No Se Habla Espanol: Ethical and Practical Considerations for Non Spanish-Speaking Attorneys Representing Spanish-Speaking Clients

Kia H. Vernon

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NO SE HABLA ESPAÑOL: ETHICAL AND PRACTICAL CONSIDERATIONS FOR NON SPANISH-SPEAKING ATTORNEYS REPRESENTING SPANISH-SPEAKING CLIENTS

KIA H. VERNON

INTRODUCTION

In Charlotte, North Carolina, a woman, after enduring years of abuse from her husband, mustered the courage to seek assistance at a nonprofit organization, which found a placement for her and her children in a shelter. Wanting to ensure that she was legally protected, she also sought assistance from the courts for an order of protection against her husband. On the day of the initial hearing for the protective order, she went to the courthouse and was so nervous and confused when she arrived, due in part to her inability to read the signs, that she ended up in the wrong courtroom. Because she failed to show up in the correct courtroom, and was thus unable to testify against her abuser, the case was dismissed. What happened to her after she left the courthouse is unknown. Although her fate is a mystery, the lesson is clear: the legal system must do more to ensure that all people, regardless of the language they speak, their origin or

1 This paper was presented at the 2011-2012 South Eastern Association of Law Schools (SEALS) New Scholars Workshop. The author wishes to thank Julia McLaughlin, Associate Professor, Florida Coastal School of Law, for her mentoring and encouragement during the SEALS process; Cheryl Amana, Professor, North Carolina Central University School of Law, for her continuous support and guidance with teaching and scholarship; Susan Hauser, Associate Professor, North Carolina Central University School of Law, for critique and commentary; and Adrienne DeWitt, Reference Librarian, North Carolina Central University School of Law, for citation and submission assistance. The author also wishes to thank her research assistant, R. Scott Trebat, for his invaluable assistance for this article.

2 Jess George, THE LATIN AMERICAN COALITION, http://latinamericancoalition.org/who.html (last visited August 27, 2011). Jess George is the Executive Director of the Latin American Coalition in Charlotte, North Carolina, a nonprofit organization. The Latin American Coalition is “dedicated to serving Mecklenburg County’s 75,000 Hispanic families with the services that allow them to overcome language, economic, educational and cultural barriers while offering the wider community opportunities to learn about and connect with the Latino population.” [hereinafter Interview with Jess George].

3 Id.

4 Id.

5 Id.
their immigration status, have equal access to justice in the courts.

President John F. Kennedy, in his book *A Nation of Immigrants*, discussed the history of immigration in the United States, describing immigration as "the secret of America: a nation of people with the fresh memory of old traditions who dared to explore new frontiers, people eager to build lives for themselves in a spacious society that did not restrict their freedom of choice and action." A champion of improving immigration policies, President Kennedy articulated "the importance of immigration in America...every American who ever lived, with the exception of one group, was either an immigrant himself or a descendant of immigrants." As a nation of immigrants, it is clear that the United States would not be the country it is without the significant contributions of immigrants. "Everywhere immigrants have enriched and strengthened the fabric of American life."8

The United States is comprised of people of different races and ethnicities, with different backgrounds and cultures. Recent United States Census projections continue to reflect the fruit of immigration: the United States population is becoming more diverse. A large part of the diversity is due to the population growth of individuals of Hispanic origin. Recent demographic statistics and projected estimates relating to the number of Hispanics in the United States reveal a rapidly growing ethnic group, now the largest minority in the United States, whose growth will have a tremendous effect on nearly -if not every -aspect of our society, including our education, health and legal systems. The American Bar Association (ABA), recognizing the impact of this growth on the legal profession and its members, created the Commission on Hispanic Legal Rights & Responsibilities to "assist in identifying the significant legal issues

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7 Id.
8 Id. at 3.
10 Id.
11 Merriam-Webster Dictionary defines Hispanic as "1: of or relating to the people, speech, or culture of Spain or of Spain and Portugal[;] 2: of, relating to, or being a person of Latin American descent living in the United States; especially: one of Cuban, Mexican, or Puerto Rican origin." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/hispanic (last visited August 27, 2011). Latino is defined as "1: a native or inhabitant of Latin America[;] 2: a person of Latin-American origin living in the United States." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/latino (last visited August 27, 2011). For the purposes of this article, the term Hispanic will be used to refer to all individuals of Spanish origin or Latin American descent, unless specifically quoted or referenced otherwise in the original text.
12 Id.
13 The commission was created by ABA President Stephen Zack to "identify and advance solutions
affecting the Latino community across the country.”

In testimony at the Commission’s inaugural hearing, Janet Murguia, President and CEO of the National Council of La Raza, the “largest national Hispanic civil rights and advocacy organization in the United States,” noted that “[a]mong the key goals of the ABA... are eliminating bias, enhancing diversity and advancing the rule of law... [and] the ABA cannot achieve those laudable goals in today’s America without a legal system that is more reflective of and more responsive to the Latino community.”

Additional challenges are presented with recent immigration trends because “[u]nlike European immigrants earlier in our history, who were more readily assimilated and sought to use English as their primary or only language, many of the newer arrivals remain culturally insulated, understanding and speaking only their native tongue.” The legal issues presented by the growing Hispanic population are compounded by the additional possibility of a language barrier between Hispanics that have limited or no proficiency in English, and attorneys assisting them who have limited or no proficiency in Spanish. The introductory example is not an isolated incident, it is an event that has most likely occurred in every courthouse across the country. Solutions to the problem vary from providing court interpreters to providing translations of court documents; but is it the court’s responsibility alone to ensure equal access? What is the attorney’s responsibility in assisting the limited English proficient (LEP) client? How can attorneys who have limited proficiency in the language spoken by their client, provide effective representation? Are there needs specific to the community that can affect a client’s representation?

This Article will examine the issues relating to the legal representation of Spanish-speaking clients and discuss ethical and cultural considerations to assist the legal practitioners representing them who have limited or no proficiency in Spanish. Part I of this Article will present demographical


17 Thomas M. Fleming, Right of Accused to Have Evidence or Court Proceedings Interpreted, Because Accused or Other Participant in Proceedings is Not Proficient in the Language Used, 32 A.L.R. 5th 149, 2 (1995).

18 While this article only addresses Spanish-speaking individuals, many of the issues discussed in
information regarding the tremendous growth of the Hispanic population in the United States. Part II of this Article will discuss issues that can arise during the representation of Hispanics. Part III will examine the ethical considerations for attorneys confronted with these issues. Part IV will provide some practical recommendations to assist attorneys who have limited or no proficiency in Spanish in representing clients who have limited or no proficiency in English.

I. THE CHANGING FACE OF AMERICA

The United States is becoming more diverse. This diversity is evidenced by the 2010 Census which revealed that of the total population of 308.7 million people residing in the United States on April 1, 2010, 72.4 percent was White alone, 16.3 percent was Hispanic or Latino, 12.6 percent was Black or African American alone; .9 percent was American Indian and Alaska Native alone; 4.8 percent was Asian alone; .2 percent was native Hawaiian and Other Pacific Highlander alone; 6.2 percent was some other race alone and 2.9 percent was two or more races. The statistical information reveals a change in the demographics of the United States. Current data reflects that minority populations are increasing at a greater rate than that of the current majority population. Although all populations experienced an increase in growth since the 2000 Census, the population of Whites alone increased by only 5.7 percent, while the increase of all other populations at least doubled that of the White alone population. The Hispanic population accounted for the majority of the growth in the entire population between 2000 and 2010 - four times the growth in the total population - increasing by 15.2 million. Though the South and Midwest experienced the most significant growth, every region in the United States experienced a growth in the Hispanic population.

As the following table illustrates, population projections reflect that the population of individuals of Hispanic origin, which experienced this article are also applicable to other clients who speak different languages and have limited or no proficiency in English.

20 2010 CENSUS RESULT, supra note 20. The Black or African American alone population increased by 12.3 percent; the American Indian and Alaska Native alone population increased by 18.4 percent; the Asian alone population increased by 43.3 percent; the Native Hawaiian and Other Pacific Islander 35.4 percent; the population identified as some other race alone increased by 24.4 percent alone; the population of two or more races increased by 32 percent; and the Hispanic or Latino population increased by 43 percent.
22 Id.
unprecedented growth during the 2000-2010 period, will continue to grow and will represent a significant part of the entire population growth in the United States.

Population Growth Table

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Despite the tremendous growth of the Hispanic population, there is a significant shortage of Hispanic attorneys in the United States. In 2000, it was estimated that, although Hispanics or Latinos represented 12.5 percent of the total population, only 2.2 percent of the attorneys practicing in the United States were Hispanic. Over ten years later, although Hispanics constitute more than 16 percent of the total population in the United States, "only 3 percent of lawyers are Hispanic." While strides have been made to increase the number of Hispanics entering the legal profession, the increase of Hispanics in the legal profession is not commensurate with the increase in the Hispanic growth population.

Due to the disproportionate number of Hispanic attorneys in the legal profession, it is obvious that Hispanic attorneys cannot serve all Hispanics in need of legal assistance. Certainly, attorneys do not have to be of the


26 U.S. Hispanic Fact Sheet, supra note 24, at 2 (Approximately 5.8 percent of all students in American Bar Association ("ABA") accredited law schools and 8.4 percent of total law school applicants are Hispanic).
same race or ethnicity of their clients to provide competent representation; however, issues can arise that are specifically related to certain demographics that, if not identified or addressed, can affect the client's representation. These issues can be amplified when the client speaks a different language than the attorney or the attorney is not aware of the cultural differences that can affect a client's representation.

According to a 2007 American Community Survey Reports of Language Use in the United States, "the population speaking a language other than English at home" has increased steadily for the past three decades.\textsuperscript{27} The survey revealed that 20 percent (55,444,485) of the total population five years old and older spoke a language other than English at home.\textsuperscript{28} Of those individuals, 62.3 percent (34,547,077) spoke Spanish.\textsuperscript{29} 52.6 percent (18,179,530) of the population five years old and older who spoke Spanish at home reported their English speaking ability as "very well," 18.3 percent (6,322,170) reported their English speaking ability as "well," 18.4 percent (6,344,110) reported their English speaking ability as "not well," and 10.7 percent (3,701,267) reported they had no English speaking ability.\textsuperscript{30} While these numbers reflect that over half of the individuals who spoke Spanish at home indicated that they also spoke English very well, even those individuals who reported that they spoke English very well are thought to require assistance with English in some situations.\textsuperscript{31} Certainly, it is reasonable to expect that one area in which individuals that speak English as a second language would require assistance with English is in legal settings, where understanding specific legal terminology and concepts are essential to successfully maneuver through the legal system. Individuals who speak little or no English are often presented with additional challenges that can potentially have an adverse effect on their representation.

\begin{itemize}
  \item \textsuperscript{28} Id. at 2–3.
  \item \textsuperscript{29} Id. at 2.
  \item \textsuperscript{30} Id. at 7.
  \item \textsuperscript{31} Id. at 3.
\end{itemize}
II. ALL CLIENTS ARE NOT CREATED EQUALLY: ISSUES THAT MAY AFFECT A CLIENT’S REPRESENTATION

A. Access to an Interpreter

A common issue affecting the representation of individuals who have limited or no proficiency in English is their ability to access an interpreter. Although 28 U.S.C. § 1827 provides for, by motion, the appointment of a qualified interpreter for a party or witness who “speaks only or primarily a language other than the English language,” this requirement applies only to “judicial proceedings instituted by the United States” and in Federal Court. With no such provision that applies to judicial proceedings in state courts, decisions regarding the appointment, selection and payment of interpreters is in the discretion of each state. While not all states have developed such standards, "some state constitutions guarantee the right to an interpreter" in judicial actions. Additionally, courts have acknowledged the constitutional guarantees of due process and the right of an accused to confront his or her accusers require individuals in some instances to have access to an interpreter. However, a key problem affecting an individual’s “right” to an interpreter is how the determination of whether a person needs an interpreter is made.

While some state courts require an interpreter to be appointed “whenever one is requested,” in many state courts “the decision whether the accused or a witness needs and should be furnished with an interpreter, in a trial or other criminal proceeding, is a matter within the presiding judge’s sound discretion and will not be disturbed on appeal absent an abuse of that discretion.” For example, the state of Georgia provides that an interpreter is appointed only when a judge determines that “(1) the party cannot understand and speak English well enough to participate fully in the proceedings to him and to interpret or translate his testimony.”

36 Id.
37 Laura Abel, Language Access in State Courts 53, Appendix A (2009) (unpublished report) (on file with Brennan Center for Justice at New York University School of Law), available at http://brennan.3cdn.net/c611a37ee2b6eb199e_9bm6b3so4.pdf; see, e.g., LA. CODE CRIM. PROC. ANN. art 25.1(A) (2011) (“If a non-English-speaking person who is a principal party in interest or a witness in a proceeding before the court has requested an interpreter, a judge shall appoint, after consultation with the non-English-speaking person or his attorney, a competent interpreter to interpret or to translate the proceedings to him and to interpret or translate his testimony.”).
38 Fleming, supra note 17, at 29.
proceedings and to assist counsel; or (2) the witness cannot speak English so as to be understood directly by counsel, court, and jury.”39 The determination is to be made through the court’s inquiry of the individual’s identity, the court proceedings, and other questions using “active vocabulary in vernacular English (for example ‘How did you come to work today?’; ‘What kind of work do you do? . . . ‘What have you eaten today?’”).40 As the Supreme Court of Georgia noted in Ling v. State, the trial court judge, “who has the opportunity to observe the proceedings, the parties and their counsel deserves an appropriate degree of deference in assessing in the first instance whether an interpreter should be provided . . .”41 Federal courts have likewise held that 28 USCA § 1827 does not provide defendants with an automatic right to an interpreter, but instead gives district court judges the discretion in deciding whether an interpreter is required. 42

Understandably, this “wide discretion” produces a system void of uniformity that fails to provide a clear, articulated standard to determine when a defendant should be appointed an interpreter. Further complicating the courts’ decisions are “substantial disincentives” to appointing an interpreter such as cost, the additional time added to the proceeding by the interpretation, and potential delay to find a court-certified interpreter. 43 The result is an arbitrary standard for determining whether a person possesses sufficient understanding of the English language. A review of several cases illustrates this point.

In U.S. v. Edouard, the defendant, Sarge Edouard, was convicted of conspiracy to import cocaine, conspiracy to commit money laundering, and money laundering, and forfeiture was ordered.44 On appeal, Edouard, a

39 GA. SUP. CT. APPX. A § I(A).
40 GA. SUP. CT. APPX. A § I(C)(2).
41 Ling v. State, 702 S.E.2d 881, 884 (Ga. 2010); see also United States v. Febus, 218 F.3d 784, 791–92 (7th Cir. 2000) (holding “the trial judge, who is in direct contact with the defendant, must be given wide discretion”) (quoting Valladares v. United States, 871 F.2d 1564, 1566 (11th Cir. 1989)).
42 United States v. Johnson, 248 F. 3d 655, 661 (7th Cir. 2001) (holding that “[a] defendant is only statutorily entitled to the appointment of an interpreter if the district court determines that the defendant: (1) speaks only or primarily a language other than the English language; and (2) this fact inhibits their comprehension of the proceedings or communication with counsel”).
43 Fleming, supra note 17, at 2. See also People v. Cambrero, 794 N.Y.S.2d 366, 367 (App. Div. 2005) (holding that “[d]efendant was not deprived of his right to be present, or otherwise prejudiced, when the hearing court declined to await the arrival of a Spanish interpreter”); Thadeus Greenson, Dearth of Interpreters Increases Costs, Delays; Humboldt County Court Regularly Brings in Translators from Out of the Area, CONTRA COSTA TIMES (February 5, 2011), http://www.contracostatimes.com/ci_17302835?source=most_emailed&nclick_check=1 (describing the frustration of courts over the “waste of time and resources” when forced to delay trials due to the unavailability of adequate interpreters).
44 United States v. Edouard, 485 F.3d 1324, 1335 (11th Cir. 2007).
Haitian who spoke Haitian Creole, contended that the district court erred by violating "the Court Interpreters Act and his constitutional rights to due process, confrontation of witnesses, effective assistance of counsel, and to be present at his trial by failing to inquire into his need for an interpreter and failing to appoint one."45 During the trial, Edouard was questioned directly by the court and the prosecutor regarding the removal of his attorney and the appointment of a new one.46 The first attorney, who was removed due to a superseding indictment against him for money laundering stemming from the same case, continued to be involved in his defense, conferring with the newly appointed attorney.47 During the questioning, Edouard expressed difficulty in understanding a question asked by the prosecutor, Ms. Kilpatrick:

The Defendant: Could the interpreter translate for me, please? Because I really want to understand everything very well.

The Court: I'm not sure I understand it either. That's why I don't want to ask it.

Ms. Kirkpatrick: Your honor, may I address the Defendant directly?

The Court: Sure.

Ms. Kirkpatrick: Mr. Edouard, it is my understanding that Mr. Deloatch has come to meet with you during your defense. You understand that Mr. Deloatch has conflicted off of your case because of his involvement in counts number 10 and 11; that is, he received the checks made out to him in counts number 10 and 11. So the Court told him he couldn't be involved in your case. It's my understanding that he continued to meet with you. Do you feel that him-his continuing to meet with you has interfered in your right to a conflict-free defense by Mr. Kaeiser?

The Defendant: I don't really understand well. I don't want to say something and not understand exactly what it is.

Ms. Kirkpatrick: Your Honor, this kind of raises a whole new concerns [sic] about an interpreter for me at this point.

The Court: Well, I think it's your question. I mean, it's incomprehensible.48

45 Id. at 1336–37.
46 Id. at 1338.
47 Id.
48 Id. at 1338–39.
Despite Edouard’s argument that the above exchange evidenced his lack of understanding and need for an interpreter, the court disagreed, holding that “[i]t is not apparent from the record that Edouard had such “difficulty with English” so as to trigger the district court’s duty to inquire into whether Edouard’s language difficulties would inhibit his comprehension of the proceedings or communications with his counsel and the district judge.”

Similarly, in U.S. v. Febus, Angel Morales, who appealed his conviction of gambling, money-laundering, and conspiracy, argued that the denial of his right to an interpreter was a violation of the Court Interpreter’s Act. Morales contended that he was unable to understand the plea colloquy, and, thus, his waiver of his right to appeal was not made knowingly or voluntarily. At the beginning of the hearing, Morales was asked if he could “‘speak, read, write and understand English,’ and he answered, ‘I get by.’” During his plea colloquy, the judge inquired whether Morales understood his waiver.

Q: And if I [the district court] sentence you within the appropriate range, are you giving up or waiving your right to appeal your sentence on any ground and also agreeing not to contest your sentence in any post-conviction proceeding?

A: No.

Q: You’re not. Read paragraph M and see if you want to change that answer. (Conference between counsel and client, not within hearing)

A: Yeah, I—my right to appeal.

Although this exchange, combined with Morales’ self-assessment of his English speaking ability as just being able to “get by,” evidenced a possible difficulty with understanding the proceedings taking place, the court held that since his responses during subsequent exchanges were appropriate, “the district court judge did not abuse his ‘wide discretion’ by failing to

49 Id. at 1339. The court also found that the lack of understanding was due to the question asked, that there was an interpreter available to interpret for several witnesses who spoke Haitian Creole, a co-conspirator testified that Edouard spoke Creole and English in federal custody and that nothing on the record indicated that Edouard couldn’t understand testimony of three co-conspirators, including two of his brothers, who testified in English.

50 United States v. Febus, 218 F.3d 784, 791 (7th Cir. 2000).

51 Id. at 792.

52 Id.

53 Id.
appoint an interpreter to assist Morales at his plea hearing.”

Although a client’s access to an interpreter in criminal cases raises potential constitutional claims of due process and the right to confront witnesses, it is less clear whether claims are applicable for failure to provide an interpreter in civil cases. In fact, “[t]he limited authority on the subject suggests that the courts have no obligation to appoint and pay for party or proceedings interpreters in civil litigation or even in some immigration proceedings.” Access to an interpreter in civil cases varies from state to state and sometimes from district to district within a state. While some states provide for an interpreter in the same manner as criminal cases, others do not provide for interpreters in civil or small claims cases, regardless of their ability to pay.

Interpreters for administrative hearings vary by agency. In some instances, even though an individual does not have the right to be appointed an interpreter, the failure to have an interpreter may result in a finding that the individual was not present at the hearing. Additionally, there are no state statutes that apply to the appointment of an interpreter in office consultations.

B. Problems with the Use of Interpreter

Even when an interpreter is utilized, the client, with limited or no English proficiency, still faces a significant challenge due to the inevitable problems associated with courtroom interpreting. In cases involving the use of an interpreter, “non-English speaking defendants are not judged on

54 Id. at 793; see also U.S. v. Paz, 981 F. 2d 199, 200 (5th Cir. 1992) ("[A] district court is given wide discretion in matters regarding the selection of a court interpreter. Such decisions will not be overturned unless the district court abused its discretion.") (quoting U.S. v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980)).
55 CHARLES ALLEN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE EVIDENCE, Vol. 27 § 6056 (2d ed. 2007).
56 For example, Maine provides an interpreter to a party or witness in any type of court case. ME. SUP. JUD. CT. ADMIN. ORDER JB-06-3 (2006). However, “North Carolina has, to date, declined to issue a written mandate granting the right to an interpreter in civil proceedings . . . .” Emily Kirby et al., Research Paper, An Analysis of the Systemic Problems Regarding Foreign Language Interpretation in the North Carolina Court System and Potential Solutions, U.N.C. Immigration and Human Rights Policy Clinic Program (2010).
57 MINN. JUDICIAL BRANCH, SECOND DIST., LIMITED ENGLISH PROFICIENCY (LEP) PLAN (2010).
58 John Schwartz, Study Finds Gap in Aid for Non-English Speakers in State Civil Courts, N. Y. TIMES, July 03, 2009, http://www.nytimes.com/2009/07/04/us/04interpret.html?ref=us ("A new study of civil courts, from the Brennan Center for Justice at the New York University law school, examined the 35 states with the highest immigrant populations and found that interpreter services are not always provided, or not provided well, and are not keeping up with growing demand. Of those states, 46 percent do not require that interpreters be provided in all cases, and 80 percent fail to guarantee that the courts will pay for the interpreter, as the Department of Justice’s view of the law requires.").
their own words.” Rather, what is reflected as the client’s (or a witness’) words in the official court record, are the words as provided by an interpreter. Because it is impossible to interpret exactly what the speaker is saying, perfect interpretation does not exist. Illustrative of this fact are the actual requirements for passing the interpreter certification exam. Federal court interpreter certification examinations require only 80 percent accuracy for passage. Furthermore, the passage rate for state interpreter certification examinations vary, but no state requires 100 percent accuracy for passage. While 70-80 percent accuracy appears to be a high percentage, anything less than 100 percent - even one word translated inaccurately - can have a devastating effect on the outcome of a trial. This is especially true in light of the liberty interest at stake during criminal proceedings.

In one New York federal court case, a man was convicted on drug charges due to an error in the translation of an undercover wire. The man, in response to an individual asking him for a loan, uttered the words, “¡Hombre, ni tengo diez kilos!” The defendant used the word “kilos” to refer to Cuban currency, to say that he didn’t even have ten cents. Instead, it was translated as kilograms, referring to a drug quantity, which led to his conviction.

In another case in California, the interpreter’s misinterpretation during the direct examination of the prosecution’s key witness led to the defendant receiving a lesser conviction for manslaughter, which did not carry a life

59 Michael Shulman, No Hablo Ingles: Court Interpretation as a Major Obstacle To Fairness For Non-English Speaking Defendants, 46 Vand. L. Rev. 175, 177 (1993).
60 Id.
61 Id.
62 Even with an accuracy requirement of only 80 percent, still a small number of those who take the federal certification exam pass. Id. at 181. See also Telephone Interview with Brooke A. Bogue, Manager, N.C. Interpreter Serv. Program (March 16, 2011) (saying the average national passage rate for state certification is approximately twenty percent). [hereinafter Interview with Brooke Bogue]
63 For example, North Carolina has adopted the policies and procedures promulgated by the Consortium for State Court Interpreter Certification which requires a 70 percent accuracy rate on each of its three scorable components: simultaneous interpreting, consecutive interpreting and sight translation, for an interpreter to pass the oral performance examination. CONSORTIUM FOR LANGUAGE ACCESS IN THE COURTS, OVERVIEW OF THE ORAL PERFORMANCE EXAMINATION FOR PROSPECTIVE COURT INTERPRETERS 7 (Revised July 2010), available at http://www.prometric.com/NR/rdonlyres/ejxxsnmpbh3pi6gdas52ow42nixi5e7rbyvc2xhkp6swftrwr3lcgxqchohy63atobvgu2q2lvqdwz2vtfv2u5ig/OverviewoftheOralExamREV20100628.pdf.
64 Shulman, supra note 59, at 176; see also Alain L. Sanders, Libertad and Justicia for All, TIME, May 29, 1989, at 65.
65 Shulman, supra note 59, at 176.
66 Id. The conviction for the individual was later overturned when another interpreter discovered the error in the original recording. Since courtroom interpretations are rarely translated, had the mistake been made during the defendant’s testimony at trial, the error probably would never have been discovered. Interview with Jess George, Executive Director of the Latin American Coalition.
sentence, rather than the murder charge sought by the prosecution, which did carry a life in prison sentence. In that case, it was "clearly established that the defendant sneaked into the home of a woman with whom he was obsessed, waited for her and her husband to come home and killed the husband." The jury's assessment that the witness was evasive during her testimony resulted in its decision to convict the defendant of a lesser charge. In reality the testimony was evasive, but only because the testimony that was heard by the jury was not the testimony that was given by the witness to the interpreter. A separate interpreter, hired by a news agency to monitor the trial, found that words were omitted and phrases were completely changed during the interpreter's interpretation of the prosecution's testimony and the witnesses' testimony. As one expert later lamented, "'[t]he witnesses and the interpreter were at one trial and the judge, the prosecutor, the defense attorney and the jury were all at another trial.'"

Although the use of certified interpreters does not guarantee error-free translations, using interpreters that are not certified is almost certain to produce disastrous results. And unfortunately, it is often necessary to use a non-certified interpreter due to the absence of a certified interpreter. The federal statute and most state provisions that provide for the appointment of an interpreter allow for the appointment of either a certified or otherwise qualified interpreter. In the event that the interpreter is not certified, it is

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68 Id. at 601-602.
69 Id. at 602.
70 Id.
71 Id.
72 Id.
73 This may be caused by either a shortage of certified interpreters or the absence of a certified interpreter for a specific language. For example, North Carolina only has certified Spanish language interpreters due to the number of languages for which interpretation is requested, some so rarely seen that there is not a certification examination available for the language and for other languages, no individual has passed the certification exam. Interview with Brooke Bogue, supra note 62.
74 "The presiding judicial officer...shall utilize the services of the most available certified interpreter...or otherwise qualified interpreter..." 28 U.S.C.A. § 1827(d)(1) (West 2011). The United States Courts has three categories of interpreters: Certified Interpreters, Professionally qualified Interpreters and Language Skills/Ad Hoc Interpreters. Certified Interpreters must first pass the written examination in order to take the oral examination. A Professionally qualified Interpreter must meet one of four criteria (for example, the individual must pass the State Department conference or seminar interpreter test or pass the United Nations interpreter test). A Language Skills/Ad Hoc Interpreter has not qualified as a Certified or Professionally qualified Interpreter but demonstrates the ability to interpret court proceedings from English into the target language. Interpreter Categories, UNITED STATE COURTS, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters/InterpreterCategories.aspx (last visited November 15, 2011).
within the presiding officer's sole discretion to determine if an interpreter possesses sufficient knowledge and ability necessary to provide interpreting services. This is especially disconcerting if the individual interpreting has not passed a standard test created to ensure that individuals are capable of providing interpreting services. Furthermore, in most instances, a presiding officer who is not fluent in the language makes the decision whether a person is qualified to interpret. Thus, the presiding officer cannot adequately evaluate the level of fluency of the interpreter. Instead, the decision must be based on the interpreter's assessment of his or her ability to perform the task. Additionally, the determination of whether the interpreter is qualified is made at the beginning of the proceedings. After an interpreter is declared qualified, it is difficult to challenge his/her interpretations, even when challenged during the trial, as evidenced in the case State v. Van Pham.

In State v. Van Pham, three defendants were convicted of two counts of first-degree murder. Since all of the defendants and most of the witnesses were Vietnamese, the court appointed four interpreters: one for the court and one for each defendant. During the beginning of the hearing, the trial judge asked the attorneys whether they objected to any of the court-appointed interpreters. One attorney expressed that he had no objection to the court-appointed interpreter, while the other two attorneys indicated they wanted to reserve their right to challenge the court-appointed interpreter. The trial judge was unsatisfied with their request to reserve their right to challenge the court-appointed interpreters and indicated that if they had any objection they had to voice it at that time. The trial judge then ordered the court-appointed interpreter to take the stand to testify about her qualifications as an interpreter. During the colloquy, the interpreter indicated that she left Vietnam after the sixth grade and then came to the

75 See State v. Van Pham, 675 P.2d 848, 860 (Kan. 1984) ("The determination and propriety of appointing a person as an interpreter lies within the discretion of the trial court.").
76 This is also very problematic for the attorney that does not speak the language of his/her client as the attorney will be unable to ascertain whether the interpreter appointed by the court is in fact qualified, thus potentially limiting his/her ability to object since he/she lacks the knowledge necessary to know to object. Molina, supra note 34, at 17.
77 Shulman, supra note 59, at 185.
78 Id.
79 Van Pham, 675 P.2d at 848.
80 Id.
81 Id. at 856.
82 Id.
83 Id.
84 Id.
85 Id. at 857.
United States. The transcript also reflected that even though she indicated she taught English in a refugee program (for Vietnamese refugees), her English was broken and she evidenced some problem in expressing herself in English. Despite a number of objections by two of the attorneys during the trial, the trial court judge refused to remove the court interpreter. In affirming the trial court’s decision and finding no error for the court’s failure to remove the court interpreter due to alleged incompetence, the Kansas Supreme Court held that “[w]hile a party may challenge the competency of an interpreter, only the trial judge may remove an interpreter.” The court further noted that it is a trial court’s decision to determine competency of an interpreter and “it is for the court to determine whether a challenge to an interpreter’s challenge has been justified.” Thus, once a court determines that an interpreter is competent to testify, it is virtually impossible to prove otherwise to the court.

In the absence of a certified interpreter, some courts have allowed a friend, family member, attorney, judge, and even a prosecutor to interpret on behalf of a defendant. In one shocking case, the trial court allowed a co-defendant to translate the responses of another co-defendant. In another case, a Spanish speaking inmate served as a court interpreter over twenty times, although he was not a trained interpreter, and he was even allowed to testify for a Laotian defendant after he indicated he “picked up” some of the language from another inmate.

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86 *Id.*
87 *Id.* The following is an excerpt of the exchange between the trial court judge and the interpreter:
Q. And might I ask you, are you acquainted with the Vietnamese language?
A. Yes, I do.
Q. What education did you receive in Vietnam?
A. Well I was in sixth grade in Vietnam, and when I got to America I was in seventh grade. And I graduated from high school. I went to college for one year, and then I was a teacher now at the Catholic Charity Church helping the refugee and at night time I go to school in Bryan Institute taking programmer...
Q. Now you indicated you are familiar with the Vietnamese language, is that broken down into dialects?
A. Well, I was in Vietnam for thirteen years, and so that’s the—I speak Vietnamese and some kind of that, but I’m not sure that I know all because I would be there for thirteen years. But we keep speaking English—I mean we keep speaking Vietnamese most of the time at home.
88 *Id.* at 861.
89 *Id.*
90 *Id.*
91 Interview with Brooke Bogue, *supra* note 62.
92 *State v. Tamez*, 506 So. 2d 531 (La. Ct. App. 1987). The conviction of Defendant Sanchez was vacated and remanded on appeal due to the use of the co-defendant as an interpreter, but only because the court, *sua sponte*, found that the use of the co-defendant to translate the proceedings was patent error, as the only issue of the defendant on appeal was the denial of a motion to suppress.
The use of family members or other interested parties as interpreters raises obvious conflicts between the client and the interpreter. One problem with using a family member or friend as an interpreter is the interpreter inserting his/her own knowledge of the case or version of the events into the interpretation, instead of interpreting what is asked or said. Although the practice of using family members as interpreters in court is frowned upon, this is not the case in private consultations that occur outside of the courtroom between an attorney and the client. With no rules in place to prohibit the practice, friends or family members are often used to provide interpretations during office consultations, with the attorney having no ability to assess the quality or accuracy of the interpretation.

In examining the problem of courtroom interpreting, it is apparent that there are many causes that can be attributed to an interpreter’s inability to accurately or correctly interpret for a client. One cause is the dialectal and regional differences that exist between the interpreter and the client or witness. When an interpreter is used that is not familiar with the speaker’s dialect, the result can be fatal to the client’s case or claim. Unfortunately, there is a misconception that all people who speak Spanish speak the same language, regardless of the country or region where the language is spoken. In reality, words used to describe something in one country can have different meanings in other countries, or even in different areas of the same country.

In one case, workers were being deposed through a court-certified interpreter in a large suit against a garment manufacturer. The interpreter translated the word “labels” as “las etiquetas” which created confusion since the workers in the garment factories in that area used “los labels” to refer to the price tags attached to the garments after they were manufactured. Muneer I. Ahmad, Interpreting Communities: Lawyering Across Language Difference, 54 UCLA L. REV. 999, 1039–40 (2007).

94 Using third parties not employed or retained by the attorney during office consultations can also raise issues of attorney-client privilege as the attorney-client privilege applies only to communications between the client and the attorney and does not extend to communications between the attorney and the third parties. Interview with C. Scott Holmes, Attorney with Brock, Payne & Meece, July 18, 2011 (record of interview on file with author). [hereinafter Interview with C. Scott Holmes].


96 In one case, workers were being deposed through a court-certified interpreter in a large suit against a garment manufacturer. The interpreter translated the word “labels” as “las etiquetas” which created confusion since the workers in the garment factories in that area used “los labels” to refer to the price tags attached to the garments after they were manufactured. Muneer I. Ahmad, Interpreting Communities: Lawyering Across Language Difference, 54 UCLA L. REV. 999, 1039–40 (2007).

97 Davis et al., supra note 35, at 1–2; see also Angela McCaffrey, Don’t Get Lost in Translation: Teaching Law Students to Work with Language Interpreters, 6 CLINICAL L. REV. 347, 352 (2000).
witnesses’ inability to understand the questions posed to them in Spanish, the defendant was convicted of murder. His conviction was subsequently affirmed on appeal. Fortunately, his case received significant media attention, and after spending four years in prison, the case was ultimately dismissed.

Idiomatic expressions can also play a role in an interpreter’s ability to accurately interpret at trial. When an individual provides interpretation services during a trial, the interpreter is tasked with providing a word-for-word translation of what is being said, rather than relaying what the interpreter personally understands to have been said. Because idiomatic expressions cannot be directly translated, their use can result in confusion and an inaccurate interpretation of the original speaker’s intent. Many phrases, ideas and concepts in English do not directly translate into other languages. For example, a speaker who says that something is in “black and white” is not intending to discuss the color of an object, but rather intending to indicate that there is written proof of the matter. Since the interpreter must interpret what is spoken, the resulting interpretation would not accurately portray what was intended.

Yet another problem with interpreting can occur due to the use of technical language or legalese. The use of terms specific to law may result in an interpreter who isn’t familiar with the language misinterpreting the word. Even if the interpreter is able to interpret the word, the client, due to his/her unfamiliarity with the word, may not understand what is being asked or stated. If the original speaker is unaware of the issue, it could interfere with the client’s ability to understand what is being said or to respond appropriately or accurately to questions.

98 Davis et al., supra note 35, at 1-2.
99 Id. at 2.
100 The trial court judge dismissed the case in 1991. Id.
102 In one case an interpreter, who was unfamiliar with legal terms, made up words or used English words to “figure it out” without consulting a dictionary or indicating that he did not understand what the legal terminology meant. The interpreter, who identified himself as bilingual but had no formal training in courtroom interpreting or interpreting legal terminology, interpreted in numerous cases before his qualifications were challenged. See City of Columbus v. Lopez-Antonio, 914 N.E.2d 464, 474-75 (Ohio 2009).
103 In the Spanish for Lawyers class offered at North Carolina Central University School of Law, several Latino students enroll in the class specifically for the purpose of learning legal terminology that they, although fluent in Spanish, were not familiar with because they never needed to use legal terminology before.
C. Cultural Issues Affecting a Client's Representation

Similar to a client’s dialect and regional differences that can affect an interpreter’s ability to accurately interpret the proceedings, a person’s culture can also have a tremendous effect on a client’s representation. In many Latin American countries, the physical numerical address of an individual is not commonly used, but rather landmarks, or even house colors. As such, there is lesser importance attached to the physical address of an individual. However, the inability to recite a physical address when asked can be viewed by others unfamiliar with this knowledge—especially police—as being evasive and dishonest, resulting in further scrutiny to a client. Similarly, an individual’s name can cause confusion and can adversely affect his/her representation. In the Spanish culture, an individual has two last names, a mother’s last name and a father’s last name. Although both are considered to comprise the individual’s last name, the use of one, rather than the other can lead to issues in several different areas of laws, from real property law, for failure to properly title a property, to family law, for failure to correctly identify a party.104

A client’s culture can also affect their perception of the legal system or the manner that they respond in legal situations. For example, while mediation is considered a less adversarial and more favorable means of resolving conflicts, this forum can be very disadvantageous to Hispanic women due to their cultural background.105 The failure to recognize or identify cultural issues that can impact a client’s representation and can have a negative impact on a client’s case. In fact, in Caro v. Calderon, the court held that “the failure to present evidence necessary to prevent a cultural gap may constitute ineffective assistance of counsel.”106

D. Immigration Issues

A client’s immigration status can have serious consequences for the client. The failure to recognize the impact of a charge on your client’s

104 In one situation, a criminal attorney’s client was stopped for speeding and gave his last name. The police officer took the client’s license that listed a different last name. The individual was charged with giving a fictitious name. Hispanics in the Legal Profession Presentation at North Carolina Central University School of Law, Panel Discussion (March 18, 2011).

105 See Jessica R. Dominguez, The Role of Latino Culture in Mediation of Family Disputes, 1 J. LEGAL ADVOC. & PRAC. 154, 165 (1999). Additionally, the perception of a Hispanic male as the leader of the family and responsible for ensuring the safety and welfare of his family may have negative implications in the justice system. Some Hispanic males may admit guilt when informed that their family may suffer (or face deportation) if the defendant goes to trial. Interview with C. Scott Holmes, supra note 94.

106 Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir. 1999).
immigration status cannot only affect a client, but can also lead to sanctions against an attorney for neglecting to disclose such information. In *Padilla v. Kentucky*, Jose Padilla, who had been a legal resident of the United States for over forty years, faced deportation after pleading guilty to drug distribution charges.\(^{107}\) Padilla alleged that his attorney failed to disclose the consequences of his plea and that he entered the plea only after he was advised by his attorney that he would not be deported because he had been in the United States for a long period of time.\(^{108}\) Although the Kentucky Supreme Court failed to provide him with relief from his conviction, the United States Supreme Court, recognizing that immigration reforms over time have “expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation,”\(^{109}\) held “that counsel must inform her client whether his plea carries a risk of deportation” and the failure to do so results in ineffective assistance of counsel.\(^{110}\) Thus with this ruling, the Court recognized that “noncitizen criminal defendants now have a right to competent deportation counsel in criminal court,”\(^{111}\) which has serious implications for criminal attorneys in their representation of clients who have not obtained citizenship.

In addition, the legal status of a client can affect his ability to seek recovery for damages in certain cases. In *Egbuna v. Time Life Libraries, Inc.*, the Fourth Circuit held that in order for a person to have standing to bring an action for discrimination in the hiring process, the individual must have work authorization at the time of the application for employment.\(^{112}\) Rights to benefits were also denied due to the legal status of an undocumented immigrant in *Hoffman Plastic Compounds v. NLRB*. In *Hoffman*, the National Labor Relations Board awarded back pay and reinstatement to an undocumented immigrant who was illegally fired. The United States Supreme Court held that the back pay and reinstatement could not be awarded because the undocumented immigrant was not legally

\(^{107}\) *Padilla v. Kentucky*, 130 S. Ct. 1473, 1475 (2010)

\(^{108}\) *Id.* at 1476.

\(^{109}\) *Id.* at 1478.

\(^{110}\) *Id.* at 1496.


authorized to work in the United States. In some cases, a person’s legal status is exploited, as some employers know that an undocumented immigrant would be reluctant to seek recovery for unpaid wages in court. Thus, these individuals perform services and after they complete the work, they are never paid.

E. Misconceptions and Biases of Other Parties

Finally, misconceptions and biases of other parties can have an adverse impact on the client. Regardless of the immigration status of an individual, there is often a misconception in the community that all immigrants are “illegal.” These misconceptions and biases are not limited to the general public, but infiltrate all areas of our society, including those that are charged with upholding and enforcing the laws. In 2008, a sheriff in Johnston County, North Carolina, was featured in a state newspaper for his remarks about the Hispanic Community in his county. In the article, Sheriff Steve Bizzell, former president of the North Carolina Sheriffs’ Association, expressed condemnation for undocumented immigrants “breeding like rabbits” and asserted that undocumented immigrants “rape, rob and murder American citizens, fail to pay taxes and drain social services...” He further opined, “Mexicans are trash...[a]ll they do is work and make love, I think.” These disparaging remarks reflect his biases and misconceptions about the Hispanic community and are especially troubling due to the position he holds and the potential impact his feelings can have on others in the community. Prior to relinquishing his post as president of the North Carolina Sheriffs’ Association, he actively encouraged the 100 sheriffs in the state to “cooperate fully with federal

114 Interview with Jess George, supra note 2.
115 ABA Journal, Commission on Hispanic Legal Rights Aims to Right Wrongs of Discrimination (Sept. 4, 2011)
http://www.abajournal.com/mobile/comments/commission_on_hispanic_legal_rights_aims_to_right_wrongs_of_discrimination/. The comment section to the ABA announcement of the new ABA Commission on Hispanic Legal Rights and Responsibilities provides insightful commentary. One commenter wrote, “[T]his is just another attempt by the ABA to turn illegal immigrants into ‘the victim.’” Another commenter wrote, “What is mainstream in our country is the overwhelming desire to enforce and uphold the laws of the land, not the fiction the ABA would have us believe about the ‘unmet legal needs’ of illegal aliens...not only is the ABA disrespecting the law, it is promoting lawlessness in our country.”
117 Id.
118 Id.
immigration authorities" and helped to make the state one of the most aggressive in the nation in deporting undocumented immigrants.¹¹⁹

Misconceptions and biases can affect law enforcement personnel, juries and even judges. In Hernandez v. State, the Florida Court of Appeals reversed the robbery conviction of a defendant due to the judge’s anti-Hispanic comments.¹²⁰ In Hernandez, the judge criticized Hispanics for failing to learn and speak English and shared an anecdote during voir dire about another Hispanic defendant who falsely claimed he didn’t speak English well, insinuating that this defendant’s claim, that he didn’t speak well and needed an interpreter, was false.¹²¹ Although the Florida Court of Appeals held that the judge’s comments constituted a reversible error,¹²² the Florida Court of Appeals’ ruling cannot erase the impact of the judge’s sentiments on past and current cases.

In a North Carolina case, Trooper C.J. Carroll, a trooper with the North Carolina Highway Patrol, conducted a stop of a Hispanic male for a seatbelt violation after he observed the individual from the rear.¹²³ During a hearing on a motion to suppress evidence, an attorney testified that Trooper Carroll stopped his client for Driving While Intoxicated. When asked by the attorney why he stopped his client he responded, “‘[I]f they’re Hispanic and they’re driving, they’re probably drunk.’”¹²⁴ Another attorney testified that after the trooper stopped her client and charged him with DWI and driving with a revoked license he admitted that “he patrols two areas of Durham [North Carolina] ‘for the purpose of looking for Hispanic males’” and later stated, “‘Everyone knows that a Hispanic male buying liquor on a Friday or a Saturday night is probably already drunk; Mexicans drink a lot because they grew up where the water wasn’t good.’”¹²⁵ The trooper’s statements resulted in an internal investigation by the North Carolina Highway Patrol in which he admitted that he could not tell whether an individual was wearing a seatbelt from behind.¹²⁶ As a result, the charges

¹¹⁹ Id. In North Carolina, the controversial Immigration and Customs Enforcement Program is implemented in all 100 counties, making the state only the tenth state to implement the program statewide. Rebekah L. Cowell, Controversial Immigration Enforcement Program Goes Statewide in North Carolina, SOUTHERN STUDIES.ORG (Mar. 21, 2011), http://www.southernstudies.org/2011/03/controversial-immigration-enforcement-program-goes-statewide-in-north-carolina.html.


¹²¹ See id.

¹²² Id.


¹²⁴ Id.

¹²⁵ Id. at 63–64.

¹²⁶ Id.
were dismissed against the defendant.\textsuperscript{127}

III. ETHICAL CONSIDERATIONS FOR THE NON SPANISH-SPEAKING ATTORNEY

Currently, there are no specific rules regarding the representation of clients with limited English proficiency. However, the ABA Model Rules of Professional Conduct provide attorneys with direction when representing LEP clients. Rule 1.1 addresses the minimum competence required for attorneys.\textsuperscript{128} Specifically, the rule mandates that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation."\textsuperscript{129} In assessing whether a lawyer has the requisite knowledge and skill, Comment [1] of Rule 1.1 employs the use of relevant factors which include, "the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field of question [and] the preparation and study the lawyer is able to give the matter..."\textsuperscript{130}

The inability of an attorney to speak the language of a client can have an effect on an attorney’s ability to provide his client with competent representation. It is the obligation of the attorney to ensure that a client’s rights are not adversely affected or compromised by a language barrier between the client and attorney. Though the attorney may possess the requisite legal knowledge regarding the case, the lack of awareness of the issues previously addressed in this Article that can affect the LEP client will result in the attorney lacking the requisite thoroughness and preparedness reasonably necessary for representation.

Additionally, Rule 1.3 dictates, "[a] lawyer shall act with reasonable diligence and promptness in representing a client."\textsuperscript{131} Comment [1] provides, "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s

\textsuperscript{127} Id. at 67. During the suppression hearing, defense attorneys presented statistics on the patterns of the trooper’s citation patterns which showed that 71% of the DWI citations issued by the trooper during a fourteen month period involved Hispanic males and in plotting the stops, the citations were issued in “two fairly concentrated areas” in Durham which was heavily populated (71%) by Hispanics. Id. at 64.

\textsuperscript{128} MODEL RULES OF PROF’L CONDUCT R. 1.1 (2011).

\textsuperscript{129} Id.

\textsuperscript{130} MODEL RULES OF PROF’L CONDUCT R. 1.1, cmt. 1 (2011).

\textsuperscript{131} MODEL RULES OF PROF’L CONDUCT R. 1.3 (2011).
cause or endeavor.’’ The comment further provides, ‘‘[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf,”

As previously addressed, there are issues that specifically affect the representation of limited English proficient clients. These unique concerns, if not addressed, can result in a client not receiving as equal a representation as that of an English proficient client. As Rule 1.3 articulates, it is the responsibility of the attorney to take all necessary steps to ensure that they “vindicate the client’s cause or endeavor.” All attorneys, even those representing these limited English proficient clients, must provide zealous representation on behalf of their client. For attorneys serving the Spanish-speaking community, this may require additional work, some of which may be without compensation, but it is necessary to adhere to the rules of practice. In fact, in *Flowers v. Board of Professional Responsibility*, the Tennessee Supreme Court held that LEP clients, due to their inability to speak or read in English, are “vulnerable clients” who may require more assistance and attention than non-LEP clients. Thus, an attorney that fails to perform the additional work necessary for LEP clients can face disciplinary actions.

Moreover, Rule 1:4 (a) provides that “[a] lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e) 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.” Rule 1.4(b) requires a lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

If a language barrier exists and the attorney is forced to utilize the services of an interpreter, how can the attorney ensure that the requirements

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133 Id.
134 Id.
136 Id.
138 Id.
for communication are met? When relying on an interpreter, the attorney is forced to delegate her duty of communication to a third-party. Often, the delegation is made to an individual who has no obligation to either party. Thus the attorney cannot guarantee that the individual providing the services is doing so in the manner in which it must be done. At a minimum, safeguards should be established to ensure that the requirements for communication are met. The failure to provide mechanisms that guarantee the requisite communication is tantamount to malpractice.

Finally, Rule 2.1 provides in pertinent part that, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." Although generally, "[a] lawyer is not expected to give advice until asked by the client...when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation." As one attorney provided as an example, clients are sometimes willing to falsely accept responsibility for a crime and sign a plea agreement to avoid having to go to trial or spending more time in jail. In those instances, the model rules dictate that the lawyer must inform the client that his action can result in substantial legal consequences.

In Padilla, the United States Supreme Court held that the failure to provide advice about the adverse legal consequences of a guilty plea amounted to ineffective assistance of counsel. With evolving immigration laws, it is incumbent on an attorney to be versed in these laws in order to provide effective representation. As the impact of the legal status of a client can have severe repercussions, the failure of an attorney to properly advise his client can result in a violation of rules regarding competency, diligence, communication, and attorney as advisor.

IV. RECOMMENDATIONS FOR THE NON-SPANISH SPEAKING ATTORNEY

For the non-Spanish speaking attorney confronted with the myriad of issues that could potentially affect a client's representation, the prospect of providing representation to this community may be daunting. However,
there are several methods of ensuring a client's zealous representation. One recommendation is to always request an interpreter for your client.\textsuperscript{143} As timing is crucial in determining whether a defendant has the ability to understand the proceedings, it is important to request interpreting services at the earliest possible appearance.\textsuperscript{144} The failure to do so can result in a determination that the services are not required.\textsuperscript{145} The attorney should object in order to preserve a record on appeal if interpreting services are not provided.\textsuperscript{146} By failing to object, certain rights may be waived resulting in a higher standard necessary to overturn the verdict on appeal.\textsuperscript{147} Continuing to object throughout the trial will further demonstrate the client's continuous difficulty with comprehension.\textsuperscript{148} When requesting an interpreter, an attorney should request two interpreters: one to provide interpreting services for witnesses and one to provide simultaneous interpretation of the proceedings for the client.\textsuperscript{149} Having a second interpreter can also provide a monitoring system to ensure that each interpreter is correctly interpreting testimony.\textsuperscript{150} If a second interpreter is not provided, utilize a bilingual family member or friend in the courtroom (or a bilingual employee or agent) to monitor the interpreter and to alert the attorney in the event of any discrepancies.\textsuperscript{151} Recordings, when allowed by the judge,\textsuperscript{152} can be invaluable in the event of a claim that an error was made in interpretation.\textsuperscript{153}

\textsuperscript{143} See Interview with C. Scott Holms, supra note 94 (suggesting that attorneys demand an interpreter, and refuse to proceed with the hearing unless an interpreter is appointed and stating that in his experience, although judges are first reluctant to appoint an interpreter, they eventually provide one when they are presented with a claim that the failure to appoint one implicates the due process rights of the client).

\textsuperscript{144} See Edouard, 485 F.3d at 1339 (determining that since the defendant did not request the use of an interpreter during any pre-trial proceedings prior to trial, he did not sufficiently show that he was unable to understand subsequent proceedings).

\textsuperscript{145} See id.

\textsuperscript{146} See Molina, supra note 34, at 17 (noting that "generally, appellate review of the lower courts' failure or refusal to appoint interpreters, as well as interpreter qualifications and performance, will only occur when there is a contemporaneous objection ").

\textsuperscript{147} See Davis, supra note 35, at 22 (comparing the plain error standard on appeal if no objection is made with the abuse of discretion standard if an objection is made).

\textsuperscript{148} See Edouard, 485 F.3d at 1343. The court determined that since the defendant's attorney only objected once, there was no indication of a continuous problem with failing to understand the proceedings.

\textsuperscript{149} United States v. Bennett, 848 F.2d 1134, 1140 (11th Cir. 1988) (stating that nothing in the Court Interpreters Act requires the appointment of more than one interpreter for each defendant, and that the appointment of more than one interpreter is within the trial judge's discretion).

\textsuperscript{150} Shulman, supra note 61, at 193.

\textsuperscript{151} Although the use of family members and friends would not be recommended for interpreting, their presence in the courtroom to monitor the interpreting can be extremely helpful.

\textsuperscript{152} Shulman, supra note 59, at 194.

\textsuperscript{153} Id. (warning that the use of a recording could result in an overload of cases on appeal caused by claims of inaccurate interpreting).
Advise the client of his right to an interpreter and the implications of waiving that right. If the client indicates that he has a sufficient understanding of English, the failure to appoint an interpreter has not been found to be plain error or an abuse of discretion. In most cases reviewed, where the lower's court decision not to appoint an interpreter was affirmed, the appeals court indicated that the trial court was in a better position to determine whether the defendant possessed an understanding of the English language and found that the record on appeal evidenced that the individual was able to participate in the proceedings and understand English.

Further, always request a certified interpreter. If a client is in need of interpreting services, consult with the office regulating interpreters in your jurisdiction to determine the process for the appointment of an interpreter. If the process allows, select an interpreter with whom you have had experience with or who is known for the quality of interpretation that she provides. Also, to avoid any issues that may arise due to dialect and regional differences, request an interpreter who is from the same region or uses the same dialect of the client. If time permits, allow the interpreter and client to get acquainted in order to ascertain and alleviate any cultural issues.

In the event a certified interpreter is not available, inquire about the qualifications for the person appointed to interpret and, if possible, have an independent party present to ensure that the individual possess the necessary legal terminology to provide interpreting services. Avoid using friends or family members to interpret for a client at trial or during office consultations. If you have office personnel that provide interpreting services for you, make sure those individuals possess the requisite ability to communicate with the client. In the event that you are unable to obtain an interpreter for office consultations, utilize the services of an off-site

154 While the author does not suggest falsely asserting that a client needs an interpreter if the client is proficient in English, it is important for the client to understand that he cannot take a “wait and see” approach and begin the trial without an interpreter, only to determine later that he does not understand what is being said. If there is any doubt whether the client has the ability to understand the proceedings, err on the side of caution and request an interpreter.

155 People v. Cambrero, 794 N.Y.S.2d 366, 367 (App. Div. 1st Dep’t 2005) (holding that the evidence exclusively established that the defendant was fully capable of speaking and understanding English); see In the Matter of Ejoel M., 824 N.Y.S.2d 660, 662 (App. Div. 2d Dep’t 2006) (stating that the record shows that the appellant understood English); see also State v. Yang, 549 N.W.2d 769, 728–29 (Wis. 1996) (stating that the court’s post-conviction determination that Yang’s language difficulty was not sufficient to make an interpreter necessary was not clearly erroneous).

156 In theory, this may seem easy to do, but in practice, it will be difficult for the non Spanish-speaking attorney to ascertain the fluency level of personnel. Some suggestions include having all personnel take a special course on legal interpreting, utilizing a court-certified interpreter to ascertain the fluency level of applicants and utilizing fluent Spanish-speaking attorneys to interview applicants for their level of fluency.
interpreter. Different types of technology, such as Skype® and FaceTime®, may be used on a case-by-case basis for office consultations. Alternatively, many services are now available that allow you to “dial an interpreter” who can provide instantaneous interpretation for your client. Although this is not the best option due to its cost and impersonal method of communication, it is better than relying on people with limited Spanish abilities to communicate important information to your client.

When utilizing the services of an interpreter, avoid the use of technical language or “legalese.” Phrase sentences in a simple way that would allow the interpreter to understand what is being asked and to properly convey the information to your client. Make sure that your interpreter understands what is being communicated. Also, make sure that your interpreter understands that she is expected to provide a direct interpretation of what is being said, rather than to provide her personal interpretation of what was originally stated. Instruct the interpreter to advise you of any questions that she may have regarding what you are asking of your client. If anything is interfering with the interpretation of your client, such as your client’s inability to understand the interpreter, instruct the client to inform you as promptly as possible.

In order to fully understand all matters which can affect your client’s representation, ask questions to ascertain any cultural differences that can provide insight to your client’s case. If necessary, use witnesses to bridge the cultural gap between your clients and the court and explain any cultural differences that can affect the perception of a judge or jury. The client’s culture can also affect the attorney-client relationship. Generally, in the Hispanic culture, clients are not accustomed to questioning the decisions of attorneys and, therefore, may be less likely to ask questions. Make the client an active participant in the process. Explain to the client what his role is in the representation and instruct him to ask any questions that he may have regarding the representation.

158 Id. The cost for “pay-as-you go” service at Language Line Services is $4.35 US Dollars per minute. Id.
159 One Spanish for Lawyers student shared that she was asked during an internship if she spoke Spanish and she responded she knew “a little” and was assigned to answer the Spanish-speaking line (the attorney advertised “Se Habla Español” although no one in the office spoke Spanish fluently). The student admitted to the class that she quickly learned she was not proficient enough for those duties but when she spoke to the attorney about her inability to perform the tasks was told she knew more than the attorney and the attorney refused to change her assignment. Spanish for Lawyers Class Discussion, North Carolina Central University School of Law (Fall Semester 2010).
160 Interview with Attorney Claudia Perez-Hurtado, Associate Attorney, Velasquez & Associates (June 29, 2011).
Always inquire about the legal status of your client and learn how the disposition of your case can potentially affect your client's status or ability to obtain legal residency or citizenship. If you are not familiar with immigration issues, consult with an immigration attorney prior to entering a plea or providing advice to your client on how the case should be disposed. One attorney recommends that any attorney working with Spanish-speaking clients should have a "team of attorneys" that he consults with, including a criminal defense attorney, civil rights attorney and an immigration attorney. This will allow the attorney and the client to make an informed decision on how to proceed with the case.

Although it is not possible to alleviate all misconceptions and biases toward the Hispanic community, learn the culture of the community to gauge whether any education or information may be necessary to assist your client. At trial, it may be necessary to confront any negative stereotypes to prevent your client from being unfairly treated. As evidenced in State of N.C. v. Villeda, the stereotypes of law enforcement personnel may also be used to prove that your client's civil rights have been violated, which could result in the dismissal of charges against the client. Use witnesses to provide information and education for the court. Finally, discuss any fears your client may have regarding his representation so they can be addressed.

CONCLUSION

With the increased number of Spanish-speaking individuals in our community and legal system, it is imperative for attorneys to understand the ethical implications and legal challenges that can arise when representing these clients. As this Article has examined, clients with limited proficiency in English are not only confronted with barriers caused by a legal system which is struggling to provide the resources necessary to accommodate their language differences; these clients also face additional obstacles due to inherent problems with courtroom interpreting, as well as issues due to their culture, immigration status and the biases and misconceptions of society which permeate the justice system.

The ABA Model Rules of Professional Conduct impose upon attorneys an obligation to provide competent representation to all clients regardless

161 Interview with C. Scott Holmes, supra note 94.
162 See 599 S.E.2d at 65 (N.C. Ct. App. 2004). In Villeda, the attorney, by accessing the public records of the prior tickets of the trooper, was able to show a pattern of citations issued in a certain area where a higher concentration of Hispanics lived. Id.
of their background, culture, immigration status or language spoken. Although some efforts have been made in the courts to assist LEP clients, the courts alone cannot solve the legal issues facing the LEP community; attorneys must be a part of the process in ensuring that their legal needs are met. Many of the concerns encountered by these clients can be addressed by awareness and education. At a minimum, all attorneys representing LEP clients should receive additional training to discuss problems and possible solutions when representing LEP clients. However, as a significant portion of legal work is performed outside of the courtroom, uniform standards must be created that provide guidelines for the representation of LEP clients during office consultations and transactions that occur outside of the courtroom.

Admittedly, attorneys representing LEP clients can encounter obstacles: increased cost due to fees associated with interpreting services and increased time caused by additional work in identifying and/or eliminating supplemental issues. But, as advocates, it is important that attorneys take all necessary steps to ensure that the Hispanic community is fairly represented. Only then will it be possible to fulfill the promise of justice for all.