

Utah Ethics Opinions

1996.

96-06. USB EAOB Opinion No. 96-06

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 96-06

Approved July 3, 1996

Issue: What are the ethical obligations if an attorney undertakes representation of a client when the attorney is not able to communicate directly with the client in a language clearly understood by that client?

Opinion: An attorney need not have any personal knowledge of language skills relating to the language ability of the client. It is necessary, however, for an attorney to be able to communicate adequately with the client. (fn1) Therefore, consideration should be given to language impediments that would materially affect the attorney's ability to communicate adequately in the specific circumstances of the client's case. The method by which this must be done will depend upon the circumstances of each situation. (fn2)

Discussion: A lawyer must be sensitive to the non-English or limited English-speaking client's communication difficulties in explaining legal problems and in understanding the legal advice to be provided by the lawyer. A lawyer must also be sensitive to the lawyer's limitations in understanding communications that come from a non-English or limited English-speaking client. Such sensitivity is an important aspect of attorney competence, as well as other duties and obligations of attorneys requiring communication with clients. In this context, a lawyer must also be sensitive to the limited communication abilities of hearing-impaired or speech-impaired clients.

An attorney must have or must acquire sufficient time, resources and ability to apply the sufficient learning, skill and diligence necessary to discharge the duties arising from the attorney-client relationship. (fn3) However, the inability to communicate directly with the client in a language clearly understood by the client does not always preclude an attorney from discharging such duties. Clearly, a client has the right to retain the services of an attorney, knowing that direct communication with that particular attorney may be limited or impossible. Also, clearly, difficulty in communication can occur even between those who speak

the same language. (fn4)

It is the responsibility of any attorney to gather all of the relevant facts, undertake reasonable research in an effort to ascertain legal principles and make an informed decision as to a course of conduct based upon an intelligent assessment of the client's problems. A language barrier does not reduce the attorney's duty to communicate adequately with the client, as required by Rule 1.4. If direct communication in a language clearly understood by the client is not possible, the attorney must take into account the fact that means other than direct communication will be required to discuss the client's case and to meet the attorney's responsibilities. The means by which an attorney may do this are varied.

On any matter that requires client understanding, the attorney must take all reasonable steps to insure that the client comprehends the legal concepts involved and the advice given by the attorney. The attorney must take all reasonable steps to insure that the attorney understands what the client is saying, so that the attorney can make intelligent judgments about the case and so that the client can make informed decisions. 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. The attorney may accomplish this by associating with a bilingual attorney who can assist with the language problem or by working with an employee or staff member who can assist the attorney with the language problem. However, an attorney must be cautious in insuring that the attorney and client are communicating with each other through the interpreter, rather than the interpreter giving legal advice independent of the attorney. To allow such a result would be to assist in the unauthorized practice of law in violation of Rule 5.5(b).

On any matter that requires the use of an interpreter, the attorney must take all reasonable steps to insure that other ethical considerations such as client confidentiality and conflict of interest are addressed. For example, the interpreter should have a clear understanding of the obligation to keep the client's communications confidential. An attorney should use care in selecting an interpreter to insure that the interpreter does not have a personal interest in the outcome of litigation. Attorneys are cautioned that use of the client's close friends and family members may often give rise to such potential problems under Rules 1.6 and 1.7.

Attorneys should also be aware of the issue of whether there would be a waiver of the attorney-client privilege when a non-employee interpreter is used and should review

the law governing this issue. (fn5)

Finally, attorneys should be sensitive to the possibility that non-English speaking clients may not readily understand legal principles described by the attorney, because the non-English speaking client may interpret communications based on a different social and cultural foundation than that assumed by the attorney. Attorneys should, therefore, take greater care in explaining complex legal communications to clients who are non-English speaking, because the client may have no social or cultural background or understanding of the United States, so as to put the attorney's communications into proper context.

It should be noted that the attorney may generally bill the client for interpreter services, so long as the attorney acts consistently with Rule 1.5. There are some exceptions to this, such as representation as appointed counsel for an indigent criminal defendant, and the Americans with Disabilities Act may require that attorneys provide interpreter services for hearing-impaired clients free of charge.

Footnotes

1. *Communication.*

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

Utah Rules of Professional Conduct 1.4.

2. The analysis and general conclusion of this opinion apply as well to dealing with clients who are speech- or hearing-impaired.

3. *Id.* Rules 1.1, 1.3.

4. *See* Cal. St. Bar Comm. on Prof. Responsibility and Conduct, Formal Op. 1984-77, 1984 WL 5101; *see also* Assoc. of Bar of N.Y.C. Comm. on Prof. and Jud. Ethics, Formal Op. 1995-12, 1995 WL 60777.

5. Whether the privilege would be waived in any particular set of circumstances is a question of law and, therefore, beyond the scope of this opinion.

Rules Cited:

1.41.61.75.5