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**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**

**FORMAL OPINION 1995-12**

**COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS**

**July 6, 1995**

**ACTION: FORMAL OPINION**

OPINION:

**TOPIC**: Competent and zealous representation; Unlawful discrimination in the practice of law; Confidentiality; Use of interpreters.

DIGEST: A lawyer who undertakes to represent a client with whom effective direct lawyer-client communication can only be maintained through an interpreter must consider the need for interpreter services and when necessary take steps to secure the services of a qualified interpreter.

CODE: DRs 1-102(A)(6), 4-101(D), 6-101(A)(2), 7-101(A)(3); ECs 1-7, 6-3; 7-1, 7-8, 7-11.

QUESTION

Must a lawyer, who cannot communicate directly with a client in a mutually understood language, consider the need for the services of an interpreter and take steps to secure the services of a qualified interpreter to insure competent and zealous representation, to preserve client confidences, and to avoid unlawful discrimination?

OPINION

Lawyers are increasingly being called upon to advise and represent persons with whom they cannot communicate directly because the lawyer and the client do not share a common language. Often, the only effective method of communication is through a language (foreign or sign) interpreter.

The strongest indication of this development in the practice of law is the dramatic rise in the use of interpreters for court proceedings. In 1991 alone, more than 68,000 federal court proceedings required interpreters, see United States v. Mosquera, 816 F. Supp. 168, 171 (E.D.N.Y. 1993). Currently in New York City, both federal and state courts employ interpreters. Additionally, the state courts use per diem interpreters for as many as 64 foreign languages. See Equal Justice and the Non English-Speaking Litigant: A Call for Adequate Interpretation Services in the New York State Courts, 49 Record 306, 3077 (1994). The need for most of these interpreters is directly related to a significant increase in our non-English speaking population. Nationally, nearly 31

million people do not use English as their primary language and locally nearly 40 percent of New York City's population speaks a language other than English. See Mosquera, 816 F. Supp. at 171.

Hearing impaired or deaf persons may also require the services of interpreters to effectively participate in legal proceedings. Approximately 10 percent of our population, or 21 million Americans, are hearing impaired and more than 2 million of these Americans are "profoundly deaf." See John V. McCoy, Communicating with Your Deaf Client, 65 Wisconsin Lawyer 16 (1992) (hereinafter "McCoy"). Although not all deaf persons communicate in sign language, many require the services of sign language interpreters in order to communicate effectively. See Improving the Access of Deaf and Hearing-Impaired Litigants to the Justice System, 48 Record 834, 835 (1993).

The role of interpreters in the administration of justice is well established under our legal system. In criminal cases, our courts have long recognized that meaningful participation in legal proceedings, for defendants who cannot understand English, is not possible unless testimony is translated for these defendants. Failure to provide interpreters for these defendants has been found to be a deprivation of due process. See United States ex rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970) (interpreter required for non-English-speaking defendants); People v. Ramos 26 N.Y.2d 272, 309 N.Y.S.2d 906 (1970) (translation of trial testimony a due process right); Mosquera, 816 F. Supp. at 178 (translation of indictment, relevant statute, plea agreements and other documents required for non-English-speaking criminal defendants). Although the assignment of court interpreters in civil cases may not raise due process concerns, see Jara v. Municipal Court, 21 Cal. 3d 181, 145 Cal. Rptr. 847, 578 P.2d 94 (1978), cert. denied, 439 U.S. 1067 (1979), our courts recognize the important role interpreters play in insuring meaningful participation in these proceedings and routinely assign interpreters for non-English speaking litigants and witnesses. Moreover, the right to have an interpreter assigned during court proceedings is also provided under federal and New York statutes. The Judiciary and Judicial Procedure Act, 28 U.S.C. §§ 1827, 1828, allows the assignment of an interpreter during federal trials and proceedings. Although New York's Constitution does not guarantee persons unable to understand English a right to an interpreter in criminal cases -- unlike California, for example, see California Const. art. 1, § 14, People v. Carreon, 151 Cal. App. 3d 559, 567, 198 Cal. Rptr. 843, 847 (5th Dist. 1984) -- New York laws provide for the hiring of court interpreters and the appointment of interpreters for deaf parties or witnesses. See N.Y. Judiciary Law, art. 12.

For the non-English-speaking litigant or the deaf litigant, meaningful participation during a legal proceeding is not possible if what the judge, witnesses, and lawyers are saying during the proceeding is in a language the litigants cannot understand. Similarly, meaningful legal assistance may not be possible when the lawyer does not fully understand what the client is telling or asking him or her or the client does not fully understand the lawyer's advice or explanation, because of a language barrier.

The inability to communicate directly with the client in a mutually understood language does not automatically preclude the lawyer's representation of that client. See California 1984-77. However, to provide adequate legal services, there must be an effective mode of communication. Although the mode of communication between lawyer and client is for the lawyer and client to determine, once the lawyer agrees to represent a client with whom effective and meaningful

direct communications can only be maintained through an interpreter, the need for qualified interpreter services cannot be ignored.

Since communication with a non-English-speaking client or a deaf client may only be effective or even possible if conducted with an interpreter, it is questionable whether a lawyer can competently represent his or her client without considering the need for, and, in some instances, securing the services of, an interpreter.

It is axiomatic that adequate communication between lawyer and client, is necessary to render competent legal services. Cf. ABA Model Rules of Professional Conduct, Rule 1.4. In addition to being the means by which a client is provided with the advice and information needed to make informed decisions, see EC 7-8, adequate communication is the means by which the lawyer obtains the information necessary to prepare for the handling of the client's legal matter.

DR 6-101(A)(2) mandates that "[a] lawyer shall not . . . [h]andle a legal matter without preparation adequate in the circumstances." Adequate preparation requires, not only that a lawyer conduct necessary legal research, but also that he or she gather information material to the claims or defenses of the client. See Mason v. Balcom, 531 F.2d 717, 724 (5th Cir. 1976). The lawyer's inability, because of a language barrier, to understand fully what the client is telling him or her may unnecessarily impede the lawyer's ability to gather the information from the client needed to familiarize the lawyer with the circumstances of the case. This makes communication via the interpreter vital since it may be the only practical way that a free-flowing dialogue can be maintained with the client, and the only means by which the lawyer can actually and substantially assist the client.

The duty to represent a client competently, embodied in DR 6-101(A)(1), requires a lawyer confronted with a legal matter calling for legal skills or knowledge outside the lawyer's experience or ability, to associate with lawyers with skills or knowledge necessary to handle the legal matter. When a lawyer is confronted with a legal matter requiring non-legal skills or knowledge outside the lawyer's experience or ability and these skills or knowledge are necessary for the proper preparation of the legal matter, DR 6-101(A)(2) appears to require that the lawyer associate with professionals in other disciplines who possess the requisite skills or knowledge needed by the lawyer to prepare the legal matter. The interpreter appears to be the type of professional envisioned by EC 6-3's observation that "[p]roper preparation and representation may require the association by the lawyer of professionals in other disciplines." When the need for an interpreter is apparent or it is reasonable to conclude that an interpreter is required for effective communication, failure to take steps with the client to secure an interpreter may be a breach of the duty to represent the client competently.

Moreover, the lawyer may not passively leave the decision as to the need for or the securing of an interpreter entirely to the client's discretion. Once it is evident that, without an interpreter, effective lawyer-client communications are questionable or not possible, failure of a lawyer to take steps to help the client understand the significance of the interpreter for adequate communication and to take, when necessary, steps to secure interpreter services may violate the lawyer's duty to represent the client zealously.

The mandate of DR 7-101(A)(3) that "[a] lawyer shall not intentionally . . . [p]rejudice or damage the client during the course of the professional relationship. . . ." embodies the concept that a lawyer must actively assist the client "to secure and protect available legal rights and benefits." EC 7-1. When the lawyer fails to take steps to bridge a communication barrier with a client, knowing that it can be bridged by the association with an interpreter, it is reasonable to expect that the client will be damaged or prejudiced by this inaction.

Clearly, the duty to represent a client zealously requires the lawyer to take special care with respect to communications with clients. As EC 7-8 observes in part, "[a] lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations." Although the lawyer may never know what the client fully understands, at a minimum, the lawyer must present information in a language the client understands. See Robert E. Lutz, Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners, 16 Fordham Int'l L.J. 53 (1992-93). Indeed, EC 7-11 reminds lawyer that "[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client. . . ." When direct communications with the client require an interpreter, the lawyer bears an additional responsibility of taking steps to secure these services rather than unnecessarily risk prejudice or damage to the client.

Whether the failure to consider the need for and, when necessary, to secure the services of an interpreter is unlawful discrimination in the practice of law and thus a violation of DR 1-102(A)(6) n1 may present questions about what constitutes disparate treatment or what constitutes a public or a reasonable accommodation under existing anti-discrimination statutes. These are questions of law, upon which we do not opine. See generally Robert T. Begg, Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative, 7 Geo. J. Legal Ethics 275 (1993); The Americans With Disabilities Act, 42 U.S.C. § 12181(7)(F); 28 CFR Part 36 (1995) (Rules and Regulations, Department of Justice, Office of the Attorney General); Jordan Hochstadt, Compliance with Title III of the ADA on $5 a Year or Less, 21 Colorado Lawyer 1897 (1992).

n1 DR 1-102(A)(6) provides that "[a] lawyer shall not . . . [u]nlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, or marital status."

Even if failure to consider the need for and to secure the services of an interpreter may not constitute unlawful discrimination, it may show biased or condescending conduct towards the client, which should be avoided. See EC 1-7. For example, exclusive reliance on family members, friends or even strangers to interpret, or attempts to communicate solely using a rudimentary personal knowledge of a foreign or sign language may not only be unwise, but may reflect bias or condescension towards the client because such a practice could tend to minimize the importance of what the client has to say to the lawyer and the client's role in decision making, and to treat the client with less care than other clients because of the language barrier between lawyer and client. Lawyers should be aware of the risk of inaccuracies in translation if amateur interpreters are used, and should proceed cautiously in light of their inability to determine the layperson's or lawyer's proficiency in the foreign or sign language. See generally L. Felipe

Restrepo, Attorneys Working with Translators Must Watch Over Defendant's Rights, Nat'l L.J., Sept. 28, 1992, at 17 (hereinafter "Restrepo"); Bill Piatt, Attorney as Interpreter: A Return to Babble, 20 New Mexico L. Rev. 1 (1990). Similarly, the exclusive use of note-taking with a deaf client can be a poor substitute for a qualified sign-language interpreter, because this practice may have prejudicial results for the deaf client. Note-taking presents several problems. It may hinder the "free flow of ideas common to verbal communications" and, for some deaf clients, it may be of very limited use. See McCoy, supra. For deaf persons who communicate in sign language, the sign-language interpreter makes the free flow of ideas with the lawyer possible and avoid the prejudicial effects of the exclusive use of note-taking.

There are obvious benefits to communicating through professionals, who have formal training in languages, experience with legal terminology and concepts, and skill. They do not consider the greater assurance of accuracy in translation possible with trained interpreters, because often they belong to professional associations which adhere to professional and ethical standards. See generally Roseann D. Gonzalez, Victoria F. Vazquez & Holly Mikkelson, Fundamentals of Court Interpretation: Theory, Policy and Practice (1991); Professional Standards for Court Interpreters in the New York State Unified Court System, New York State Unified Court System, Court Interpreter Manual 8 (July 1994). n2

n2 These practices may also unnecessarily imperil the preservation of non-English speaking or deaf clients' secrets and confidences, in violation of the fiduciary relationship between lawyer and client. They impinge on the lawyer's ability to "exercise reasonable care to prevent . . . others whose services are utilized by the lawyer from disclosing or using confidences or secrets of the client," since the lawyer may have little or no control over these persons. See DR 4-101(D).

Lastly, the practice of limiting communications with the client to periods when the lawyer and client are in court and a court interpreter is available has a prejudicial effect on the client. It may unfairly limit the opportunity for the lawyer to fully familiarize himself or herself with the facts of the matter being handled and to advise the client accordingly. It may also limit the client's access to the lawyer and the opportunity for the client to obtain the full advantage of our legal system. The detrimental effects of this practice are uniquely related to the inability of the lawyer and client to communicate in a mutually understood language. See Restrepo, supra, at 1.

In sum, when a language barrier impedes the ability for the lawyer and the client to communicate effectively, the lawyer must be sensitive to the needs for interpreter services and take steps to secure interpreter services, when needed, to avoid unlawful discrimination or prejudice.

CONCLUSION

A lawyer who represents a client with whom direct communications cannot be maintained in a mutually understood language, must evaluate the need for qualified interpreter service and take steps to secure the services of an interpreter, when needed for effective lawyer-client communications, to provide competent and zealous representation, preserve client confidences and avoid unlawful discrimination or prejudice in the practice of law.