

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 500**

**October 6, 2021**

## Language Access in the Client-Lawyer Relationship

*Communication between a lawyer and a client is necessary for the client to participate effectively in the representation and is a fundamental component of nearly every client-lawyer relationship.<sup>1</sup> When a client's ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or owing to a client's non-cognitive physical condition, such as a hearing, speech, or vision disability, the duties of communication under Model Rule 1.4 and competence under Model Rule 1.1 are undiminished. In that situation, a lawyer may be obligated to take measures appropriate to the client's circumstances to ensure that those duties are capably discharged. When reasonably necessary, a lawyer should arrange for communications to take place through an impartial interpreter or translator<sup>2</sup> capable of comprehending and accurately explaining the legal concepts involved, and who will assent to and abide by the lawyer's duty of confidentiality. The lawyer also should use other assistive or language-translation technologies, when necessary. In addition, particularly when there are language considerations affecting the reciprocal exchange of information, a lawyer*

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> For purposes of this opinion, an interpreter is a person who converts "speech from a source language into a target language" while a translator "works with the written word." *Translator vs. Interpreter: What's the Difference*, AMERICAN TRANSLATORS ASSOCIATION (last visited Sept. 23, 2021), <https://www.atanet.org/client-assistance/translator-vs-interpreter/>. The Committee recognizes that there are existing and emerging technologies that in some circumstances may enable a lawyer and client to partially or fully address language access issues. For example, closed captioning, live transcription, screen readers, refreshable braille displays, and speech recognition software, are examples of the assistive technologies that may address access issues for some individuals with a non-cognitive physical condition, such as a hearing, speech, or vision disability. See *Assistive Devices for People with Hearing, Voice, Speech or Language Disorders*, NATIONAL INSTITUTE ON DEAFNESS AND OTHER COMMUNICATION DISORDERS, <https://www.nidcd.nih.gov/health/assistive-devices-people-hearing-voice-speech-or-language-disorders> (last visited Sept. 23, 2021). Electronic text and voice translation software and devices, including text-to-text, text-to-speech, and speech-to-speech translators such as telecommunications relay service (TRS) (free - dial 7-1-1), video relay service (VRS) (free - subscriber based) and video remote interpreting (VRI) (fee based), have the capacity to translate from one language to another in close to real time. Brian Heater, *Interpreter, Google's real-time translator, comes to mobile*, TECH CRUNCH (Dec. 12, 2019, 9:00 AM), <https://techcrunch.com/2019/12/12/interpreter-googles-real-time-translator-comes-to-mobile/>. Depending on the circumstances, use of such technologies in lieu of or in addition to the engagement of a human interpreter or translator may be appropriate and sufficient to satisfy the ethical obligations of communication and competence. Owing to the rapid evolution of these technologies and the variability of client needs in the context of language access, an analysis of whether and when a technology will address a particular language-access quandary is beyond the scope of this opinion. The Committee notes that the availability of assistive and translation technologies is another example of the ever-increasing impact of technology on the practice of law and underscores the duty of lawyers to develop an understanding of relevant technology. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. [8] ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . .").

*must ensure that the client understands the legal significance of translated or interpreted communications and that the lawyer understands the client's communications, bearing in mind potential differences in cultural and social assumptions that might impact meaning.*

## I. INTRODUCTION

As the population of the United States continues to become ever more diverse and multicultural, communication issues stemming from language differences, as well as physical disabilities, are increasing.<sup>3</sup> Between 1990 and 2013, the population of persons having limited English proficiency grew 80 percent, from nearly 14 million to 25.1 million.<sup>4</sup> The adoption of the Americans with Disabilities Act in 1990, coupled with ongoing advocacy by and on behalf of persons with disabilities, has led to the profession's growing awareness that clients seeking representation may not be able to hear, speak, or read without accommodation.<sup>5</sup> For these reasons, with increasing frequency lawyers are called upon to communicate with clients who do not speak the lawyer's native language or speak the lawyer's language with limited proficiency, or for whom the conventional written or spoken word is not an accessible form of communication.<sup>6</sup>

The foundational rules of competence (Rule 1.1) and communication (Rule 1.4) in the ABA Model Rules of Professional Conduct establish a baseline for a lawyer's duties when there is a barrier to communication because the lawyer and the client do not share a common language, or when a client is a person with a non-cognitive physical condition that affects how the lawyer communicates with a client, such as a hearing or speech disability.<sup>7</sup> This baseline prescribes that when a lawyer and client cannot communicate with reasonable efficacy, the lawyer must take steps to engage the services of a qualified and impartial interpreter and/or employ an appropriate assistive or language-translation device to ensure that the client has sufficient information to

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<sup>3</sup> In 2013, approximately 61.6 million individuals, foreign and U.S. born, spoke a language other than English at home. While the majority of these individuals also spoke English with native fluency or very well, about 41 percent (25.1 million) were considered as having Limited English Proficiency (LEP), which is defined as speaking English "less than very well." Jie Zong & Jeanne Batalova, *The Limited English Proficient Population in the United States in 2013*, MIGRATION POLICY INSTITUTE (July 8, 2015) [hereinafter *Limited English Proficient Population*], <https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states-2013>. 2019 data from the U.S. Census bureau estimates that 22% of households in the U.S. speak a language other than English in the home. U.S. CENSUS BUREAU SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES (2019), <https://data.census.gov/cedsci/table?d=ACS%201-Year%20Estimates%20Data%20Profiles&tid=ACSDP1Y2019.DP02&hidePreview=false>.

<sup>4</sup> See *Limited English Proficient Population*, *supra* note 3.

<sup>5</sup> See generally Alex B. Long, *Reasonable Accommodation As Professional Responsibility, Reasonable Accommodation as Professionalism*, 47 U.C. DAVIS L. REV. 1753 (2014) (evaluating ethical and professional obligations to reasonably accommodate disabilities).

<sup>6</sup> For an excellent discussion of issues facing lawyers due to the changing demographics of the United States population and the increase of language diversity, see Muneer I. Ahmad, *Interpreting Communities, Lawyering Across Language Difficulties*, 54 U.C.L.A. L. REV. 999 (2007).

<sup>7</sup> Some mental conditions may affect the traditional client-lawyer relationship or the lawyer's customary means of delivering legal services in other ways. For example, a client may suffer from a diminished mental capacity or a non-sensory cognitive condition. The legal obligation to accommodate a client's mental disability and the ethical duties applicable to representing clients with diminished capacity are addressed in Model Rule 1.14 and beyond the scope of this opinion.

intelligently participate in decisions relating to the representation and that the lawyer is procuring adequate information from the client to meet the standards of competent practice.<sup>8</sup>

This opinion analyzes the duties of Rules 1.1, 1.4, and 5.3 in the context of language access and explains in more detail (1) the lawyer's obligation to evaluate the need for a translator or interpreter or interpretive device, (2) the appropriate qualifications for a person or service providing translation or interpretive services, and (3) a lawyer's supervisory duties when engaging or directing a translator or interpreter. The opinion also provides additional guidance on the advisability of maintaining awareness of potential differences in cultural and social assumptions, particularly those based on national origin or ethnicity, which may affect the way in which legal advice is sought or understood.<sup>9</sup>

## II. ANALYSIS

Lawyers must communicate with clients in a manner that is reasonably understandable to those clients. This is a central tenet of the duties applicable to the client-lawyer relationship under the Model Rules of Professional Conduct. In 1983, the ABA Commission on Evaluation of Professional Standards (commonly known as the Kutak Commission) recommended the adoption of Model Rule 1.4, codifying the importance of communication with clients so that clients know what is happening on their matters and can participate intelligently in the representation.<sup>10</sup>

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<sup>8</sup> In addition to the ethical duties analyzed in this opinion, law firms and other legal organizations may be legally required to provide and pay for auxiliary aids and services in order to provide a client with reasonable accommodation under the ADA. Law offices are explicitly included in the definition of public accommodations under Title III of the ADA, 42 U.S.C. § 12181(7)(f), and as a general rule, ADA Title III entities cannot pass along the costs of auxiliary aids and services to the person with the disability. See 28 C.F.R. § 36.301(c). Although particulars of a lawyer's duties under the ADA are beyond the scope of this opinion, a lawyer, law firm, and legal organization should be aware of the legal risks and responsibilities related to ADA compliance. See generally Elana Nightingale Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143 (2011); Janine Robben, *You Are Us What Every Lawyer Needs to Know About Representing Disabled Clients*, OR. ST. B. BULL. 19 (Feb./Mar. 2008); National Ass'n of the Deaf Law Center, *Attorneys, Deaf Clients, and the Americans with Disabilities Act*, W. VA. LAW. 30 (Jan. 2004); Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155 (1994).

<sup>9</sup> The role of interpreters for parties and witnesses is well established in U.S. criminal, civil, and administrative justice systems, and use of interpreters for individuals with limited English proficiency in adjudicative proceedings may be required by the Constitution, a statute, or a court rule. *United States ex rel. Negron v. New York*, 434 F.2d 386, 390–91 (2d Cir. 1970) (defendant's Sixth Amendment rights violated when interpreter not appointed); U.S. Court Interpreters Act, 28 U.S.C. § 1827 (right to an interpreter applied to all "judicial proceedings," including pretrial hearings in federal district court); EXEC. ORDER NO. 13166, IMPROVING ACCESS TO SERVICES FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY DEPARTMENT OF JUSTICE ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, NATIONAL ORIGIN DISCRIMINATION AGAINST PERSONS WITH LIMITED ENGLISH PROFICIENCY (2000), available at <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/eolep.pdf>. "While the Court Interpreters Act provides a singular guideline for use in the federal courts, there is much greater variation among state interpreter laws. Some states mirror the federal scheme, requiring the appointment of an interpreter upon a judicial determination that a defendant cannot comprehend the proceedings. Other states afford even more discretion to judicial officers." Kate O. Rahel, *Why the Sixth Amendment Right to Counsel Includes an Out-of-Court Interpreter*, 99 IOWA L. REV. 2299 (2014).

<sup>10</sup> ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, 72 (2013). There was no direct counterpart to Rule 1.4 in the predecessor Model Code of Professional Responsibility, but because a lawyer's failure to communicate was a frequent source of disciplinary complaints, the Commission believed it was important to clarify the obligation to keep a client reasonable informed.

The duty of communication under current Model Rule 1.4 includes a number of communicative components, including duties: (1) to promptly inform the client of information when the client's informed consent is required; (2) to "reasonably consult" with the client about the representation; (3) to "keep the client reasonably informed" about the status of a matter; (4) to promptly comply with "reasonable requests for information"; and (5) to "consult with" the client on relevant limitations on the lawyer's ability to provide legal assistance.<sup>11</sup> Additionally it is incumbent on the lawyer to ensure that the client has sufficient information to participate intelligently in the client-lawyer relationship, to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>12</sup>

Reasonably understandable client-lawyer communication is not only necessary to enable the client to make informed decisions; it is also an element of the lawyer's obligation to provide the client with competent representation under Model Rule 1.1.<sup>13</sup> If a lawyer does not communicate with a client in a mutually understood language, it is doubtful that the lawyer is exercising the thoroughness and preparation necessary to provide the client with competent representation.<sup>14</sup>

In short, communication between a lawyer and a client is both the means by which a client is provided with the advice and explanations needed to make informed decisions and the vehicle through which the lawyer obtains information required to address the client's legal matter appropriately.

In general, the information that must be provided when discharging the duty to explain a matter reasonably is "that appropriate for a client who is a *comprehending* and responsible adult."<sup>15</sup> The

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<sup>11</sup> *Id.* The black letter of Model Rule 1.4 has been amended only once since its adoption in 1983—in 2002 as part of Ethics 2000 amendments. The Ethics 2000 Commission explained that Rule 1.4(a) was amended to "specifically identify five different aspects of the duty to communicate." *Id.* at 77.

<sup>12</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(a).

<sup>13</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(b) & cmt. [5]. See N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) (obligations of Rule 1.4 "require that the attorney and the client be able to exchange information and understand one another").

<sup>14</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. [5] ("Competent handling of a matter includes inquiry into and analysis of the factual and legal elements of the problem . . ."). See N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) (noting that attorney's obligation to provide competent representation to clients requires that the attorney gather sufficient facts regarding the client's problem from the client and that the attorney develop a strategy, in consultation with the client, for solving the legal problems of the client); State Bar of Cal., Formal Op. 1984-77 (1984) (sensitivity to a non-English or limited English-speaking client's communication barriers in explaining their legal problem and in understanding legal advice provided is an important aspect of competence); Alex B. Long, *Reasonable Accommodation As Professional Responsibility, Reasonable Accommodation As Professionalism*, 47 U.C. DAVIS L. REV. 1753, 1760 (2014) ("Competent representation lies at the heart of every lawyer's professional obligation to clients. Law firms should view the reasonable accommodation requirement as a means of complying with this obligation.").

<sup>15</sup> See N.Y. City Bar Formal Op. 1995-12 (1996) (noting that adequate preparation requires that a lawyer gather information material to the client's claims or defenses: "The lawyer's inability, because of a language barrier, to understand fully what the client is telling him or her may unnecessarily impede the lawyer's ability to gather the information from the client needed to familiarize the lawyer with the circumstances of the case.").

<sup>16</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. [6] (emphasis added). Comment [6] addresses the impracticability of this standard when the client is a child or suffers from diminished capacity. Duties arising from representation of a client with diminished capacity are governed by Model Rule 1.14. See generally ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-404 (Client Under a Disability) (1996). This opinion does not address the manifold ethics issues that arise when representing a client with diminished capacity, except to the extent that there are

Model Rule 1.1 and 1.4 obligations do not change when a client's ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or when a client is a person with a non-cognitive physical condition, such as a hearing, speech, or vision disability.<sup>16</sup>

If communications issues are such that the client cannot adequately comprehend the lawyer's advice and other communications, and thus, cannot participate intelligently in the representation, or the lawyer is unable to ascertain the information needed to competently assist the client, the lawyer must take measures to establish a reasonably effective mode of communication. Ordinarily, this will require engagement of a qualified impartial interpreter or translator (or, in some situations, the use of an appropriate assistive or language-translation device) so that the lawyer and client can reasonably understand one another to a degree that is compatible with the lawyer's professional obligations.<sup>17</sup>

### **A. Evaluating Whether an Interpreter or Translator Is Required**

Once a lawyer determines that there is a language-access issue affecting the ability to communicate sufficiently with a client, the lawyer must evaluate whether engagement of an interpreter, translator, and/or the use of other assistive or language-translation technologies is needed to satisfy the lawyer's professional obligations.<sup>18</sup> This is true regardless of whether the language-access issue is attributable to limited language proficiency or a non-cognitive disability.<sup>19</sup>

Ordinarily, the mode of communication to be used during a representation is a matter to be decided between the lawyer and the client,<sup>20</sup> and, in the case of language-access issues, consultation with the client is appropriate if possible. A lawyer may not, however, passively leave the decision to the client or thrust the responsibility to make arrangements for interpretation or translation entirely

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language, speech, hearing, or visual considerations also affecting the reciprocal exchange of information between lawyer and client.

<sup>16</sup> See State Bar of Ariz. Op. 97-05 (1997) (presence of interpreters to facilitate communication between lawyers and clients who do not share a common language furthers the purposes of Rule 1.4); Utah Ethics Advisory Op. Comm., No. 96-06 (1996) ("A language barrier does not reduce the attorney's duty to communicate adequately with the client, as required by Rule 1.4."); N.Y. City Bar Formal Op. 1995-12 (1996) (Rule 1.4 obligation applies to client with whom the only means of effective communication is through a sign language interpreter).

<sup>17</sup> See N.Y. City Bar Formal Op. 1995-12 (1996) (a language barrier may make the use of an interpreter "the only practical way that a free-flowing dialogue can be maintained with the client, and the only means by which the lawyer can actually and substantially assist the client"); N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) ("When the attorney cannot communicate directly and fluently with the client in a language that the client can understand—whether the inability to engage in a direct communication is because the attorney and the client do not speak the same language, or because either the client or attorney is deaf or hearing impaired—the attorney must make use of the services of a qualified, impartial interpreter"); Utah Ethics Advisory Op. Comm., No. 96-06 (1996) ("If the attorney cannot communicate fluently in the client's own language, the attorney should communicate through an interpreter skilled in the client's particular language or dialect.").

<sup>18</sup> See N.Y. City Bar Formal Op. 1995-12 (1996) ("When the need for an interpreter is apparent or it is reasonable to conclude that an interpreter is required for effective communication, failure to take steps with the client to secure an interpreter may be a breach of the duty to represent the client competently.").

<sup>19</sup> See N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010); N.Y. City Bar Formal Op. 1995-12 (1996).

<sup>20</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (a lawyer shall consult with the client as to the means by which the objectives of the representation are to be pursued).

upon the client.<sup>21</sup> Once it is reasonably apparent that, without an interpreter, translator, or an appropriate assistive or language-translation device, there cannot be a reliably understandable reciprocal exchange of information between the lawyer and the client, the lawyer must take steps to help the client understand the need for and purpose of an interpreter or translator, and, when reasonably necessary, take steps to secure such services.<sup>22</sup>

In this as in other contexts requiring client-lawyer communication, it is the lawyer's affirmative responsibility<sup>23</sup> to ensure the client understands the lawyer's communications and that the lawyer understands the client's communications.<sup>24</sup> In situations where there is doubt about the efficacy of client-lawyer communication, that doubt should be resolved in favor of engagement of an interpreter, translator, or an appropriate assistive or language-translation device.<sup>25</sup> Furthermore even in situations when an interpreter is used to facilitate spoken communication between a lawyer and a client, it may also be necessary to secure the translation of specific written documents to satisfy the duties of communication and competence in a particular case.<sup>26</sup>

## B. Qualifications of a Person Providing Translation or Interpretive Services

In general, an individual engaged to facilitate communication between a lawyer and a client must be qualified to serve as an interpreter or translator in the language or mode required, familiar with and able to explain the law and legal concepts in that language or mode, and free of any personal

<sup>21</sup> Attorney Grievance Comm'n v. Aita, 181 A. 3d 774 (Md. 2016) (lawyer failed to fulfill obligation to enable client to make informed decision by sending a letter in English to client who did not read or write in English and telling client to get letter translated); N.Y. City Bar Formal Op. 1995-12 (1996) ("once the lawyer agrees to represent a client with whom effective and meaningful direct communications can only be maintained through an interpreter, the need for qualified interpreter services cannot be ignored").

<sup>22</sup> See State Bar of Cal., Formal Op. 1984-77 (1984) (though client may have selected the lawyer knowing that direct communication may be limited, or even not possible, this does not reduce the lawyer's duty to communicate adequately).

<sup>23</sup> The ADA generally obligates the lawyer to bear the cost of procuring such services when they are necessary to accommodate a disability. See note 5, *supra*. In other language-access situations, lawyers should confer with the prospective client about the expense of providing needed language access and address the issue of responsibility for that expense in the initial fee agreement. See MODEL RULES OF PROF'L CONDUCT R. 1.5(a) & (b) & cmt. 2 (prohibiting unreasonable amounts for expenses and requiring the basis for expenses for which the client will be responsible be communicated to the client; noting desirability of furnishing client with a writing that states "to what extent the client will be responsible for any costs, expenses or disbursements").

<sup>24</sup> See State Bar of Cal., Formal Op. 1984-77 (1984) ("On any matter which requires client understanding, the attorney must take all reasonable steps to insure that the client comprehends the legal concepts involved and the advice given, irrespective of the mode of communication used, so that the client is in a position to make an informed decision.").

<sup>25</sup> Even if a client speaks *some* English in informal contexts, an interpreter may be needed to ensure that the client understands the legal concepts involved in client-lawyer communications. See *In re Welke*, 131 N.E.3d 161, 163 (Ind. 2019) (respondent violated Rule 1.4 by failing to hire an interpreter to communicate with client with "extremely poor English language skills"; court rejected respondent's argument, based on testimony of a kitchen supervisor at the client's workplace, that the "client may have had a marginally better English-language proficiency than other evidence indicated" on grounds that communicating with a supervisor of a kitchen staff and communicating about legal matters are very different things); Attorney Grievance Comm'n of Maryland v. Landeo, 132 A.3d 196, 215 (Md. 2016) (in representing an immigration client who could speak English but preferred Spanish, lawyer failed to comply with Rule 1.4 obligations by sending client documents and letters about her Abused Spouse Petition and Adjustment of Status without explaining process to client).

<sup>26</sup> State Bar of Cal., Formal Op. 1984-77 (1984) (providing as examples a contingent fee agreement, a general release of claims, or a written consent to a conflict of interest).

or other potentially conflicting interest that would create a risk of bias or prevent the individual from providing detached and impartial interpretive or translation services.

In assessing the qualifications of a prospective interpreter or translator, a lawyer should verify that the individual is skilled in the particular language or dialect required. In addition, the lawyer should confirm that the individual has the expertise needed to comprehend the legal concepts/terminology at issue so that the legal advice being provided is communicated accurately in a language or format accessible to the client.<sup>27</sup>

In most situations, the verification of a prospective interpreter's or translator's level of skill and capacity to convey legal concepts is best achieved through engagement of the services of an outside professional to assist the lawyer in the delivery of legal services.<sup>28</sup> Depending on the circumstances, alternative arrangements may suffice.<sup>29</sup> For example, a lawyer may look to a multilingual lawyer or nonlawyer staff member within the firm to facilitate communication with a client. If a nonprofessional interpreter is contemplated, however, the lawyer should proceed cautiously in light of the reduced ability to assess the nonprofessional's level of proficiency and the concomitant increased risk of inaccuracies in interpretation or translation.<sup>30</sup>

In some instances, a client's friend or a family member may function as a viable interpreter or translator.<sup>31</sup> But particular care must be taken when using a client's relatives or friends because of the substantial risk that an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation.<sup>32</sup> In such situations, a lawyer must exercise appropriate diligence to guard against the risk that the lay-interpreter is distorting or altering communications in a way that skews the information provided to the lawyer or the advice given to the client.<sup>33</sup> Lacking accountability to the lawyer or firm derived from an employment or other

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<sup>27</sup> See N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010).

<sup>28</sup> A lawyer should be able to verify a prospective translator's or interpreter's professional qualifications in the same manner used when engaging the services of an expert, i.e., by evaluating the individual's training, experience, certifications, and professional standing. See N.Y. City Bar Formal Op. 1995-12 (1996) (noting "obvious benefits to communicating through professionals, who have formal training in languages, experience with legal terminology and concepts, and skill" and who provide greater assurance of accuracy in translation because often they belong to professional associations that adhere to professional and ethical standards); N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010).

<sup>29</sup> "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and the law itself." MODEL RULES OF PROF'L CONDUCT Preamble, Scope [14].

<sup>30</sup> N.Y. City Bar Formal Op. 1995-12 (1996). The mere fact that the person selected is bilingual is insufficient to establish compliance with the lawyer's ethical duties. The person must have a reasonable degree of competence and fitness to serve as an interpreter or translator. See *In re Welke*, 131 N.E.3d 161, 163 (Ind. 2019) (failure to hire appropriate interpreter violated Rule 1.4(b) when lawyer "brought an untrained and unpaid woman who needed community service credit for her own criminal conviction to serve as an interpreter, and through that woman . . . attempted to [discuss client's case]").

<sup>31</sup> See Attorney Grievance Comm'n of Maryland v. Ibeuchi, 241 A.3d 870, 881 (Md. 2020) (holding respondent did not violate Rule 1.4(b) "in connection with the language barrier issue" with Spanish-speaking client where client relied on a friend to interpret at every client meeting because client "trusted" friend).

<sup>32</sup> See N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) (using relatives or friends of clients as interpreters carries substantial risks).

<sup>33</sup> See Utah Ethics Advisory Op. Comm., No. 96-06 (1996) (lawyer must be "cautious in insuring [sic] that the attorney and client are communicating with each other through the interpreter, rather than the interpreter giving legal advice independent of the attorney"). N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) (lawyer "should watch for cues that indicate that the interpreter is speaking for the client or filtering the attorney's

contractual relationship, relatives and friends of the client may also be less reliable in providing interpretation or translation services when needed.<sup>34</sup>

Finally, if obtaining necessary services would place an unreasonable financial burden on the lawyer or the client<sup>35</sup> or if necessary services are unavailable, the lawyer should ordinarily decline or withdraw from the representation<sup>36</sup> or associate with a lawyer or law firm that can appropriately address the language-access issue,<sup>37</sup> such as a multilingual lawyer. In an emergency situation where the need for legal action is exigent—for example, if a client or potential client is subject to an expedited removal action in an immigration proceeding—and the lawyer reasonably believes that necessary interpretive services cannot be obtained expeditiously, a lawyer should take steps to prevent immediate and irreparable harm to the client.<sup>38</sup>

### C. Supervisory Duties When Engaging or Directing the Work of a Translator or Interpreter

Model Rule 5.3 governs a lawyer's responsibilities for nonlawyers employed, retained by, or associated with a lawyer. In general, a lawyer is responsible to ensure that the conduct of a nonlawyer service provider is compatible with the professional obligations of the lawyer.<sup>39</sup> This principle applies with equal force to individuals serving as interpreters or translators to facilitate communications within the client-lawyer relationship, i.e., the lawyer must make reasonable efforts to ensure that the interpretive or translation services are provided in a manner that is compatible with the lawyer's ethical obligations, particularly the Rule 1.6 duty of confidentiality.<sup>40</sup>

In this regard, the terms of any arrangement between the lawyer and the interpreter or translator should address the protection of client information, and when retaining or directing the work of an

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statements rather than impartially conveying the communications"). In these situations, it would be prudent for the lawyer to consult with the client about the risks and benefits of using a family member as an interpreter or translator. See MODEL RULES OF PROF'L CONDUCT R. 1.2, cmt. 1 ("With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) . . ."). The Committee recognizes the potential circularity of this dilemma, which further suggests that use of the client's friends or family members to solve a language access problem is ethically fraught.

<sup>34</sup> Cf. *In re Howe*, 843 N.W.2d 325, 331 (N.D. 2014) (rejecting lawyer's defense that he "tried to communicate the date, but confusion persisted because the [client's] daughter was not there to translate," and holding that "[r]easonable efforts to ensure the client is informed of the status of the matter include assuring the [clients] understood their hearing was rescheduled despite their daughter not being available to translate").

<sup>35</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(6) (authorizing withdrawal if representation "will result in an unreasonable financial burden on the lawyer").

<sup>36</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1).

<sup>37</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. [2] ("Competent representation can also be provided through the association of a lawyer of established competence in the field in question.").

<sup>38</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [9] (authorizing lawyer to take emergency legal action on behalf of person with seriously diminished capacity where person's health, safety, or a financial interest is threatened with imminent and irreparable harm, even though person is unable to establish a client-lawyer relationship or to make or express considered judgments about matter, but only to extent reasonably necessary to maintain status quo or otherwise avoid imminent and irreparable harm).

<sup>39</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [1].

<sup>40</sup> N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) ("Attorneys representing clients through interpreters should ensure that the interpreter has a clear understanding of the obligation to keep the client's communications confidential.") (citing Utah Ethics Advisory Op. Comm., No. 96-06 (1996)).

interpreter or translator, the lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the interpreter or translator understands the lawyer's ethical duty of confidentiality and agrees to abide by it.<sup>41</sup>

#### D. Guidance Regarding Social and Cultural Differences

In addressing language access issues within the client-lawyer relationship, the duty of competence requires close attention to social and cultural differences that can affect a client's understanding of legal advice, legal concepts, and other aspects of the representation.<sup>42</sup> When a lawyer and a client do not share a common language, there may be other significant cultural differences bearing on the representation including, but not limited to, ethnicity, religion, and national origin.<sup>43</sup> The client may view the representation and choices it entails through the lens of cultural and social perspectives that are not shared by or familiar to the lawyer. Beyond language differences, the ability to understand, effectively communicate, gather information, and attribute meaning from behavior and expressions are all affected by cultural experiences.<sup>44</sup> Competently mediating these differences to achieve the ends of the representation for the client requires: (i) identifying these differences; (ii) seeking to understand them and how they bear upon the representation; (iii) paying attention to implicit bias and other cognitive biases that can distort understanding; (iv) adapting the framing of questions to help elicit information relating to the representation in context-sensitive ways; (v) explaining the matter in multiple ways to promote better client insight and comprehension; (vi) "allow[ing] for additional time for client meetings and ask[ing] confirming questions to assure that information is being exchanged accurately and completely";<sup>45</sup> and (vii) conducting additional research or drawing upon the expertise of others when that is necessary to ensure effective communication and mutual understanding.<sup>46</sup>

A lawyer should not assume that a translator has this deeper cultural expertise merely because the translator is adept with the client's language. Awareness of, and ability to understand, issues of culture and disability that might affect communication techniques and influence client objectives is inextricably intertwined with providing effective legal advice to a client. Communication is a two-way street. To convey information about the representation in a meaningful way, it is essential that the lawyer understands the client and the client understands the lawyer. Client-lawyer communication is not merely a translation of words but a determination by the lawyer that the client understands the relevant law and legal, institutional, and social contexts of the communication.

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<sup>41</sup> See MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [3].

<sup>42</sup> See Utah Ethics Advisory Op. Comm., No. 96-06 (1996); see also Flowers v. Bd. of Prof'l Responsibility, 314 S.W.3d 882, 889 (Tenn. 2010) (imposing discipline, court found clients were "vulnerable victims" because they did not speak or write English and did not often have "a solid understanding of the broader culture").

<sup>43</sup> For an overview of the impact of implicit cultural bias on the delivery of legal services, see Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. LAW & SOCIAL CHANGE 367 (2017).

<sup>44</sup> See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, CUNY SCHOOL OF LAW (2001) [hereinafter *The Five Habits*], available at [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1257&context=c1\\_pubs](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1257&context=c1_pubs).

<sup>45</sup> N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010).

<sup>46</sup> *The Five Habits*, *supra* note 44.

### **III. CONCLUSION**

A lawyer's fundamental obligations of communication and competence are not diminished when a client's ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or owing to a client's non-cognitive physical condition, such as a hearing, speech, or vision disability. Under such circumstances, a lawyer may be obligated to take measures appropriate to the client's situation to ensure that those duties are properly discharged. When reasonably necessary, a lawyer should arrange for communications to take place through an impartial interpreter or translator capable of comprehending and accurately explaining the legal concepts involved, and who will assent to and abide by the lawyer's duty of confidentiality. In addition, particularly when there are language considerations affecting the reciprocal exchange of information, a lawyer must ensure that the client understands the legal significance of translated or interpreted communications and that the lawyer understands the client's communications, bearing in mind potential differences in cultural and social assumptions that might impact meaning.

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