

ACCESS TO THE DISCIPLINARY SYSTEM

By

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Last year I traveled to Chile and Peru. I do not speak much Spanish. Few of the people I dealt with in either Chile or Peru spoke much English. Although I managed to get around (my wife and I were visiting our son who was studying in Chile at the time and who could act as an interpreter when he was with us), I was reminded how difficult it must be for the many residents of this country who don't speak English as a first language, or don't speak it at all. Spanish and English at least share many cognates, words that may be recognizable to a non-English speaker. What about the many Hmong, Karen, Somali and Russian immigrants living in Minnesota for whom even basic signs in a foreign alphabet may be difficult? I read some Russian, and having spent a little time in the former Soviet Union I recall just how big an advantage that gave me over members of my group who couldn't even make out a street name in the Cyrillic alphabet. Even briefly experiencing what is a daily fact of life for so many is indeed eye-opening!

We as lawyers can easily forget what an even more overwhelming experience it must be for someone who is not fluent in English to enter into the justice system in this country. Even for many natives, the legal jargon spoken and understood by lawyers may seem like a foreign language—for a non-native speaker such technical language may as well be ancient hieroglyphics.

Language & Disability Issues

Last month, I highlighted several aspects of the recent report of the Supreme Court Advisory Committee to Review the Lawyer Discipline System. One of their specific areas of study and recommendation was access to the disciplinary system for individuals with limited English proficiency (LEP) or with disabilities. The committee wrote:

As a matter of good public service, Minnesota should ensure that all of its legal system consumers, including disabled and LEP persons, do not encounter serious barriers in the lawyer discipline system. The integrity of the profession cannot be properly safeguarded if a segment of the community cannot effectively bring complaints to the lawyer discipline system or if the system is unable to gather information from and interact with persons with communication limitations and disabilities.

The committee noted further that accommodations for individuals with disabilities and interpreters for LEP persons in judicial proceedings—including licensing proceedings—are, in addition to being wise policy, often required by law.

The committee complimented the discipline system for already being responsive to needs in this area. In the past, the Director’s Office has used foreign-language or sign-language interpreters in its hearings and meetings as needed, and used translators for complaints and associated documents when complaints are received in a language other than English. The Director’s Office currently has its brochure translated into Spanish, Hmong, Somali and Russian, and our website has the brochure and a complaint form available in Spanish. We are in the process of expanding those options. There has not been an extensive demand for such services to date, which means that the discipline system has not yet had to face the vastly increased costs for interpretation services that the district courts now confront. That fact does not diminish the need to have such services readily available, however.

The committee recommended that the discipline system’s policies be more formalized. Specifically, the committee urged consultation with state councils that serve the needs of individuals with disabilities and limited English proficiency, leading to adoption and publication of a formal written policy. The committee advised that such a policy should provide, *inter alia*, that any complainant, witness or respondent attorney who cannot effectively communicate in the course of a disciplinary hearing without assistance shall be provided an interpreter by the Director’s Office upon request. At the investigation stage, anyone (including DEC volunteer investigators) requesting an interpreter should have one provided. Accommodations, such as holding meetings only in handicap-accessible spaces, should be made to afford equal access for meetings and hearings involving people with disabilities. These are all reasonable suggestions that effectively describe how the disciplinary system already operates; there should be little difficulty in formalizing and following such proposals.

Using Interpreters

Court-certified interpreters, not unlike other regulated professionals, are subject to a code of professional responsibility that subjects them to potential discipline or loss of certification. In a court proceeding, the interpreter is sworn in just like the witness. Trained and court-certified interpreters also can generally be relied on to know most legal terminology in both English and the target language. That’s why conscientious lawyers use certified interpreters.

The advisory committee generally urged the Director’s Office to rely on trained interpreters, although the committee recognized such a requirement might be impracticable at some stages of an investigation, such as when a complainant “walks in” with a family member or friend to interpret prior to having submitted a written complaint. In most situations, use of such uncertified or informal interpreters can raise concerns. First of all, the informal interpreter likely has no interpreting training and may lack true proficiency in one of the languages and thus provide inaccurate information. Sometimes even a well-

meaning individual may embellish or simplify the actual statements or slightly change the meaning. Further, the individual may be interested in the outcome of the matter and be subject to conflict issues. To ensure accuracy when dealing with an LEP complainant, whenever possible the Director's Office attorneys seek to conduct at least one session with the complainant that is professionally interpreted before an attorney is charged with unprofessional conduct.

Between a lawyer and client, few ethical issues arise in the use of interpreters. The obligation under Rule 1.4 to communicate with a client may mandate the use of an interpreter in some instances. Use of interpreters, and especially informal arrangements, can raise confidentiality and privilege concerns, however. The presence of an interpreter during a meeting between an attorney and client does not affect the lawyer's confidentiality obligation under Rule 1.6, since any information obtained still relates to the representation of the client, which is the threshold for requiring confidentiality. Whether the presence of a third person such as an interpreter may be construed to constitute a waiver of the attorney-client privilege is a question often raised, and is a question of law for which a judicial opinion would be necessary. It appears that courts in other jurisdictions typically have held that the presence of an interpreter, where necessary, does not destroy the attorney-client privilege,[Ftn 1](#) and Minnesota law requires interpreters to honor all applicable privileged information obtained in the course of their duties. The lawyer nevertheless should remind the interpreter of the confidentiality obligation, since pursuant to Rule 5.3, the lawyer has her own independent obligation to ensure compliance with the Rules of Professional Conduct by all nonlawyer agents.

Conclusion

In parallel with demand for access to the courts generally, the need for interpreter and translator services continues to increase. The lawyer disciplinary system will continue to use and likely will expand its use of interpreters and translators in the future, and will continue to accommodate people with disabilities. Formalizing these policies, as recommended by the Supreme Court Advisory Committee, is appropriate.

Notes

1 See, e.g., *People v. Osorio*, 75 N.Y.2d 80, 549 N.W.2d 1183, 1186 (1989).