

ABA OPINION 500 takes on language access in the client-lawyer relationship

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Minnesota's Rules of Professional Conduct are based on the Model Rules of Professional Conduct established by the American Bar Association Standing Committee on Ethics and Professional Responsibility. Each year, the ABA Standing Committee publishes formal opinions interpreting the Model Rules; these opinions provide guidance to practitioners in interpreting the Model Rules and, by extension, the Minnesota Rules. In October 2021, the ABA issued Formal Opinion 500: *Language Access in the Client-Lawyer Relationship*.¹

Competence and diligence are critical

Once representation has commenced, lawyers must be prepared to communicate effectively with clients who have limited proficiency in the lawyer's native language or are not able to hear, speak, or read without accommodation. As the opinion makes clear, a lawyer's foundational duties of competence (Rule 1.1) and communication (Rule 1.4) do not change simply because communication may be more challenging or costly due to language barriers or the need for a disability accommodation. When language barriers or non-cognitive disabilities impede effective communication, Rules 1.1 and 1.4 require the lawyer to facilitate better communication—specifically, to “take steps to engage the services of a qualified and impartial interpreter and/or employ an appropriate assistive or language-translation device to ensure that the client has sufficient information to intelligently participate in decisions relating to the representation and that the lawyer is procuring adequate information from the client to meet the standards of competent practice.”

The duty to communicate with your client requires effective communication, no matter their primary language or physical abilities—and effectiveness includes comprehension.

When must a lawyer affirmatively facilitate communication?

The mode of communication is ordinarily a mutual decision between client and lawyer. Opinion 500 makes clear that “[a] lawyer may not... passively leave the decision to the client or thrust the responsibility to make arrangements for inter-

pretation or translation entirely upon the client.”² Rather, “it is the lawyer’s affirmative responsibility to ensure the client understands the lawyer’s communications and that the lawyer understands the client’s communications.”³ When there is doubt about whether either side understands what is being said, it falls to the lawyer to resolve that doubt in favor of facilitating communication through an interpreter, translator, or assistive device.

According to U.S. Census data from 2015, more than 100 languages besides English are spoken in Minnesota, and about half a million Minnesotans speak languages other than English at home.⁴ Of that half-million, slightly less than half speak Spanish; tens of thousands more speak Hmong, Cushite (a language family including Oromo and Somali), German, Vietnamese, and Chinese.⁵ Also in 2015, the Minnesota State Demographic Center reported that 193,400 Minnesotans lived with a hearing disability.⁶

Demonstrating the potential gap, the Minnesota State Bar Association’s online lawyer directory lists 85 members who speak Spanish, 26 who speak German, 12 who speak Chinese, three who speak Hmong, two who speak Vietnamese, one who speaks Somali, and two who communicate through American Sign Language (ASL).⁷ While this is undoubtedly an undercount—not all MSBA members list their language skills, and there are of course other attorneys within the state who are not MSBA members who have proficient language skills—the data suggest an imbalance between demand and supply for legal services in languages other than English. The Minnesota courts publish forms in several languages—including Spanish, Hmong, Somali, and Karen—but the forms must be completed in English. Many Minnesotans may need help communicating their legal needs across a language or disability barrier, and the English-speaking lawyers who serve them may be ethically (as well as legally) required to provide that help.

Who is qualified to facilitate communication?

Opinion 500 uses “interpreter” for spoken language and “translator” for written language; I will refer to both as “communication facilitators.” Whichever the mode of communication, a communication facilitator must be (1) qualified to

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facilitate communication in the language or mode required, (2) “familiar with and able to explain the law and legal concepts” in that mode, and (3) “free of any personal or other potentially conflicting interest that would create a risk of bias or prevent the individual from providing detached and impartial” services.⁸ The opinion is primarily focused on human communication facilitators, but acknowledges that existing and emerging technologies may also be appropriate for consideration.

It is the lawyer’s duty to assess the qualifications of the communication facilitator (or communication technology). Opinion 500 recommends hiring an outside professional, but acknowledges that other options may suffice if appropriate precautions are taken. One option is to look to a multilingual firm employee, bearing in mind the greater risk of inaccuracies if the person is not a professional. Another option is to allow a client’s friend or family member to facilitate communication. Lawyers relying on friends and family to facilitate communication must proceed cautiously because, as Opinion 500 notes, “an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation.”⁹ It may also be challenging to ensure that a friend or family member maintains the client’s information in confidence as required by Rule 1.6, and there may be privilege issues as well.

What if adequate communication services are not available, or prove too costly for the lawyer or client? Opinion 500 states that the lawyer should ordinarily decline or withdraw from

representation, or associate with another lawyer or firm that can supply the necessary services. Please be mindful that anti-discrimination statutes such as the Americans with Disabilities Act and the Minnesota Human Rights Act also regulate the provision of services to people with disabilities; if they apply to your firm, they may require greater accommodation efforts than do the Minnesota Rules of Professional Conduct and may prohibit passing along costs associated with the accommodation.

In exigent circumstances, Opinion 500 permits the lawyer to render emergency legal assistance to the same degree permitted for a client with diminished capacity under Rule 1.14, comment [9].

How should a lawyer supervise a communication facilitator?

The short answer: exactly the same as any other nonlawyer service provider. Rule 5.3 requires a lawyer to ensure that the conduct of a nonlawyer service provider—such as a communications facilitator—is consistent with the lawyer’s professional obligations. In the context of communications facilitators, Opinion 500 calls out the obligation to keep client information confidential under Rule 1.6. It is the lawyer’s burden to ensure that the facilitator understands the nature of the lawyer’s duty of confidentiality and the nature of the attorney-client privilege, and agrees to protect client information to the same degree the lawyer would. Obtaining this agreement in writing—whether or

not the facilitator is a professional—may help ensure that they understand and comply with the lawyer’s professional obligations. It’s one way to demonstrate the measures you have in place for supervision.

What about communicating across cultural differences?

Perhaps the most intriguing aspect of Opinion 500 is its acknowledgment that professional competence includes cultural competence. “[T]he ability to understand, effectively communicate, gather information, and attribute meaning from behavior and expressions are all affected by cultural experiences.”¹⁰ To practice law competently across cultural differences, Opinion 500 recommends (i) identifying these differences, (ii) seeking to understand how they affect the representation, (iii) being aware of cognitive biases (such as implicit bias) that can distort understanding, (iv) framing questions with the client’s cultural context in mind, (v) explaining the matter in multiple ways to help clients understand better, (vi) scheduling longer meetings and asking confirming questions of the client to be sure there is mutual understanding, and (vii) seeking out additional resources when necessary to ensure effective communication.¹¹

Conclusion

“Communication is a two-way street.”¹² Opinion 500 helps lawyers understand that our side of the street includes facilitating communication effectively with clients across language and

disability barriers. As always, if you have questions regarding how the ethics rules should guide your practice, please call our advisory opinion service at 651-296-3952. And thank you to Karin Ciano, OLPR managing attorney, for assistance with this month’s column. Karin has a passion for supporting solo and small office lawyers in their practices and is a great resource. ▲

NOTES

¹ The most recent 12 months of formal opinions may be accessed on the ABA’s website at no charge whether or not you are a member of the ABA. See https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/

² ABA Formal Op. 500 at 5-6.

³ ABA Formal Op. 500 at 6.

⁴ Ibrahim Hirsi, *Minnesotans speak more than 100 languages at home, new data finds*, MinnPost, 11/5/2015, available at <https://www.minnpost.com/new-americans/2015/11/minnesotans-speak-more-100-languages-home-new-data-finds/> (last visited 2/3/2022).

⁵ *Id.*

⁶ Andi Egbert, *Minnesotans with Disabilities: Demographic and Economic Characteristics*, Minnesota State Demographic Center Population Notes (March 2017) at 2.

⁷ See <https://www.mnbar.org/member-directory/find-a-lawyer> (last visited 2/3/2022).

⁸ ABA Formal Op. 500 at 7.

⁹ *Id.*

¹⁰ ABA Formal Op. 500 at 9.

¹¹ *Id.*