



## Language Challenges for Effective and Ethical Client Representation

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As we become a more multilingual and multicultural society, more lawyers are likely to serve clients who do not speak the same language as the lawyer. This barrier to communication leads to several issues that lawyers will have to address to effectively and ethically serve their clients. The primary areas which this barrier impacts are competence (rule 1.1<sup>i</sup>) and communication (rule 1.4). Among other rules affected are confidentiality (rule 1.6) and responsibilities regarding nonlawyer assistants. <sup>ii</sup>

Rule 1.4 requires a lawyer to keep the client informed about significant developments in the matter, to consult with the client about the means of accomplishing the client's objectives, and to inform the client of necessary information where the client's informed consent is required. Rule 1.4 (b) requires the lawyer to: "explain a matter to the extent reasonably necessary to permit the client make informed decisions regarding the representation." In order to meet this obligation, the lawyer must be able to communicate effectively with the client in a way the client can use the information.

Rule 1.1 requires lawyers to deliver their services "with competence." Delivering services with competence includes understanding the facts and law of the matter and the client's needs and objectives and explaining to the client such topics as confidentiality and expectations.

Effective communications with a client who does not speak the same language as the lawyer is normally done through an interpreter, someone who translates the lawyer's statements and questions into the client's language and the client's statements and questions into the lawyer's language. Modern technology is making interpretation more available without an interpreter, but the lawyer needs to decide, in consultation with the client, whether such means can be effective in communicating not just the words but the tone and nonverbal cues that need to be conveyed. In most cases, an interpreter is the preferred method of such communication.

When choosing an interpreter, the lawyer must consider the ability of the interpreter to speak and understand both languages fluently. The interpreter must also understand and accept the responsibility of confidentiality and the need to translate accurately what the lawyer and client are saying without adding anything more. It is also important that the interpreter not have a stake in the matter that might color the accuracy of the interpretation.

Using an outside professional interpreter provides that surest way to verify the interpreter's knowledge and skill. In a recent opinion, the ABA Committee on Ethics and Professional Responsibility stated: "In most situations, the verification of a prospective interpreter's or translator's level of skill and capacity to convey legal concepts is best achieved through engagement of the services of an outside professional to assist the lawyer in the delivery of legal services." <sup>iii</sup>They are likely to be well trained and neutral. It may also be effective to use bilingual in-house staff, or to associate a bilingual co-counsel on the matter.

To the extent possible, the use of the client's family or friends as interpreter should be avoided. In reviewing the qualifications for serving as an interpreter, several demonstrate the problem with using friends or family. As noted above, the interpreter must be fluent in

both languages, be able to understand and convey legal concepts, and understand and accept the duties of confidentiality and accurate translation, without additional conversation. The interpreter must also be without conflict, not benefiting from the outcome of the case in either direction.

A personal relationship between the client and the interpreter is likely to cause bad results. Almost every lawyer who has worked with a friend or family interpreter has had the experience of asking a question and waiting for the answer while the client and the interpreter carry on a conversation, with the interpreter then telling the lawyer “she says yes.” There is no way for the lawyer to know what the conversation was about, or whether the interpreter accurately conveyed the question or the answer. “[P]articular care must be taken when using a client’s relatives or friends because of the substantial risk that an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation.”<sup>iv</sup> Using a friend or family member may also result in the interpreter counseling the client, rather than just conveying the actual statements made.

Whoever serves as the interpreter, the lawyer has a duty to assure that the interpreter understands and meets the obligations of the lawyer, particularly the duty of confidentiality. Rule 5.3 states: “With respect to a nonlawyer employed or retained by or associated with a lawyer: (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm, shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”<sup>v</sup> The lawyer has this responsibility whether the nonlawyer interpreter is an employee of the firm, an outside contractor or a friend or family member of the client.

Accurate interpretation is not the end of the story. Where the lawyer and client do not share a common language, there are also likely to be

cultural differences that make communication more difficult.

Difference in culture can cause the same concerns even if the client and lawyer speak the same language. Differing cultures and life experiences can lead to misunderstandings that can prevent the client from fully understanding the lawyer's communications and the lawyer from understanding the client's fears and concerns. If the client is from a country where the law is often seen as an enemy, persuading the client to freely communicate with the lawyer can be particularly difficult. A simple explanation from the lawyer as to the date and time of an appearance and the expectations for it can be totally misunderstood by the client. "Communication is a two-way street. To convey information about the representation in a meaningful way, it is essential that the lawyer understands the client and the client understands the lawyer. Client-lawyer communication is not merely a translation of words but a determination by the lawyer that the client understands the relevant law and legal, institutional, and social contexts of the communication."<sup>vi</sup>

It is not just oral communication that must be interpreted. Key documents, such as retainer agreements and conflict waivers, should be translated into the client's language,<sup>vii</sup> and should also be explained through the interpreter. Client understanding of the attorney-client relationship is critical to an effective representation.

The ability of a client and a lawyer to effectively communicate with each other is critical to the function of a lawyer and to the lawyer's ability to competently represent the client. Where the client and the lawyer do not speak the same language, efforts must be made to address the difference to allow effective representation.

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i All references to rules are to the California Rules of Professional Conduct.

ii This article addresses language access issues. Many of the same issues arise where communication difficulties arise from non-cognitive disabilities such as hearing, speech, or vision disabilities. Non-cognitive disabilities also create additional obligations on the attorney under the Americans with Disabilities Act and California Civil Code §54 et seq.

iii ABA Formal Opinion 500 (2021). In some languages, court certified interpreters may be available. Using them assures the interpreter has both the skill and knowledge to interpret effectively.

iv ABA Formal Opinion 500 (2021) (footnotes omitted).

v ABA Formal Opinion 500 (2021) (Emphasis added)

vi ABA Formal Opinion 500 (2021)

vii California Civil Code section 1632 requires most consumer contracts , including lawyer retainer agreements, to be provided to the client in the language in which they are negotiated. Civ. Code 1632 (b) (6).