

## WHAT DID YOU SAY? The perils of clients that don't speak English.

### INTRODUCTION:

O God. There's a voice on the phone and you can't understand a word they are saying. Maybe you don't even recognize the language they are speaking. Or your receptionist says "There's a (wo)man on the phone and they don't speak English. Can you talk to them? Or you hear a little voice say "My daddy needs to talk to you but he can't." And you know you have just stepped into ... The Translation Zone.

Where I live, the Washington D.C. Metropolitan area, there are over 1,000,000 immigrants according to the Washington Post. In Fairfax County, Virginia, the public schools teach ESL in over 100 languages. And I've had clients whose first language is Spanish, Portugese, Vietnamese, Korean, Chinese, Tagalog, Mhong, Swahili, Urdu, Hindi, Persian, Arabic, Russian and Hebrew. Other attorneys I know have even more varied clientele.

This article will look at some (but not all) of the issues which arise when you are in The Translation Zone. Some of these issues are also cultural.<sup>1</sup> All of them can make representing clients tricky.

### DISCUSSION

#### The Role of an Interpreter:

Interpreters play three different roles in criminal (or any) proceedings: (1) they make the questioning of a non-English speaking witness possible; (2) they facilitate the non-English speaking defendant's understanding of the colloquy between the attorneys, the witnesses, and the judge; and (3) they enable the non-English speaking defendant and the defendant's English-speaking attorney to communicate. Williamson B.C. Chang & Manuel U. Araujo, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 Cal. L. Rev. 801, 802 (1975). The authors refer to the first use of an interpreter as a "witness interpreter,"

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<sup>1</sup> This is an entirely different subject and one that would be a good article all by itself. Because there are cultures where the attorney must be very careful in how the questions are asked--it is considered rude to disagree with the "higher-status" person, even when that person is wrong. Other cultures have other mores or body language; *e.g.*, shaking the head side to side to signify "yes" or nodding to signify "no".

to the second use as a "proceedings interpreter," and to the third use as a "defense interpreter." *Id.*

Before your Start:

Before you even sit down with the prospective client, know this: If you cannot speak directly to your client you are about to confront three issues: breach of confidentiality, the possibility of an independent agenda, and accuracy.

In criminal cases, an unofficial interpreter cannot be compelled to testify if it is "reasonably necessary" that the interpreter be present *i.e.*, if the client cannot communicate without the intermediary. *See e.g., State v. Aquino-Cervantes*, 88 Wash. App. 699, 945 P.2d 767, 771-72 (Wash. Ct.App. 1997) or *In Re Lindsey*, 158 F.3d 1264, 1280 (D.C. Cir. 1998). In civil cases, I solve the problem by hiring the translator to work for me on a part-time basis, making it all confidential.

It is hard to guard against the independent agenda but if you are not alert to it problems can arise. (Usually in the context of immigration, family law or criminal cases.)

I've never found a better check on accurate translation than to interview and re-interview the witnesses. Interpreters cannot consistently sustain inaccurate translations any more than others can sustain bad memories.

In your office:<sup>2</sup>

When you first meet our new client, do they speak no English at all? Or do they speak a little? Many of my clients say they don't speak English but actually they understand some (sometimes a lot) and speak a little. But they are not fluent and are embarrassed about that.<sup>3</sup> So they let another, who is more fluent, talk. Be

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<sup>2</sup> This section assumes that you do not have anyone on staff who speaks the client's language and will not address those issues. But if you do have someone on staff who speaks the client's language, be sure that they are properly trained for this task.

<sup>3</sup> Other clients will use lack of English as a ploy of some sort. I had one client who had me absolutely convinced that he could not speak English other than a few words. Then, we went to trial and he showed up in Court drunk. And we used the translator until the judge asked him a question in English and--before the interpreter could translate, the client replied--in English. Needless to say, he was

sure to check. You want to be sure to get as much information as possible directly from your client.

If you do have to use an interpreter, find out more about them too. After all, they are the effective witness. Ask them about themselves, find out if they have any “skin in the game”. Questions I like to ask (other than background information about the interpreter and her relationship to the client) cover:

- what direct knowledge they have about the situation;
- if they know the other people involved;
- what opinions they have already formed;
- how they got involved; and
- if they have ever had any involvement in similar situations.

Depending on the answers to these questions, I can decide how best to understand their translations.

If the interpreter is a child, as often happens, you have to ask even more questions. When that happens I ask questions designed to explore the child’s ability to understand what is being said, the importance of being accurate, the willingness to ask questions when the child doesn’t understand the words or concepts spoken so she cannot translate them, and the importance of never ever repeating what she hears in my office to anyone. If at all possible, **try to use a translator who is in high school**, not a young child who is still in elementary school.

In Jail:

Interestingly enough, a policeman can be the translator in interrogations. In *Commonwealth v. Carrillo* 465 A.2d 1256, (Pa. 1983) the Pennsylvania Supreme Court specifically upheld this and I know, from personal experience, that the same is true in Virginia. When researching this article I found no state, not even California, where police representatives are precluded from acting as translators in interrogations.

The potential for abuse in these circumstances seems significant but courts have not treated police translators as having a disqualifying “interest”. So if you wish to challenge the statements of the police translator you will have a hard row to hoe.

Also, the police are not required to provide interpreters for defense counsel in

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convicted out of hand.

jail. So if you are retained or appointed to represent someone you cannot talk to, consider hiring a translator to go with you.<sup>4</sup>

### What Right does One Have to an Interpreter In Court?<sup>5</sup>

The right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and "the right inherent in a fair trial to be present at one's own trial." Many states have their own policies as well and the local practitioner should be sure to check for state's rules.

To implement this right, the United States Congress passed the Court Interpreters Act in 1978. 28 U.S.C. §§ 1827- 1828. Deirdre M. Smith, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial*, 46 Me. L. Rev. 87, 126 (1994). The act requires that non-English speaking persons be provided interpreters in civil and criminal cases in federal courts. Heather Pantago, *Injustice in Any Language: The Need for Improved Standard Governing Courtroom Interpretation* in Wisconsin, 82 Marq. L. Rev. 601, 629 (1999). The Administrative Office of the United States Courts maintains a list of certified and qualified interpreters.<sup>6</sup> 82 Marq. L. Rev. at 628. This list gets updated periodically so you should check it regularly.

Virtually every State and Territory in the United States has a similar provision for criminal law. But provisions for civil complaints vary considerably and the alert practitioner should check her local rules.

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<sup>4</sup> I believe that, even if you hire a family friend, the formality of hiring them to translate should protect the conversations. Unfortunately I could find no cases on point to substantiate this belief.

<sup>5</sup> There is no "right" to an interpreter in civil cases but some places, like Montgomery County Maryland, provide qualified interpreters upon request. In Virginia, you must provide your own. In Washington, D.C. you must provide your own from the list of approved interpreters provided by the Court. You must know your local practices.

<sup>6</sup> For the sake of precision,

- A "qualified interpreter" is one who is "able readily" to translate English for non-English speaking persons and to translate the statements of non-English speaking persons into English.
- A "certified interpreter" is a qualified interpreter who is certified by the office of the administrator for the courts.

Who should be the translator in Court?

It is important to note that a person is not necessarily competent to translate legal proceedings because he or she is bilingual. On the contrary, courtroom interpretation is a sophisticated art, demanding not only a broad vocabulary, instant recall, and continuing judgment as to the speaker's intended meaning, but also the ability to reproduce tone and nuance, and a good working knowledge of both legal terminology and street slang. *Garcia v. State*, 149 S.W.3d 135, 143 (TX Ct. Crim. App. 2004). The moral of the story: avoid amateurs in the Court.

Even when you have a competent translator, there are more things to consider: Does the translator have an “interest” in the case? In all cases, a translator should be “disinterested”.<sup>7</sup>

While in the nature of things, a disinterested interpreter is essential to an impartial interpretation of a witness' testimony, at the same time the trial court is necessarily accorded a wide discretion in determining the fitness of the person called, and the exercise of that discretion will not be disturbed on review in the absence of some evidence from which prejudice can be inferred. See *People v. Valencia*, 27 Cal.App. 407, 150 P. 68; *People v. Rardin*, 255 Ill. 9, 99 N.E. 59; *DeBaca v. Pueblo of Santo Domingo*, 10 N.M. 38, 60 P. 73; See annotation 172 A.L.R. 923, 941, Subsection (c).

*Lujan v. United States*, 209 F.2d 190, 192 (10th Cir. 1953).

How is an interpreter selected?

If in Federal court, interpreters are selected off the list of qualified and certified interpreters that the Court maintains. If there is no person on the list speaking the language, the appointing authority shall make a preliminary determination that the interpreter is able to accurately communicate with and translate information to and from the non-English speaker.<sup>8</sup>

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<sup>7</sup> You must be alert to outside agendas held by the translator as well. Sometimes, especially in these days of intense concern about immigrants, the translator will have an agenda different than the client. You must be alert to that problem.

<sup>8</sup> For a more detailed discussion of the Interpreter Act, see *Barrera v. United States*, 599 A.2d 1119, 1130-33 (D.C. 1991).

Generally, state courts follow this procedure asking the proposed interpreter to talk to the Defendant and observing closely to determine the interpreter's abilities.

If the court requires you to bring your own interpreter, you should do the same preparatory work as you would in the office plus additional things:

- Be sure to go over the court rules with the interpreter;
- review your expectations of the interpreter with the interpreter;
- if you are using a child interpreter (something I strongly recommend against) be sure they understand the Oath;
- review the broad outlines of the testimony you expect to hear so the interpreter can translate smoothly;
- caution the interpreter strongly about not putting words into the witness's mouth; and
- discuss any cultural issues which might crop up that would interfere with the translation.

Once selected, can an Interpreter be Removed?

Once selected, any interpreter may be removed for good cause. The problem is proving it. What is good cause? Any of the following actions would qualify: (1) being unable to interpret adequately, including where the interpreter self-reports such inability; (2) knowingly and willfully making false interpretation while serving in an official capacity; (3) knowingly and willfully disclosing confidential or privileged information obtained while serving in an official capacity; (4) failing to adhere to the requirements prescribed by the local Code of Professional Responsibility for foreign language interpreters; (5) failing to follow other standards prescribed by law. *See e.g., Redman v. United States*, 616 A.2d 336 (D.C. 1992) .

But if you don't speak the language, and the client doesn't speak English, it can be very hard to show good cause. The only time I was able to do it, I was lucky: I am bilingual in Spanish and had a translator who was incapable of making a translation without inserting their own ideas into the client's mouth. So I could catch her at it. But not everyone has that advantage. If you are concerned about a bad translation, bring someone with you, someone who -- although perhaps not good enough to use in court -- can guard against error.

Other Issues:

There are two other issues that I think are worth mentioning in this (necessarily) short article:

- Some jurors don't trust anyone who doesn't speak English, especially if they have lived here in the United States for some time (how long is hard to say). Voir Dire is the only way to find them and exclude them. But it isn't easy.
- On the other hand, some jurors may understand the language (or think they do). I have had cases where Spanish-speaking jurors have gotten a subtly (but significantly) different understanding of the testimony than the official translation. Fortunately, we caught the problems (wrong dialect) but ... Voir Dire is the only solution.
- Finally, do not assume that no other person around you can understand.<sup>9</sup> I knew a Spanish-speaking lawyer who was hauled into court on charges of suborning perjury because someone heard (or thought they heard) him telling his client to lie. As it turned out, they were speaking a rather slangy street dialect of Spanish and the person who reported them had misunderstood.

#### CONCLUSION:

Working with interpreters and translators to help clients who don't speak English well can be complicated. But it is rewarding. Just keep some of these suggestions in mind and good luck.

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<sup>9</sup> A personal story about this phenomenon to illustrate my point--on my van ride to the hotel at the ABA GPSolo meeting this Spring in Kansas City, a woman was conducting a conversation in Greek on her cell phone. She actually told the person on the other end that nobody there spoke Greek. Unfortunately, she was wrong. One of the people in the van with us had lived in Greece for 10 years. Oops!)

## PRACTICE TIPS

### *PRACTICE TIP 1: If you can, match male translator with male witness and female translator with female witness.*

This is especially true when you are trying to have the jury understand the relationships among the parties. One of the strangest trial experiences in my life was when I had a small, gentle-voiced soprano female translating for a large bass male in a car collision case. The incongruity of a deep bass voice speaking in Spanish and then her (small, high, gentle) voice translating, as she described (in first person) how the victim (my client) was pulled out of the car, picked up and carried away because it was leaking gasoline had to be seen and heard to be believed. Similarly, I witnessed a sexual assault trial some time ago where the State used a male translator for the female victim. Again, I think something was lost even though the translations were exact.

### *PRACTICE TIP 2: Be sure your translator speaks the dialect.*

Many languages are more varied in dialect than English (or American). Imagine how difficult it is for a Brooklyn accent to be understood in deep Texas or how the slang of southern California might be misunderstood in New York City. Now, Cubans and Chileans and Mexicans and Puerto Ricans all speak Spanish, but different types of Spanish with different slang. And Spaniards speaking Castillian Spanish (with the lisp) speak a 4<sup>th</sup> dialect.

Just to pick a couple of examples to show how confusing things can be, a “pitillo” is Castillian Spanish for a “cigarillo” which is Mexican Spanish and both are cigarettes. Similarly, I was in a case where my construction worker client (who was from Guatemala) said that her “lampara” wasn’t working. This caused considerable confusion when the translator used the word “lamp” when what was meant was “flashlight”. If your interpreter doesn’t know the dialect lots of confusion can result with possible adverse effects on your case.

Another problem hit me personally when defending a murder case about 8 years ago. The accused was a Salvadorean teenager and he referred to the victim as a “metcha” or, in English a “match”. This was confusing to me until I realized that “metcha” was street slang for a shooting victim. They had a specific word for it.

Another confusion arose in a different case when I was interviewing someone from Honduras about a car collision and asked where the car was now. The answer was that the “reca” had taken it. It must have taken me about 10 minutes to figure out that “reca” was “spanglish” for “wrecker” and that the tow truck had picked up the car because it had been totaled.



**PRACTICE TIP 3: be sure your selected interpreter is trained, qualified, sworn and impartial**

In addition to assuring yourself that the designated translator speaks the correct language, there are other things that you should do. All too many times, especially if you are using an untrained translator or one who is a family friend, the translator tries to “help” the case. This must be resisted at all costs. Juries are quick to pick up on it. Caution the translator against this in the strongest terms.

Another thing, instruct the interpreter to translate exactly and not “explain” your words. There are many stories of interpreters translating a question, engaging in a colloquy with the witness, and then answering with one word. Be sure the translator knows not to explain but to just translate.

**PRACTICE TIP 4: If the translator is busy with testimony and you need to talk to your client, ask the Court for break in testimony. *People v. Tomas*, 484 N.E. 2d 341, 344 (1985)**

**PRACTICE TIP 5: Watch out for challenges to jury that lack of English is a ploy.<sup>10</sup> Some courts will allow that. See e.g., *State v. Heredia*, 754 A.2d 114 (Conn. 2000).**

**PRACTICE TIP 6: Object to bad translation right away. *U.S. v. Joshi*, 896 F.2d 1303, 1310 (11<sup>th</sup> United States v. *Martinez*, 616 F.2d 185, 187-88 (5th Cir. 1980), cert. denied, 450 U.S. 994 (1981).**

**PRACTICE TIP 7: Beware of others who might speak the language.**

**PRACTICE TIP 8: In court, be sure the interpreter is seated between you and the client and slightly behind so she can translate the proceedings for your client and your client’s comments to you and vice-versa. When necessary to translate your client’s testimony, she should follow the court’s directions.<sup>11</sup>**

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<sup>10</sup> And watch for your client actually using the ploy too.

<sup>11</sup> There is an issue as to whether the Court can “borrow” the interpreter so a witness can testify. In California this is frowned upon but other jurisdictions seem to be consistent: this is permitted provided that the Court permits testimonial interruptions so as to allow you to confer with your client.

