

# **LANGUAGE, CULTURAL, AND CONCEPTUAL BARRIERS: PROTECTING YOUR CLIENT'S RIGHT TO PARTICIPATE FULLY IN HIS DEFENSE**

## **I. Introduction**

Imagine being arrested in a foreign country. You do not speak the language, or if you do, your vocabulary and comprehension is barely sufficient to order food in a restaurant. You have only the most rudimentary understanding of the culture, customs, and legal system of the arresting country. Now, imagine being interrogated in a language that you do not fully understand. After interrogation, you are given a lawyer who is employed by the government, who does not speak English, who knows nothing of your background, who has no idea what the U.S. legal system is like, and who struggles to explain complex legal concepts that you have never encountered before. Most of us would feel isolated, confused, frightened, and more than a little distrustful. These are precisely the sentiments of many Mexican nationals detained in the United States.

Even Mexican nationals who have resided in the United States for most of their lives may not fully understand the country's legal system. Levels of acculturation vary from person to person and are affected by socio-economic status, education, and other factors. Thus, even for these clients, language, cultural, and conceptual barriers may still present significant obstacles to effective attorney-client communications.

In addition to providing guidance on working with interpreters, this chapter describes a number of legal strategies relating to linguistic and cultural issues affecting interrogation, waivers, and court proceedings.

## **II. Language Barriers**

For many Mexican nationals, language barriers substantially impede their ability to understand their legal rights, communicate with counsel, and understand court proceedings. Too often, police, lawyers, and court personnel wrongly assume that a Mexican national understands English, simply because he can carry on a simple conversation. While language barriers can make effective attorney-client communications difficult, they also give rise to litigation opportunities. Here, we provide guidance on working with interpreters, and suggest strategies to ensure your client's rights are fully protected.

### **A. Choosing and Working with an Interpreter**

The best defense team will have a member who is completely proficient in the dominant language of your client. Understanding that this is not always possible, we offer a few suggestions for choosing and working with an interpreter.

When considering using an interpreter it is important to think about the following:

- *Determine your client's dominant language.* Many Mexican clients are most comfortable speaking Spanish, but don't assume that Spanish is your client's first language. There are many indigenous languages spoken in Mexico. In one Oregon capital case, the courts appointed a Spanish-speaking interpreter for the proceedings, only to find out later that the defendant (and most witnesses) spoke Mixtec, an indigenous language. The defendant knew only very basic Spanish and the provision of a Spanish interpreter did not assist him in understanding the proceedings.<sup>1</sup> Your client may also be more comfortable speaking English. To ascertain which is his dominant language, ask him what language he speaks with his family, and the language he speaks with his closest friends.
- *Should you use an interpreter at all?* Your client may speak some English, and it is tempting to try to communicate directly, without the assistance of an interpreter. Working through an interpreter is slow and cumbersome. On the other hand, your client may not fully understand you, and important concepts may be lost, without an interpreter present. If your client is not a native English speaker, we strongly recommend that you have an interpreter accompany you on all visits in which you will need to explain complex legal matters.
- *Neutrality and confidentiality are vital.* Relatives do not make good interpreters as they may share sensitive information, or filter information to protect others.
- *Use the same interpreter for all client visits, wherever possible.* Interpreting is an art and different interpreters may use different terms for the same concept. If two interpreters are used, your client may not necessarily understand both. Additionally, in a capital case, highly personal and sensitive information may be discussed, and your client may not wish to divulge his innermost secrets before a stranger he has just met for the first time.
- *Consider the interpreter's character and rapport with your client.* Two interpreters may have identical interpreting skills, but one's manner may be more conducive to interactions with your client. An interpreter who develops a good rapport with your client will allow for better communication and may allow your client to be more forthcoming about the intimate details of his life.
- *Evaluate the interpreter's style.* The interpreter should have a good sense for flow of information, being careful to not be too short with your client, as well as being able to convey your client's emotion and substance of the dialog. Likewise, if you notice your client giving a very long response to a question that results in a short translation, this may be a sign of problems with the interpreter. Be sure to address this early on.

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<sup>1</sup> Paul J. DeMuniz, "Introduction", in *Immigrants in Courts* 3, 3-5 (Joanne I. Moore ed., 1999).

- *Try to get an interpreter with knowledge of death penalty cases.* An interpreter should have knowledge of the complicated issues surrounding a capital case and be able to convey them fully to your client. Ideally, your interpreter will have worked on capital cases in the past. Get references from other attorneys.

Things you can do to help the interpretation process:

- *Speak in first person.* Always talk to your client as if the interpreter was not there. For example ask of your client, “What’s your name?” Do not direct the question to the interpreter as, “Ask him what his name is.”
- *Keep your sentences short.* Keeping sentences short leads to more accurate translation and less confusion.
- *Agree upon an interpretation style.* An interpreter can do a consecutive, question-for-question 100 percent verbatim interpretation such as with witness interrogation in court, or can provide simultaneous interpretation, or can even facilitate—jumping in and helping out with some explanations. Keep in mind that a potential conflict with mitigation investigations and interpretation is that narratives are good things for mitigation—they lead to disclosures. However, narratives are impossible to interpret 100 percent correctly unless the interpreter is working simultaneously and talking over the interviewee. Interpreters can only retain a certain amount of dialog at one time. A sentence-by-sentence consecutive style of interpreting is quite accurate, but tends to break up the narrative, potentially leading to a lack of disclosures.
- *Discuss difficult concepts and vocabulary before starting.* Find out what areas of the language cause problems. In Spanish, for example, the word for doctor, cousin, and friend changes depending on the gender of the person. If you ask about a male cousin, the client might not think to tell you about his female cousin. Tell the interpreter whether “Dr. Smith” is a man or a woman. Tell the interpreter the English words that the person is likely to try to say (in particular, names). It will be easier for the interpreter to catch what is said if the interviewee badly mispronounces the names during the interview.
- *Take advantage of your interpreter’s expertise.* If your client does not respond to a question, take advantage of the interpreter’s expertise as s/he probably know why the question was confusing to your client.

## **B. Courtroom Interpreters**

Courtroom interpreting is arguably the most difficult form of interpreting and requires specialized training and skills.<sup>2</sup> Courtroom interpreters must be able to simultaneously interpret, consecutively interpret, and sight translate documents. Courts

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<sup>2</sup> Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 Harv. Latino L. Rev. 1, Spring 2004.

have been known to utilize police officers, county employees who barely speak English, children, and inmates, among others, to interpret in courtroom settings, a practice that is problematic on many levels. Courts will also at times utilize the services of a translator, but this can be equally troublesome. Translators generally translate documents and have time to reflect on their output and make necessary changes. Interpreting refers to the oral form of translating and interpreters must work instantaneously.<sup>3</sup>

Counsel should always request that two interpreters be provided when there are witnesses testifying in Spanish. One interpreter must always be at the side of the defendant, so that he can communicate with counsel at all times, as well as understand what is being said by the witnesses, judge, and attorneys. The other interpreter translates the testimony of witnesses. **A motion for the appointment of two interpreters is contained on the CD provided with this manual (see Appendix IX).**

There are two standards of review in challenges to the adequacy of courtroom interpretation. Whether or not an objection to the interpretation was made at trial is the determining factor as to which standard applies. If a timely and specific objection is made, then the “abuse of discretion” standard is applied (i.e. appeal must show the faulty interpretation was prejudicial to your client’s case).<sup>4</sup> If interpreter error is not objected to at trial, then the “plain error” standard is applied (i.e. appeal must show that “the error was egregious, that it affected substantial rights, represented a miscarriage of justice, or resulted in an unfair trial”).<sup>5</sup> Reversals based on plain error are seldom granted.<sup>6</sup>

Furthermore, court reporters record only the English portion of proceedings. Unless there is an audio or videotape, or unless counsel has made a timely and specific objection, the quality of interpretation is lost. Because a reviewing court has little basis for evaluation, claims of improper interpretation are usually denied.

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<sup>3</sup> Roseann D. Gonzalez et al., *Fundamentals of Court Interpretation: Theory, Policy, and Practice* 295 (1991).

<sup>4</sup> See *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9<sup>th</sup> Cir. 2000) (ordering new deportation hearing based on inadequate interpretation).

<sup>5</sup> *United States v. Camejo*, 333 F.3d 669, 672 (6<sup>th</sup> Cir. 2003) (discussing standard of review for error related to inadequate translation); *State v. Uvalle*, 565 S.E.2d 727, 731 (N.C. Ct. App. 2002) (same); *State v. Calderon*, 13 P.3d 871, 874-79 (Kan. 2000) (same); Virginia Benmaman, “Interpreter Issues on Appeal, “*Proteus: Newsletter of the National Association of Judiciary Interpreters and Translators*, Fall 2000, available at [http://www.najit.org/proteus/v9n4/benmaman\\_v9n4.htm](http://www.najit.org/proteus/v9n4/benmaman_v9n4.htm).

<sup>6</sup> *U.S. v. Joshi*, 896 F.2d 1303, 1310 (11<sup>th</sup> Cir. 1990) (describing necessity of contemporaneous objections to the quality of the interpretation); *United States v. Valladares*, 871 F.2d 1564, 1566 (11<sup>th</sup> Cir. 1989) (“Only if the defendant makes any difficulty with the interpreter known to the court can the judge take corrective measures. To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.”).

For a survey of recent cases involving courtroom interpretation, see Honorable Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation* 7 Harv. Latino L. Rev. 1 (Spring 2004).

## **C. Legal Arguments Relating to Language Barriers**

### **1. Custodial Interrogations and Consent Searches**

Language proficiency issues in custodial interrogations and consent searches usually center on the adequacy of the *Miranda* warnings: whether a waiver was valid, and whether consent was knowingly given. Even if your client speaks some English, this is no guarantee that he sufficiently understood the *Miranda* warnings or the consent-to-search form. Your client may be very adept at conversing about daily life in English, but this is very different from understanding legal concepts in English.

A wide range of the following interrogation methods may have been used, all of which are problematic and should be vigorously challenged:

- Your client, who speaks only basic conversational English, was interrogated without an interpreter.
- Your client was interrogated with the assistance of an unqualified or biased interpreter, such as a police officer.
- Your client signed a statement written in English, despite his inability to speak English fluently.
- Your client signed a statement written in highly educated Spanish, or Spanish that contains expressions not used in Mexico.
- Your client only speaks Spanish, and was interrogated through an interpreter. No recording was made, and the only record of his statement is contained in a report written by a law enforcement officer who does not speak Spanish.

#### *a. Challenges Based on Unreliability, Due Process and the Right to Confrontation*

In all of the above scenarios, whether the interrogation was recorded will have a significant impact on your litigation strategy. If there is no recording, you should argue that the statement is inherently unreliable, and cannot be adequately challenged due to law enforcement's failure to create a recording—in violation of your client's due process and confrontation rights. Argue that in the absence of a recording, the court should presume any waiver invalid, and should also presume that law enforcement's rendition of your client's statements is inaccurate. Many jurisdictions now record statements as a matter of course, and the failure to record the interrogation should always be challenged.

If your client's statement was audio- or videotaped, its reliability can be more accurately assessed. *If a tape recording exists, you should retain an independent interpreter to (1) create a written transcript; and/or (2) review the written transcript provided by the prosecution, and compare it to the audiotape to determine whether it is accurate.* A taped statement can provide strong proof of your client's inability to understand the questions posed by the interrogators. By retaining a linguist to evaluate your client's linguistic skills, and to examine the transcript, you can more effectively argue that your client did not understand his interrogators—despite his sometimes successful attempts to answer a question correctly.<sup>7</sup>

If there was an interpreter present, then it is important to investigate the interpreter's language ability and interpreting experience, as well as any bias that the interpreter might harbor.<sup>8</sup> Police departments commonly use a bilingual police officer to conduct interrogations for non-English speaking or limited-English speaking suspects and witnesses. In such situations, bias, dialect differences, and poor interpreting skills can lead to miscommunication. As the Ninth Circuit has observed, "an incorrect or incomplete translation is the functional equivalent of no translation: the alien must be able to understand the questions posed to him and to communicate his answers" to his interrogators.<sup>9</sup> Demand a hearing to evaluate his/her training, competence, and fluency. **A motion for a hearing to determine the interpreter's proficiency is contained on the CD included with this manual (see Appendix IX).** Often professional court interpreters can be powerful allies in assessing the Spanish language skills of uncertified interpreters, since they take professional pride in their work.

For an excellent description of what constitutes good interpreting skills, see Joanne I. Moore and Judge Ron A. Mamiya, *Interpreters in Court Proceedings, in Immigrants in Courts* (Joanne I. Moore ed., 1999).

#### *b. Challenges to Miranda Waivers*

If your Spanish-speaking Mexican client waived his *Miranda* rights and gave an incriminating statement, there are several legal arguments you should consider raising in every case. If your Spanish-speaking client was interrogated without an interpreter and the police read him the *Miranda* rights in English, you should always argue that his waiver of his *Miranda* rights was not "knowing" and "voluntary."<sup>10</sup> Language

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<sup>7</sup> See generally *United States v. Castorena-Jaime*, 117 F.Supp. 2d 1161 (D. Kan. 2000).

<sup>8</sup> See *United States v. Nazemian*, 948 F.2d 522, 525-27 (9<sup>th</sup> Cir. 1991) (listing factors to be considered when assessing interpretation and subsequent waiver of *Miranda* rights).

<sup>9</sup> *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9<sup>th</sup> Cir. 2000) (ordering new deportation hearing based on inadequate interpretation).

<sup>10</sup> See, e.g., *Moran v. Burbine*, 475 U.S. 412, 422 (1986); *United States v. Garibay*, 143 F.3d 534 (9<sup>th</sup> Cir. 1997).

difficulties and cultural barriers are factors that should always be raised as part of the “totality of the circumstances” that justify suppression of your client’s statement.<sup>11</sup>

Supplement your motion to suppress with information about the length of time your client has been in the United States, his knowledge of the criminal justice system, his mental state and level of education, and more.<sup>12</sup> In evaluating the totality of circumstances surrounding a defendant’s *Miranda* waiver, courts should take into account a defendant’s alienage and cultural background.<sup>13</sup> Stress and anxiety exacerbate language difficulties.<sup>14</sup>

Cultural factors should not be overlooked in any motion to suppress. For example, a Mexican national who has been subjected to police brutality in Mexico may not believe that he has a right to withhold consent for a search—and may believe that if he asserts his rights, he’ll be beaten. Cultural differences may also lead a defendant to say whatever they think the police wish to hear and sign whatever form the police want them to sign. Counsel should be aware of these factors and educate judges and juries as to how they affect the validity of any waiver, and the ultimate truthfulness of any statements the defendant made.

Expert witnesses, such as linguists and bi-cultural psychologists, can help explain these factors to the judge and jury.

**You will find a sample motion to suppress on the CD provided with this manual (see Appendix IX).**

## **2. Discovery**

File motions to have the discovery (or portions of the discovery) translated into your client’s native language. Your client cannot fully participate in his defense if he cannot read the police reports and witness statements. If the court denies this motion, move to appoint (and compensate) an interpreter to read witness statements and police reports to your client. **A sample motion to pay for translation of discovery is found on the CD provided with this manual (see Appendix IX).**

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<sup>11</sup> See Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. Crim. L. & Criminology 1, 38-47 (1999) (detailing the factors considered in the “totality of the circumstances” test); Linda Friedman Ramirez, L. Kay and K. Weber, *When Language is a Barrier to Justice*, 9 Criminal Justice 2 (Summer 1994).

<sup>12</sup> See, e.g., *United States v. Higareda-Santa Cruz*, 826 F.Supp. 355, 359 (D.Or. 1993), *Davis v. North Carolina*, 384 U.S. 737, 742 (1966).

<sup>13</sup> See *United States v. Yunis*, 859 F.2d 953, 965 (D.C. Cir. 1988); *United States v. Nakhoul*, 596 F. Supp. 1398, 1402 (D. Mass. 1984).

<sup>14</sup> See Thomas Scovel, *The Effect of Affect on Foreign Language Learning: A Review of the Anxiety Research*, 28 Language Learning 129-42 (1978).

### **3. Making a Record of Spanish Language Testimony**

Unless there is a tape recording of the proceedings, you will be unable to preserve the original testimony of Spanish-speaking witnesses. It is vital that you arrange for a recording of the original Spanish, in order to preserve for appeal any issues relating to the inadequacy of interpretation. You could also request that a court reporter take down the testimony, in Spanish—but in our experience, it is extremely difficult to find court reporters with the ability to do this.

### **III. Cultural Impediments to Effective Communications**

Differences in communication styles can significantly impede exchanges with your client as well as create misunderstandings with police, judges, jurors and court personnel. It is important to remember that nonverbal communication, like the spoken word, can be misinterpreted. Juries and judges must be educated about these issues, particularly when they must evaluate the credibility of a Mexican witness.

If your client is from a lower social class, he may consider it rude to look a “superior” in the eyes. Thus, your client may avoid eye contact out of respect. Some Mexican nationals may also consider it rude to outright contradict or disagree with a “superior,” so your client may agree with things that are not accurate. This is particularly dangerous in the context of police interrogations, and on cross-examination.

A client who has little education, or comes from a rural culture with an oral tradition of communicating, may have difficulty communicating in writing. Consider communicating through several different modes: send messages with relatives or friends with whom the client will feel more at ease and who might put things in a fashion that the client is more likely to grasp. More importantly, visit your client often. If you do write letters, keep them shorter but write more often to avoid the chance of overwhelming the client with pages swimming with words.

Asking a client to repeat back what they have understood may be critical to ensure that the client understands you. In addition, probably more so than with other clients, be wary that you are not merely being told what the client thinks you want to hear, or what the client thinks will be helpful to the case, regardless of its truth or actual helpfulness.

### **IV. Conceptual Differences Between the Mexican and U.S. Criminal Justice Systems**

Your client’s understanding of the U.S. legal system may be grounded in his exposure to and understanding of the Mexican legal system. The U.S. common law system is an adversarial system where rights of the individual are protected from the outset by an attorney. In Mexico’s civil law system, the investigating magistrate arguably plays a more important role in protecting the defendant’s rights than his own

attorney. If your client is not familiar with the U.S. legal system, he may not see the need for counsel so early in his case and may underestimate the importance of seeking counsel's advice.

In Mexico there are not U.S.-style criminal trials. Statements are taken one-by-one over a period of time. A witness comes in to a clerk's office to give a witness statement. A formal pleading is then prepared by the court clerk. When two witnesses disagree, there may be a *careo*, where the parties come "face to face," to state and possibly resolve their disagreements. The judge decides the case based on the written statements in the clerk's file. There are no jury trials.<sup>15</sup>

Other notable differences in legal systems include: confession before any authority other than the judicial authority or the prosecutor—or before any of them without the presence of the defense—will not have any probative value; no death penalty<sup>16</sup>; no plea bargaining; and prisoners in most Mexican prisons are allowed regular conjugal visits and greater freedoms than in most U.S. penitentiaries, although prison conditions are typically harsh.

#### **A. Differences in Public Defender Roles**

Your client may be hesitant about having a public defender represent him and he may be suspicious of the U.S. legal system as a whole. Corruption has been a fact of life for quite some time in Mexico. It is economically driven and not surprisingly so since public servants are often not even paid enough to survive. In some instances, this corruption of the Mexican criminal justice system can leave your client believing that public defenders in the U.S. follow a similar path. Moreover, public defenders in Mexico play a much smaller role than in the United States, and are often ineffective. Frequently, a Mexican public defender is purely making sure the paperwork is in order. If an individual wants "real" representation in Mexico, he must hire private counsel. You may find your client holding a similar belief here in the U.S. and wishing to bypass you to get to a "better" attorney—one that has been paid for.

In some instances, a family will hire an inept private lawyer (at minimal cost) to replace a seasoned public defender because they believe hired counsel will be much better than appointed counsel. Many clients will question how effective a public defender can possibly be when appointed by the same government authorities trying to convict him. Be sure to take the time to fully explain your responsibilities and reasons why a private attorney—at least, the private attorney your client's family can afford—will not provide effective representation. It is important to enlist the assistance of consular officials in this endeavor.

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<sup>15</sup> Although the Constitution allows for jury trials, there are no jury trials in practice.

<sup>16</sup> Mexico officially abolished the death penalty on December 9, 2005. Prior to that, the Constitution allowed for imposition of the death penalty for certain crimes; however, there was no secondary legislation regulating the death penalty and was not applied in practice.

## **B. Plea Bargaining**

Plea bargaining is one of the most difficult legal concepts for a Mexican national to grasp. In a civil law system such as Mexico's, there is no concept of a plea. If a defendant confesses in a civil law system, that confession is simply offered into evidence and the prosecution must still present a full case. Moreover, prosecutors in civil law countries have limited or no power to drop or reduce charges once a case has been filed. Your client may be very suspicious of a plea offer; consequently, it is important that you clearly explain the benefits of the offer and be patient if your client seems hostile to the notion.

## **C. Additional Differences**

Ex parte Communications – Your client may want you to bring him and/or his family to the judge in order to tell the judge their side of the story. In an inquisitorial judicial system, such as Mexico's, such a request seems normal.

Forensic Technology – DNA evidence is not part of the cultural or judicial experience in Mexico and resources do not allow for some of the other advanced technology which is common in the U.S. Take additional time to explain this aspect of the U.S. legal system to your client.

Rules of Evidence – Mexico has different rules of evidence and your client may not understand the U.S. legal system concepts of chain of custody, authentication, hearsay, evidence, and argument. Try to explain these as best you can.

Role of Victim's Family – In Mexico, the victim's family plays a significant role over the course of the prosecution and, in some cases, can drop charges. Charges may be dropped after an offer of money or some other conciliation by the defendant's family. A similar approach taken here in the U.S. by your client's family can cause major problems. Explain the role of the victim's family to your client and his family so that any improprieties can be avoided.

## **IV. Conclusion**

Certainly, language, cultural and conceptual barriers can make representation of a Mexican national a special challenge. But the barriers are not insurmountable. A lot of hard work and preparation, and a little creativity and ingenuity will go a long way towards protecting your client's right to participate fully in his defense. The difficulties in representing a Mexican national can also be mitigated by establishing a relationship with your client's consular representative early on in the case. See *Working with the Mexican Consulate*.

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## **BIBLIOGRAPHY**

- James G. Connell III & Rene L. Valladares, *Cultural Issues in Criminal Defense* (2001, looseleaf updated when needed) (written by attorneys and academicians, this book is a valuable resource for an attorney representing a foreign national).
- The Honorable Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation* 7 Harv. Latino L. Rev. 1 (Spring 2004) (discussion on several recent cases involving courtroom interpretation issues).
- Joanne I. Moore ed., *Immigrants in Courts* (1999).

## **Culture**

- Sandra Santana & Felipe O. Santana, *An Introduction to Mexican Culture for Rehabilitation Service Providers* (2001) <http://cirrie.buffalo.edu/mexico.html> (focuses on cultural aspects of poor, unacculturated, non-school-educated Mexicans—characteristics noted in many Mexican national clients you may see).