

Issues Regarding the Use of Interpreters in Depositions in Indiana

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INTRODUCTION

The need for, and use of, language interpreters and translators is increasing daily in Indiana courtrooms. As a result, the need for interpreters and translators is expanding in the pretrial stage as well. While many courts across the state are beginning to hire official court interpreters, the availability of those interpreters for pretrial matters is extremely limited, if it exists at all. Accordingly, attorneys who are dealing with cases in which language translation is needed are required to retain their own interpreters. At first blush, it may seem simple: you are going to depose a non-English-speaking party or a hearing impaired witness. You call the nearest college to find a student who can help or you call the local translation service to hire an interpreter. However, the issues involved run much deeper than simply finding an interpreter. You must find a qualified interpreter. Further, once you get the interpreter, what do you do then? How is the deposition to be run? What happens if there is confusion during the deposition? Many unexpected problems can arise in this arena.

In attempting to minimize the potential for problems, preparation is the key. Following are several points to consider when preparing for a deposition involving the need for an interpreter.

WHO RETAINS THE INTERPRETER?

The prevailing practice seems to be that the party taking the deposition is to retain the interpreter. This is the best practice for two reasons. First, and foremost, the party taking the deposition will want some control in selecting the interpreter so that party can feel more assured that the interpretation will be accurate and can be more confident in the interpreter's abilities. At the same time, however, the party being deposed may wish to have a "defense" interpreter present to further ensure the accuracy of the opposing party's interpreter and translation. This is very important when a party wishes to "read and sign" the deposition. Secondly, just as the party taking the deposition is usually required to pay for the original transcript, the party taking the deposition is the most logical party on which to place the cost of the interpreter for the deposition.¹

RECORDING THE DEPOSITION

Due to the unique nature of the use of translators, it is advisable always to ensure that the deposition is recorded by audio as well as by transcription. First, both parties will want the actual audio of the deposition preserved because the words of the deponent in her native language are not transcribed; only those of the interpreter are taken down. In the case of a

conflict in the interpretation, there will be no record on which to base any resolution since the native language words will not be preserved. Secondly, the defending party can also allow its own interpreter to listen to the deposition, whether in preparation for trial or otherwise, to ensure its accuracy. This becomes even more important when it comes to attempts to impeach the witness whose testimony was interpreted. The defending attorney may want to videotape a deposition where sign language translation is involved.

Also, when retaining the court reporter, it is important to ensure that the reporter has the ability to do a translated deposition and is familiar with the process.

QUALIFICATIONS OF THE INTERPRETER

Indiana Rule of Evidence 604 dictates that an interpreter is subject to the rules relating to the qualification of experts.² Further Indiana Code § 34-45-1-4(c) allows a court to disqualify any person from serving as an interpreter. Although formal interpreter certification is not necessarily required,³ it is suggested in order to make qualification of your interpreter and use of the deposition at trial more likely.⁴ In order to qualify as an expert, an interpreter must have specialized knowledge in the language or particular form of communication sufficient to assist the trier of fact to understand the evidence.⁵ It is very important that parties pay attention this fact. It is questionable whether a deposition could later be used if the interpreter is not properly qualified.

An attorney will also want to look into the qualifications of the interpreter in order to assure the interpretation will be accurate regardless of later use of the deposition or the interpreter. Experience is very important in this area. For example, Mandarin Chinese has several dialects. Although they share a common written language, many of the dialects are “mutually unintelligible.”⁶ Failing to ensure the experience and credentials of the interpreter prior to arriving at the deposition may not only prove to be embarrassing (when the interpreter does not know the particular dialect), but also expensive in terms of wasted time and risky in terms of accuracy of the translation.

The Indiana Court of Appeals has developed a set of questions to ask a potential interpreter. Although these are aimed at use in the trial setting, they are equally helpful in the deposition stage in determining whether a translator is properly qualified. (1) Do you have any particular training or credentials as an interpreter? (2) What is your native language? (3) How did you learn English? (4) How did you learn [the foreign language]? (5) What was the highest grade you completed in school? (6) Have you spent any time in the foreign country? (7) Did you formally study either language in school? To what extent? (8) How many times have you interpreted in court?(9) Have you interpreted for this type of hearing or trial before? To what extent? (10) Are you a potential witness in this case?(11) Do you know or work for any of the parties? (12) Do you have any other potential conflicts of interest? (13) Have you had an opportunity to speak with the non-English-speaking person informally? Were there any particular communication problems?(14) Are you familiar with the dialect or idiomatic peculiarities of the witnesses?⁷ Following these questions and guidelines will help to ensure the expertise of the translator.

ATTORNEY-CLIENT PRIVILEGE

All attorneys working with interpreters should pay close attention to potential problems regarding the attorney-client privilege. When dealing with third parties, there is always a danger of unintentional waiver of the privilege. This is especially true regarding interpreters and depositions. For example, the party defending the deposition uses the interpreter to speak briefly with the deponent prior to the deposition regarding the deposition or case in general. If the party taking the deposition had retained that interpreter (or if anyone but the defending attorney had retained the interpreter) there may have been a waiver of the privilege in that case. This is where it may become necessary to retain a “defending” interpreter to sit in on the deposition to answer any questions that may arise from the deponent as well as to prepare the deponent for the deposition.

It is also important to be cautious when using family members or friends of the client as interpreters. If these persons have personal knowledge of the facts of the case or have an interest in it, or may otherwise be at risk of being called as witnesses at trial, the danger of losing the privilege is great.⁸

Fortunately, most states have statutes, rules, or cases which expand the cloak of the privilege to the interpreter as an agent of the attorney, as long as the interpreter is facilitating the communication between the attorney and client or is acting as the attorney’s agent in the discharge of her duties. The same is true in Indiana. The attorney-client privilege attaches to communications between the client and an agent of the attorney, as long as the communication involves the subject matter about which the attorney was consulted and the agent was retained by the attorney for the purpose of assisting the attorney in rendering legal advice to or conducting litigation on behalf of the client.⁹ This extends to the attorney’s interpreter while in the discharge of his or her duties.¹⁰ It is acceptable to use another member of the same law office who is bilingual or to hire an independent interpreter for the sole purpose of facilitating the communication to protect the privilege. However, it is important to remember that an attorney cannot both interpret for and represent the client at the same time in court, and being bilingual does not necessarily equate to being qualified to interpret.¹¹

Although most courts agree that the interpreter is covered by the attorney-client privilege, the Washington State Court of Appeals has held that an interpreter can be called to testify as to the client’s ability to understand English and ability to understand courtroom translations based on observations made during court.¹²

METHOD OF TRANSLATION

The interpreter should be sworn using the oath outlined in Indiana Code § 34-45-1-5. It is also very important to make sure the interpreter speaks in the first person when translating during a deposition. First, the deposition can get quite confusing when the testimony varies from third to first person. More important, failure to translate in the first person may have ramifications in the litigation. Essentially, when an interpreter speaks in the third person, that interpreter may be paraphrasing or summarizing the client’s remarks or the interpreter’s conclusions regarding the client’s statements.

The Ohio Court of Appeals, in fact, allowed the withdrawal of a guilty plea and vacated a sentence when the interpreter failed to translate in the first person. The court in *State v. Pina* held it was prejudicial error for a court not to require a translation and record of the remarks of an accused incapable of understanding the English language, but to rely solely upon the conclusions of an interpreter in determining whether the defendant fully understands the

instructions of the court and the effects of a plea of guilty. 361 N.E.2d 262 (Ohio Ct. App. 1975).¹³

CONCLUSION

This list of “issues” is surely not exhaustive, but should be a good starting point for the attorney entering into a deposition where it is necessary to utilize an interpreter. Of course, always consult your local rules of court to determine what specifically needs to be done regarding these types of depositions. The failure to be properly prepared can lead to harsh consequences, including not being able to utilize a deposition at trial or for other impeachment-related purposes.

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1. It is important to be mindful of Indiana Code §§ 34-45-1-3 and 34-45-1-4 and Trial Rule 43(f). These statutes, which give non-English-speaking persons a right to an interpreter, are of questionable applicability when it comes to depositions. Also, Indiana Code § 34-45-1-4 and Trial Rule 43(f) do not mandate that the court pay for the interpreter, only that it directs the amount and mode of payment. It is important to consult your local rules and practice in this area.

2. Indiana Rule of Evidence 604 states:

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

This rule is not specifically applicable to interpreters in pretrial proceedings such as depositions, see 13 ROBERT L. MILLER, INDIANA EVIDENCE §§ 604.101 at 66 n.1 (2d ed. 1995), but it is suggested it be followed if a party plans on using the deposition at trial.

3. Madelyn Herman & Anne Endress Skove, *Memorandum Re: State Rules for Language Interpreters*, National Center for State Courts, Sept. 8, 1999 (contains summary chart of state rules on interpreters).

4. Indiana *does* certify interpreters for the deaf and hearing impaired through the Family and Social Services Administration’s Deaf and Hard of Hearing Service (“DHHS”). The Board of Interpreter Standards governs the certification of these interpreters in Indiana under the auspices of Title 460 Article 2 of the Indiana Administrative Code. A list of Indiana-certified interpreters for the deaf and hearing impaired can be found at the DHHS website at www.in.gov/fssa/dhhs. As of yet, Indiana does not certify language interpreters.

5. *Cruz Angeles v. State*, 751 N.E.2d 790, 794 (Ind. Ct. App. 2001) (quoting 13 ROBERT L. MILLER, INDIANA EVIDENCE §§ 604.101 at 66 (2d ed. 1995)).

6. Judith Shapiro, *Mandarin in the Legal Arena*, 10(3) PROTEUS (National Association of Judiciary Interpreters and Translators (“NAJIT”), New York, N.Y.) (Summer 2001).

7. *Cruz Angeles v. State*, 751 N.E.2d at 794-96 (citing *Court Interpretation: Model Guides for Policy and Practice in the State Courts* 148 (State Justice Institute 1995)).

8. Utah State Bar Ethics Op. 96-06, (1996)

9. *Brown v. State*, 440 N.E.2d 10, 14 (Ind. 1983), *Witham Mem’l Hosp. v. Honan*, 706 N.E.2d 1087, 1091 (Ind. App. 1999).

10. *See Matter of C.P.*, 543 N.E.2d 410, 413 (Ind. Ct. App. 1989) (Hoffman, Dissenting) (*aff’d* 563 N.E.2d 1275) (citing *Springer v. Byram* 137 Ind. 15, 21, 36 N.E. 361, 363 (Ind. 1894)).

11. Or vice versa. In *Cruz Angeles v. State*, 751 N.E.2d at 795, the interpreter was held to be qualified even though she did not consider herself bilingual.

12. *State v. Aquino-Cervantes*, 945 P.2d 767 (Wash. Ct. App. 1997).

13. *See also State v. Fonseca*, 705 N.E.2d 1278 (Ohio Ct. App. 1997) (interpreter not to carry on independent communication with witness).