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Attorneys Who Interpret for Their Clients: Communication, Conflict, and Confusion - How Texas Courts Have Placed Attorneys and Their L.E.P. Clients at the Discretion of the Trial Court The Fifth Annual Symposium on Legal Malpractice and Professional Responsibility" Recent Development.

Teresa B. Morales

Nathaniel D. Wong

RECENT DEVELOPMENT

ATTORNEYS WHO INTERPRET FOR THEIR CLIENTS: COMMUNICATION, CONFLICT, AND CONFUSION— HOW TEXAS COURTS HAVE PLACED ATTORNEYS AND THEIR L.E.P.[1] CLIENTS AT THE "DISCRETION" OF THE TRIAL COURT

TERESA B. MORALES*
NATHANIEL D. WONG

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1. LEP, an acronym commonly used for a person with limited English proficiency (LEP), is used throughout this Recent Development to address non-English speaking or limited English speaking clients.

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I. Introduction: A Growth of Diversity of Language

A. *Acceptance of Foreign Languages Throughout Texas and the United States*

English is the dominant language in the United States and Texas.[2] However, shifts in cultural norms are increasing the acceptability of other spoken and written languages in the United States.[3] Several factors have

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2. *See* María Pabón López, *The Phoenix Rises from El Cenizo: A Community Creates and Affirms a Latino/a Border Cultural Citizenship Through Its Language and Safe Haven Ordinances*, 78 DENV. U. L. REV. 1017, 1032 (2001) (recognizing that "[t]he English language today enjoys an exalted position in the United States. It has been acknowledged by one Circuit Court of Appeals to be the preeminent language of the United States."). Texas does not have an official language and is becoming more tolerant of bilingualism. *See, e.g.*, Tex. S.J. Res. 356, 79th Leg., R.S. (2005) (commending the Texas Foreign Language Association and recognizing 2005 as the Year of Languages). The relevant portion of the resolution states, "WHEREAS, With Texas' rich and diverse cultural heritage, Texans value the different languages spoken by our citizens, and as our state becomes more involved with the economics and cultures of the global community, it is more vital than ever to promote learning languages other than one's native language . . . ." *Id. See generally* Lori A. McMullen & Charlene R. Lynde, *The "Official English" Movement and the Demise of Diversity: The Elimination of Federal Judicial and Statutory Minority Language Rights*, 32 LAND & WATER L. REV. 789, 789 (1997) (discussing the history of the several attempts to make English the official language and stating that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue" (quoting Meyer v. Nebraska, 262 U.S. 390, 401 (1923))).

3. *See* Richard D. Brecht & Catherine W. Ingold, *Tapping a National Resource: Heritage Languages in the United States* (May 2002), http://www.cal.org/resources/digest/0202brecht.html (discussing the "unprecedented need for individuals with highly developed language competencies not only in English, our societal language, but also in many other languages") (on file with the *St. Mary's Law Journal*); Kenya Hart, *Defending Against a "Death by English": English-Only, Spanish-Only, and a* Gringa's *Suggestions for Commu-*

aided this change, such as: (1) an influx of new immigrants;[4] (2) the Internet and other sophisticated technology;[5] (3) the development of a global economy;[6] and (4) the changing demographics in the United States.[7] This shift raises several questions regarding the duty an attorney may owe to clients who possess a limited English proficiency (LEP).

The general rules of professional responsibility apply to attorneys representing LEP clients; however, an attorney should be aware that a client who has a limited command of the English language presents several con-

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nity Support of Language Rights, 14 BERKELEY LA RAZA L.J. 177, 179 (2003) (commenting on the reasons why the United States should move away from its monolingual mindset).

4. David Meyer, David Madden & Daniel J. McGrath, *English Language Learner Students in U.S. Public Schools: 1994 and 2000*, 6 EDUC. STAT. Q. 37, 37 (Issue 3, 2004), *available at* http://nces.ed.gov/pubs2005/2005612.pdf (reporting an increase in the number of languages, other than English, being spoken in the United States).

> In 1990, 32 million people over the age of 5 in the United States spoke a language other than English in their home, comprising 14% of the total U.S. population. By 2000, that number had risen by 47% to nearly 47 million [people], comprising nearly 18 percent of the total U.S. population . . . .

Id.

5. Kellie Fowler & James Manktelow, *Effective Cross Culture Communication - Collaborative Efforts a Must!*, MIND TOOLS NEWSLETTER 29 (Mind Tools Ltd., Swindon, U.K.), Aug. 16, 2005, http://www.mindtools.com/CommSkll/Cross-Cultural-communication.htm (observing that "[t]he Internet and modern technology have opened up new marketplaces, and allow us to promote our businesses to new geographic locations and cultures") (on file with the *St. Mary's Law Journal*).

6. *See generally* Richard D. Brecht & Catherine W. Ingold, *Tapping a National Resource: Heritage Languages in the United States* (May 2002), http://www.cal.org/resources/digest/0202brecht.html (discussing the need for more qualified interpreters as we enter into business negotiations with other countries) (on file with the *St. Mary's Law Journal*).

7. *See* Paul M. Uyehara, *Funding the Mandate for Language Access*, 8 DIALOGUE (ABA Division for Legal Services Access to Justice Newsletter), Winter 2004, at 16, *available at* http://www.abanet.org/legalservices/dialogue/04winter/dial_04winteriolta.html#top (noting a dramatic change in the "client[-]eligible population").

> The demographic makeup of the client[-]eligible population has changed dramatically since the advent of legal services programs in the 1960s. The proportion of the U.S. population that is foreign born has doubled since 1970 and today is higher than at any time since the early part of the 20th century. The Latino population has soared more than 40 times since 1960. Two-thirds of the Asian Pacific population is foreign born, with half having arrived in the past ten years. Not only has the number of immigrants grown tremendously, but the rate of change has been accelerating. The newest Americans, moreover, have not all settled in traditional immigrant strongholds. States and localities unaccustomed to immigrants have to adjust on the fly to influxes of newcomers from different parts of the world.

Id.

flicts that are not typical of the "average" client.[8] As a result, programs must be designed to improve the legal services available to LEP clients.[9] As noted by the American Bar Association, "[m]eeting the needs of LEP clients can no longer be an afterthought for legal services grantees, but must be a matter of deliberate policy and planning."[10]

This Recent Development essay focuses on the implications of interpreting to and for LEP clients.[11] First, it sets out an overview of the likely LEP client and the Texas court system. Next, it determines an attorney's legal duties to his LEP clients when he serves as an interpreter and his malpractice liability, if any, to such clients. Finally, this essay presents practitioners with several practical strategies which may aid them in representing an LEP client.

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8. *See id.* at 19 (advocating the need to design new practice methods when assisting LEP clients).

> The primary risk is that accurate communication between advocates and clients will be impeded because they do not speak the same language, or because untrained or incompetent interpreters are used. . . . Failing to negotiate the language barrier results in further risks: that advocates will not obtain an accurate factual recital from the client, or a sound understanding of the client's goals and needs; that LEP clients will not grasp the options available to them or the actions that they should undertake to protect their legal interests; and that impeded communication may result in missed deadlines, inaccurate legal filings, or other mistakes that could lead to a malpractice claim.

Id.

9. *Id.* at 16, 19.

10. *Id.* at 19.

11. *See* RIC Int'l Inc., *What Does an Interpreter Do?*, http://world.std.com/~ric/what_is_int.html (last visited Feb. 18, 2005) (addressing the difference between interpreting and translating) (on file with the *St. Mary's Law Journal*).

> [T]he difference between interpreting and translation is only the difference in the medium: the interpreter translates orally, while a translator interprets written text.
> . . . [D]ifferences in the training, skills, and talents needed for each job are vast. The key skill of a very good translator is the ability to write well, to express him/herself clearly in the target language. An interpreter, on the other hand, has to be able to translate in both directions, without the use of any dictionaries, on the spot.

Id.

Although the scope of this discussion limits itself to LEP clients, translation issues in international legal transactions also appear frequently in the areas of patent law and international law. *See* Gerald R. Gooding, Letters to the Editor, *It Loses in the Translation*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 614, 618 (1994) (citing translation problems when U.S. companies seek patent protection in Japan).

II. THE LEP CLIENT

A. *Special Considerations of LEP Clients*

Clients seek attorneys with "special knowledge, skills and diligence" to assist them in navigating through the complexities of the legal system.[12] In doing so, clients expect their attorney to competently and diligently represent them in their legal matters.[13] An attorney for the LEP client should have the aforementioned qualifications and be able to communicate with and represent the client not only in the dominant language, but also in a language that both can adequately understand.

When advertising his services to prospective LEP clients, an attorney must use care. If the advertisement is false or misleading, the attorney may find himself in violation of the Model Code of Professional Responsibility[14] or his own state's rules of professional conduct. For example, an attorney falsely advertises when he promises or holds himself out to be fluent in the client's native language when in reality he is not.[15] These

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12. LEGISLATIVE ASSISTANCE AND RESEARCH PROGRAM, CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE 25 (Maya Goldstein Bolocan ed., 2002), *available at* http://www.abanet.org/ceeli/publications/conceptpapers/proflegalethics/professional_legal_ethics_concept_paper.pdf.

13. *See id.* (noting the essential need for lawyer competence and diligence); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003) (requiring lawyers to provide their clients with competent representation); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01, *reprinted in* TEX. GOV'T CODE ANN., tit.2, subtit. G app. A (Vernon Supp. 2005) (TEX. STATE BAR R. art. X, § 9) (mandating competent and diligent representation by lawyers).

14. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1983) (indicating that it is misconduct for an attorney to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation"); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(A) (1983) (stating "[a] lawyer shall not . . . use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim"); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-105 (1983) (disallowing an attorney from holding himself out as a specialist when he is not); *see, e.g.*, *In re* Balcacer, 293 A.D.2d 107, 108 (N.Y. App. Div. 2002) (upholding an attorney's suspension due to deceptive advertising). *In re* Balcacer involved an attorney who was found to have placed two advertisements which were deliberately false and misleading. *Id.* One advertisement was published in English and the other in Spanish. *Id.* The Spanish advertisement suggested that the attorney had other attorneys associated with him by using the word "we" and indicated that the attorneys were specialists in certain areas of law. *Id.* In fact, the attorney was a solo practitioner and did not possess a specialty certification in the areas of law mentioned in the advertisement. *Id.* As a result of this deceptive advertising, the attorney was suspended for six months. *Id.* at 109.

15. *See* Texans Against Censorship, Inc. v. State Bar, 888 F. Supp. 1328, 1333 (E.D. Tex. 1995) (deciding the constitutionality of proposed amendments to the Texas disciplinary rules that would restrict attorney advertising). In 1993, a "Special Committee on Lawyer Advertising" was created to determine what changes were needed to the legal advertising rules. *Id.* at 1335. During one of the committee's hearings, a witness testified that he had knowledge "of attorneys advertising that they could speak Spanish, when, in

rules attempt to deter lawyers from misstating their credentials, capacity, or any aspect of their service.

An LEP client may find himself at the mercy of his attorney if the two are unable to effectively communicate and understand one another's culture. When discussing legal matters, the attorney must understand the LEP client's cultural expectations because these expectations often vary greatly from the eventual outcome of the case.[16] Additionally, the attorney who cannot adequately communicate in the client's native language or depends on office staff to translate to the client potentially jeopardizes a critical aspect of the attorney-client relationship.[17]

B. *More Than Language: Building "Cross-Cultural Competence"*[18]

Communication is essential to the attorney-client relationship because it balances the attorney's power by "obligat[ing] the lawyer to consult with the client to determine the terms and objectives of the representation."[19] As such, the Model Rules and the Texas Disciplinary Rules of Professional Conduct make communication an affirmative duty.[20]

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fact, they could not." *Id.* at 1349. This testimony is but one example of the evidence considered by the committee in determining that the prevention of false and deceptive lawyer advertising serves a substantial governmental interest. *Id.* As a result of the extensive evidence reviewed by the committee, a bulk of the promulgated amendments, restricting attorney advertising, were deemed constitutional. *Id.* at 1372.; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 7.02 cmt. 14 (commenting on communications concerning a lawyer's services in a second language). This rule prohibits an attorney from making false or misleading statements concerning his qualifications. *Id.*

16. *See* Frank D'Alessandro, *Lost in Translation*, FAM. ADVOC., Fall 2004, at 20, 23 (counseling family law attorneys to fully explain "what can and cannot be accomplished in a family law case"). For example, the author explains that "LEP clients may come from societies where divorce and domestic violence are treated differently than they are in this country." *Id.* As such, an LEP client may assume that children are always awarded to the mother in a divorce and that the mother has sole discretion in determining visitation between the children and the father. *Id.* While this is not true in the United States, it may represent the system in the LEP client's native country. *See id.* (asserting the same).

17. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 (requiring *lawyers* to keep their clients informed as to the status of their legal matter and to explain matters with sufficient detail so clients may make informed decisions (emphasis added)).

18. *See* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 33 (2001) (borrowing from the author's title).

19. LEGISLATIVE ASSISTANCE AND RESEARCH PROGRAM, CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE 28 (Maya Goldstein Bolocan ed., 2002), *available at* http://www.abanet.org/ceeli/publications/conceptpapers/proflegalethics/professional_legal_ethics_concept_paper.pdf (last visited Apr. 13, 2006); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 (requiring full and complete communication between lawyers and their clients).

20. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2003) (explaining a lawyer's duty to communicate with his client); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 (requiring

A problem arises when the attorney and client must communicate through piecemeal information. This occurs when an attorney finds himself unable to competently communicate with his LEP client and instead expects the client to ask clarifying questions. In *The Five Habits: Building Cross-Cultural Competence in Lawyers*,[21] Professor Susan Bryant states:

> Inaccurate attributions can cause lawyers to make significant errors in their representation of clients. Imagine a lawyer saying to a client, "If there is anything that you do not understand, please just ask me to explain" or "If I am not being clear, please just ask me any questions." The lawyer might assume that a client who does not then ask for clarification surely understands what the lawyer is saying. However, many cultural differences may explain a client's reluctance to either blame the lawyer for poor communication . . . or blame himself or herself for lack of understanding . . . . Indeed, clients from some cultures might find one or the other of these results to be rude and, therefore, will feel reluctant to ask for clarification for fear of offending the lawyer or embarrassing himself.[22]

Thus, a prudent attorney should recognize not only a potential language barrier, but also the possible cultural barriers that may affect the attorney-client relationship.

III. WHO CAN INTERPRET IN TEXAS?

A. *Is Justice Being Served?*

In Texas, a person may serve the dual role of witness and interpreter.[23] The witness/interpreter "is not required to be an 'official' or 'certified' interpreter under the [Texas] Code [of Criminal Procedure], but only to have sufficient skill in translating and be familiar with the use of slang."[24]

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full and complete communication between lawyers and their clients); *see also* LEGISLATIVE ASSISTANCE AND RESEARCH PROGRAM, CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE 28 (Maya Goldstein Bolocan ed., 2002), *available at* http://www.abanet.org/ceeli/publications/conceptpapers/proflegalethics/professional_legal_ethics_concept_paper.pdf (recognizing that attorneys "have affirmative obligations to communicate with clients").

21. SUSAN BRYANT, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

22. *Id.* at 43 (footnote omitted).

23. *See* Mendiola v. State, 924 S.W.2d 157, 161 (Tex. App.—Corpus Christi 1995, writ ref'd) (indicating that "[a]ny person may be called upon to serve as interpreter by the court, under the same rules and penalties as witnesses") (citation omitted).

24. *Id.*

Whether this standard applies to an attorney who is interpreting to or for his client, or both, in the courtroom, remains unclear.[25]

In an 1867 case, *Kuhlman v. Medlinka*,[26] the Texas Supreme Court held that a witness could translate into English a letter written in German only if the witness understood the two languages.[27] The court reasoned that the defendant's legal rights had not been diminished because "it was sufficient if the witness was sworn in the usual form."[28] This standard has not changed, evidenced by the 2003 case of *Menjivar v. State*,[29] where the defense attorney interpreted for his client at trial from English to Spanish and Spanish to English.[30] "Counsel was asked his name and then invited to perform his duty as an interpreter. An oath was administered, he was duly sworn, and no objection was lodged."[31] The court in *Menjivar* noted that the defendant "never voiced, through his counsel or otherwise, his inability to understand any of the proceedings."[32]

This recent example raises the question of *who* should object. It could be the LEP defendant, who most likely does not completely understand the proceedings. Or, should it be the attorney who is acting as the interpreter for his client? Alternatively, opposing counsel could make the objection—especially when he does not know the foreign language.

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25. *See* Garcia v. State, 149 S.W.3d 135, 140, 143 (Tex. Crim. App. 2004) (evaluating whether a criminal defendant was denied his Sixth Amendment right to confrontation when "the proceedings were not translated for him"). In *Garcia*, the defendant's attorney spoke no Spanish, so the attorney used his bilingual legal assistant to help him communicate with Mr. Garcia. *Id.* at 136-37. At the start of the trial, the judge introduced the legal assistant to the jury and said "[s]he translates pretty frequently in the courts, so she's hired by the Court." *Id.* at 137. The Texas Court of Criminal Appeals noted that the legal assistant was not the defendant's court interpreter because "[s]he was not sworn in by the court to interpret the trial for Garcia, she was not told to interpret the trial for Garcia, and she did not interpret the trial for Garcia." *Id.* at 143. Although the issue before the court was not the effectiveness of the supposed interpreter, the court did not seem to take offense to the prospect of such interpretation taking place. *See id.* (seemingly approving of the use of interpreters because an objection to the concept was not raised).

26. 29 Tex. 385 (1867).

27. Kuhlman v. Medlinka, 29 Tex. 385, 393 (1867). The court stated that "[i]f [the interpreter] deliberately assumed to understand the two languages, and deliberately read to the jury, as a true translation of the letter, what in fact was false and fabricated by him for the occasion, he would be guilty of perjury." *Id.*

28. *Id.*

29. No. 08-02-00143-CR, 2003 Tex. App. LEXIS 1553 (Tex. App.—El Paso Feb. 20, 2003, no pet.) (mem. op.) (not designated for publication).

30. Menjivar v. State, No 08-02-00143-CR, 2003 Tex. App. LEXIS 1553, at *3 (Tex. App.—El Paso Feb. 20, 2003, no pet.) (mem. op.) (not designated for publication).

31. *Id.*

32. *Id.*

On appeal, the defendant in *Menjivar* argued that the "trial court failed to provide him with a certified court interpreter."[33] In a Texas criminal proceeding, an interpreter is required when "it is determined that a person charged or a witness does not understand and speak the English language."[34] The defendant could have also argued that he had ineffective assistance of counsel because his attorney failed to request an interpreter; the attorney served in the dual roles of advocate and interpreter and consequently was unable to zealously advocate for his client's position.[35]

The disciplinary rules are silent regarding whether an attorney may simultaneously serve as both a witness and an interpreter, and whether he may translate certain facts as essential facts that, as an advocate, he may not interpret to the detriment of his client. If he is assigned as an interpreter, he must interpret fully because (1) he is under oath, and (2) he is an officer of the court.[36] Arguably, when an attorney acts as an interpreter for his client, it becomes less possible for him to effectively represent his client. For example, how or when could an attorney object to his own translation? As an interpreter under article 38.30 of the Texas Code of Criminal Procedure, the attorney is "under the same rules and penalties as are provided for witnesses,"[37] but in reality, he is not a witness. Further, under the Texas Disciplinary Rules of Professional Conduct, an attorney should not become counsel if a possibility exists for him to be "a witness necessary to establish an essential fact on behalf of the lawyer's client."[38]

For criminal cases, the Texas Disciplinary Rules of Professional Conduct contain special prosecutorial responsibilities.[39] Specifically, a comment to Rule 3.09 provides, in part: "A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate."[40] By extension, if a prosecutor hears something interpreted incorrectly, he should object regardless of the circumstances to ensure justice is being carried out. Similarly, in civil litigation, opposing counsel should have this same

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33. *Id.* at *2.

34. TEX. CODE CRIM. PROC. ANN. art. 38.30 (Vernon Supp. 2005).

35. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 2 (providing that a lawyer's responsibility is to "zealously assert[ ] the clients [sic] position under the rules of the adversary system").

36. *Id.* ¶ 1.

37. TEX. CODE CRIM. PROC. ANN. art. 38.30 (Vernon Supp. 2005).

38. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 (addressing the lawyer as a witness). The first portion of the rule states that: "(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client." *Id.*

39. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09.

40. *Id.* 3.09 cmt. 1.

level of responsibility. Even though his client's interest may be better protected by his silence or failure to object, an attorney is obligated to bring any potential for a gross miscarriage of justice to the court's attention.

B. *Practical Difficulties in Preserving Error in Cases Involving LEP Clients*

In order to preserve error for appeal, "the complaining party must make a specific objection and obtain a ruling on the objection."[41] In *Escamilla v. State*,[42] the El Paso Court of Appeals held that the defendant's counsel failed to preserve error because "no objection was made regarding the accuracy of the translations," regardless of the court's recognition that counsel voiced his concerns about the erroneous translation.[43] The appellate court further held that the adequacy of the translation is not reviewable on appeal, but is a matter to be determined by the trier of fact.[44] Further, the court pointed out that although "[t]he trial court's determination of the competence of an interpreter is subject to a review for abuse of discretion," it would not do so unless there was an objection made to an actual injury on the record.[45]

The court also stated that the trial court did not have an affirmative duty to question the interpreter in order to determine her qualifications, but rather, it was up to counsel to voice his objection and make a record.[46] This is obviously very difficult if counsel is also interpreting for his client. Nonetheless,

> [t]he right of a non-English speaking person to the assistance of an interpreter during trial proceedings is guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution, the Due Process Clause of the Fourteenth Amendment, article I, section 10 of the Texas Constitution, and article 38.30 of the Texas Code of Criminal Procedure.[47]

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41. Escamilla v. State, No. 08-03-00193-CR, 2005 Tex. App. LEXIS 4193, at *15 (Tex. App.—El Paso May 31, 2005, no pet.) (quoting Wilson v. State, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002)) (mem. op.) (not designated for publication); *see also* Tex. R. Evid. 103 (requiring a specific objection and a ruling on the objection in order to preserve error).

42. No. 08-03-00193-CR, 2005 Tex. App. LEXIS 4193, at *19 (Tex. App.—El Paso May 31, 2005, no pet.) (mem. op.) (not designated for publication).

43. *Id.* at *16.

44. *Id.* at *18.

45. *Id.* at *18-19.

46. Escamilla v. State, No. 08-03-00193-CR, 2005 Tex. App. LEXIS 4193, at *19 (Tex. App.—El Paso May 31, 2005, no pet.) (mem. op.) (not designated for publication).

47. Pineda v. State, No. 01-03-00457-CR, 2004 WL 1472089, at *2 (Tex. App.—Houston [1st Dist.] July 1, 2004, pet. ref'd) (not designated for publication).

Yet, that right is only protected to the extent that counsel can effectively do his job.[48]

In *Guerrero v. State*,[49] the Waco Court of Appeals stated that "an attorney's professional obligation to his client may conflict with the interpreter's duty to interpret the proceedings fully and fairly in some cases."[50] In the event of a vigorously contested trial, the court stated that "an interpreter/attorney's duty to interpret may unnecessarily distract from his duty to plan and execute a trial strategy designed to provide zealous representation of the accused."[51] Conversely, the court stated that in a straightforward guilty-plea proceeding, counsel may "simultaneously serve as interpreter without much difficulty or distraction."[52] Thus, the court pointed out that "whether trial counsel should serve as an interpreter should be decided on a case-by-case basis, giving appropriate deference to the discretion of the trial court in the conduct of trial proceedings."[53]

The decision of whether to interpret for a client in the courtroom should not be based upon the attorney's ability to fluently speak the client's native language. The conflicts of interest are various and raise several questions. Additionally, in both civil and criminal litigation, a lawyer has the responsibility to perform competently in the client's interest.[54] As discussed, this responsibility becomes strained when an attorney acts as counsel and interpreter. To illustrate, in *State v. Rios*,[55] the Supreme Court of Arizona stated:

> For defense counsel to cross-examine witnesses, listen attentively to testimony and objections of the prosecuting attorney and hear rulings and remarks of the presiding judge and simultaneously render an accurate and complete translation to his three clients, is an impossible task. The effectiveness of defense counsel under those circum-

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48. *See Pineda*, 2004 WL 1472089, at *3 (explaining the manner in which ineffective assistance of counsel is determined under Strickland v. Washington, 466 U.S. 668 (1984)).

49. 143 S.W.3d 283 (Tex. App.—Waco 2004, no pet.).

50. Guerrero v. State, 143 S.W.3d 283, 284 (Tex. App.—Waco 2004, no pet.).

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 cmt. 1 (pronouncing a lawyer's duty to provide clients with representation which is both diligent and competent). This comment defines competence "as possession of the legal knowledge, skill, and training reasonably necessary for the representation." *Id.*

55. 539 P.2d 900 (Ariz. 1975).

> stances is obviously greatly impaired to the serious detriment of his clients' defense.[56]

Thus, requesting an independent interpreter is more favorable than having counsel interpret.

As previously discussed, in a criminal trial the attorney can make a motion under the Texas Code of Criminal Procedure to have the trial court appoint an interpreter.[57] In *Garcia v. State*,[58] the Texas Court of Criminal Appeals held that the right to an interpreter is a right that must be implemented by the system, unless expressly waived by the defendant.[59] In this way, an attorney maintains his role as an advocate for his client in criminal proceedings.

However, in civil litigation, no rule requires interpreters. Obtaining an interpreter is an expense that may possibly be charged against the losing party.[60] As a result, an attorney may decide to act as an interpreter for his client due to the client's economic restraints. However, regardless of whether the attorney is acting as an interpreter in criminal or civil litigation, the issue arises as to how an attorney can best maintain his fiduciary duty to his client while concurrently serving as the client's interpreter.

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56. State v. Rios, 539 P.2d 900, 901 (Ariz. 1975) (illustrating the difficulty defense counselors face in properly representing their clients while simultaneously acting as an interpreter).

57. *See* TEX. CODE CRIM. PROC. ANN. art. 38.30 (Vernon Supp. 2005) (providing for interpreters in criminal litigation). *But see* United States v. Martinez, 616 F.2d 185, 188 (5th Cir. 1980) (holding that the case was not subject to reversal on the merits simply because the trial judge failed to provide a court appointed interpreter). In this case, the defendant was represented by a privately retained bilingual attorney. *Id.* at 187. The judge advised the defendant that he had a right to employ his own interpreter, but there was no requirement for the court to provide an interpreter for the nonindigent defendant. *Id.* The defendant made no attempt to show he could not afford an interpreter, and therefore, the appellate court reasoned that where the trial judge made it clear that "the defendant had a right to an interpreter, but was assured by defendant's retained bilingual counsel that he could translate for the defendant and no objection was made, there was no abuse of discretion in failing to supply a court-appointed interpreter." *Id.* at 188.

58. 149 S.W.3d 135 (Tex. Crim. App. 2004).

59. Garcia v. State, 149 S.W.3d 135, 145 (Tex. Crim. App. 2004).

60. *See* Datapoint Corp. v. Picturetel Corp., No. 3:93-CV-2381-D, 1998 U.S. Dist. LEXIS 10897, at *3-4 (N.D. Tex. July 9, 1998) (holding that not all expenses can be reimbursed). The court included "fees of court appointed . . . interpreters and special interpretation services" amongst the fees that may be passed along to the losing party. *Id.* at *4. However, the court was careful to note that a court may still decline to award such costs. *Id.*; *see also* Auto Wax Co. v. Mark V Prods., Inc., No. 3:99-CV-0982-M, 2002 U.S. Dist. LEXIS 2944, at *24-25 (N.D. Tex. Feb. 22, 2002) (stating that only necessarily incurred translation costs will be paid).

IV. INTERPRETING FOR CLIENTS

A. *Potential Conflicts with the Texas Disciplinary Rules of Professional Conduct*

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."[61] Furthermore, in the capacity of a "representative of clients," an attorney is also an advisor providing the client with an "informed understanding of the client's legal rights and obligations and explain[ing] their practical implications."[62] Moreover, the terms "consult" or "consultation" under the Texas Disciplinary Rules mean "communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question."[63] This cursory review of the disciplinary rules illustrates that attorneys walk a fine line when they decide to interpret for their clients.

The Texas Disciplinary Rules of Professional Conduct provide that an attorney should not undertake a legal matter if the attorney knows or ought to know that he is not competent to handle the case.[64] Whether this admonition includes competency in interpretation is unclear. Moreover, the attorney may be fully capable of handling the legal matter but incapable of informing the client of the case status or assessing the client's thoughts on the situation because of the language barrier. More specifically, the attorney may not fully abide by the client's decisions regarding the objectives of the representation, such as accepting a settlement agreement, entering a plea, or placing the client on the stand to testify.[65] Furthermore, it is questionable whether an attorney should attempt to represent an LEP client when he knows that a conversation will only be partially understood, or when he recognizes that matters can only be discussed with an interpreter present. Also questionable is whether an

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61. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 1.

62. *Id.* ¶ 2.

63. *Id.* terminology.

64. *Id.* 1.01(a)(1) – (2). The relevant portion of the rule reads as follows:

> (a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:
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> (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
>
> (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

Id.

65. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003) (discussing the "scope of representation and allocation of authority between client and lawyer").

attorney should decline to represent such a client when he knows the individual may have limited options due to financial or demographical reasons. Finally, the analysis may change when considering whether the attorney is court appointed.

If the attorney is court appointed, options are available to the attorney and client. In a criminal proceeding, where personal liberties are at stake, an attorney should carefully evaluate his decision to either extend or decline representation to an LEP client. Although the Texas Code of Criminal Procedure gives an LEP client the right to an interpreter, courts have denied the use of an interpreter when: (1) an LEP defendant failed to make a motion for an interpreter;[66] (2) an LEP defendant hired a criminal attorney, and thus indicated he had the resources to pay for an interpreter;[67] and (3) no official interpreter was available, but another person in the courtroom could act as an interpreter.[68]

In a civil case, an interpreter is an expense which may or may not be paid by the losing party.[69] Thus, the attorney or the client are left to: (1) pay for an interpreter; (2) depend on another individual to interpret (perhaps a family member or a friend); (3) try to piecemeal the trial proceedings (assuming the attorney is fluent enough to act as an interpreter or the client minimally understands); or (4) forgo an interpreter altogether.[70]

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66. *See* Khai Anh Tran v. State, No. 05-92-01578-CR, 1997 Tex. App. LEXIS 351, at *4-5 (Tex. App.—Dallas Jan. 30, 1997, no writ) (not designated for publication) (declining to disturb the trial court's decision when the record did not show that the appellant requested an interpreter).

67. *See* United States v. Martinez, 616 F.2d 185, 187 (5th Cir. 1980) (stating that "the [trial] court told all counsel that [the defendant] had a right to have his own interpreter but since he had employed counsel the court was not required to provide an interpreter for him").

68. *See* Castaneda v. State, No. 13-02-146-CR, 2004 Tex. App. LEXIS 9773, at *4 (Tex. App.—Corpus Christi Nov. 4, 2004, pet. ref'd) (mem. op.) (not designated for publication) (affirming a judgment where a bailiff acted as an interpreter). In this criminal case, counsel for the defendant suggested the use of the bailiff as an interpreter, and if the bailiff was not able to act as an interpreter, then counsel himself would interpret. *Id.* at *5-6. This begs the question whether counsel acted in the best interest of his client.

69. *See* Datapoint Corp. v. Picturetel Corp., No. 3:93-CV-2381-D, 1998 U.S. Dist. LEXIS 10897, at *3-4 (N.D. Tex. July 9, 1998) (holding that not all expenses can be reimbursed). The court included "fees of court appointed . . . interpreters and special interpretation services" amongst the fees that may be passed along to the losing party. *Id.* at *4. However, the court was careful to note that a court may still decline to award such costs. *Id.*

70. *Compare* TEX. GOV'T CODE ANN. § 57.002 (Vernon Supp. 2005) (providing that "[a] court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the court"), *with* Op. Tex. Att'y Gen. No. JC-0584 (2002) (interpreting chapter 57 of the Texas Government Code). In addressing "the appointment

Perhaps the most apparent challenge facing attorneys who interpret or translate for their clients is fulfilling their obligation to communicate under the Texas rules.[71] This can be a tremendous responsibility in a legal system that does not provide substantial safeguards to ensure that an interpreter renders an accurate translation.[72] Consequently, if an attorney chooses to officially interpret for his client, no process assists in discerning the accuracy of the attorney's translations throughout the course of a hearing, trial, or otherwise. Yet, as the current Dean of St. Mary's University School of Law, Bill Piatt, aptly wrote nearly fifteen years ago, "[z]ealous advocacy would seem to require counsel to seek an interpreter when there is any doubt as to whether a language barrier is inhibiting his or her client's comprehension of the proceedings or interfering with the presentation of evidence on the client's behalf."[73] Thus, interpreting for

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of spoken-language interpreters and the payment of their fees," former Texas Attorney General John Cornyn stated:

> In either a civil or criminal proceeding, whether a party has filed a motion for or a witness has requested the appointment of an interpreter will depend upon the facts and is a question for the trial court in the first instance. The court may grant or deny such a motion or request.

Id. The Pennsylvania Supreme Court has written a general comment on the constitutional aspects of allowing interpreters. *See* FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 22 (2003), *available at* http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf (discussing the constitutional issues that arise when an LEP individual is not provided with an interpreter). The committee stated:

> Constitutional principles can also apply to civil and administrative proceedings . . . . Fundamental due process and equal protection rights grounded in the Fifth and Fourteenth Amendments are implicated when an individual is threatened with loss of property . . . or is denied access to court for enforcement of legal rights on the grounds of his or her ability to speak or write well in English.

Id. That report further asserted that "the court should level the playing field, at least to the extent of permitting both sides to understand and participate in proceedings without regard to English language ability." *Id.*

71. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 (explaining a lawyer's duty of communication).

72. *See* 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6055 (West 1990) (observing that while Federal Rule of Evidence 604 requires interpreters to take an "oath . . . that they will make a 'true translation,'" the rule "imposes no standards on the interpreter's performance after the interpreter has been qualified and sworn"). Thus, the rule does not require the interpreter to "render a true translation." *Id.*

73. Bill Piatt, *Attorney As Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 5-6 (1990) (citing Peeler v. State, 750 S.W.2d 687, 688-91 (Mo. Ct. App. 1988)); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 3 (indicating that "[i]n all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law. In doing so, a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation.").

clients poses a unique threat to the fulfillment of a lawyer's duties under the Rules, and it requires each lawyer to critically assess his capabilities as an interpreter before choosing to undertake this additional obligation.

B. *Conflict of Interest and Related Obstacles Facing Attorneys Who Interpret for Their Clients*

Although it is not disputed that attorneys can serve as both counsel and interpreter for a client,[74] strong scholarly and logical arguments suggest attorneys who undertake such an obligation present great harm to both their clients and themselves. This problem arises from the difficulty for courts and counsel to fully understand the interests involved in cases with foreign language speaking clients.[75] Furthermore, with such apparent deference to an attorney's ability to translate for clients, lawyers confront issues such as upholding their reputation of competency and fulfilling their duty of loyalty to their clients. As noted by Dean Piatt:

> Bilingual attorneys may have hesitated to object to being required to interpret for their clients. They may have hesitated out of deference to the court or out of some perceived greater sense of duty to a client who has placed a great deal of trust in that attorney based upon the common language shared by counsel and client. They may have hesitated out of concern that they would somehow appear less competent as attorneys to the court or client if they did not demonstrate an ability to interpret the proceedings for the apparent benefit of both.[76]

A more practical concern is the degree of multi-tasking within a trial, beyond the normal duties, such as simultaneously interpreting for a client

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74. *See* Maldonado v. State, No. B14-93-00176-CR, 1994 Tex. App. LEXIS 1555, at *5-6 (Tex. App.—Houston [14th Dist.] June 30, 1994, no writ) (not designated for publication) (holding that the trial court was not required to provide the defendant with an additional interpreter when his own attorney was already fulfilling that role); Medellin v. State, No. B14-92-01016-CR, 1994 WL 151436, at *8 (Tex. App.—Houston [14th Dist.] Apr. 28, 1994, writ ref'd) (not designated for publication) (concluding that Medellin's counsel did not provide ineffective assistance of counsel when serving as both attorney and interpreter, and indicating that the defendant was unable to cite any "case law establishing a general rule that an attorney cannot act as a translator for his client").

75. *See* Bill Piatt, *Attorney As Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 1 (1990) (proposing that the problems regarding interpreters arise because courts and counsel are not informed of the interests at stake) (citing Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 885-91 (1986)).

76. *Id.* at 14-15.

while paying attention to witnesses, rulings, and other necessary events during the course of a hearing, trial, or otherwise.[77] Moreover:

> The attorney may miss something being said in court because he or she is busy interpreting for the defendant; legal malpractice insurance may not cover the added interpreter function; conflict of interest issues may arise if the attorney is not completely impartial to the information given to or by the defendant or if the defendant responds with confrontational words that the attorney would prefer the court did not hear.[78]

Finally, when defendants appeal on the grounds of ineffective assistance of counsel, the attorney is forced to testify regarding his representative and interpretative capacity.[79]

C. *Ineffective Assistance of Counsel and Its Relation to Attorneys Who Interpret for Their Clients*

The United States Constitution grants the accused the right to "have the Assistance of Counsel for his defense."[80] The Sixth Amendment also requires that the accused "shall enjoy the right . . . to be confronted with the witnesses against him. . . ."[81] Consequently, the Sixth Amendment provides a popular appellate device for LEP defendants defining their constitutional right to effective assistance of counsel, and for attorneys seeking to defend themselves against a convicted client's appeal.

1. Standard of Review for Ineffective Assistance of Counsel

One potential problem for practitioners who interpret for their clients is the exposure to an appeal based on a claim of ineffective assistance of counsel by convicted clients who claim they lacked understanding during the proceedings. *Strickland v. Washington*[82] provides the standard of review for such claims:

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77. *See* Francisco Araiza, *Se Hable Everything: The Right to an Impartial, Qualified Interpreter*, WIS. LAW., Sept. 1997, at 14, 16 (noting that an "attorney may miss something being said in court because he or she is busy interpreting for the defendant").

78. *Id.*

79. Rivera v. State, 981 S.W.2d 336, 340 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (discussing the defendant's burden to establish that his or her counsel was ineffective, and concluding that because "trial counsel specifically testified at the hearing on the motion for new trial that he discussed the consequences of pleading guilty with the [defendant]," defendant's second point of error was overruled).

80. U.S. CONST. amend. VI.

81. *Id.*

82. 466 U.S. 668 (1994).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[83]

In Texas, in order to satisfy the first prong under *Strickland*, the "appellant must (1) rebut the presumption that counsel is competent by identifying the acts or omissions of counsel that are alleged as ineffective assistance, and (2) affirmatively prove that such acts and omissions fell below the professional norm of reasonableness."[84] This presents a very difficult standard for defendants to overcome in order to prevail upon appeal. This does not mean, however, that attorneys should feel immune from ineffective assistance claims by their clients.

2. Ineffective Assistance of Counsel Involving LEP Criminal Defendants

Due to the *Strickland* standard, Texas criminal defendants have had a particularly difficult time appealing their convictions based on ineffective assistance of counsel when their attorneys served in the dual roles of attorney and translator/interpreter.[85] Understandably, issues of voluntariness of a defendant's guilty plea arise in cases involving LEP defendants.[86] In some of these cases, however, logical questions must be

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83. Strickland v. Washington, 466 U.S. 668, 687 (1994).

84. Ruiz v. State, No. 14-98-01013-CR, 1999 Tex. App. LEXIS 9489, at *7 (Tex. App.—Houston [14th Dist.] Dec. 23, 1999, pet. ref'd) (citing McFarland v. State, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)) (not designated for publication).

85. *See* Maldonado v. State, No. B14-93-00176-CR, 1994 Tex. App. LEXIS 1555, at *4-6 (Tex. App.—Houston [14th Dist.] June 30, 1994, no pet.) (not designated for publication) (holding that the trial court did not abuse its discretion in not providing the defendant with a second interpreter, or not informing him that he could be assigned one other than his counsel, because the defendant's interpreter was his counsel, and "[t]he trial court was under no obligation to provide an additional interpreter"); Medellin v. State, No. B14-92-01016-CR, 1994 WL 151436, at *8 (Tex. App.—Houston [14th Dist.] Apr. 28, 1994, pet. ref'd) (not designated for publication) (concluding that Medellin's counsel did not provide ineffective assistance of counsel when serving as both attorney and interpreter, and indicating that the defendant was unable to cite any "case law establishing a general rule that an attorney cannot act as a translator for his client").

86. *See* Costilla v. State, 146 S.W.3d 213, 217 (Tex. Crim. App. 2004) (affirming a trial court's entry of a plea of guilty despite never obtaining an oral plea from a Spanish speaking defendant). Instead the court relied on the defense counsel's assertion that he had communicated the pertinent aspects of the guilty plea to his client and believed his client understood its consequences. *Id.*; *see also* Velez v. State, No. 14-99-01135-CR, 2000 Tex.

asked before giving deference to the courts' analyses on the issue. In *Maldonado v. State*,[87] the Houston Court of Appeals for the Fourteenth District denied the defendant's ineffective assistance of counsel claim because he never indicated any dissatisfaction with his attorney's translation during the sentencing proceeding.[88]

One may reasonably query how a defendant who needs an interpreter throughout the proceedings and has only his attorney on which to rely can adequately or even possibly understand whether his counsel is providing an accurate interpretation to the court. In other words, a defendant will not need an interpreter if he is capable of understanding the English language to the extent that he can guarantee an interpretation. Moreover, Texas courts have determined that defendants can waive their rights to challenge the qualifications and oath of authenticity of their attorney as interpreter.[89] Yet, how can a client waive what he does not understand?

D. *Abuse of Discretion Standard in Determining When a Defendant Is Entitled to the Constitutional Right to Confront Witnesses*

Article 38.30 of the Texas Code of Criminal Procedure codifies the mechanism through which a non-English speaking Texas defendant is guaranteed his constitutional rights.[90] In pertinent part, the statute requires that "[w]hen a motion for appointment of an interpreter is filed by

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App. LEXIS 4953, at *6 (Tex. App.—Houston [14th Dist.] July 27, 2000, pet. ref'd) (not designated for publication) (holding that because the defendant received his admonishments in Spanish and his lawyer felt "confident that he understood the nature of his plea," the defendant entered the plea voluntarily).

87. No. B14-93-00176-CR, 1994 Tex. App. LEXIS 1555 (Tex. App.—Houston [14th Dist.] June 30, 1994, no pet.) (not designated for publication).

88. *See* Maldonado v. State, No. B14-93-00176-CR, 1994 Tex. App. LEXIS 1555, at *6 (Tex. App.—Houston [14th Dist.] June 30, 1994, no pet.) (not designated for publication) (refusing to find that the trial court abused its discretion).

89. *See* Montoya v. State, 811 S.W.2d 671, 673 (Tex. App.—Corpus Christi 1991, no pet.) (citing Carr v. State, 475 S.W.2d 755, 757 (Tex. Crim. App. 1972)) (recognizing that error is preserved when an objection is made to the admission of testimony); Hernandez v. State, No. 05-95-01801-CR, 1999 WL 33481, at *1 (Tex. App.—Dallas 1999, no pet.) (not designated for publication) (holding that although the appellant complained on appeal that the trial court erred in failing to determine the trial counsel's fluency in Spanish, the client effectively waived his complaints when he did not object at the sentencing hearing); *see also* Salas v. State, 385 S.W.2d 859, 861 (Tex. Crim. App. 1965) (holding that the defendant received a fair trial and was not denied his right of confrontation after he failed to request an interpreter during the trial and did not demonstrate that his counsel was unable to interpret for him).

90. *See, e.g.*, Pineda v. State, No. 01-03-00457-CR, 2004 Tex. App. LEXIS 5940, at *5 (Tex. App.—Houston [1st Dist.] July 1, 2004, pet. ref'd) (not designated for publication) (observing that a defendant's right to an interpreter during trial is guaranteed by the

any party or on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him."[91] This statute on its face appears to grant a specific right to a defendant and curtail the discretion of the trial court, but Texas case law casts doubt on the statute's mandate.

Texas courts have indicated that when a defendant is denied the assistance of an interpreter, the appellate court will review the actions of the trial court "for an abuse of discretion."[92] Furthermore, when determining a defendant's entitlement to an interpreter, courts balance the defendant's right of confrontation and the public's interest in judicial economy, leaving the final determination within the discretion of the trial judge.[93] Such a standard leaves Texas LEP defendants vulnerable to a trial judge, who is likely unqualified to make a determination as to a defendant's level of English proficiency.[94]

Even more difficult to understand is how judges determine whether a defendant needs an interpreter. The landmark case of *Baltierra v. State*[95] creates a strong rule mandating interpreters for non-English speaking defendants. In *Baltierra*, the Hispanic defendant was accused of stealing less than twenty dollars worth of property.[96] The trial court appointed a Spanish speaking attorney to represent the defendant, but the court stated:

> Accordingly we hold that when it is made known to the trial court that an accused does not speak and understand the English language

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United States Constitution, the Texas Constitution, and the Texas Code of Criminal Procedure).

91. TEX. CODE CRIM. PROC. ANN. art. 38.30(a) (Vernon Supp. 2005).

92. *See, e.g.*, Sanchez v. State, 122 S.W.3d 347, 354 (Tex. App.—Texarkana 2003, pet ref'd) (concluding further that "the requirement of effective assistance of counsel forms a basis for the requirement of an interpreter").

93. United States v. Martinez, 616 F.2d 185, 188 (5th Cir. 1980) (citing the reasoning of Ferrell v. Estelle, 568 F.2d 1128 (5th Cir. 1978), *opinion withdrawn*, 573 F.2d 867 (5th Cir. 1978)).

94. *Cf.* T. Caroline Briggs-Sykes, *Lost in Translation: The Need for a Formal Court Interpreter Program in Alaska*, 22 ALASKA L. REV. 113, 116 (2005) (commenting that under Alaska Rule of Evidence 604, "the trial judge must 'inquire into and consider the interpreter's education, certification and experience in interpreting relevant languages; the interpreter's understanding of and experience in the proceedings in which the interpreter is to participate; and the interpreter's impartiality'"). If a standard can be set for how a judge considers the prerequisites of an interpreter, Texas should at least look to setting guidelines for how judges determine whether (1) a client is LEP, and (2) the interpreter is qualified or impartial.

95. 586 S.W.2d 553 (Tex. Crim. App. 1979) (en banc).

96. Baltierra v. State, 586 S.W.2d 553, 554 (Tex. Crim. App. 1979) (en banc).

> an interpreter must be furnished to translate to the accused the trial proceedings, including particularly testimony of the witnesses presented by the State. In the absence of the opportunity to be aware of the proceedings and the testimony of the witnesses against her, appellant was denied the constitutional right of confrontation and, that right not being knowingly and intelligently waived, her trial and conviction are null and void.[97]

In a pertinent footnote to this case, the Texas Court of Criminal Appeals expressly discouraged attorneys from interpreting for their clients as a means of satisfying the Confrontation Clause—a duty of the trial court, not trial counsel.[98] Additionally, Texas courts have held that the constitutional right of confrontation can be waived, particularly by non-English speaking clients.[99]

Despite *Baltierra*'s admonition, other Texas courts conflict on whether to appoint an interpreter. In *Vasquez v. State*,[100] the prosecution stipulated to the defendant's lack of English proficiency in a motion for a new trial.[101] Yet, the Corpus Christi Court of Appeals held that the trial judge did not abuse his discretion in not appointing an interpreter because the defendant answered "[y]es" twice during his sentencing phase.[102] The panel apparently concluded this response justified the trial court's failure to appoint an interpreter, even though the defendant's testimony and the testimony of four witnesses were all interpreted during trial.[103]

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97. *Id.* at 559 (footnote omitted).

98. *See id.* at n.11 ("The trial court commendably appointed counsel fluent in the Spanish language and thereby afforded appellant a basic aspect of effective assistance of counsel, ability to communicate. But effectuating that important constitutional requirement should not be taken as implementing the constitutional right of confrontation."). The court further stated that although "a lawyer speaking the same language can interpret testimony for an accused, we believe that [this] added task, with its obvious distracting implications, should not be imposed on counsel." *Id.* Additionally, the court commented:

> A lawyer discharges his obligation by providing effective assistance guaranteed by the Sixth Amendment to the Constitution of the United States and Article I, Section 10 of the Constitution of Texas. Counsel is not obliged to implement the right of confrontation. That duty is imposed upon the court by the [C]onfrontation [C]lause in the Sixth Amendment and Article I, Section 10.

Id.

99. *See* Garcia v. State, 151 Tex. Crim. 593, 210 S.W.2d 574, 579 (1948) (explaining that the right of confrontation is not a fixed right and may be waived).

100. 819 S.W.2d 932 (Tex. App.—Corpus Christi 1991, writ ref'd).

101. Vasquez v. State, 819 S.W.2d 932, 937 (Tex. App.—Corpus Christi 1991, writ ref'd).

102. *Id.* at 937-38.

103. *See id.* (noting that the indictment was also read to the defendant in Spanish, and that although four witness testimonies (one defense and three prosecution) were translated, there were seven witnesses for the prosecution that were not translated).

In *Diaz v. State*,[104] the Texas Court of Criminal Appeals held that the trial court did not abuse its discretion to *sua sponte* appoint an interpreter because the trial court found that the defendant spoke English "reasonably well."[105] However, during the defendant's testimony, in which he could speak some English, he proclaimed before the court, "I wish I can have a interpreter, but I don't have a interpreter. See, sometimes I say something I'm not supposed to say and sometimes I say something wrong. I just say what I know the way— ."[106] Again, the problem arose because neither Diaz himself, nor his counsel requested an interpreter.[107] Responding to the *Diaz* decision, Professor Leslie V. Dery argues:

> The reasoning of the *Diaz* opinion implies that the reviewing court believed this defendant desired an interpreter as a matter of convenience rather than need: he did not merit an interpreter because he seemed to speak and understand English sufficiently during the proceedings without one. The appellate court seemingly concluded that this defendant was another bad immigrant who was attempting to defraud the English-only justice system by trying to persuade the trial judge to grant him a right to which he was not entitled.[108]

This trend in Texas places criminal defense attorneys in a difficult situation because they put their clients at grave risk of being denied their constitutional rights of confrontation and effective assistance of counsel when they attempt to interpret for their clients. On one hand, judicial economy rarely persuades a judge that a defendant is entitled to an interpreter when the attorney speaks the client's native language.[109] On the other hand, an attorney can apparently waive his client's right of confron-

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104. 491 S.W.2d 166 (Tex. Crim. App. 1973).

105. Diaz v. State, 491 S.W.2d 166, 168 (Tex. Crim. App. 1973).

106. *Id.* at 167.

107. *See id.* at 168 (stating that even if defendant's testimony could be construed as a request for an interpreter, defendant had waived his right at that point because such statements appeared on page 143 of a 149-page record.). *But see Ex parte* McCune, 156 Tex. Crim. 213, 246 S.W.2d 171, 173 (1952) (asserting that "the Supreme Court of the United States defines denial of due process in a criminal trial as 'the failure to observe that fundamental fairness essential to the very concept of justice'"). Consequently, the question arises whether understanding a court proceeding should be considered fundamental.

108. Leslie V. Dery, *Disinterring the "Good" and "Bad Immigrant": A Deconstruction of the State Court Interpreter Laws for Non-English-Speaking Criminal Defendants*, 45 U. KAN. L. REV. 837, 889 (1997).

109. United States v. Martinez, 616 F.2d 185, 187 (5th Cir. 1980) (stating that "the court was not required to provide an interpreter for a nonindigent defendant").

tation by not advising the client about his right to an interpreter if the client does not sufficiently understand the English language.[110]

E. *Current Standards Regarding the Right to an Interpreter and Preservation of Error*

In *Garcia v. State*, the Texas Court of Criminal Appeals faced an issue commonly found in cases involving LEP defendants—the issue of a defendant's "Sixth Amendment right to confront the witnesses against him."[111] The issue on appeal was "whether 'a Mexican citizen who speaks and understands little or no English [can] be tried without benefit of translation . . . and without affirmative waiver of the right to have the proceedings translated under the [United States] [C]onstitution.'"[112] Although a legal assistant interpreted some of the proceedings for the defendant and the defendant himself was able to speak some English, the court concluded that "the [trial] judge was required to ensure that the trial proceedings were translated into a language which [the defendant] could understand, absent an effective [Sixth Amendment] waiver by [the defendant]."[113]

For the Texas practitioner, an equally important issue in *Garcia* involves preservation of error in LEP criminal cases. This issue was addressed in *Marin v. State*.[114] The Court of Criminal Appeals explained that our legal system contains three distinct types of rules: "(1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request."[115] For several reasons, the court believed that LEP interpretation cases fit well within the second category of preservation of error classifications.[116] Thus, an LEP defendant's right to an interpreter "must be implemented by the system unless

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110. *See id.* at 188 (holding that because no objection was made after counsel assured the court he could translate for the client, the court did not abuse its discretion in failing to appoint an interpreter).

111. *See* Garcia v. State, 149 S.W.3d 135, 145 (Tex. Crim. App. 2004) (holding that a defendant's conviction violated the Sixth Amendment's Confrontation Clause when the defendant did not affirmatively waive his right to translation and was seemingly unaware of that right).

112. *Id.* at 140.

113. *Id.* at 145.

114. 851 S.W.2d 275 (Tex. Crim. App. 1993) (en banc).

115. Marin v. State, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) (en banc).

116. *See Garcia*, 149 S.W.3d at 144 (reasoning that before *Marin*, although it was true that the assistance of an interpreter could be waived, it could not be waived if the trial judge was aware that the defendant could not understand English). Furthermore, requiring an LEP defendant to object is illogical, considering his limited English speaking capacity. *Id.*

expressly waived."[117] As a result, while the waiver requirement is clear, trial judges and attorneys face the burden of determining when the waiver has actually been asserted.

F. *Inequitable Results in Cases Involving LEP Defendants*

Our justice system's approach to dealing with non-English speaking defendants has sometimes led to inequitable results. For example, in 1995, the Texas Court of Criminal Appeals upheld a sentence that imprisoned a non-English-speaking defendant for one year rather than grant him the one-year of probation that is more commonly given to defendants for DWI offenses.[118] For similar DWI offenses, defendants were normally sentenced to one year of probation and ordered to participate in a mandatory alcohol education program.[119] However, the trial judge reasoned that because no Spanish speaking rehabilitation programs were available, the defendant would not benefit from such a program.[120] As a result, probation was unavailable to the defendant, thus requiring incarceration.[121]

It would be unfair and inappropriate to suggest that an interpreter should be used in all cases involving defendants (or other parties) who primarily speak a language other than English. In fact, a defendant and his counsel may consider waiving rights to an interpreter as a sound trial strategy. For example, jurors may unduly and prejudicially disfavor an LEP defendant.[122] Additionally, no safeguards prevent interpreters from improperly influencing defendants during the proceedings.[123] For in-

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117. *Id.*

118. *See* Flores v. State, 904 S.W.2d 129, 131 (Tex. Crim. App. 1995) (en banc) (affirming the decision of a lower court to incarcerate the defendant rather than grant him probation).

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* Leslie V. Dery, *Disinterring the "Good" and "Bad Immigrant": A Deconstruction of the State Court Interpreter Laws for Non-English-Speaking Criminal Defendants*, 45 U. KAN. L. REV. 837, 873 (1997) (observing that an interpreter may further stigmatize "the defendant's foreignness within our English-only justice system").

123. *See id.* (explaining the coercive effect an interpreter can have over an LEP defendant).

> [T]he interpreter's role with respect to defendants can be coercive rather than helpful, especially when the defendant is testifying:
> The interpreter often plays a decisive role in controlling the speech of witnesses or defendants who are testifying on the stand. This additional and potentially decisive role is one of controlling the flow of testimony. The interpreter may achieve her own kind of pressure on witnesses or defendants in one of two ways: she can urge or prompt them to speak, and she can get them to be silent.

stance, "[a]n interpreter may prompt a defendant to answer a judge or attorney. As a result, the defendant may feel pressured to give a premature response, or be fearful of asking for clarification when there is confusion."[124] Thus, while an attorney can place his LEP client at risk when he serves as an interpreter, he may also place his client in jeopardy when he asserts his client's right to an independent interpreter. Inevitably, the unique challenges of representing LEP defendants present difficult and dubious burdens upon counsel.

V. CONCLUSION: PRACTICAL STRATEGIES AND SUGGESTIONS

Several factors may contribute to the success of an attorney-LEP client relationship. An attorney should be proactive in establishing a good working relationship with his LEP client. Understanding any cultural barriers, as well as overcoming the language barrier, will help establish a mutual working relationship where the client's goals can be accomplished.

The cultural barriers can be understood only by study, acceptance, and interaction with individuals of different origins, nationalities, and races. "Cultural meanings and connotations can be so complex that it is not possible to truly convey what the word means to a speaker from the culture in question."[125] For example, the Haitian Creole concept of "[*v*]*oudou* or *vodou* . . . is a complex belief system which permeates Haitian culture in myriad ways. Because of this word's many connotations its cultural meaning cannot be adequately conveyed without expert explanation."[126] In English, the word voodoo "tends to evoke negative stereotypical images of magic spells and zombies, without evoking the larger religious-historical-cultural context from which this belief system emerged and in which it operates."[127] This example demonstrates how "different cultures may be misunderstood, or their actions, appearance or demeanor misinterpreted by police, parties, jurors, or the court itself. This is because social and behavioral norms of persons from a foreign country may appear suspect because they are not within the common ex-

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Id.

124. *Id.* at 874.

125. Leslie V. Dery, *Hear My Voice: Reconfiguring the Right to Testify to Encompass the Defendant's Choice of Language*, 16 GEO. IMMIGR. L.J. 545, 575 n.187 (2002) (quoting ROSEANN DUENAS GONZALES ET AL., FUNDAMENTALS OF COURT INTERPRETATION 240 (1st ed. 1991)).

126. *Id.* (citations omitted).

127. *Id.*

perience of native-born Americans."[128] Having an awareness that different cultures respond and act differently from the native-born or assimilated American narrows the cultural gap and facilitates better understanding between the attorney and LEP client.

Technology can assist in narrowing the gap to better communicate with an LEP client and especially aids in translating documents.[129] Many companies on the Internet specialize in document and personal file translation.[130] The important thing to remember is to properly research the company's reputation[131] and to acknowledge that legal documents are harder to translate because "[t]ranslation consists of the transmission of concepts from one cultural context to another and requires an understanding of two languages, two cultures and two legal systems. Words are loaded with culturally specific meanings and connotations."[132] Conversely, international legal systems differ and thus translation choices must convey an equivalent legal theory or term to the client or intended recipient.[133]

Alternatively, over-the-phone interpretation, which is available in nearly 150 languages, provides another option.[134] An attorney may also invest in computer software or hand-held devices which help with trans-

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128. *Id.* at 576 n.194 (quoting Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of the Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 195 (1997)).

129. *See* John Elliott Leighton, *Diversity and the Law: Check out Translation Help Online*, TRIAL, Aug. 2002, at 22, 22 (reporting that "[f]oreign-language translations are among the growing number of services available on the Internet. Web sites offering translations can be useful if you choose them carefully."). The services grew out of the need to translate web pages and content. *Id.* The industry has generated more than $30 billion per year since 1999. *Id.*

130. *Id.*

131. *See id.* (suggesting a research strategy).

> A good place to start your search is the American Translators Association (ATA) Web site, www.atanet.org. This site provides links to state chapters of the ATA and a directory of more than 2,200 translators classified by their language proficiency and specialty. Law is one of these specialties. Subspecialties include personal injury, contracts, and tax law.

Id.

132. Janice Becker, *Finding the Right Foreign Language Professional*, LEGAL MGMT., Jan.-Feb. 1996, at 32, 34.

133. *Id.*

134. John Elliott Leighton, *Diversity and the Law: Check out Translation Help Online*, TRIAL, Aug. 2002, at 22, 22 (indicating that "AT&T claims that it has 2,000 interpreters trained in legal terminology. Their services are available 24 hours a day, 7 days a week."). Demonstrations can be heard by calling AT&T at (800) 821-0301. *Id.* The mention of AT&T in this Article is for educational purposes only and does not constitute an endorsement of their translation services.

lating and interpreting.[135] Professional translation services are available via e-mail as well.[136] Further, hand-held electronic translators may help an LEP client better communicate with the attorney or more clearly understand the situation. However, this technology should be used with caution because although the word may be technically correct, the nuance may be lost or another term would be better suited to the situation. In addition, some people may not feel comfortable relying on such technology, which may also require patience. Technology merely dresses the wound—it does not cure the problem. Finally, an attorney who needs to communicate with his client when no help is present also has the option of turning the client away.[137]

Likewise, the decision to hire a certified or licensed interpreter, or both, or to use staff or other individuals as interpreters must be made with care. A child should not be used as an interpreter because unnecessarily exposing a child to conflict shows poor judgment.[138] Similarly, using an adult family member or friend may be problematic, because a family member or friend, especially in highly charged situations, cannot remain neutral.[139] Moreover, the person is not bound by any ethical

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135. *See* Ectaco Electronic Translators, http://www.ectaco.com (last visited Mar. 3, 2006) (discussing interpretation software) (on file with the *St. Mary's Law Journal*).

> Available for more than 35 languages, the translation software . . . provides a wide range of linguistic solutions for just about any circumstance. Covering language instruction, study materials, full-text translation, speaking and non-speaking dictionaries, and localization software[,] they are available for most major platforms and [operating systems] including Windows, Pocket PC, Palm OS, Smartphones and others.

Id. There are several brands of hand-held translators. *See, e.g.*, Franklin, http://www.franklin.com/estore/handhelds (marketing hand-held translators) (last visited Mar. 3, 2006) (on file with the *St. Mary's Law Journal*); AH aimhi.com, http://translator.aimhi.com (advertising talking translators) (last visited Mar. 3, 2006) (on file with the *St. Mary's Law Journal*). The examples in this essay of websites to visit are for educational purposes only and do not constitute an endorsement of any product.

136. *See generally* John Elliott Leighton, *Diversity and the Law: Check out Translation Help Online*, TRIAL, Aug. 2002, at 22, 22 (discussing translation services); Systran Language Translation Technology, http://www.systransoft.com (providing samples of translations and prices) (last visited Mar. 3, 2006) (on file with the *St. Mary's Law Journal*).

137. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15 (allowing a lawyer to decline representation when it will result in a violation of the rules of professional conduct); *see also id.* 1.01 (requiring a lawyer to provide competent representation). Naturally, an inability to communicate with the LEP client will impede competent representation.

138. *See* Frank D'Alessandro, *Lost in Translation*, 27 FAM. ADVOC. 20, 20 (2004) (emphasizing that a child should not be used as an interpreter in family law cases). However, in extreme emergencies a child may be asked to relay a critical message; when interviewing a client, the better approach is to find an adult to interpret. *Id.*

139. *Id.*

guidelines and the interpretation may be "based on his or her own agenda or view of what is 'best' for the parties."[140]

Regardless of who is employed—a certified or licensed interpreter, or both, or office staff—the attorney must explain and carefully define the interpreter's role. Namely, the interpreter is not a confidant or attorney. The attorney must especially emphasize to the interpreter, professional or otherwise, the significance of protecting the confidential communication that transpires between the attorney and his client.[141]

When using an interpreter, the attorney must speak to the client and not the interpreter.[142] Also, the interpreter and attorney must recognize that speaking slower or louder does not help the LEP client.[143] An attorney should insist that he receive a word-for-word interpretation from the interpreter—especially during the initial consultation with the LEP client.[144] If the interpreter merely interprets his understanding of things, he may determine that a particular fact is meaningless when in fact it is critical to the representation. For example, "[m]any attorneys relate the experience of asking the LEP client a question and then having the interpreter and client have a lengthy and spirited conversation, after which the interpreter turns to the attorney and says, 'she says, no.'"[145] In these instances, the attorney should discuss with the interpreter the importance of knowing all facts which may or may not be relevant to the legal situation.

These practical strategies are just that—strategies that can be used to transform the challenging LEP client-attorney relationship into a manageable and productive one. Ideally, the legal system should allow each individual who needs an interpreter to have one; however, because of costs and other factors discussed above this is highly unlikely at the present time. However, a legal movement has begun in helping LEP clients maintain their legal and social rights.[146] In Texas, the 79th Legislature

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140. *Id.*

141. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(c)(1) ("A lawyer may reveal confidential information: When the lawyer has been expressly authorized to do so in order to carry out the representation."). However, this does not mean that a lawyer is free from any liability; rather the lawyer should use due care in conveying the sanctity of attorney-client confidentiality.

142. Frank D'Alessandro, *Lost in Translation*, 27 Fall FAM. ADVOC. 20, 24 (2004).

143. *Id.* at 20.

144. *Id.* at 24.

145. *Id.*

146. *See generally* FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 12 (2003), *available at* http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf (analyzing the LEP person's dilemma in confronting and using the Pennsylvania Legal System).

recently passed several laws that will help LEP individuals.[147] As LEP persons gain more access to the legal system, many more attorneys will face the decision of whether to represent LEP clients.

In summary, the role of an attorney is threefold. He must concurrently represent his client, be an officer of the court and struggle with conflicting moral and legal responsibilities while seeking justice for clients.[148] If it becomes necessary for an attorney to interpret for and to his client, these roles become further complicated.[149] Interpreting for another person brings a host of challenges, which are not limited to the spoken and written language. Interpreting language implicates cultural norms and stigmas; legal, ethical, and moral concerns; expense; and conflicting duties of the legal profession. However, an attorney should treat everyone—including LEP clients—fairly and with respect, honesty, and due diligence. The client's LEP status should not be the linchpin of the situation, but rather a hurdle which an attorney faces and overcomes to the best of his abilities while properly representing the client and serving the judicial system.

147. *See* TEX. GOV'T CODE ANN. § 2054.116 (Vernon Supp. 2005) (requiring state agencies to include Spanish language content on their websites to ensure meaningful access to LEP individuals); TEX. HUM. RES. CODE ANN. § 32.068 (Vernon Supp. 2005) (creating a pilot program which provides interpretation services to recipients of medical assistance); TEX. LAB. CODE ANN. § 411.081 (Vernon Supp. 2005) (providing a 24-hour telephone hotline in English and Spanish for purposes of reporting occupational health and safety law violations).

148. LEGISLATIVE ASSISTANCE AND RESEARCH PROGRAM, CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE 1 (Maya Goldstein Bolocan ed., 2002), *available at* http://www.abanet.org/ceeli/publications/conceptpapers/proflegalethics/professional_legal_ethics_concept_paper.pdf.

149. *See* Virginia E. Hench, *What Kind of Hearing? Some Thoughts on Due Process for the Non-English-Speaking Criminal Defendant*, 24 T. MARSHALL L. REV. 251, 257 (1999) (discussing a Michigan case where the attorney faced the dubious challenge of defending his client while providing interpretation services, resulting in the defendant's conviction).