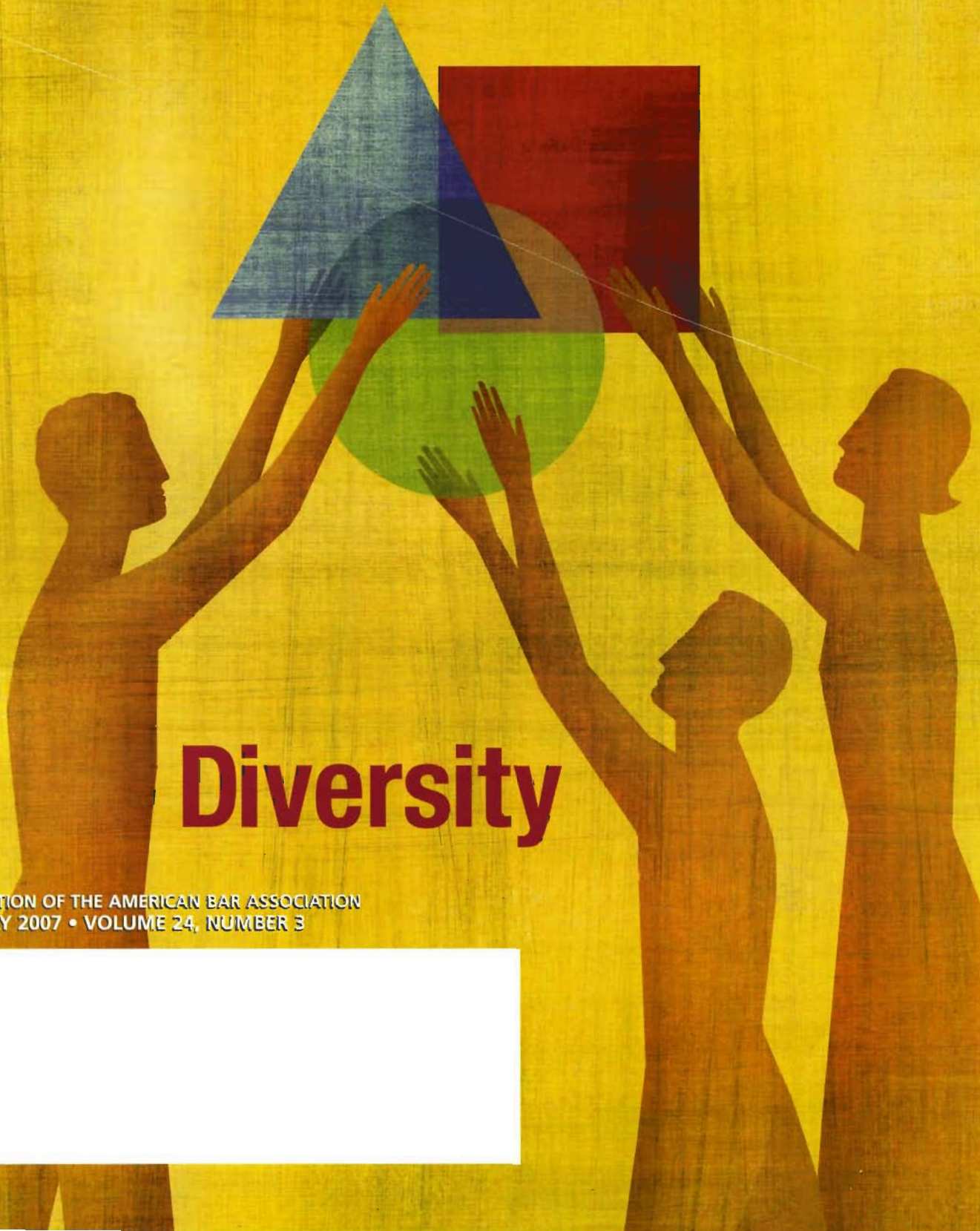


GENERAL PRACTICE, SOLO & SMALL FIRM DIVISION

GPSOLO



Diversity

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION
APRIL/MAY 2007 • VOLUME 24, NUMBER 3



WHAT DID YOU SAY? THE PERILS OF CLIENTS WHO DON'T SPEAK ENGLISH

BY DAVID ZACHARY KAUFMAN



Oh, no. There's a voice on the phone and you can't understand a word being said. Maybe you don't even recognize the language. Or your receptionist says, "There's a woman on the phone and she don't speak English. Can you talk to her?" 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 more than 1 million immigrants. In Fairfax County, Virginia, the public schools teach English as a second language in more than 100 languages. I have had clients whose first language is Spanish, Portuguese, Vietnamese, Korean, Chinese, Tagalog, Hmong, 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 that arise when you are in The Translation Zone. Some of these issues are also cultural—clients who come from a culture where it is considered rude to disagree with the "higher-status" person, even when that person is wrong, or where shaking one's head side-to-side signifies "yes" or nodding signifies "no." All of these issues can make representing clients tricky.

(The following discussion assumes that you have no one on staff who speaks the client's language; if you do have such a person on staff, be sure that he or she is properly trained for this task.)

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. In their 1975 article "Interpreters for

the Defense: Due Process for the Non-English-Speaking Defendant" from *California Law Review* (vol. 63, no. 3), Williamson B. C. Chang and Manuel U. Araujo refer to the first use of an interpreter as a "witness interpreter," to the second use as a "proceedings interpreter," and to the third use as a "defense interpreter."

Before You 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.

Regarding confidentiality, different rules apply to criminal and civil cases, and to "official" versus "unofficial" interpreters. An "official" interpreter is an adult who has been tested for competency and knowledge; an "unofficial" interpreter is anyone else—like a relative or child of your client. In criminal cases unofficial interpreters cannot be compelled to testify about what they hear when interpreting if their presence is "reasonably necessary" for the legal representation—i.e., if the client and lawyer cannot communicate without the intermediary. This test does not apply to official interpreters: They cannot be compelled to testify, period. 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 a translator with an independent agenda, but if you are not alert to it, problems can arise, usually in the context of immigration, family law, or criminal cases where the translator—especially an unofficial translator—might have an "interest" in the outcome.

To ensure accuracy, I've never found a better check than to interview and re-interview the witnesses. Interpreters cannot consistently sustain inaccurate translations any more than others can sustain faulty memories.

In Your Office

When you first meet new clients, 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

Your receptionist says, "There's a woman on the phone who doesn't speak English. Can you talk to her?"

David Zachary Kaufman practices law in Fairfax, Virginia. He may be reached at david@businessbrawls.com.

little. You want to get as much information as possible directly from your client, so be sure to check. Sometimes they are simply embarrassed about their level of English fluency, but they can nevertheless convey quite a bit of information in English. Other clients will use lack of English as a ploy of some sort. One client had me absolutely convinced that he could speak only a few words of English. Then we went to trial

and he showed up in court drunk. We used the translator until the judge asked him a question in English and, before the interpreter could translate, the client replied. In English. This did not help his case—he was convicted.

If you do have to use interpreters, find out more about them, too. For all intents and purposes, they are the witnesses, so ask them about themselves. Questions I like to

PRACTICE TIPS

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. Some time ago I witnessed a sexual assault trial in which the state used a male translator for the female victim. I think something was lost even though the translations were exact. Years later I had an even stranger courtroom translation experience of my own in a car collision case. I was representing the victim, who had been rescued after the crash by a large man who spoke only Spanish. When this man took the stand to testify as a witness, his words were translated into English by a small, gentle-voiced woman. The incongruity had to be seen and heard to be believed as his deep, bass voice was followed by the quiet, soprano voice of the translator describing—in the *first* person—pulling my client from the wreck-age and carrying him to safety.

Tip 2. Be sure your translator speaks the dialect. Many languages are more varied in dialect than English. 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, Mexicans and Puerto Ricans all speak Spanish, but different types of Spanish with different slang. And Spaniards speaking Castilian Spanish (with the lisp) speak another dialect.

I once had a case where my construction worker client from Guatemala said that her *lampara* wasn't working. This caused considerable confusion when the translator used the word "lamp"—it should have been "flashlight." If your interpreter doesn't know the dialect being spoken, the ensuing confusion can adversely affect your case.

Another problem hit me personally when defending a murder case about eight years ago. The accused, a Salvadoran teenager, referred to the victim as a *metcha*—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.

In another case I was interviewing a Honduran about a car collision and asked where the car was now. The answer was that the *reca* had taken it. It wasn't until ten minutes later that it dawned on me: *Reca* was Spanglish for "wrecker." A tow truck had picked up the car because it had been totaled.

Tip 3. Be sure your selected interpreter is trained, qualified, sworn, and impartial. 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. Also, instruct the interpreter to translate exactly and not to "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.

Tip 4. If the translator is busy with testimony and you need to talk to your client, ask the court for a break in testimony.

Tip 5. Watch out for challenges to the jury that lack of English is a ploy. Some courts will allow that. (Watch out for your client actually using the ploy, too!)

Tip 6. Object to bad translation right away.

Tip 7. Beware of others—such as jury members—who might speak the language and form their own, unofficial translation.

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. When necessary to translate your client's testimony, she should follow the court's directions. 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 the court permits testimonial interruptions so as to allow you to confer with your client.

ask, other than basic biographical information and relationship to the client, cover:

- what direct knowledge they have about the situation;
- whether 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 decide how best to understand and use their translations.

If the interpreter is a child, as often happens, you have to ask even more questions. In these cases I ask questions designed to explore the child's ability to understand what is being said and willingness to ask questions when the child doesn't understand the words or concepts spoken and so cannot translate them; I also stress the importance of being accurate and of never, ever repeating what is said in my office to anyone. If at all possible, I try not to use translators younger than high school age.

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

Right to an Interpreter in Court

The right of a defendant in a criminal case to have an interpreter is based on the Sixth Amendment 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 U.S. Congress passed the Court Interpreters Act in 1978. 28 U.S.C. §§ 1827-1828. The act requires that non-English-speaking persons be provided interpreters in civil and criminal cases in federal courts. The Administrative Office of the U.S. Courts maintains a list of certified and qualified interpreters. 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. The Administrative Office's list of certified and qualified interpreters 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. There is no right to an interpreter in civil cases, but some places, such as 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. Know your local practices.

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)). Avoid amateurs in the courtroom.

Even when you have a competent translator, there are additional things to consider: In all cases, a translator should be disinterested and have no outside agenda.

(Continued on page 53)

A person is not necessarily competent to translate legal proceedings just because he or she is bilingual.

WHAT DID YOU SAY?

(Continued from page 25)

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

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.

How Is an Interpreter Selected?

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. (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 the same procedure for evaluating a proposed interpreter, asking him or her 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 add the following steps:

- Be sure to go over the court rules with the interpreter.
- Review your expectations with the interpreter.

- If you are using a child interpreter (something I strongly recommend against), be sure he or she understands 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.
- Discuss any cultural issues that might interfere with the translation.

Can an Interpreter Be Removed?

Once selected, any interpreter may be removed for good cause. The problem is proving 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; and (5) failing to follow other standards prescribed by law. (See, for example, *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 had a Spanish-language translator who continually inserted her own ideas into the client's mouth, but I am bilingual in Spanish, so I

could catch her at it. Not everyone has that advantage. If you are concerned about a bad translation, bring with you someone who—although perhaps not good enough to use in court—can guard against error.

Other Issues

There are two other issues worth mentioning about translation:

- Some jurors don't trust anyone who doesn't speak English. Voir dire is the only way to find them and exclude them. But it isn't easy.
- Finally, do not assume that no other person around you can understand your client or your conversations with your client. 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. Similarly, I have had cases where Spanish-speaking jurors have gotten a subtly (but significantly) different understanding of the client's testimony than the official translation. Fortunately, we caught the problem: wrong dialect. Once again, voir dire is the only solution.

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. **GPSOLO**

The General Practice, Solo and Small Firm Division acknowledges its appreciation to all the advertisers that support this publication. Our advertisers play an integral part in the success of *GPSolo*.

We are pleased to have the support of the following companies:

THOMSON
WEST

ABA
Retirement
Funds™

ABE
AMERICAN BAR ENDOWMENT
Insuring your life's needs. Advancing your life's work.

Tabs3™