

**TEXAS ASSOCIATION OF MEDIATORS
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“USING INTERPRETERS IN MEDIATION”



Presented

by

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If the definition of **MEDIATION** is “a process during which an impartial, neutral person, the mediator, *facilitates communication between the parties* in a dispute to assist reconciliation, settlement, or understanding among them,” then a mediator should be an expert in terms of communication (oral, written, implied and body language) to act as a bridge of communication for the disputants. Nevertheless, when the mediator does not speak, read or write the language of the disputants, does not understand the nonverbal communication and culture of the disputants, does not understand the sensitivities of the participants in the mediation process, then mediation sometimes becomes a useless tool. The process would not bring about any fruitful outcomes, would result in unresolved disputes, and often could leave the non-English speaking disputants with an unsatisfactory and bitter experience.

Mediation is a purposeful technique of communication to bridge the communication gaps. But when a mediator cannot communicate directly to disputants or look straight into the disputants’ eyes and create trust, confidence, and good rapport, s/he would instead have to rely totally on an outside interpreter. The mediator cannot facilitate communication or know whether the interpreter’s translations truly reflect what the disputants mean if s/he does not speak the target language. A mediator cannot qualify the interpreter if s/he cannot understand a word of disputants’ native tongue. A mediator who uses an interpreter may not be able to know whether the interpreter is biased against one party and sympathetic toward another. When a mediator does not acquire the principles and techniques of interpretation and translation, s/he cannot be sure that interpreters truthfully and accurately perform their duty.

“Without communication, there is no negotiation.... When the parties speak the different languages the chance for misinterpretation is compounded.” (Getting To YES-Fisher)

I. The Law

There have been many changes in interpreter qualifications since the article “*Translating Justice*” (Utpal P. Mehta) was first published in the Texas Bar Journal in October of 1994. Effective on September 1, 2001, anyone wanting to be an interpreter must be licensed by the Texas Department of Licensing and Regulation (TDLR). Nevertheless, there is a grandfather clause allowing applications filed before January 1, 2002 provided that the applicant “*has practiced as a court interpreter prior to September 1, 2001 and the applicant wishes to become licensed without examination*” to be accepted. The TDRL did not specify the length of interpreter’s practice, education or competency of his/her interpreting capability. The applicant must have one of the two following attachments to the application:

1. A written and signed reference from an officer of a court, stating that the applicant has acted as a court interpreter in that court and that the applicant has demonstrated proficiency in interpreting in a specific language.
2. Results of a court interpreter’s examination passed within the two years preceding the application.

Many applicants took advantage of the first requirement and immediately solicited a recommendation letter from an officer of the court - particularly a judge - to satisfy the TDLR's requirements for obtaining a court interpreter license. Many of applicants have never been trained in either the fundamentals of interpretation and/or translation. Currently, if a licensed court interpreter is asked to take the oral examination which requires him/her to perform "*simultaneous interpreting of an attorney's opening or closing statement from English into foreign language*" and s/he fails this oral test, the quality of his/her court interpreting services would definitely be in question.

A licensed interpreter is not mandated to have knowledge of local culture, tradition, regional dialects, and colloquial expressions of the disputant/litigant, which are major factors for being a competent interpreter. One of the most crucial elements in determining a competent interpreter is his/her cultural competency.

As Mehta stated, the judge "*wrongly assumed that judge can accurately determine the competency of a particular interpreter.*" He added, "*A judge who is not fluent in the particular source language cannot be expected to independently determine the interpreter's ability to accurately translate from the source language.*" And emphasized that "*the interpreter's experience in previous court proceedings does not guarantee competency*" since court interpreters "*tend to repeat the same crucial misstates.*"

II. Licensing Requirement

Does an interpreter for mediation session need to be licensed?

Yes. According to the TDLR, mediations, arbitrations, administrative hearings, civil and criminal trials and depositions are considered *court proceedings, which require the interpreters having a license to serve*. However, this law does not apply to federal courts.

It is not clear whether mediations that take place before a lawsuit being filed are to be considered court proceedings. Since mediation is part of the legal proceedings, should the interpreter be administered the oath? If so, who will administer the oath to the interpreter if the parties do not have legal counsel (an officer of the court), court reporter or even a Notary Public present at mediation session? The mediator is not considered an officer of the court, so who would be able to administer the interpreter's oath.

III. Interpreter's Qualification

The Texas Rules of Evidence considers the qualified interpreter as an "expert".

The American Disabilities Acts (ADA) defines a "qualified" interpreter as one who can interpret effectively, accurately, impartially and expressively.

Indeed, a competent interpreter must be versatile in *sight translation, consecutive and simultaneous interpretations*; thoroughly understand interpreting techniques, ethics, procedure,

protocol; and most importantly, possess multicultural awareness. A qualified interpreter should be directly or indirectly trained in interpreting techniques, skill-development, translation/interpreting analysis, critiques, and preferably should acquire subject matter expertise and cultural competency.

Having a “Licensed Court Interpreter” license does not necessarily guarantee that an interpreter is a competent interpreter. Most of the courts and legal counsels are mainly concerned about interpreter’s knowledge and language of law and mediation rather than technology, science, business, finance, medicine or culture etc., and fail to investigate to see whether the interpreter retained for the assignment is knowledgeable about the subject matter in particular.

There are not many interpreters who can serve in all mentioned fields. Some even cannot perform simultaneous interpreting mode, and some even fail to keep neutral by sympathizing with one disputant. No matter how precise the interpretation is, the interpreter cannot deliver the nuances and emotion at the same level of the original speaker’s

If an interpreter is requested to interpret in a medical malpractice lawsuit, dispute, deposition or mediation, that interpreter should be knowledgeable with specialized terminology in *physiology, anatomy, forensic pathology, major diseases, medical document translation and surgical procedures*. Merely acquiring the described professional terminology is not sufficient; one should know non-technical language for these specialized words.

An interpreter who has worked in the field for five, ten or even twenty years is not necessarily a good interpreter. Voluntary membership in national associations does not necessarily indicate an ability to interpret. There is no national interpreting/translating association that ever tests applicant before accepting them into their association. Concerned litigants and mediators are advised to test the interpreter’s ability to do simultaneous interpretation prior mediation session, but very few mediators or litigants have the knowledge of the disputants’ native languages.

The interpreter’s length of residence in the United States or his/her level of education does not guarantee his/her competency in interpreting assignments. A linguist is not an interpreter. A translator is not an interpreter. A person who claims that s/he can speak more than one, two or three languages is not an interpreter. A trained interpreter is a “neurological-physiological performer.”

IV. Cultural Dynamics and Gender Sensitivities

Many times the non-English speaking disputant’s religion, race, culture and gender sensitivities are disregarded by many legal counsels and mediators. The hidden agenda sometimes is the main cause for the conflict. It is insensitive to have a male interpreter in a criminal proceeding where the sexually assaulted victim is a female. A female complainant would be uncomfortable in expressing her apprehension to a male interpreter for an alleged sexual complaint. The interpreter is retained not as a psychological or cultural advisor. It is the duty of the advocate or mediator to identify and recognize the gender sensitivities and cultural dynamics in conflicts and disputes.

Human thought processes and feelings are extremely complex, and language is exceptionally intricate. It is of utmost importance to understand thoroughly the essential non-verbal, body language, and cultural intricacies that a competent interpreter would need to recognize in order to convey the speaker's intent. A gesture demonstrating courtesy and politeness of one culture could be considered obscene or offensive to another culture. One gesture may be appropriate for one gender but may be outrageous to the other. All parties must absolutely avoid jokes or comments about religion, race, and personal appearance. When gender and cultural awareness are taken into consideration, mediation can progress with fewer missteps that can disrupt the proceedings.

Today, more advocates prefer to use video deposition rather than stenographic deposition because video will vividly convey the witness' body language - all nods, shrugs, gestures, mumbles, facial expressions, and hesitations. Jurors can form opinions or judge testimony a lot more accurately from a witness' appearance and non-verbal expression in addition to the spoken testimony. Even a competent interpreter cannot convey these subtleties. In many situations, body language can speak volumes that words cannot express.

The personality and behavior of the interpreter often can contribute much to the success of a mediation session. A culturally competent interpreter's courtesy and professional conduct toward the disputing parties will help to secure the disputants' confidence in the mediation process and, more importantly, in the mediator.

V. Confidentiality

Confidentiality is the most important prong in mediation beside swiftness, cost-effectiveness and casual elements. Some disputants who are prominent in their communities refuse to use certain interpreters for fear of a lack of confidentiality. They either want to "save face" or do not want their personal matters leaked to their community, even if the qualified interpreter conducts business strictly within the professional code of ethics. The problem is compounded when an untrained interpreter who has no knowledge of professional conduct or ethical considerations performs the task.

A non-English speaking female disputant in a domestic battle often hesitates to participate in a mediation session where the opposing party, mediator, and interpreter are all male. A female party often prefers or at least feels more comfortable with an interpreter who is female in a lawsuit or disputes related to domestic issues, women's health or personal matters, and especially in matters concerning physical and sexual abuse.

Friends and relatives of disputants frequently come to mediation sessions with the purpose of either being witnesses or giving emotional support. Their presence alone can be an intimidating barrier to open dialogue. If family members come and function as interpreters, they tend to be advocates not bound by the rules of ethics and professional conduct that require confidentiality and impartiality.

VI. Working with Interpreters

A competent interpreter is a professional and independent language expert whose performance is influenced by neither advocate nor mediator. When s/he takes the oath to interpret the proceeding, s/he is obligated to interpret precisely to and from the target language during the entire proceeding. He/she is responsible to interpret all that is said faithfully, without deviation. The role of the interpreter is not to mitigate a disputant's angry statements to the opposing party or to the mediator. It is unethical for an interpreter to alter, rephrase, substitute, or modify a party or witness' offensive expressions for one that is more pleasant or auspicious.

Usually an interpreter is advised not to intermingle with disputants before the mediator introduces them. For this reason, disputants tend to consider the unknown interpreter as a court staff provided to handle the legal matter. They do not willingly, actively, or intentionally participate in the mediation process due to a mistrust of the legal system. Many times the mediation process comes to an impasse or disputants are unwilling to agree to what the mediator recommends so they do not sign the mediated settlement.

To ensure the licensed interpreter abides by professional standards, provide him/her with the interpreters' code of ethics or professional conduct. Request that s/he read them and revisit the issue with him/her to make sure that s/he understands and will abide by the guidelines within.

VII. Conclusion

An interpreter/translator is the most useful language service provider in any proceeding, including mediation sessions. However, the interpreter cannot be presumed to be an expert in all subject matters and his/her knowledge about the subject, culture, interpreting skill and professional conducts must be verified and constantly monitored to assure the professional service intended for the mediation is of the highest quality. The interpreter's knowledge of criminal or civil trials will be different with each mediation session. His/her knowledge of legal terminology and court protocol is completely different with other financial, technology or medical mediation sessions.

When faced with a concern about an interpreter's competence and professional service in a mediation session, most veteran mediators and advocates zealously support the choice of having a co-mediator who is competent in the culture and language of the disputant. Ultimately, the only mediator who possesses cultural competency, understands gender sensitivities, knowledge of the subject in disputes is the most appropriate mediator for a case.

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