

Language Access Issues for Lawyers

RPC(s): 1.1, 1.2(a), 1.4(a) & (b), 1.6(a), 1.16(a)(1), 2.1, 5.3

Summary: *This opinion discusses how a lawyer's duties of professional competence and timely and accurate communication with a client are impacted when the client is unable to communicate with the lawyer, or has limited proficiency, due to language or other communication barriers. Open, accurate, and confidential communication between a lawyer and their client is at the heart of the relationship, and a prerequisite to being able to provide competent representation. A lawyer who cannot clearly communicate with a client cannot learn the client's objectives, discuss options with the client, obtain informed consent from the client, or otherwise competently represent the client.*

Accordingly, lawyers have an ethical duty to make reasonable use of qualified interpreters, translators, or other translation services to bridge any language gaps with clients who are unable to fully communicate with the lawyer due to communication barriers. In utilizing these services, the lawyer also has an ethical duty to be careful to preserve client confidences, including reasonable oversight of any translator or interpreter.

Issues Presented:

Lawyers often opt to utilize translation or interpretation services to assist in client understanding or communication, but to what extent are such services required to comply with the lawyer's ethical obligations?

1. What rules and considerations are triggered by a client who does not communicate proficiently through standard English conversation and/or written correspondence (e.g., emails)?
2. Is a lawyer required to decline or withdraw from representation in the absence of providing a qualified interpreter or translator in all instances?
3. What suggestions are available to assist lawyers evaluate whether they can competently accommodate language barriers?

Short Answers:

1. In general, the lawyer needs to consider competency and confidentiality. Incumbent in both considerations is the need to manage, arrange for, ascertain the qualifications of the interpreter, and in whatever capacity required by the representation.
2. If a lawyer cannot competently communicate with a client, they are ordinarily required to decline or withdraw from the representation.

3. Below we provide several considerations and suggestions for working with interpreters and translators.

Discussion:

• ***Competency Considerations***

Communication barriers between lawyers and clients can present significant issues. Many clients in today's diverse and multicultural society are not proficient in the English language and will have difficulty communicating with counsel in written or spoken English. In addition, some individuals are unable to communicate in written and/or spoken English due to physical limitations, such as hearing and/or visual impairments. [n. 1]

Lawyers have an ethical duty to:

- (1) ascertain the best language spoken and understood by each client, including sign language.
- (2) make reasonable efforts to use an interpreter who communicates in that language; and
- (3) ensure that the client can understand, and effectively communicate with, the interpreter.

Interpreters and translators are both dual language proficient individuals who help people communicate across languages, but they work with different mediums.

Interpretation is the process of orally rendering communication from one language to another language, while translation is the preparation of a written text from one language into an equivalent form in another language. For purposes of this discussion, a lawyer's obligations regarding the use of an interpreter (oral) or translator (written) are the same.

RPC 1.1 requires, in relevant part:

A lawyer shall provide competent representation to a client ...
[including] the ... thoroughness and preparation reasonably necessary for the representation.

A lawyer who is unable to communicate with a client will be unable to learn the facts and circumstances of the client's legal problem sufficient to discharge that the lawyer's duty to be prepared.

RPC 1.2(a) mandates a lawyer to:

[A]bide by a client's decisions concerning the objectives of representation and as required by RPC 1.4, [to] consult with the client as to the means by which they are to be pursued.

This will similarly be challenging, if direct communication is frustrated by language or physical barriers to communication. Rule 1.2(a) specifically references compliance with the requirements of RPC 1.4.

RPC 1.4 states, in pertinent part:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent... is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A lawyer who cannot adequately communicate with a client is unable to discharge any of the lawyer's duties under this rule. A lawyer who is unable to communicate with a client cannot meaningfully consult with a client on the client's objectives and the means sufficient to fulfill the lawyer's obligations under this rule.

RPC 2.1 requires a lawyer, in part:

[T]o render candid advice to clients [based upon the] law ... [as well] as moral, economic, social and political factors, that may be relevant to the client's situation.

Again, the lawyer is likely unable to meaningfully convey candid advice if accurate communication is stymied. In fact, without adequate communication, the lawyer would likely be unable to know or fully appreciate the various considerations contemplated by RPC 1.2.

In light of the foregoing "Duties to Clients" set forth in the Washington Rules of Professional Conduct, the lawyer must take reasonable steps to ensure that the lawyer can communicate to

the fullest extent practicable in a reasonably effective manner regardless of whether the client shares a common language with the lawyer and/or has a physical condition that affects the client's ability to communicate (including limitations on the client's ability to hear or speak). Those steps may include a requirement that the lawyer engage the services of a qualified and impartial interpreter or translator to ensure the client and the lawyer are able to communicate effectively. If the lawyer chooses to engage machine interpretation or translation technology in lieu of human interpreters or translators, the lawyer must: determine the reliability and confidentiality of the technology; decide whether human review of the interpretation or translation is needed; disclose the use of the technology; and bear the risks of error associated with it. It is also important that the lawyer obtain the informed consent of the client prior to using any AI or machine technology for translation of documents.

Because of competency concerns, when possible, lawyers should make their best efforts to translate all documents or letters sent to the client *before* transmission. Under RPC 1.1, 1.2 and 1.4, lawyers have a duty to provide written or oral translation of any document whose contents are material to the case. Lawyers whose practice involves both frequently reused forms and clients who need assistance communicating should consider having those forms or documents translated into the lawyer's more commonly encountered client languages.

In the absence of utilizing such tools and resources to ensure compliance with the aforementioned duties, a lawyer must decline or withdraw from representing a client with communication and/or language barriers, making sure that doing so would not be a violation of any state or federal requirements.

RPC 1.16(a)(1) provides:

[A] lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law[.]

- ***Ancillary Duties to the Use of Translators & Interpreters***

When a lawyer elects to utilize translation and interpretation services, there are additional considerations under the Washington Rules of Professional Conduct. For example, maintaining client confidences is a critical obligation in the use of interpreters or translators.

RPC 1.6(a) states:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). [n. 2]

Per this rule, sharing information relating to the representation of a client with a translator or interpreter would require informed consent from the client (which would necessarily require the use of a translator or interpreter to obtain). The lawyer should also advise the client about possible loss of privilege if they use a third party (*i.e.*, not hired or employed by the lawyer) to interpret or translate documents that were sent to the client. Privilege is a similar but distinct concept under the evidentiary rules. While the scope of the attorney-client privilege is beyond the scope of this opinion, the use of a professional interpreter will generally not impact privilege. However, the use of other individuals may do so. [n. 3]

RPC 5.3 mandates:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Because the lawyer typically will be using nonlawyer interpreters/translators or other similar services, it is incumbent on the lawyer to ensure that the individual or service facilitating communications between the lawyer and client is qualified to provide interpreter or translation services and agrees to protect all client confidences revealed during those communications.

RPC 5.3, Comment [3].

In addition, lawyers should ensure that their nonlawyer staff members do not violate confidentiality or engage in the unauthorized practice of law by giving legal advice while interpreting or translating. This can be accomplished in several ways, including through proper training, as well as having the staff member sign a confidentiality statement.

Practical Considerations

It is the lawyer's affirmative duty to determine whether the lawyer can adequately communicate with the client. Once it is reasonably apparent that a language or other barrier prevents adequate communication, it is also the lawyer's duty to secure the services of a qualified interpreter, translator, or some other service to bridge the communication gap. In some circumstances, language lines, non-lawyer staff who are reasonably proficient in the client's language, or translation applications can suffice, particularly if the communication is less substantive in nature. For example, if the communication in question is simply to schedule an appointment, use of an application like an AI translator may suffice. However, it is the lawyer's duty to determine the accuracy and availability of the machine translation or interpretation, to research and be aware of the differences of machine interpretation and translation accuracy by language and dialect, and to ensure human review when it is not safe to rely on machine interpretation or translation. Examples of where human review may be required include summarization of client notes after a meeting, preparing declarations, preparing a client for a hearing or a trial, translating documents that will be submitted to a fact finder.

Complicated and substantive communications will require more accurate human interpretation and translation services. Lawyers who are explaining complicated legal concepts to clients must ensure that the interpreter or translator is both proficient in both languages involved and has the expertise to comprehend and communicate the legal concepts and terminology involved in a manner accessible to the client. In those instances, a lawyer may typically rely on a professional interpreter's or translator's certification by a professional association or court system. However, using certified interpreters and translators can sometimes be cost-prohibitive for the lawyer and client. Non-certified interpreters and translators may also be competent to serve this role, but lawyers must be careful to both evaluate their competence and be aware of potential conflicts, as discussed below.

Clients and lawyers will sometimes want to use bilingual family members or friends as interpreters and translators. Personal associates of the client may increase the client's comfort with the process and often allow the parties to avoid the cost of a professional interpreter or translator. However, lawyers must determine whether the personal associate is sufficiently proficient in both languages to adequately communicate with the client and must ensure that use of a nonprofessional interpreter or translator does not invalidate attorney-client privilege protections from the communication. The lawyer must be alert to the possibility that the family member or associate may have a personal interest in the outcome of the representation, and that the client may be reluctant to disclose certain information due to fear or concern for the family member, all of which may impact the accuracy of any interpretation or translation. In addition, there is a danger of violating RPC 1.7 (conflict of interest) when using the lawyer's

family members or friends acting as interpreters or translators, particularly if the interpreter or translator misunderstands their or the lawyer's role or believes that the lawyer is representing their interests or the collective interests of both the interpreter or translator and the client. Last, but not least, the lawyer must ensure a nonprofessional will adequately preserve any client confidences revealed during the conversation.

Practical Tips for Working with an Interpreter:

1. **Prepare the interpreter in advance.** Where possible and after informed consent by the client, let the interpreter know the type of case they will be interpreting and if there is any sensitive information that they may have difficulty interpreting. Be cognizant of interpreter secondary trauma. Interpreter fatigue starts to diminish accuracy after about twenty minutes so plan for breaks in longer interviews.
2. **During the interview, speak directly to the person who needs the interpreter's help.** If the lawyer is working with a professional interpreter, the lawyer should directly address the client or witness as if the interpreter were not there. The lawyer should explain that the interpreter will relay the information and then communicate the client's or witness' response directly to the lawyer and that the interpreter is bound by the rules of confidentiality. For in-person meetings at the office with spoken language interpreters, consider seating placement that allows for ease of translation and direct line of sight between the lawyer and the client. For sign language interpreters, the client or witness needs to see the interpreter without a distracting background.
3. **Monitor carefully for interpreter training and client understanding.** Signs that the interpreter has received training include using the first person, taking notes to ensure accuracy, using a dictionary or technology to check vocabulary, interpreting everything the client is saying, and conveying respect to the client with facial expressions and body language. Monitor the client for signs they may be confused, nervous, or embarrassed. Be sure to ask the client to repeat back next steps and how to contact the lawyer. Determine if information needs to be translated and communicated in written form to facilitate the representation.
4. **Utilize a clear and normal tone and ask the client to do the same.** Avoid talking too quickly and take normal pauses. Be sure to slow down when reading documents aloud that are going to be orally interpreted into another language—a process known as sight translation.
5. **Speak in segments.** Attempt to speak in one sentence or two short ones at a time but avoid breaking up a thought. The interpreter will try to understand the meaning of what the lawyer is saying, so the lawyer needs to express the whole thought if possible. Interpreters should be instructed to raise their hand to ask the lawyer or client to slow down or repeat if necessary. Many clients do not have much experience working with interpreters. Hence, it is important at the onset of a meeting or call for the lawyer to ask the clients to speak in segments and allow the interpreter time to interpret. The

interpreter should interpret the client's utterances even if they do not make sense or demonstrate lack of comprehension. This is essential for the attorney to assess client competency.

6. **Let the interpreter finish interpreting.** To make effective use of an interpreter, the lawyer should pause to let the interpreter deliver the entire message.
7. **Clarifications.** If something is unclear, or if the interpreter must interpret a long statement, they may ask the lawyer for a complete or partial repetition of what was said, or questions to clarify what was meant. The lawyer should also advise the client to seek clarification if they do not understand something.
8. **Do not ask for the interpreter's opinion.** Avoid asking the interpreter for opinions or comments. The interpreter's job is to convey meaning and not allow their personal opinion to affect the interpretation.
9. **Avoid jargon or technical terms and adopt the principles of Plain English.** Avoid slang, jargon, idioms, acronyms, or technical terms. It is the lawyer's job, not the interpreters, to explain legal concepts to a client in a way that they understand and can receive effective representation.
10. **Don't be surprised at the length of the interpretation.** Many concepts may have no direct equivalent in other languages. The interpreter may have to describe or paraphrase the terms used. The interpreter should explain to the lawyer if they need to do this, since their role is not to explain legal concepts, only to adequately communicate similar meaning in another language. As a result, the interpretation may take considerably longer than if the concept was expressed in English.
11. **Slow down when reading.** If reading a prepared text, the lawyer needs to be mindful of the fact that speech is often accelerated when reading something. The lawyer should try and speak more slowly so the interpreter can keep up.
12. **Permit only one person to speak at a time.** If there is more than one person in the meeting, be diligent about only allowing one person to speak at a time. Crosstalk is difficult for the interpreter to deal with and can confuse the conversation.
13. **Make sure the client is informed of the anticipated costs at the beginning of representation.** It is a good idea to clearly lay out the anticipated costs of a qualified interpreter at the time of engagement so that the client is informed as to the costs.
14. **Advancing the cost of interpreters or translators.** If the lawyer advances the costs of the interpreter, make sure the client understands the reimbursement procedures subject to legal protections.

15. **Thank the interpreter!** Interpreting requires high level of concentration, memory, ability to convey meaning, and attention to detail. Thanking the interpreter conveys respect and value for their work.

Practical Tips for Working with a Translator

1. **Do not assume certified interpreter can provide accurate translations.** Check that translators are certified and trained in both English and the target language.
2. **Make sure that translations are reviewed for accuracy.** The best practice for the translation of legal documents that the client will rely on in the future is to have a second translator review the document for accuracy, word choice, and readability. Do not rely on machine translation without human review for any legal document.

Additional Practice Suggestions:

1. **Determine proficiency.** Ensure the client's proficiency in a language and whether the client feels more comfortable using a different dialect. A dialect is commonly defined as a variety of a particular language that is common to a particular subgroup of speakers of the language, often based on regional differences. In some instances, a particular client may do better with an interpreter familiar with their dialect. Some instances may even require dual interpreters, one to translate to another language and then a second interpreter to translate from that language to the specific local dialect. It is the client, not the attorney, who should determine the client's proficiency in a particular language.
2. **Ensure the interpreter's competence.** The interpreter should be qualified, familiar with legal terms, impartial, and understand confidentiality. Working with an interpreter who has been certified by a federal or state court will usually satisfy the lawyer's duty to use a competent interpreter. Where a certified interpreter is not available, a lawyer should take reasonable steps to ensure that whoever is enlisted to interpret is able to facilitate effective communications with the client. Taking reasonable steps includes inquiring as to where and how the interpreter learned English and the target language, whether the interpreter has had any formal training as an interpreter or legal interpreter, what is their level of formal schooling, and whether they know any of the parties or witnesses in the client matter. It also includes reminding the interpreter of GR 11 the Interpreter Code of Ethics which requires the interpreter to only undertake interpretation for which they are qualified; remain neutral, impartial, and objective; and disclose any conflicts of interest. Advise the client that if they do not understand the interpreter, they need to inform the lawyer as soon as possible. If translating documents, then a Certificate of Translation made under oath should be attached to the translated document.
3. **Consider costs and necessities.** Determine whether a professional interpreter is necessary for all potential interpretation or translation services. Do this by assessing the need for professional interpretation services considering the matter/document requiring interpretation and the client's resources. For example, when preparing a client

for a trial, the lawyer should use an impartial qualified interpreter. However, for more routine matters that do not involve sensitive information (e.g., scheduling an appointment), a family member may be fine. A lawyer can also use a staff member to interpret, so long as that staff member is impartial, qualified and complies with confidentiality obligations. [n. 4]

4. **Translate in advance.** The initial fee agreement with the lawyer and all written communication from the lawyer should be translated prior to being sent to the client. If the lawyer is sending other documents that are voluminous, then the lawyer should have a translator translate those documents for the client. This is particularly true if the document is a formal document of particular importance to the representation, such as a will or contract.
5. **Establish preference for interpretation with an interpreter.** For example, some lawyers like simultaneous interpretation (where the interpreter speaks the same time as the speaker, as opposed to waiting until the speaker has finished their sentence, a format known as consecutive interpreting). Other lawyers find this distracting.
6. **Online options for video meetings.** If the lawyer is meeting with the client over a video platform, the lawyer can use language resources available to facilitate simultaneous interpretation (such as a separate channel for the interpreter) so long as the lawyer ensures that the interpreters involved are qualified and that confidentiality is maintained.
7. **Allow extra time.** The lawyer should recognize that including an interpreter necessarily extends the time for any meeting or discussion with the client. The lawyer should allow extra time for this necessity, so that important discussions are not cut short.
8. **Manage the interpreter.** The lawyer should instruct the interpreter not to insert their own opinions or give any legal advice to the client. In addition, the interpreter should be instructed to interpret the exact meaning if possible and not insert their own version of a summary of the lawyer's words into the interpretation. Finally, during oral conversations and interactions with the client, the interpreter should not be allowed any side conversations with the client unless the interpreter asks first for permission to clarify something that the client does not understand and gets permission from the lawyer to do so.
9. **Ensure confidentiality is maintained.** The lawyer should engage in a written confidentiality agreement with the interpreter, as well as have a discussion with the interpreter confirming that they understand and will abide by such an agreement. *See RPC 5.3.*
10. **Lawyers can pass on the cost of using an interpreter to the client as well as any translation services for documents.** [n. 5] If the client cannot afford to pay for an interpreter, then the lawyer should decline or withdraw from the case if the lawyer

cannot otherwise represent the client competently and diligently consistent with this opinion.

Endnotes

1. While beyond the scope of an ethics opinion, lawyers should be mindful that the Americans with Disability Act (ADA), Civil Rights Act of 1964, Washington State's anti-discrimination law, RCW 49.60, and/or other legal requirements also require lawyers to facilitate effective communications in some instances.
2. RPC 1.6(b) allows a lawyer to reveal certain otherwise protected information in certain circumstances—none of which are relevant to the scope of this opinion.
3. Privilege may not always be lost if a non-certified interpreter is utilized. There is authority that privilege is maintained where translation services are required to render legal advice and services to the client. However, there is a greater chance that information will be accidentally shared in ways that destroy the privilege where the person performing such services is not familiar with the specific requirements of the confidentiality rules. Note that this advisory opinion does not address privilege in greater detail as it is outside the scope of our opinion.

In court proceedings, RCW 2.42.160 applies to interpreters and states the following:

Privileged communication.

(1) A qualified and/or intermediary interpreter shall not, without the written consent of the parties to the communication, be examined as to any communication the interpreter interprets under circumstances where the communication is privileged by law.

(2) A qualified and/or intermediary interpreter shall not, without the written consent of the parties to the communication, be examined as to any information the interpreter obtains while interpreting pertaining to any proceeding then pending.

In addition, *State v. Aquino-Cervantes*, 88 Wn. App. 699, 945 P.2d 767 (Div. 11, 1997) was a significant case decided by the Court of Appeals of Washington, Division 2, in 1997. The case addressed important issues related to interpreter confidentiality and attorney-client privilege in the context of criminal proceedings

4. Where the lawyer should make sure procedures are in place for supervision with staff members to ensure that no unauthorized legal advice is being given to the client by any interpreter.

5. Note that in flat fee arrangements for a new client, lawyers should promptly establish that costs, which can include out of pocket interpreter fees, are separate than the legal fee and lay this out in the fee agreement. [RPC 1.5, Comment 2.]