical instances of silence to the most prototypical instances of speech”); see Thomas J. Bruneau, *Communicative Silences: Forms and Functions*, 23 J. COMM. 17, 18 (1973) (“A major misconception preventing intellectual focus on silence is the common, basic assumption that silence is completely other than speech, its foreign opposite, its antagonist.”); Adam Jaworski, “White and White”: *Metacommunicative and Metaphorical Silences*, in SILENCE: STUDIES IN ANTHROPOLOGICAL LINGUISTICS 381, 381 (Adam Jaworski ed., 1997) (“As with all pairs of such oppositions, the boundaries between speech and silence are unclear, indistinct and fuzzy.”).

⁵ Thomas J. Bruneau, *How Americans Use Silence and Silences to Communicate*, 4 CHINA MEDIA RES. 77, 82 (2008) (noting that “silences . . . create the possibilities for switching from being a speaker to being a listener, and *visa versa* [sic]”).

As a general matter, Americans tend to be uncomfortable with silences,⁶ and thus rush to fill them.⁷ This general societal discomfort with silence also affects interpretations of silence. In the United States, there is a tendency to view silence negatively⁸—to view silence as being indicative of, among other things, “weakness, avoidance, lack of preparation, or deception.”⁹ These two tendencies—discomfort with silence and viewing silence as negative—have particular ramifications in law school and lawyering—law professors tend to want quick, unhesitating answers from their students, interpreting silences as an inability to answer the question,¹⁰ and lawyers often become impatient—or even suspicious—of hesitant clients or witnesses.¹¹

In Part I, this article explores the societal bias against silence, drawing on interdisciplinary research in the fields of law, psychology, philosophy, and communication. Part II addresses age bias and analyzes the potential for over-

⁶ JAWORSKI, *THE POWER OF SILENCE*, *supra* note 4, at 7 (noting “the general Western bias in favor of speech rather than silence”); Margaret L. McLaughlin & Michael J. Cody, *Awkward Silences: Behavioral Antecedents and Consequences of the Conversational Lapse*, 8 HUM. COMM. RES. 299, 299 (1982) (noting that people in social encounters “operate under an implicit but nonetheless very compelling obligation to sustain interaction so as to avoid or at least minimize potential gaps”).

⁷ Basil Bernstein, *Social Class, Linguistic Codes and Grammatical Elements*, 5 LANGUAGE & SPEECH 221, 221, 238–39 (1962) (finding that people may utter “sociocentric sequences” to fill lapses in conversation); McLaughlin & Cody, *supra* note 6 (“As most students of social interaction are aware, lapses in conversation are so potentially embarrassing that participants will often resort to noisy ‘masking’ behaviors to fill in the silence—coughing, clearing the throat, sighing, whistling, yawning, drumming the fingertips . . .”). One study suggested that participants viewed remaining silent as worse than or equal to saying something negative. See Thomas J. Knutson, *An Experimental Study of the Effects of Orientation Behavior on Small Group Consensus*, 39 SPEECH MONOGRAPHS 159, 160–61, 163, 165 (1972).

⁸ ROBERT T. OLIVER, *COMMUNICATION AND CULTURE IN ANCIENT INDIA AND CHINA* 264 (1971) (“[I]n the West silence has generally been considered socially disagreeable.”); Johannesen, *supra* note 1 (noting that “more often than not in Western culture silence is viewed more negatively than positively”).

⁹ Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 OR. L. REV. 199, 205 (2001); accord JAWORSKI, *THE POWER OF SILENCE*, *supra* note 4, at 67 (noting that “silence is associated with concealing the truth”).

¹⁰ Although studied at a different level in the educational ladder, law professors might see some interesting similarities in Rowe’s work regarding pausing in the classroom. Rowe’s seven-year study showed that teachers tend to move very quickly through classroom interactions, typically waiting only one second after asking a question before expecting a student response—and also waiting only one second after a student’s response before asking the next question. But when teachers were trained to increase their wait time to three seconds instead of one second, the length of student responses increased (from a mean of seven words to a mean of twenty-seven words); the number of appropriate unsolicited responses increased (from a mean of five to a mean of seventeen); the frequency of student-initiated questions increased (from a mean of one to a mean of four), and the instances of student failure to respond dropped (from a mean of seven to a mean of one). Mary Budd Rowe, *Pausing Phenomena: Influence on the Quality of Instruction*, 3 J. PSYCHOLINGUISTIC RES. 203, 221–22 (1974).

¹¹ Anne Graffam Walker, *The Two Faces of Silence: The Effect of Witness Hesitancy on Lawyers’ Impressions*, in PERSPECTIVES ON SILENCE 55, 55 (Deborah Tannen & Muriel Saville-Troike eds., 1985).

lap between silence bias and age bias. Finally, Part III synthesizes these overlapping biases with practical considerations for lawyering.

I. SILENCE BIAS

Historically, researchers largely have overlooked silence.¹² Both researchers and individuals generally have tended to view silence “as absence of sound and therefore as absence of communication.”¹³ But silence often has meaning, and researchers subsequently have begun to explore silence, finding that there are different types of silence, each of which may serve different functions, and which, in turn, may have many different meanings and contextual variations. In terms of “types” of silence, although it is acknowledged that not all types of silence carry a message,¹⁴ most silence research logically focuses on the type of silence that is called “communicative” silence, meaning silence that serves some communicative purpose.¹⁵

¹² Bruneau, *supra* note 5, at 77 (“In the U.S., communication studies have developed rapidly, but the interest in the study of silence, silences, and silencing is only beginning to be developed.”); Damron & Morman, *supra* note 1, at 186 (noting that “the extant research on interpersonal silence is sparse”); Johannesen, *supra* note 1, at 33 (noting that there is only a “relatively small body of focused speculation and empirical research on the functions of silence”); Joost A.M. Meerloo, *The Strategy of Silence*, 2 COMM. 69, 69 (1975) (“Silence is a neglected aspect of the study of communication.”); Muriel Saville-Troike, *The Place of Silence in an Integrated Theory of Communication*, in PERSPECTIVES ON SILENCE, *supra* note 11, at 3, 3 (“Within linguistics, silence has traditionally been ignored except for its boundary-marking function, delimiting the beginning and end of utterances.”); Deborah Tannen & Muriel Saville-Troike, *Introduction* to PERSPECTIVES ON SILENCE, *supra* note 11, at xi, xi (describing silence as “a relatively neglected component of human communication” and stating that “the study of communication has focused on talk to the relative exclusion of silence”).

¹³ Ron Scollon, *The Machine Stops: Silence in the Metaphor of Malfunction*, in PERSPECTIVES ON SILENCE, *supra* note 11, at 21, 21 (“Studies of communication have tended to look at silence as absence—as absence of sound and therefore as absence of communication.”); accord Michal Ephratt, *The Functions of Silence*, 40 J. PRAGMATICS 1909, 1910 (2008) (silence in studies from the 1970s “was treated as absence: absence of speech, and absence of meaning and intention”); see also BERNARD P. DAUENHAUER, SILENCE: THE PHENOMENON AND ITS ONTOLOGICAL SIGNIFICANCE 4 (1980) (“[S]ilence is neither muteness nor mere absence of audible sound.”); MAX PICARD, THE WORLD OF SILENCE 17 (Stanley Godman trans., 1952) (“Silence is nothing merely negative; it is not the mere absence of speech. It is a positive, a complete world in itself.”); William J. Samarin, *Language of Silence*, 12 PRAC. ANTHROPOLOGY 115, 115 (1965) (“[S]ilence is not just the absence of a significant piece of behavior. It is not just emptiness. Silence can have meaning. Like the zero in mathematics, it is an absence with a function.”).

¹⁴ Saville-Troike, *supra* note 12, at 4 (“Just as not all noise is part of ‘communication’, neither is all silence.”); Samarin, *supra* note 13 (“Not all silence carries a message.”).

¹⁵ See generally, e.g., Debra Lyn Bassett, *Class Action Silence*, 94 B.U. L. REV. 1781 (2014) (discussing silence as consent in the context of class action suits). Most silence research, whether from the psychological, philosophical, or communication disciplines, logically focuses on communicative silence. See DAUENHAUER, *supra* note 13, at 78 (“Any formulation of the sense of silence obviously occurs within the domain of discourse”—philosophy); John J. Cook, *Silence in Psychotherapy*, 11 J. COUNSELING PSYCHOL. 42, 46 (1964) (concluding that more silences characterized successful psychotherapy—psychology); Johannesen, *supra*

With respect to the “functions” of silence, it has been proposed that there are five such functions: (1) linkage (meaning to bond people or to separate them), (2) affecting (meaning to heal or to wound), (3) revelation (meaning to make something known or to hide something), (4) judgmental (meaning to assent or dissent), and (5) activating (meaning thoughtfulness or mental inactivity).¹⁶ Contextual variations include both situational differences¹⁷ and cultural differences.¹⁸ Meanings of silence can range from comfortable contentment to sulking anger.¹⁹ In particular, an especially salient and significant trait of silence is its potential to reflect not just multiple meanings, but actually contradictory meanings.²⁰ The numerous and inconsistent meanings of silence render

note 1, at 25 (“survey[ing] some of the research and speculation on the role of silence in human communication”—communication). However, there are also other types of silence. See PICARD, *supra* note 13, at 40, 122, 138–39 (“The silence of death” and “[t]he things of nature are filled with silence. They are like great reserves of silence. . . . The mountain, the lake, the fields, the sky—they all seem to be waiting for a sign to empty their silence on to the things of noise in the cities of men.”).

¹⁶ Jensen, *supra* note 1, at 249–55.

¹⁷ See, e.g., Frances J. Milliken et al., *An Exploratory Study of Employee Silence: Issues that Employees Don’t Communicate Upward and Why*, 40 J. MGMT. STUD. 1453, 1467 fig.1 (2003) (addressing particularized purposes of silence in the specific context of employment, and proposing approximately eight reasons for an employee who fails to communicate issues to an employer: (1) status differences, (2) fear of damaging relationships, (3) feelings of futility, (4) lack of experience in current position, (5) concerns about negative impact on others, (6) poor relationship with supervisor, (7) fear of punishment, and (8) fear of being labeled or viewed negatively); see also CHERYL GLENN, UNSPOKEN: A RHETORIC OF SILENCE 23–28 (2004) (discussing the silencing of women and other disenfranchised groups); Nadine Bienefeld & Gudela Grote, *Silence That May Kill: When Aircrew Members Don’t Speak Up and Why*, 2 AVIATION PSYCHOL. & APPLIED HUM. FACTORS 1, 4 (2012) (proposing similar reasons for silence in the specific context of aviation crew members).

¹⁸ See, e.g., GLENN, *supra* note 17, at 15 (“[S]ilence takes many forms and serves many functions, particularly as those functions vary from culture to culture.”); JAWORSKI, THE POWER OF SILENCE, *supra* note 4, at 22 (noting “[c]ross-cultural differences in the use and valuation of silence”); Damron & Morman, *supra* note 1, at 186 (observing that “[o]pinions and uses of silence are also culturally based. For example, various scholars have noted the differences that exist between U.S. perceptions of silence and those of the Japanese, Native American, Amish, and Aboriginal cultures. In all four cases, research findings reported that people in the U.S. were generally less comfortable with, and less appreciative of silence than were members of the other cultures in question.” (citations omitted)); Samarin, *supra* note 13, at 116 (“Once we grant that silence during periods of linguistic interaction can have meaning, we must assume that there are cross-cultural differences.”); Wong Ngan Ling, *Communicative Functions and Meanings of Silence: An Analysis of Cross-Cultural Views*, 3 TAGEN BUNKA (多元文化) 125, 126 (2003) (“As cultural attitude plays a marked role in interpreting and assessing what has been said and been left unsaid, misjudging someone’s use of silence can take place in many contexts and on many levels.”), available at <http://hdl.handle.net/2237/8405>.

¹⁹ See GLENN, *supra* note 17, at 18 (“[T]he functions of silence are diverse, as multifarious as the motives for silence. The functions and the motives for silence are inextricably linked, for silence can be used to threaten, show respect, demonstrate a language inadequacy, emphasize the spoken, connect, judge, or activate—just like speech.”).

²⁰ JAWORSKI, THE POWER OF SILENCE, *supra* note 4, at 24, 68–69 (“[Silence] is probably the most ambiguous of all linguistic forms. It is also ambiguous axiologically; it does both good

any assumptions about the meaning of a particular silence risky, especially when the speaker is a new acquaintance or otherwise not well known. A few of the many contradictory meanings of silence may help to illustrate this phenomenon: Silence may reflect agreement—or disagreement; silence may reflect comfort/camaraderie—or discomfort/fear; silence may reflect respect—or disrespect; silence may reflect intense concentration—or apathy/distraction; silence may reflect approval—or disapproval; silence may reflect politeness—or rudeness; silence may reflect an attempt to encourage—or to discourage—the speaker from continuing; and silence may reflect an attempt to connect—or an attempt to disengage.²¹

For whatever reason, most Western cultures, and Anglo-American culture in particular, generally find silence difficult to handle, and instead tend to feel more comfortable when there is a fairly constant stream of sound.²² This sense that sound should be continuous is carried over into conversation, such that

and bad in communication. . . . '[S]ilence is not only polysemic but symbolic of logically opposite meanings or emotions.' . . . Further ambivalence regarding the nature of silence is demonstrated in English by two common expressions attributing to silence two extremely different qualities: 'Silence is golden' and 'Silence is deadly.'" (first quotation quoting Takie Sugiyama Lebra, *The Cultural Significance of Silence in Japanese Communication*, 6 MULTILINGUA 343, 350 (1987)); Mario Perniola, *Silence, the Utmost in Ambiguity*, 12 CLCWEB: COMP. LITERATURE & CULTURE (2010) ("[A]mbiguity is at its most intense not in words, nor in action, but in silence."), available at <http://docs.lib.purdue.edu/clcweb/vol12/iss4/2>; Tiersma, *supra* note 3, at 9 (noting that "silence can often be quite ambiguous").

²¹ See, e.g., Johannesen, *supra* note 1, at 29–30. In the article, Johannesen compiled a non-exhaustive list of twenty "typical potential meanings" of silence:

- (1) The person lacks sufficient information to talk on the topic.
- (2) The person feels no sense of urgency about talking.
- (3) The person is carefully pondering exactly what to say next.
- (4) The silence may simply reflect the person's normal rate of thinking.
- (5) The person is avoiding discussion of a controversial or sensitive issue out of fear.
- (6) The silence expresses agreement.
- (7) The silence expressed disagreement.
- (8) The person is doubtful or indecisive.
- (9) The person is bored.
- (10) The person is uncertain of someone else's meaning.
- (11) The person is in awe, or raptly attentive, or emotionally overcome.
- (12) The person is snooty or impolite.
- (13) The person's silence is a means of punishing others, of annihilating others symbolically by excluding them from verbal communication.
- (14) The person's silence marks a characteristic personality disturbance.
- (15) The person feels inarticulate despite a desire to communicate; perhaps the topic lends itself more to intuitive sensing than to verbal discussion.
- (16) The person's silence reflects concern for not saying anything to hurt another person.
- (17) The person is daydreaming or preoccupied with other matters.
- (18) The person uses silence to enhance his own isolation, independence, and sense of self-uniqueness.
- (19) The silence marks sulking anger.
- (20) The person's silence reflects empathic exchange, the companionship of shared mood or insight.

Id.; see also Damron & Morman, *supra* note 1, at 186 (summarizing the functions of interpersonal silence as also including "eloquent silence" as well as "anger, frustration, attentive listening, uncertainty, self-reflection, disdain, hesitancy, the expression of comfort or sympathy toward another (i.e., 'just being there'), admittance to a particular charge, an attempt to punish another, and/or disinterest" (citations omitted)).

²² See Bruneau, *supra* note 4, at 37 ("Western culture is characteristically noisy with sounds and speech—moments of silence and solitude are becoming rare, especially in the United States."); Bruneau, *supra* note 5, at 80 (observing that Americans "must be in constant and continual contact with others as well as TVs, radios, telephones, computers, and other communication contact devices").

once a conversation has started, the participants seem to feel the need to keep chattering without a break until the conversation has formally ended.²³ But research studies tell us that both speech and silence serve important communicative functions because “[c]ommunication involves both sending and receiving. . . . The most common error [in receiving communication] is taking action [(i.e., speaking)] before a reasonable amount of time for the response has passed.”²⁴

In conversation, in addition to brief interruptions of speech due to the physiology of articulation and air intake,²⁵ silences include pauses²⁶ as well as an actual complete lack of response. Pauses and lack of responses are both potentially disruptive to the conversational flow and typically are viewed negatively.

Indeed, psychological research has demonstrated that as little as four seconds of silence in conversation can result in discomfort and awkwardness.²⁷ In one study, 86 percent of the participants reported feeling uncomfortable when silences occurred in their interactions with others.²⁸ This discomfort with silence causes most people to fill that silence with speech—sometimes with truly any speech—in order to make the silence go away.²⁹

In psychological studies, participants have “reported feeling a ‘pressure to talk’ [during silences] coupled with ‘fear of disapproval.’”³⁰ Recent psychological research into silence has concluded that conversational flow provides people with feelings of belonging and social validation.³¹ Humans are particularly sensitive to social acceptance and belonging,³² and accordingly, even short dis-

²³ JAWORSKI, THE POWER OF SILENCE, *supra* note 4, at 6 (noting that “we accelerate our conversations with others and avoid pauses at all cost”); Helen M. Newman, *The Sounds of Silence in Communicative Encounters*, 30 COMM. Q. 142, 142 (1982) (“There often appears to be a ‘demand to interact’ which characterizes much of dyadic and small group communication—a built-in assumption that when people are engaged in focused conversation it is their responsibility to keep verbal communication active. Silence might, at times, represent a threat to this responsibility.”).

²⁴ RON SCOLLON & SUZIE SCOLLON, RESPONSIVE COMMUNICATION: PATTERNS FOR MAKING SENSE 36 (1986).

²⁵ F. GOLDMAN EISLER, PSYCHOLINGUISTICS: EXPERIMENTS IN SPONTANEOUS SPEECH 12 (1968).

²⁶ Researchers use the terms “pauses” and “hesitations” interchangeably. *See, e.g.*, JAWORSKI, THE POWER OF SILENCE, *supra* note 4, at 186 (indexing “Hesitations” and “Pausing” together); Walker, *supra* note 11, at 61 (explaining that over time “‘pause’ began to be associated more and more closely with ‘hesitation’ in general”).

²⁷ Namkje Koudenburg et al., *Disrupting the Flow: How Brief Silences in Group Conversations Affect Social Needs*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 512, 514 (2011).

²⁸ Newman, *supra* note 23, at 148.

²⁹ *See supra* note 7 and accompanying text.

³⁰ Newman, *supra* note 23, at 148 (internal quotations omitted).

³¹ Koudenburg et al., *supra* note 27, at 512; *see* JAWORSKI, THE POWER OF SILENCE, *supra* note 4, at 6 (observing that we “avoid pauses at all cost, because we think that whatever silences occur in discourse they inevitably indicate lack of mutual rapport between the interlocutors”).

³² Namkje Koudenburg et al., *Resounding Silences: Subtle Norm Regulation in Everyday Interactions*, 76 SOC. PSYCHOL. Q. 224, 226–27 (2013).

ructions in conversational flow can lead to discomfort.³³ Although there certainly are also “comfortable” silences,³⁴ silences in conversation can prompt feelings of unease, distress, and rejection.³⁵

Although silence bias is a serious concern in its own right, silence bias often is exacerbated when the source of the silence is an older individual. This exacerbation is due to the prevalence of age bias, which is the subject of the next section.

II. AGE BIAS

There are approximately forty million people who are age sixty-five and over in the United States, accounting for 14.1 percent of the population—or about one in every eight Americans.³⁶ By 2050, the population age sixty-five and older is expected to more than double, reaching 88.5 million and representing just over one in five U.S. residents; similarly the increase in the number of those eighty-five and older is projected to be even more dramatic—more than tripling in number to constitute 4.3 percent of the total population.³⁷ Although there are many older individuals, and although those numbers are projected to increase, there are some serious biases against older individuals.

Age bias is a particularly interesting type of bias because, unlike race and gender, everyone eventually gets older. Not everyone is going to be an African-American, and not everyone is going to be a female—but old age is one catego-

³³ Koudenburg et al., *supra* note 27, (“[C]onversational flow is associated with positive emotions and a heightened sense of belonging, self-esteem, social validation, and consensus. Disrupting the flow by a brief silence produces feelings of rejection and negative emotions.”).

³⁴ Sidney J. Baker, *The Theory of Silences*, 53 J. GEN. PSYCHOL. 145, 158 (1955) (“[T]here is also a placid, contented type of interpersonal silence, such as that sometimes (although not frequently) encountered between lovers or old friends. They know each other so well that words are unnecessary. They can remain happily in each other’s company without need for words and without any feelings of unrest at continued silence.”).

³⁵ Koudenburg et al., *supra* note 32, at 226.

³⁶ *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Mar. 31, 2015).

³⁷ FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, OLDER AMERICANS 2012: KEY INDICATORS OF WELL-BEING iv, 2, 82 (2012), *available at* http://www.agingstats.gov/agingstatsdotnet/Main_Site/Data/2012_Documents/docs/EntireChartbook.pdf (summarizing information from the U.S. Census Bureau and over a dozen other national data sources).

ry to which most of us eventually will belong.³⁸ Age bias is prevalent in the United States, where older people tend to be stigmatized and marginalized.³⁹

Ageist attitudes, beliefs, and behaviors have been called “the most socially accepted and encouraged types of prejudice” today.⁴⁰ People are less likely today to make racist or sexist comments, but ageist comments are still generally socially acceptable.⁴¹ Although there are some positive stereotypes about older individuals,⁴² negative assumptions and stereotypes are far more numerous and pervasive.⁴³

Common ageist assumptions and stereotypes include beliefs that older people tend to be pretty much alike; that older people are like children; that physical and mental decline is an inevitable consequence of aging; that most older people are sick or disabled; that older people have no interest in, nor capacity for, sexual relations; and that a physical disability indicates a cognitive disability.⁴⁴ Older individuals typically are considered “useless, declining, . . . draining society’s health and social resources . . . [and] suffering from dementia and incompetence.”⁴⁵ Assumptions and stereotypes about older individuals frequently result in ageist practices—such as using disrespectful⁴⁶ or patronizing⁴⁷

³⁸ Todd D. Nelson, *Preface* to AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS ix, at x (Todd D. Nelson ed., 2002) (“One of the unique features of ageism is that age, unlike race and sex, represents a category in which most people from the in-group (the young) will eventually (if they are fortunate) become a member of the out-group (older persons).”).

³⁹ ERDMAN B. PALMORE, AGEISM: NEGATIVE AND POSITIVE 4 (2d ed. 1999) (“Americans have developed a set of prejudices and discriminations against our elders that may be unequalled by any other society. . . . Most Americans are prejudiced against elders . . .”).

⁴⁰ Michael N. Kane, *Social Work Students’ Perceptions About Incompetence in Elders*, 47 J. GERONTOLOGICAL SOC. WORK 153, 154 (2006).

⁴¹ See Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS, *supra* note 38, at 49, 50–51, 64 (stating that “[a]geism, unlike racism, does not provoke shame,” and that “[u]nlike negative attitudes and stereotypes of race and gender, negative feelings and thoughts about age are still prevalent in public spheres”).

⁴² PALMORE, *supra* note 39, at 34–40 (summarizing positive stereotypes of older individuals).

⁴³ Levy & Banaji, *supra* note 41, at 54–55 (summarizing results of implicit age bias research that found “the largest negative implicit attitudes we have observed . . .—consistently larger than the antiblack attitude among white Americans”).

⁴⁴ PALMORE, *supra* note 39, at 4, 20–24, 201–05.

⁴⁵ Kane, *supra* note 40.

⁴⁶ M.R. Clark-Cotton et al., *Language and Communication in Aging*, in 2 ENCYCLOPEDIA OF GERONTOLOGY 1, 2 (James E. Birren ed., 2d ed. 2007) (noting that speakers often “use ‘elder-speak’ when addressing older adults,” which may “be perceived as patronizing, denoting a negative attitude and disrespect”); Amy J.C. Cuddy & Susan T. Fiske, *Doddering but Dear: Process, Content, and Function in Stereotyping of Older Persons*, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS, *supra* note 38, at 3, 18 (“Believing older people are incompetent leads others to treat them as if they are incompetent. Young people use baby talk—higher voices and simpler words—and sound more unpleasant when communicating with older people.”).

⁴⁷ Kane, *supra* note 40, at 156–57.

speech or behavior. People who hold negative stereotypes of older individuals are often unaware that they are operating merely on stereotypes, and their ageism often goes unchallenged.⁴⁸

However, the so-called “conventional wisdom” about older individuals often simply is not true. For example, one popular misconception is that most older people suffer from dementia;⁴⁹ however, dementia occurs far less often than most people imagine. Only 5 to 8 percent of people over the age of sixty-five suffer from some form of dementia.⁵⁰ Another popular misconception is that a large proportion of older individuals live in nursing homes.⁵¹ However, only 4 to 5 percent of older people live in nursing homes at any point in time; the vast majority of older individuals live independently in the community.⁵² Examining our own beliefs and attitudes for erroneous assumptions and stereotypes is crucial when working with older individuals.

To combat stereotypes of aging, awareness of ageist beliefs, attitudes, and practices is necessary.⁵³ One recent study showed that there was a significant difference between views of older people held by undergraduate social work students and the views of graduate social work students.⁵⁴ The undergraduate social work students were generally aware of the concept of ageism, but they nevertheless widely viewed all older individuals as incompetent—they did not believe that ageism impacted their perceptions of the competence of older individuals and they did not recognize ageism in their own behavior or the behavior of others.⁵⁵ For example, one widely held belief was that “people over age [seventy] shouldn’t drive an automobile.”⁵⁶ Graduate social work students, however, exhibited far less ageism, which the study largely attributed to the fact that the graduate students had “been exposed to aging content in gerontological courses”—in other words, they had received diversity education in the area of aging.⁵⁷

Silence bias and age bias can exist independently, but there is a tremendous potential for the overlapping of these two biases. Part III turns to the potential convergence of these two biases in the practice of law.

⁴⁸ Cuddy & Fiske, *supra* note 46, at 3 (noting that “stereotyping people based on their age . . . goes largely unchallenged and even unnoticed in the United States. We disparage elderly people without fear of censure.”).

⁴⁹ PALMORE, *supra* note 39, at 201, 205; Kane, *supra* note 40.

⁵⁰ *Diseases & Conditions: Dementia*, CLEVELAND CLINIC, http://my.clevelandclinic.org/disorders/dementia/hic_types_of_dementia.aspx (last visited April 29, 2015).

⁵¹ PALMORE, *supra* note 39, at 202, 205.

⁵² *A Profile of Older Americans: 2012*, ADMIN. FOR COMMUNITY LIVING, http://www.aoa.gov/Aging_Statistics/Profile/2012/6.aspx (last visited April 29, 2015).

⁵³ Levy & Banaji, *supra* note 41, at 68–69.

⁵⁴ Kane, *supra* note 40, at 153.

⁵⁵ *Id.* at 165.

⁵⁶ *Id.*

⁵⁷ *Id.* at 164.

III. THE CONVERGENCE OF SILENCE BIAS AND AGE BIAS IN THE LAWYERING CONTEXT

A. *Silence Bias in Lawyering*

Unfortunately, discomfort with silence exists not only in the population generally, but extends into the practice of law specifically. This discomfort has particular ramifications for lawyer effectiveness in negotiating, interviewing, and counseling.

1. *Negotiating*

Research has shown that silence's potential for causing discomfort simultaneously creates the potential for power in some contexts.⁵⁸ One such context is negotiations.⁵⁹ Most lawyers negotiate on behalf of their clients: most litigation is resolved through settlement and most transactions (whether resulting in a lease or other type of contract) involve negotiations as to the contractual terms and conditions.⁶⁰

Lawyers, like other high-status individuals, tend to talk more (and interrupt more) than low-status individuals.⁶¹ This tendency to talk more, combined with the tendency of lawyers, like people generally, to be uncomfortable with silence, can lead lawyers to unwittingly talk too much. However, silence presents an opportunity to turn unease with silence to the lawyer's (and thus the lawyer's client's) advantage.

When a lawyer uses silence instead of automatically rushing to fill it, the potential exists for shifting discomfort to opposing counsel—which concomitantly shifts the pressure to opposing counsel to fill that silence. Psychological studies have shown that silences can be employed as a probe, to stimulate individuals to provide more information.⁶² Although a lawyer should explain the use of silences during a client interview so that any silences will not make the client uncomfortable, the opposite approach is necessary for the effective use of silence in negotiations—the lawyer should not educate opposing counsel about her use of silence and its intended purpose. One commentator has explained how this approach to silence can work in the negotiation context:

⁵⁸ See generally Dennis Kurzon, *When Silence May Mean Power*, 18 J. PRAGMATICS 92 (1992).

⁵⁹ WILLIAM URY, *GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* 88–89 (rev. ed. 1993).

⁶⁰ JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* 1 (2006).

⁶¹ See Ann Leffler et al., *The Effects of Status Differentiation on Nonverbal Behavior*, 45 SOC. PSYCHOL. Q. 153, 153 (1982).

⁶² WILLIAM D. BROOKS, *SPEECH COMMUNICATION* 167 (6th ed. 1989) (citing R.L. Gordon, *An Interaction Analysis of the Depth-Interview* (1954) (unpublished Ph.D. dissertation, University of Chicago)); see Bruneau, *supra* note 5, at 81 (noting that silence can be used “to secure or gain information”).

If [your negotiating counterpart does] not respond, you may feel a growing discomfort from the silence. In normal conversation, when you see that your question has made your companion uncomfortable, you let him or her off the hook by breaking the silence.

You should resist this temptation and wait for an answer from your negotiating counterpart. . . . Let the silence and discomfort do their work. The other side may eventually respond with information about their interests, or a possible option, or a relevant standard. The moment they do, they are engaged in the game of problem-solving negotiation.⁶³

2. *Interviewing and Counseling*

Silences are not only relevant to the practice of law for negotiating purposes, but also are important to interviewing and counseling. Although there are times when the lawyer is expected to present a monologue, such as at the outset of presenting a motion, in most other contexts a lawyer monologue is counterproductive. But because lawyers—just like the general population—tend to be uncomfortable with silence, they often fill in pauses with their own speech.⁶⁴ In particular, lawyers often respond to pauses by asking additional questions, which potentially interferes with clients' (or witnesses') abilities to convey their stories completely.

When lawyers quickly fill in silences by asking additional questions, one risk is that the lawyer's questions may reflect inaccurate assumptions or even stereotypes. Suppose, for example, that a client seeks legal advice about drafting a will, and the client briefly stops talking. Uncomfortable with the silence, the lawyer rushes in to fill that silence by asking, "Do you want your children to receive everything?" That question reflects an assumption—a common assumption, but an assumption nonetheless—that parents always want to bequeath everything to their children. Perhaps the client indeed does want to leave everything to his or her children, but the lawyer's preemptive question may cause the client to feel uncomfortable expressing a contrary desire.

When lawyers ask intervening questions, another risk is that the inquiry will distract or derail the client (or witness), taking the client down a different conversational path than the client otherwise would have pursued. Suppose, for example, that the client is explaining a sequence of events, and during a brief pause, the lawyer interjects a question, perhaps to ask if the client remembers the color, make, and model of a car. Despite the potential relevance of the lawyer's inquiry, the question may create a distraction, causing the client to turn her concentration to answering the question and, in the process, lose her original train of thought. Memory does not work in the same manner as simply re-winding a recording—psychological studies have shown that memory is affect-

⁶³ URY, *supra* note 59.

⁶⁴ BROOKS, *supra* note 62 ("The inexperienced interviewer is often afraid of pauses and silences. He tends to fill every silence, and by so doing, to rush through the interview.")

ed by the form of the questions asked.⁶⁵ For this reason, it is preferable to let clients offer a narrative account of events rather than asking a series of questions—the lawyer should hold off on follow-up questions until the client has provided all of the information that he or she can recall independently.

In addition to potentially pigeonholing clients or inadvertently forcing a client down a particular path, filling in these silences serves, in effect, to rush clients. By rushing clients, lawyers send the message that clients need to fill in the gaps quickly and to keep things moving without pauses and hesitations. The client may accordingly perceive the lawyer as uncaring, lacking empathy, rude, or in a hurry, without enough time really to listen to the client's predicament. Rushing the client undermines the goal of making the client feel comfortable and reduces the likelihood of building rapport. If a lawyer simply marches through a list of prepared questions and is unable to tolerate silences, the lawyer may only get part of the story, and may actually develop erroneous hypotheses about theories of the case. Instead, it is preferable to use non-verbal facilitators (such as nodding or leaning forward), or brief words of encouragement (such as "that's OK, take your time").⁶⁶

Jumping in to fill silences involves substantial risks—the risk that the lawyer thinks she understands the client's silence when perhaps she doesn't; the risk that the lawyer's intervention will chill the client's communication; and the risk that the lawyer's intervention will distract or otherwise channel the client's focus to a different direction. Practicing tolerance of silence until one becomes more comfortable with silence—achieved by both sacrificing some of one's own comfort level in order to help one's clients and genuinely listening to clients—facilitates better communication and enhances the potential both for building rapport and for acquiring valuable information.

A significant number of the psychological studies into silence come from the context of psychotherapy, where researchers have found that effective sessions have more silences; less effective sessions have fewer silences.⁶⁷ Studies also have correlated greater use of silence with higher client perceptions of rapport⁶⁸ and with successful outcomes.⁶⁹ The study of silence in the specific con-

⁶⁵ See generally Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 *COGNITIVE PSYCHOL.* 560 (1975).

⁶⁶ HERSCHEL KNAPP, *THERAPEUTIC COMMUNICATION: DEVELOPING PROFESSIONAL SKILLS* 68–69 (2007).

⁶⁷ See, e.g., Cook, *supra* note 15 (finding that "a lack of silence . . . characterized the unsuccessful cases, whereas, a lesser percentage of speech tended to characterize the successful cases"); Christopher F. Sharpley & Michelle A. Harris, *Antecedents, Consequents, and Effects of Silence During Cognitive-Behavioural Therapy Interviews*, 24 *SCANDANAVIAN J. BEHAV. THERAPY* 3, 3 (1995).

⁶⁸ Sharpley & Harris, *supra* note 67.

⁶⁹ Ze'ev Frankel et al., *Assessing Silent Processes in Psychotherapy: An Empirically Derived Categorization System and Sampling Strategy*, 16 *PSYCHOTHERAPY RES.* 627, 633 (2006) (suggesting that "good-outcome therapies tended to exhibit higher frequencies of emotional silence during the first half of therapy," whereas the poor-outcome therapies tended to exhibit "very low frequencies of emotional silence" during that time).

text of psychotherapy has relevance for a number of other disciplines, including law, because these disciplines share a number of goals. For example, building rapport with the client, conveying empathy, facilitating communication, and acquiring information from the client are all common goals that silence can play a role in achieving. Accordingly, lawyers should adopt the approach to silence that is used by therapists: educating clients about silence. Due to negative perceptions of silence, silence without explanation could potentially cause the client distress. Accordingly, therapists have reported that they educate clients about their use of silence to avoid potential misunderstandings and lessen any negative reactions.⁷⁰ Similarly, lawyers employing the results of silence research should explain that they will remain silent, for example, while the client recounts the events leading to a particular event, and explain that the silence does not reflect a lack of attention or lack of interest, but is meant to permit the client to focus on his or her thoughts without distraction.

Silence bias tends to create discomfort with conversational silences, often resulting in a rush to fill the silence with speech. In addition, due to silence's ambiguities, the meanings of silences are subject to misinterpretation and misunderstanding. Although such misinterpretations can occur in virtually any circumstance and with virtually any client, one prominent area rich in the potential for misinterpretations involves the older client.

B. The Additional Layer of Age Bias in Lawyering

Although lawyers are admonished that manifestations of bias or prejudice can lead to disciplinary action,⁷¹ and although these prohibitions against bias include not just racial or gender bias but also expressly include age bias,⁷² lawyers have no special immunity from age bias. The combination of age bias and silence bias can lead to consequences ranging from inaccurate assumptions to unwarranted conclusions of diminished capacity.

Bias against older individuals and bias against silence are each interesting in their own right—but they also have a definite potential for overlap. Although any individual may have slower speech patterns leading to pauses, hesitations, or lack of responses in conversation due to, among other possibilities, hearing limitations, health conditions, or simply the way they speak, these possibilities, statistically, are higher for older individuals. For example, one can experience hearing loss at any age, but, statistically speaking, the likelihood of hearing loss tends to increase as individuals grow older.⁷³ Similarly, a health-related condi-

⁷⁰ Nicholas Ladany et al., *Therapist Perspectives on Using Silence in Therapy: A Qualitative Study*, 4 COUNSELLING & PSYCHOTHERAPY RES. 80, 84 (2004).

⁷¹ MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 1, 3 (2013).

⁷² MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013).

⁷³ NIDCD Working Group on Accessible and Affordable Hearing Health Care for Adults with Mild to Moderate Hearing Loss, NAT'L INSTS. HEALTH, <http://www.nidcd.nih.gov/funding/programs/09HHC/Pages/summary.aspx> (last updated Apr. 24, 2015) (stating that 17 percent of American adults report hearing loss; of that group, 18

tion such as a stroke can lead to impairments in one's ability to speak, often with the specific result of longer pauses and hesitations in a stroke victim's speech patterns. Strokes are not limited to older individuals—they may occur at any age—but, statistically speaking, more individuals who suffer a stroke are older individuals.⁷⁴ And, more generally, speech patterns vary from individual to individual, and individuals of any age may simply speak more slowly and/or use more pauses and hesitations when they are engaged in conversation. But again, due to the effects of aging, older individuals, statistically speaking, tend to speak more slowly⁷⁵ and use more pauses.⁷⁶

As an example of the convergence of age bias and silence bias, let us suppose that a lawyer has an initial consultation scheduled with new client Jennifer on Monday, and with new client Barbara on Tuesday. When Jennifer, who is thirty-five years old, arrives for her consultation, it turns out that she speaks a bit slowly and pauses before answering questions. Absent anything else, the lawyer probably will consider Jennifer to be “thoughtful.” When Barbara, who is seventy years old, arrives for her consultation, it turns out that, just like Jennifer, she speaks a bit slowly and pauses before answering questions. Absent anything else, the lawyer probably will consider Barbara to be “elderly,” rather than “thoughtful.” Is there any real harm in these differing characterizations? Maybe not—but there are three potential, and overlapping, areas of concern.

The first of these three concerns is stereotyping. As we have seen, age bias and silence bias are pervasive, and lawyers are not immune from such bias. Taken together, these two biases promote negative stereotypes of older individuals. Just because a client is older does not necessarily mean that he or she is impaired in any fashion. Our attitudes toward, and stereotypes of, older individuals can unconsciously obstruct our communication with, and our perceptions of, our clients. These attitudes and stereotypes may cause us to think that older individuals generally are unable to make their own decisions or to explain their own problems.

The second concern is that of client autonomy and paternalism. Interestingly, it is actually just as easy to stereotype older individuals out of benevolence

percent are between the ages of forty-five and sixty-four, 30 percent are between the ages of sixty-five and seventy-four, and 47 percent are age seventy-five and older).

⁷⁴ *Stroke Statistics*, THE INTERNET STROKE CENTER, <http://www.strokecenter.org/patients/about-stroke/stroke-statistics/> (last visited Apr. 29, 2015). “Stroke is the third leading cause of death in the United States. More than 140,000 people die each year from stroke Each year, approximately 795,000 people suffer a stroke. . . . Nearly three-quarters of all strokes occur in people over the age of 65.” *Id.*

⁷⁵ Clark-Cotton et al., *supra* note 46 (noting that “[o]lder adults’ speech is usually lower in volume [and] slower”); Judith Graham, *Listening Carefully to Voice Changes*, N.Y. TIMES, THE NEW OLD AGE (Sept. 28, 2012, 6:35 AM), <http://newoldage.blogs.nytimes.com/2012/09/28/listening-carefully-to-voice-changes/> (“[O]ur voices change with aging. The pitch of women’s voices becomes lower, while the pitch of men’s . . . drifts higher. Speech slows, with fewer words uttered between breaths. The voice gets weaker, harder to project, less consistent and more tremulous.”).

⁷⁶ Clark-Cotton et al., *supra* note 46.

as it is to stereotype out of a negative form of bias or prejudice.⁷⁷ One of the overarching issues in considering the relationship of lawyers (or other professionals) to older clients is the tension between the ideal of client autonomy and the potential for paternalistic attitudes the lawyer may bring when dealing with an older client. A lawyer's duty is to represent the client in accordance with the client's wishes and goals.⁷⁸ But when the client is older, there can be an inclination on the lawyer's part to substitute his or her own judgment for that of the client. This inclination is typically well-intentioned: the lawyer wants what is best for the client, and therefore is tempted to substitute his or her own judgment as to the client's best interests because the lawyer perceives the client as being unable to make decisions as well as the lawyer can. Concern for client autonomy and paternalistic concern for the client's welfare can both be in play in many lawyer-client relationships, but they tend to come to the fore particularly in those relationships that involve older clients.

The third, and most serious, danger lies in assumptions of diminished capacity. Like the population generally, lawyers often assume that all older individuals are experiencing declining competence, and thus decide that mental decline is the "obvious" explanation for the behavior of an older client. This means that when counseling an older client, a lawyer may jump to the conclusion that an older client is incompetent or senile when the lawyer would characterize the same behaviors in a younger client as merely creative, original, quirky, or idiosyncratic. Fortunately, the rules under which lawyers practice require lawyers to "maintain a normal client-lawyer relationship," "as far as reasonably possible," even when a client's decision-making ability is in fact diminished, and the rule is relatively stringent about the circumstances under which more extreme actions—such as seeking a conservator for the client—would be appropriate.⁷⁹

In examining these potential concerns—stereotyping, client autonomy and paternalism, and diminished capacity—perhaps the most common danger turns out to be situations where all of these concerns are potentially rolled together. A prime example is the very common situation where an older individual ar-

⁷⁷ See Peter Glick & Susan T. Fiske, *Sexism and Other "Isms": Interdependence, Status, and the Ambivalent Content of Stereotypes*, in *SEXISM AND STEREOTYPES IN MODERN SOCIETY: THE GENDER SCIENCE OF JANET TAYLOR SPENCE* 193, 206–07 (William B. Swann, Jr. et al. eds., 1999) (describing the concept of benevolent stereotyping).

⁷⁸ See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2013) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation, . . . shall consult with the client as to the means by which they are to be pursued, . . . [and] shall abide by a client's decision whether to settle a matter."); MODEL RULES OF PROF'L CONDUCT R. 1.2(a) cmt. 1 (noting that the rule "confers upon the client the ultimate authority to determine the purposes to be served by legal representation").

⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 1.14 (2013); see also A.B.A. COMM'N ON LAW & AGING & AM. PSYCHOLOGICAL ASS'N, *ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS* iv (Jennifer Moye ed., 2005) (acknowledging a "collaborative effort" of the American Bar Association and American Psychological Association to provide guidance in recognizing diminished capacity).

rives in the lawyer's office accompanied by someone else, such as a son, daughter, grandchild, friend, or caregiver. This additional person may want to participate in the discussions with the lawyer, and the relative/friend/caregiver may be someone who the older client trusts and relies upon. We would like to think that everyone in the room in such a situation has the best interests of the older client at heart, but combinations of biases, stereotypes, presumptions of diminished capacity, and paternalism may lead even well-intentioned individuals astray. Accordingly, the lawyer must watch out not only for his or her own assumptions, but also for the potential for inaccurate assumptions and undue influence. The ultimate guidance is to remember who the client is, and the client is the older individual, not that older individual's family, friend, or caregiver.

For example, let us assume that a son has brought in his mother for an initial consultation with a lawyer regarding drafting a will or some other estate planning issue. There are many reasons why the son may have come. His mother may have asked him to come. His mother may have needed a ride, or may have been nervous about meeting with a lawyer and asked her son to come with her for emotional support. Perhaps the son feels he has a responsibility to help his mother. Perhaps the son hopes to "help" in the decision process—hoping to have a say about the decisions made. Or perhaps the son disapproves of how his mother handles her finances, perhaps even ascribing his mother's financial choices to incompetence. Perhaps the son is genuinely concerned that his mother's emotional condition has deteriorated and hopes to enlist the lawyer's assistance in obtaining help for her. Perhaps the son is not well intentioned at all—perhaps he hopes to convince his mother to write a will that is highly favorable to him.

Relatives, friends, and caregivers typically are well meaning, but they also can be pushy and occasionally can even be bullies. To minimize the potential for some of these issues, initial consultations should begin by politely insisting that the third party accompanying the older client wait in another room while the lawyer speaks with the older client alone. A routinely conducted, private initial consultation with the client avoids the problematic scenario that results from unthinkingly asking the client, in the presence of the third party, whether the client wishes the third party to be present during the consultation. When the lawyer makes that inquiry in the third person's presence, it may be difficult or awkward for the client to say "no," and it may be all too easy for the third party to offer a million reasons as to why he or she should remain. It is important to remember that the interests of the client are paramount—not the perspective, or the wishes, of someone accompanying the client.

Lawyers must be cognizant of the negative connotations associated with silence, the tendency to fill silences with speech, and the potential for exacerbating silence bias when the source of that silence is an older individual. Lawyers also must confront their own attitudes about silence and about older individuals by examining their own biases, prejudices, and assumptions so that they can be

aware of them and resist them, rather than complacently assuming that their attitudes and assumptions are proper. Toward these ends, lawyers must first begin with a presumption that the person is fully competent. If lawyers adopt the assumption that the older individual is not fully competent, they may be more susceptible to silence bias and age bias in their inadvertent quest for signs to confirm that incompetence. And finally, patience remains a virtue. Exercising patience helps to resist the tendency to rush to fill silences with speech—a common practice that potentially robs lawyers of valuable information, and potentially denies clients the opportunity to be fully heard.

CONCLUSION

Effective listening, where one genuinely focuses on the other person, can be rare in everyday life. It often seems that everyone is more interested in talking about their own ideas than in paying attention to what anyone else is saying. But interaction without any silences prohibits the processing of information. Often people are so uncomfortable with silence that they are preparing what they want to say next while the other person is still talking. And, of course, this means that they aren't really listening.

Although rushing to fill silence with speech is our societal norm, this haste can undermine professional relationships. This is potentially true in the context of any client relationship, but requires special attention when the source of the silence is an older individual. Lawyers who lack knowledge of silence's power for facilitation risk ineffectiveness. The effective practice of law requires the ability to use silence for the client's benefit—whether in acquiring information, learning about the client's wishes and goals, or obtaining the best result possible.