



LAPTOP

Legal Assistance Providers' Technical Outreach Project

***INTERPRETING THE INTERPRETER:
WHAT EVERY LAV ATTORNEY AND ADVOCATE NEEDS TO KNOW
ABOUT LEGAL INTERPRETATION***

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Introduction

As an interpreter working with judges, attorneys, law enforcement, and advocates, I would like to share with you how I became involved in the interpreting field and what I have learned through years of experience, training, and research. Similar to many, I believed the myth that anyone who is bilingual is capable of being a competent interpreter, which is exactly how I approached my first court assignment. Thank goodness the case was a minor misdemeanor. I did everything that an untrained, unqualified interpreter would do. I stood silent while the judge spoke to the defendant, and when the judge finished speaking, I provided a summary of what I thought the judge had said. I was not familiar with all the legal terminology that the judge used, and had to leave some of it out. In addition, the judge was upset and yelled at the defendant. I provided a summary interpretation with a smile because I felt sorry and embarrassed for the defendant. I am not proud of how I handled this first court assignment, but this experience prompted me to research the field of legal interpreting and translating, obtain training, read case law, and ultimately work towards certification. I will share with you some of the basic principles I have learned throughout the years.

We take pride in a legal system based on fundamental fairness; without it, we have no system of justice. Legal issues surrounding victims of domestic violence and sexual assault involve constitutional rights including equal protection under the law and equal access to justice. Victims of domestic violence and sexual assault must have a voice—their own voice—in order to tell their side of the story, and they must be empowered to speak. Without a trained and qualified interpreter, a victim who is a non-English speaker or limited English speaker will not be properly heard: it will be as if he or she has no voice. When we fail to provide competent interpretation, we jeopardize a person's physical and emotional well being—indeed, we may even jeopardize their life.

The Right to an Interpreter

¹ The author acknowledges the editorial assistance of Nancy Festinger, NAJIT editor and Chief Interpreter for the US District Court of the Southern District of New York and Caitlin Glass, LAPTOP partner and staff attorney with Legal Aid Services of Oregon.

The first case to recognize that a non-English speaking defendant had a right to an interpreter was United States ex rel. Negron v. State of New York.² The U.S. Circuit Court of Appeals for the Second Circuit overturned the murder conviction of a Spanish-speaking defendant because he was not provided a complete interpretation of everything that was said during his trial.³ That case inspired Congress to enact the Court Interpreters Act of 1974, 28 USC § 1827, which requires Federal Courts to appoint a certified interpreter for all criminal and civil cases initiated by the United States.⁴ The statute also defines the categories of certified, otherwise qualified and language skilled interpreters.⁵ The statute indicates that only the Administrative Office of the United States Courts can deem a certification test valid and reliable. The statute also outlines the three modes of interpretation that are permitted in legal settings: simultaneous, consecutive, and sight translation.⁶

In addition, the Federal Rule of Evidence (FRE) 604 states that qualifications of an expert are also applicable to interpreters.⁷ FRE 702 defines an expert as someone who has experience, training, skill, education, or knowledge in a particular field. Some state courts have adopted the same rule or similar rules.⁸

On the state level, legislation and state supreme court rules govern the field in a similar manner to the federal statute. Case law in many states has developed pertaining to the role of interpreters and translators in legal settings. State courts as well as professional associations have developed guidelines regarding interpreter ethics and professional responsibilities.⁹

In addition to federal and state court cases, statutes and rules governing interpreters, Title VI of the Civil Rights Act of 1964, Executive Order No.13,166 states that federally-funded recipients are required to provide competent language assistance to all limited English-proficient persons at the recipients' own expense.¹⁰

Understanding the Profession

² 434 F.2d 386 (1970).

³ *Id.* at 389-90.

⁴ *See* 28 U.S.C. § 1827(d)(1).

⁵ *See* 28 U.S.C. § 1827(b)(1), (c)(2).

⁶ *See* 28 U.S.C. § 1827(k).

⁷ FED. R. EVID. 604.

⁸ FED. R. EVID. 702.

⁹ *See, e.g.*, Wis. SCR 63.001 et seq. (2002); Del. Admin. Directive No. 107, *available at* <http://courts.delaware.gov/Courts/Supreme%20Court/Administrative%20Directives/?ad107.pdf>; Mass. Trial Ct., CODE OF PROFESSIONAL CONDUCT FOR COURT INTERPRETERS OF TRIAL COURT, *available at* <http://www.mass.gov/courts/admin/planning/codeofconduct.html>; CODE OF PROFESSIONAL RESPONSIBILITIES, *available at* <http://www.nmcourts.com/newface/court-interp/guidelinesandpolicies/codeofconduct.pdf>; CODE OF PROFESSIONAL RESPONSIBILITY FOR INTERPRETERS SERVING VIRGINIA COURTS, *available at* <http://www.courts.state.va.us/interpreters/code.htm> [*hereinafter* VIR. PROF. RESP.].

¹⁰ *See* 42 U.S.C. § 2000d-1.

Translation v. Interpretation

To understand the field, one must first understand the significant differences between interpretation and translation. Interpretation is an *oral medium*, rendering an oral message from one language into another. Translation is a *written medium*, rendering a text in one language into an equivalent text in another language. Each requires different skills, training, and knowledge. The fact that someone is an interpreter does not necessarily mean that they possess the skills for producing reliable translations and vice versa. Of course, interpreting and translating are complementary skills and quite a few people have mastered both.

Being bilingual does not make one automatically equipped to serve as an interpreter or translator. An interpreter must possess native-like fluency in the two or more languages interpreted in order to pick up all nuances and accurately convey each element of the information. Native-like fluency is the highest level of bilingualism one can achieve. This level cannot be achieved through an immersion program, a few years of high school, or a few quarters of studying a second language at a college or university. In addition to native-like fluency in both languages, interpreters must also have knowledge of interpreting techniques, significant practice in instant and accurate language conversion, plus knowledge of ethics and the role of interpreters in legal proceedings, as well as knowledge of any specialized or technical terminology used in the field.

The interpreter is the nexus between all of those involved with the case (the parties, attorneys, law enforcement, victim advocates, witnesses, other court support services, etc.) and the administration of justice. When untrained and untested interpreters are used to bridge the communication gap, the competency of each and every player is placed at risk. That is why trained and qualified interpreters are necessary for all parties involved in judicial or quasi-judicial settings.

Interpreting in Quasi-Judicial and Judicial Settings

Legal interpretation is divided into *quasi-judicial* and *judicial settings*. Quasi-judicial interpreting is typically performed out-of-court but these meetings are often related to court proceedings, for example: attorney-client and attorney-witness interviews. The interviews may take place in an office, a hallway, the courthouse, a jail, or a hospital. Judicial interpreting, by contrast, takes place primarily in courts of general and limited jurisdiction in criminal, civil, and administrative law. These legal and quasi-legal scenarios can take place at the federal, state, or municipal level. Judiciary interpreters interpret both in judicial and in quasi-judicial settings. Therefore, the judiciary interpreter and translator must be familiar with legal and other technical terminology that could come up in any of these settings, such as domestic violence, forensic, medical, drugs, DNA, and psychological terminology. An interpreter must practice and develop the cognitive skills required for all three modes (simultaneous, consecutive, and sight translation) of interpretation. These skills cannot be developed overnight or in the course of a trial.

The *simultaneous mode* of interpretation is used during all court proceedings where the non-English speaking person is listening to the trial proceedings or when any parties or witnesses are speaking (during trial, whenever the judge is speaking to an officer of the court or any other person, legal arguments, etc.). The *consecutive mode* of interpretation is used when a non-English speaking person is giving testimony or when a judge or officer of the court is asking questions. *Sight translation* is when an interpreter orally renders a written text into another language (e.g. protection order forms). An interpreter assists all parties in the administration of justice, helping to put a non-English speaker on an equal footing with an English speaker.

An interpreter should not give an advantage or disadvantage to the non-English speaker.¹¹ In order to assist in the administration of justice, the interpreter must render everything said in the source language into the target language, in any of the three modes of interpretation, and must do so accurately, faithfully, and completely, without distorting the meaning or intent of the speaker, and without any changes in style or register. In short, the interpreter cannot omit, summarize, add, or edit anything in spoken or written form.

In legal and quasi-legal settings, interpreter prerequisites are established by state or federal law, or by local rule. Interpreters must become familiar with the requirements already established, and with the accepted professional practices. An example of such a practice is the use of direct speech. In legal settings, the interpreter becomes the voice of the speaker, interpreting in the same grammatical person as the speaker. In plea negotiations, for example, a defendant must enter a plea knowingly, voluntarily and of his own free will. If an interpreter speaks in the third person, as in “*He says he is guilty,*” the record will reflect the interpreter’s conclusion and not that of the defendant. Many cases have been reversed due to this error. In addition to inaccuracy of the record, if an interpreter uses indirect speech such as the third person, the product will only cause confusion to the parties. It is only when the interpreters are speaking for themselves that they will revert to the third person, i.e.: “Your honor, *the interpreter* would like to request a repetition.”

Another reason why the interpreter should use direct speech is to ensure that the non-English speaker develops direct communication and a relationship with the English speaker. The interpreter should not participate except to convey messages; the interpreter does not create messages. Direct communication and clear relationships are especially important for victims of domestic violence. Judges, attorneys, advocates and law enforcement officers are better able to evaluate first-hand information. When proper protocols are followed, appeals involving technicalities are minimized.¹²

¹¹ See, e.g., Mass. Trial Ct., CODE OF PROFESSIONAL CONDUCT FOR COURT INTERPRETERS OF TRIAL COURT. R. 1.03(1), 1.03(5), available at <http://www.mass.gov/courts/admin/planning/codeofconduct.html>; CODE OF PROFESSIONAL RESPONSIBILITIES Canon 11, available at <http://www.nmcourts.com/newface/court-interp/guidelinesandpolicies/codeofconduct.pdf>; VIR. PROF. RESP. Canons 3-4, available at <http://www.courts.state.va.us/interpreters/code.htm>.

¹² See, National Association of Judiciary Interpreters and Translators position paper on the subject matter at <http://www.najit.org>.

Scope of Practice and Ethical Issues

Interpreters have a limited scope of practice. Although the profession of legal interpretations and translations is difficult (due to the requirements of native-like fluency in both languages, specialized training, education, skills, knowledge, and expertise), the role of the interpreter is simple. The interpreter's role is to assist all parties in communicating accurately and competently. The interpreter is not an advocate for any of the parties and cannot give legal advice. Her expertise is limited to interpretations and/or translations and expertise in the role, procedures, and protocol of the field of legal interpretation and translation. When an interpreter steps out of her role, she exposes herself to challenges. An interpreter is not immune to criminal prosecution should the interpreter break the law, obstruct justice, or provide services that they are not competent to provide.

Judiciary interpreters and translators have ethics and professional responsibilities established by the profession, by statute, or by court rules. The role, ethics, and professional responsibilities of an interpreter are crucial for the uninterrupted nexus between all the parties.

A few of the most important canons of ethics are: 1) to be accurate and complete, 2) to avoid a conflict of interest whether the conflict is real or perceived, 3) to be impartial regardless of who is paying for the interpreter, 4) to maintain attorney-client privilege and 5) to adhere to rules of confidentiality/nondisclosure/privilege applicable to the specific setting and scope of practice.¹³ Maintenance of high interpreter standards of conduct is important in promoting public confidence, not only of the interpreting and translating profession, but also in the administration of justice.

Accurate and Complete

It is crucial that interpreters interpret everything completely and accurately, without omitting, summarizing, or adding.¹⁴ This completeness includes accuracy of style or register of speech, and non-distortion of meaning of the source language even if it appears obscene, incoherent, non-responsive, or a misstatement. If not, then the non-English speaker is on unequal footing with an English speaker. Information that may be crucial is not conveyed and puts the non-English speaker at risk. In addition, omitting elements of testimony or information provided by a non-English speaker, such as

¹³ See, e.g., Wis. SCR §§63.01, 63.03, 63.05; Community and Court Interpreters of the Ohio Valley, CANONS OF ETHICS AND CONDUCT FOR COURT INTERPRETERS, nos. 2-4, available at <http://www.ccio.org/CCIO-CodeofEthics-Court.htm>; VIR. PROF. RESP. Canons 1, 3, 5, available at <http://www.courts.state.va.us/interpreters/code.html>.

¹⁴ See, e.g., Wis. SCR §63.01; Mass. Trial Ct., CODE OF PROFESSIONAL CONDUCT FOR COURT INTERPRETERS OF TRIAL COURT R. 1.03(1), available at <http://www.mass.gov/courts/admin/planning/codeofconduct.html>; Utah Code of Judicial Administration, APPENDIX H: CODE OF PROFESSIONAL RESPONSIBILITY FOR COURT INTERPRETERS CANON 1, available at http://utcourts.gov/resources/rules/ucja/append/h_intprt/apph.htm; VIR. PROF. RESP. Canon 1, available at <http://www.courts.state.va.us/interpreters/code.html>.

misstatements, obscene language, or even hesitations, could alter a judge's or investigating officer's perception of the non-English speaker.

Through personal observation and my work as a consultant reviewing appellate cases, I have had the opportunity to observe many cases dismissed, sentences or awards substantially reduced, or convictions or orders successfully reversed because the parties and court did not secure a trained and qualified interpreter. For example, in a domestic violence case, an officer with decent conversational skills but incomplete fluency in Spanish interviewed the alleged victim and missed the part where she said that the defendant was forcing her to have sex. As a result, a defendant who could have been charged with rape was instead charged with domestic violence assault - a charge that eventually was reduced and the defendant was sent back home to the victim.

Conflict of Interest

If an actual conflict of interest or an appearance of a conflict of interest arises, the interpreter is to inform the court, the attorneys, and anyone else involved in the case.¹⁵ It is important for interpreters to understand that such disclosure does not include privileged or confidential information. A conflict of interest may exist when interpreters are related to or have a close social relationship with a party or witness, are themselves potential witnesses, have been involved in the choice of counsel, have a financial or other interest in the outcome of the case, or served during the investigative phase of the case. Note that friends and family members are not neutral parties.

Attorneys and advocates for non-English speaking clients should carefully consider whether the potential interpreter is neutral.

Impartiality

Interpreters should refrain from conduct that may give the appearance of bias and are bound to disclose any real or perceived conflict of interest.¹⁶ They are not to permit themselves to be used as an investigator for any party to a case. Interpreters should not permit themselves to be used for communicating information to a party, a relative of a party, or a witness without the presence of the attorney or other officer of the court. Interpreters are not permitted to receive gifts or secondary remuneration above and beyond their set fees.

¹⁵ See, e.g., Wis. SCR §63.03; Utah Code of Judicial Administration, APPENDIX H: CODE OF PROFESSIONAL RESPONSIBILITY FOR COURT INTERPRETERS Canon 3, available at http://www.utcourts.gov/resources/rules/ucja/append/h_intprt/apph.htm; VIR. PROF. RESP. Canon 3, available at <http://www.courts.state.va.us/interpreters/code.html>.

¹⁶ See, e.g., Del. Admin. Directive No. 107, Canon 2, available at <http://courts.delaware.gov/Courts/Supreme%20Court/Administrative%20Directives/?ad107.pdf>; Mass. Trial Court, CODE OF PROFESSIONAL CONDUCT FOR COURT INTERPRETERS OF THE TRIAL COURT §1.03(1); Community and Court Interpreters of the Ohio Valley, CANONS OF ETHICS AND CONDUCT FOR COURT INTERPRETERS Canon 3, available at <http://www.ccio.org/CCIO-CodeofEthics-Court.htm>; Utah Code of Judicial Administration, APPENDIX H: CODE OF PROFESSIONAL RESPONSIBILITY FOR COURT INTERPRETERS Canon 3, available at http://utcourts.gov/resources/rules/ucja/append/h_intprt/apph.htm.

At times, it is necessary to hire from outside of the jurisdiction to obtain an impartial interpreter. This may be advisable when the community is small or when the interpreter is a highly visible member of the community. It may be particularly necessary in domestic violence cases, where one of the parties has and is likely to continue to use tactics of intimidation. For example, in one case, the wife of an extremely influential man in his community and church alleged verbal and psychological abuse and sought help in a shelter for battered women. The husband contacted every interpreter in his community and threatened them, suggesting that they not interpret for his wife. In addition, it was alleged that one interpreter was purposely withholding information that the victim was providing in order to protect this influential member of the community. Other interpreters claimed to be very frightened and refused to interpret for the courts and/or any of the parties. Eventually law enforcement went out of the jurisdiction in order to obtain a qualified and neutral interpreter.

The following example illustrates the potential dangers of using non-neutral parties as interpreters. In a rape case of a minor, the police used the mother of the victim to interpret *Miranda* and police interrogations. During the reading of *Miranda*, the victim's mother did not interpret *Miranda*, but instead indicated to the alleged perpetrator that he "had better tell the truth, the whole truth." This particular police interview was tape-recorded. Subsequently, a bilingual attorney appointed to the case came across the tape-recorded interview and filed a motion to suppress. The suppression hearing never occurred, because the prosecutor and attorney entered into a plea agreement due to the possible *Miranda* violation. The defendant pleaded guilty to a reduced charge of gross sexual imposition and he received probation. As the mother of the victim, the interpreter in this case had an obvious conflict of interest and her interest in the case was such that it would have been impossible for her to remain impartial.

Attorney-Client Privilege

Attorney-client privilege is extended to the interpreter and thus an interpreter cannot disclose information obtained during attorney-client interviews, unless the client waives the privilege.¹⁷ It only can be overcome in exceptional circumstances. In addition to well-established laws regarding privilege and confidentiality with respect to any communication, documents, police and medical records, or other types of privileged communications, interpreters are bound by the profession's ethics to keep confidential any information obtained during the course of their professional assignments, even if that information is no longer confidential.¹⁸

¹⁷ See *State v. Christian*, 841 A.2d 1158, 1184 (Conn. 2004); *People v. Sin*, 718 N.Y.S.2d 333, 334 (2000); *People v. Alvarez*, 926 P.2d 365, 415 (Cal. 1996); *Insurance Co. North America v. Superior Ct of Los Angeles*, 166 Cal.Rptr. 880, 888 (Cal. App. 2 Dist. 1980). Attorneys may want to consider using one interpreter for attorney-client interviews and a different interpreter for court proceedings.

¹⁸ See, Wis. SCR §63.06; CODE OF PROFESSIONAL RESPONSIBILITY FOR INTERPRETERS IN THE OREGON COURTS, no. 7, available at <http://www.ojd.state.or.us/osca/cpsd/interpreter/documents/ethicscode.pdf>; VIR. PROF. RESP. Canon 5, available at <http://www.courts.state.va.us/interpreters/code.html>.

Tips for Legal Assistance to Victims (LAV) Grant Attorneys and Advocates

I would like to leave you with some suggestions to consider as you work with interpreters in your practice.

First, in addition to the need for the interpreter to understand his or her role, it is important for judges, attorneys, advocates, and law enforcement to become familiar with the laws and rules pertaining to interpreters.

Attorneys should document their request for a certified and/or qualified interpreter, through oral and written motions and objections. All conflicts, concerns, or objections should be raised on the record and at the time they occur because without a record they cannot be raised on appeal.

Next, it is vital for all entities involved in civil and criminal cases, including domestic violence shelters, victim advocacy groups, and medical personnel, to provide a copy of the canon of ethics and professional responsibility to their interpreters so that the interpreter is clear about what is expected. They also should require an interpreter to sign a confidentiality agreement that carefully describes the meaning and scope of the agreement. These steps will help to ensure that all parties are protected, including the interpreter.

Make sure that you are aware of the interpreter's credentials, training, and familiarity with the canons of ethics. Then, through the interpreter, you should introduce all relevant information to your limited English-speaking client about his right to an interpreter, and to the interpreter's confidentiality and neutrality.

Don't forget that you are in charge. If you see that the interpreter is having a separate conversation with the client, stop it and ask the interpreter to tell you exactly what each person has said. Then explain that the interpreter should not initiate or respond to any conversation without interpreting it first.

Finally, there is a rule that I always include when I speak to judges, attorneys, law enforcement, or advocates and that is, that the standard procedures and rules applicable to English speaking persons are also applicable to non-English speaking persons. You can ask: "If this were an English speaker, how would I proceed in this situation?" The answer is to treat the LEP person as you would any English speaker. Just because an interpreter is present, there is no reason to deviate from standard procedures already established by law or the particular organization.¹⁹ To have an incompetent interpreter is tantamount to having no interpreter at all.²⁰

¹⁹ Isabel Framer, Getting It Right By Doing It Right: Mile Markers Along the Road Across the Linguistic Divide (July 2003) (unpublished article, Federal Interagency LEP Working Group) (on file with author).

²⁰ NATIONAL ASSOCIATION OF JUDICIARY INTERPRETERS AND TRANSLATORS, HANDBOOK FOR THE LEGAL PROFESSION: WORKING WITH INTERPRETERS (1989).