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## The Messenger as the Medium of Communication: The Use of Interpreters in Mediation

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She's lying; she doesn't need an interpreter. I've heard her speaking English.<sup>1</sup>

### INTRODUCTION

Since the age of seven, I have served as an interpreter for family, friends of family, and even complete strangers in various administrative, bureaucratic, legal, and medical settings. My experience as a child of immigrant parents is not very rare;<sup>2</sup> children tend to pick up new languages more readily than adults. In addition, because children begin acquiring a functional knowledge of the workings of bureaucracies and agencies at school, they are uniquely positioned to interpret for non-English speaking parents. More recently, while working as an associate in a law firm, I represented pro bono clients who required interpreters in state legal proceedings and in state and federal administrative hearings. I also interpreted during conference calls for senior attorneys on corporate matters involving Spanish and Mexican clients and lawyers.

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1. A comment made by an English speaking disputant in the *Twenty Hour Basic Skills Mediation Training*, a mock mediation held on January 13, 1995 and conducted by the Southern Illinois University School of Law Alternative Dispute Resolution Clinic at the Small Business Incubator in Carbondale, Illinois. See discussion *infra* part IV.E.3.

2. See, e.g., Joshua A. Fishman, *Foreword* to ROSEANN DUEÑAS GONZÁLEZ ET AL., *FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY AND PRACTICE* at vii (1991) (recalling his experiences as a preschooler translating between English and Yiddish for his grandmother); Bruce S. Rosen, *N.J. Study Charges Interpreters Impede Justice*, NAT'L L.J., Aug. 26, 1985, at 8 (reporting on a New Jersey Supreme Court task force study indicating that some judges allow young children to translate for their parents in court).

My interpretation experiences in a mediation setting occurred after I began teaching law school. I was first introduced to Alternative Dispute Resolution ("ADR") as a law student but never had much opportunity to pursue additional training in ADR. Thus, when I was asked to serve as an interpreter for a mediation between a migrant farm worker and his former employer, I welcomed the opportunity to experience mediation in action. My presence as an interpreter in the mediation created some interesting dynamics.

Both the mediator from the Southern Illinois University School of Law Clinic ("ADR Clinic") and I were expecting the mediation process to be slow. However, we were both surprised by how long the process actually took.<sup>3</sup> In this particular case, the mediator was also bilingual and had previous experience working with migrant farm workers. In various instances, the mediator (and sometimes the English-speaking employer) understood better than I what had transpired between the parties at the work site because of her greater familiarity with migrant farming procedures and terminology as well as with idioms common among Mexican migrant workers. Despite her greater familiarity, the mediator made the right decision when she chose not to serve as both the mediator and the interpreter.<sup>4</sup> Furthermore, this and successive interpretations have convinced me that most bilingual<sup>5</sup> individuals who are called upon to interpret in dispute resolution settings are not qualified<sup>6</sup> and that mediators should not serve dual roles as interpreter and mediator in mediation.<sup>7</sup>

When Suzanne Schmitz, the ADR Clinic director, subsequently asked me to demonstrate a bilingual mediation session and present a brief lecture on interpretation difficulties to our advanced ADR class, I thought that I would do all of the teaching. Instead, I discovered that I still had a lot to learn. Since then, I have repeated my lecture and interpreter-assisted mediation for various ADR training sessions. Although no session has been as unusual as my first mediation, each subsequent one has produced new and recurring issues.

A search of relevant literature turned up a dearth of information on this topic. Thus, in this article, I share some of the information I give trainees, as well as some of the insights I have gained from interpreting in mediation, performing the demonstrations, and receiving comments following the demonstrations. This article will also serve as an initial resource for mediators confronted with the need to perform a bilingual mediation and for the attorney who must advise a client about the feasibility of such a mediation. I would also like this article to begin a dialogue about the need for, and effectiveness of, interpreters in mediation. Most people are unaware of the many challenges to effective communication in dispute resolution, particularly ADR, when all of the participants are not equally fluent in a common language. Hence, most attorneys, judges and other professionals underestimate the

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3. See *infra* notes 87-95 and accompanying text.

4. See discussion *infra* part III.B.

5. Bilingualism in this article refers to fluency in two or more languages, including sign language.

6. See discussion *infra* parts II.C., III.A.

7. See discussion *infra* part III.B.

need for interpretation assistance and underestimate their ability to communicate effectively when an interpreter is available, especially when ad hoc interpreters are used.

Only in science fiction stories do people from vastly different cultures, and sometimes different species, appear able to communicate faultlessly with each other immediately upon their first meeting. From the "preposterous" Universal Language Translator of the *Star Trek* series<sup>8</sup> to the parody fish-in-the-ear translator of Douglas Adams' *Hitchhiker's* series,<sup>9</sup> these devices represent the unattainable goal of seamless communication in cross-cultural interactions. In real life, we, as ordinary mortals, must make do with the awkward process of using another individual to serve as the conduit and translator of our words.

However, merely adding one more person to the mediation process adds greater complexity to the dynamics of the mediation than most lawyers and mediators would anticipate. As Part I of this article indicates, mediators must understand the complexities of interpreted mediation because the need for interpreted mediation is increasing due to national demographics, legal requirements, and international market forces. Part II examines the skills needed for interpretation and the probable structure of an interpreted mediation. Part III considers who might possess those interpretation skills as well as the additional skills required of one who will serve as an auxiliary to the mediator. Part IV addresses several issues which might arise in an interpreted mediation and for which mediators contemplating interpreter-assisted mediation should prepare.

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8. David Allen Batchelor, *The Science of Star Trek* (1993) (visited Feb. 29, 1996 and September 6, 1996) <[http://www.gsfc.nasa.gov/education/just\\_for\\_fun/startrek.html](http://www.gsfc.nasa.gov/education/just_for_fun/startrek.html)> (copy on file with author) (describing it as "an automagical device to enable characters to get through the story," this NASA physicist "dismiss[es] the possibility of such an invention ever being built").

9. See, e.g., DOUGLAS ADAMS, *THE HITCHHIKER'S GUIDE TO THE GALAXY* 56-57 (Pocket Books 1979):

"You just come along with me and have a good time. The Galaxy's a fun place. You'll need to have this fish in your ear."

"I beg your pardon?" asked Arthur, rather politely he thought.

Ford was holding up a small glass jar which quite clearly had a small yellow fish wriggling around in it. Arthur blinked at him. . . .

Suddenly a violent noise leaped at them from no source that he could identify. He gasped in terror at what sounded like a man trying to gargle while fighting off a pack of wolves.

"Shush!" said Ford. "Listen, it might be important."

"Im. . . important?"

"It's the Vogon captain making an announcement on the tannoy."

"You mean that's how the Vogons talk?"

"Listen!"

"But I can't speak Vogon!"

"You don't need to. Just put this fish in your ear."

Ford, with a lightning movement, clapped his hand to Arthur's ear, and he had the sudden sickening sensation of the fish slithering deep into his aural tract. Gasping with horror he scrambled at his ear for a second or so, but then slowly turned goggle-eyed with wonder. . . .

He was still listening to the howling gargles, he knew that, only now it had somehow taken on the semblance of perfectly straightforward English.

## I. THE NEED FOR INTERPRETERS IN MEDIATION

The need for interpreter-assisted mediation is on the increase. The increase results from three different factors: two dealing with purely domestic disputes and one dealing with international disputes. First, the increasing number and diversity of immigrants among the general population will result in mediators being confronted with parties facing a language barrier. Second, society and the legal system are increasingly recognizing the need to eliminate barriers for persons with physical disabilities. Third, many forces are creating a world with greater interaction among parties from different countries who may speak different languages.

### A. Mediation Services for Non-English Speakers<sup>10</sup>

During the last few years, attorneys have recognized the need to communicate with clients from other cultures.<sup>11</sup> Similarly, the demand for and importance of language interpretation in the courts has received increasing recognition.<sup>12</sup>

As of 1990, approximately 12.6 percent, almost 32 million Americans, spoke a language other than English in their home.<sup>13</sup> Six states: California, Florida, Illinois, New Jersey, New York, and Texas; had more than a million "Home Speakers of Non-English Languages."<sup>14</sup> Specifically, California had 8.6 million. In nine states, Home Speakers of Non-English Languages represented more than 15% of that state's population.<sup>15</sup> Moreover, the diversity of languages is also increasing. In 1988, seventy different languages, including Native American languages like Navajo and Apache, were used in federal district courts.<sup>16</sup> In Los Angeles, the court employs interpreters for more than 50 languages.<sup>17</sup>

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10. For the convenience of most readers, this article assumes that the mediation will be conducted in spoken English and that interpretation will be needed for a non-English speaker or a sign language user. Many of the same issues would arise for a mediation conducted in another language, e.g. French in Quebec or Spanish in Mexico, where the individual requiring interpretation only speaks English (or another language) or uses sign language. Some of the same issues would apply in a mediation conducted in sign language where one or more parties need a spoken language interpreter. Readers faced with such a situation will find most of the points and recommendations made herein equally applicable.

11. See, e.g., FRED E. JANDT, *EFFECTIVE INTERVIEWING AND A PROFITABLE PRACTICE* 105 (1990); PAUL M. LISNEK, *EFFECTIVE CLIENT COMMUNICATION: A LAWYER'S HANDBOOK FOR INTERVIEWING AND COUNSELING* §§ 2.25-2.26 (1992).

12. WILLIAM E. HEWITT, *COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS* 11-13 (1995).

13. *Id.* at 11.

14. *Id.* at 25 (citing D. Waggoner, *Six States Have a Million Plus Speakers of Non-English Languages*, 3 *NUMBERS & NEEDS* 2 (1993)).

15. *Id.*

16. GONZÁLEZ, *supra* note 2, at 186.

17. *Id.* See also Gary Gorman, *Court Interpreters Speak Language of Law*, L.A. TIMES, April 5, 1993, at B1 (indicating that in 1992, Ventura County courts used interpreters in languages other than Spanish in 450 cases; sign language and Vietnamese were the most frequently used languages next to Spanish, for which no statistics were kept because of the frequency of its use).

There are only a few references in the lay and legal literature recognizing the use of interpreters in mediation. For instance, bilingual mediation and interpretation in community mediation agencies was recommended for the resolution of a dispute regarding the smell of ethnic cooking by neighboring tenants.<sup>18</sup> The impact of language barriers and cultural differences was recognized as potentially affecting mediation of family disputes, especially where both parties are not equally proficient in English.<sup>19</sup> Isabelle Gunning reports that an interpreter was used at least once during a series of attempts to mediate a conflict between residents of a suburban neighborhood and Mexican immigrant and Mexican American day laborers who congregated in the neighborhood because they were attracted by the prospect of employment to a building supply store in the neighborhood.<sup>20</sup> In one apparently successful mediation of a wrongful-death action, the plaintiff was Yugoslavian and spoke no English; her daughter was used as an interpreter.<sup>21</sup> Beyond these few references, little has been written about the use of interpreters in ADR. In fact, only recently has consideration been given to the use of interpreters in traditional dispute resolution settings—the courts.<sup>22</sup>

While interpreters can certainly be provided to non-English speaking ("NES")<sup>23</sup> parties in the courts as a matter of accommodation,<sup>24</sup> the use of a court interpreter has been addressed primarily in terms of constitutional<sup>25</sup> and statutory rights.<sup>26</sup> In 1978,

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18. Operation Sentinel, *Rent Watch*, L.A. TIMES, June 4, 1995, at K1.

19. Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 752-53 (1993). The author believes that communication or language barriers in family mediation may "prevent one partner from communicating with the mediator as effectively as the other partner," and "may also subtly affect the balance of power" and, therefore, may present situations which are not suitable for mediation. *Id.* at 751-53. With regard to interpreted or "[b]ilingual mediation," the author suggests that it "is likely to be more time-consuming and therefore more costly," and that "the need for translation makes mediated agreements more susceptible to misunderstandings." *Id.* at 753.

20. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 77-79. The mediation between the residents and the day laborers was never completed because in the interim an ordinance criminalizing loitering was passed by the county. *Id.* at 78-79.

21. Martha Middleton, *They Kept Talking: Even When it Seemed Hopeless*, NAT'L L.J., Jan. 12, 1987, at 26.

22. See GONZÁLEZ, *supra* note 2, at 5-15, 37-57.

23. NES refers to those individuals who primarily use a language other than English to communicate. The term is sometimes used to encompass persons who have a limited ability to communicate in English, including those whose "language limitation arises due to deafness or being hard of hearing." HEWITT, *supra* note 12, at 31. In this article, NES refers to those who primarily speak a different language. To encompass both those who grew up speaking a different language at home and those who use American Sign Language ("ASL") or another sign language, the deaf prefer the term Natural Language Other than English rather than NES.

24. See, e.g., FED. R. CRIM. P. 28 and FED. R. CIV. P. 43(f) (providing that "[t]he court may appoint an interpreter of its own selection . . .").

25. See, e.g., *United States v. Carrion*, 488 F.2d 12, 15 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974) (confirming duty of court to inform defendant "who may have a language difficulty" of right to an interpreter); *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970) (overturning conviction because of court's failure to inform defendant of right to an interpreter, at government expense if necessary, where defendant did not speak English, his court-appointed attorney did not speak

the Court Interpreters Act recognized the right of parties and witnesses to an interpreter if, in the determination of the trial court, they speak "only or primarily a language other than" English, or "suffe[r] from a hearing impairment."<sup>27</sup> The Act, however, has a fairly limited scope, requiring interpreters only for "judicial proceedings instituted by the United States" in a United States District Court.<sup>28</sup> State legislation or local rules may also provide a right to an interpreter for NES parties or witnesses.<sup>29</sup>

Although the laws do not refer to mediation, arguably, the interpretation requirement for court hearings should be extended to mediation which is mandated by, or affiliated with, a court under a duty to provide interpreters. In some cases, interpreters in mediation may be mandated by statute or constitution. Moreover, a court may, at its discretion, require an interpreter. Thus, the increasing use of mediation as a substitute for judicial resolution of disputes will lead to an increasing need for bilingual and even multi-lingual mediation.

The most important reason to use interpreters in any mediation involving one or more NES parties is because an interpreter may be necessary to achieve the goals of mediation. The primary goal of mediation is communication between the parties. "In its simplest terms, mediation may be characterized as one mediator trying to get two participants to [voluntarily] do that which they least desire to do--talk to each other."<sup>30</sup> Mediation is inherently "a communication process."<sup>31</sup> There is no greater

Spanish, and the prosecution only made available summarized translations of trial testimony in violation of defendant's right to comprehend and participate meaningfully in proceedings); *Arizona v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974) (recognizing the inability of defendant to understand the proceedings as violating defendant's right to counsel and right of confrontation as much as if defendant "was forced to observe the proceedings from a soundproof booth"); *Jara v. Municipal Court for San Antonio Judicial Dist. of L.A. County*, 578 P.2d 94, 98 (Cal. 1978) (Tobriner, J., dissenting) (indicating that a limited or non-English speaking defendant's civil trial conducted without an interpreter was not a "fair trial" but "a Kafka-esque ritual"). But see *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742 (9th Cir. 1992) (holding that an individual needing interpretation has no right to translation of an entire deportation proceeding). See generally GONZÁLEZ, *supra* note 2, at 43-51, 57-79; Alan J. Cronheim & Andrew H. Schwartz, Note, *Non-English Speaking Persons in the Criminal Justice System: Current State of the Law*, 61 CORNELL L. REV. 289, 289-307 (1976); Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1 (1990).

26. See, e.g., *Zamora v. Local 11, Hotel Employees and Restaurant Employees Int'l Union*, 817 F.2d 566, 571 (9th Cir. 1987) (holding that Labor-Management Reporting and Disclosure Act required union to provide interpreters at monthly membership meeting where 48% of the union's members understood only Spanish).

27. 28 U.S.C. § 1827(d) (1994).

28. *Id.*

29. See GONZÁLEZ, *supra* note 2, at 71-79; Piatt, *supra* note 25, at 4. See GONZÁLEZ, *supra* note 2, at 81-86 (providing a brief sketch of Canadian court interpreter requirements and usage).

30. Kent L. Brown, Comment, *Confidentiality in Mediation: Status and Implications*, 1991 J. DISP. RESOL. 307, 309.

31. *Id.* See Illinois Not-For-Profit Dispute Resolution Center Act, 710 ILCS 20/2 (West 1992) (defining the role of the mediator as "assist[ing] disputants in identifying and clarifying issues of concern and in designing and agreeing to solutions for those issues"); JAY FOLBERG & ALISON TAYLOR, *MEDIATION* 7-9 (1984) (defining mediation as "the process by which participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement" and as a process which helps "[r]educe

barrier to communication than the inability to use the same language. Thus, an interpreter is indispensable when communication could not effectively occur otherwise.

### *B. Mediation Involving Parties with Hearing Impairments*

Mediators must accommodate individuals with disabilities by providing sign language interpreters, readers, or other communication aids. Because communication is central to mediation objectives, mediators must be responsive to parties who have sensory impairments,<sup>32</sup> including the hearing impaired. In fact, federal legislation may require mediators to provide sign language interpreters to hearing impaired parties.

The Americans with Disabilities Act ("ADA"), enacted in 1990 because of concerns about discrimination against the "43,000,000 Americans [who] have one or more physical or mental disabilities,"<sup>33</sup> may require public and private mediation services to provide sign language interpreters. Mediation services may be so closely tied to a court or other state or local government body that they may be required to provide sign language interpreters or other "auxiliary services" for individuals with hearing impairments, visual impairments or other disabilities. Under Title II of the ADA, a person with disabilities may not be "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>34</sup> Court sponsored mediation,

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the obstacles to communication between participants"). See also KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICES* 16-18 (1994).

32. "Sensory impairment" refers here to individuals who have visual, auditory or oral disabilities. Although the terms "deaf" and "deafness" include both partial and total "depriv[ation] of the sense of hearing," see *RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY* 348 (1991), the terms are often used to refer to total hearing deprivation. Thus, "impairment" emphasizes that communication barriers exist even though the individual may have some ability to see, hear, or speak. Some deaf individuals who are not members of the culturally deaf community prefer the term hearing impairment because it includes the hard of hearing and because the terms indicate entitlement to programs designed to provide "equal access to public services" while avoiding negative labels. HEWITT, *supra* note 12, at 160. However, members of the deaf community, most of whom were deaf at birth or lost hearing "before the end of adolescence" may prefer the term deafness. *Id.* at 158-59. Members of the deaf community may find the term "impairment" to be offensive. See, e.g., Douglas Bahl, *In other words . . .*, *STAR TRIB.*, Sept. 23, 1992, at 3S (comparing calling a deaf person "hearing-impaired" to calling a black person "white-impaired").

Members of the deaf community reject the disability label altogether; instead, they refer to themselves as members of a minority group which is capable of being bilingual, using English for writing and sign language for conversation. *Id.* See also HEWITT, *supra* note 12, at 159; John V. McCoy, *Communicating with Your Deaf Client*, 65 *WIS. LAWYER* 16 (1992). Individuals with these views are seeking to change the law and its terminology. See Bahl, *supra*. This article, however, will use the terms disability and hearing impairment to refer to the deaf, because those are the categories which presently create legal requirements for the use of interpreters and auxiliary aids and services.

33. 42 U.S.C. § 12101 (1994).

34. 42 U.S.C. § 12132 (1994). A public entity is "any department, agency, special purpose district, or other instrumentality of a state or states or local government." 42 U.S.C. § 12131 (1994). See also 28 C.F.R. § 35.104 (1996).



whether mandatory or voluntary, is probably a *service, program or activity* of a public entity.<sup>35</sup>

Although the ADA does not define discrimination, under the regulations, discrimination includes the failure to provide an individual with disabilities "an opportunity to participate in or benefit from . . . the service that is not equal to that afforded others"<sup>36</sup> or "is not as effective in affording equal opportunity to obtain the same result . . . as that provided to others."<sup>37</sup> In order to provide an equal opportunity, public entities may be required to provide "auxiliary aids and services" in communications with hearing impaired individuals.<sup>38</sup> Neither the ADA nor the regulations expressly requires public entities to provide sign language interpreters.<sup>39</sup> Arguably, however, in many instances sign language interpreters would be necessary to provide a hearing impaired party with an equal opportunity to participate in the court-affiliated mediation and to obtain the same results as a hearing party.

In addition, although no court has addressed the issue yet, Title III of the ADA probably requires private mediation services, whether or not court-affiliated, to provide sign language interpreters or other auxiliary services for individuals with disabilities.<sup>40</sup> Title III of the ADA applies to all "public accommodations," which include "service establishments" and "social service establishments" that affect interstate commerce.<sup>41</sup> Although mediation services are not expressly listed under either category, the listing of similar professional services such as accountants, physicians, and lawyers<sup>42</sup> suggests that private for-profit mediation services are

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35. Cf. *Duffy v. Riveland*, 98 F.3d 447, 455 (9th Cir. 1996) (holding a prison's disciplinary hearings were services, programs or activities of a public entity under the ADA); *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) (holding that a prison which refused to provide a qualified interpreter for deaf, mute, and partially blind inmate in his disciplinary hearings, counseling sessions and medical treatment may have failed to provide inmate with "meaningful access" to programs or activities of prison as required under the Rehabilitation Act).

36. 28 C.F.R. § 35.130(b)(1)(ii) (1996).

37. 28 C.F.R. § 35.130(b)(1)(iii) (1996).

38. 28 C.F.R. § 35.160(b)(1) (1996) ("A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.").

39. See 28 C.F.R. Part 35, App. A, Subpart E (1996):

Although in some circumstances a notepad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

*Accord Duffy*, 98 F.3d at 456 (indicating that whether the ADA required a prison to provide a qualified sign language interpreter to inmate at a disciplinary hearing was a question of fact for the trial court to decide based on the considerations cited in the regulations).

40. See 28 C.F.R. § 36.303(b) (1996).

41. 42 U.S.C. § 12181 (1994).

42. Subsection 7(F) of 42 U.S.C. § 12181 (1994) defines "a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other

covered by the ADA.<sup>43</sup> Not-for-profit mediation services could similarly be classified as public accommodations subject to the ADA as either service or social service establishments.<sup>44</sup>

The ADA expressly defines discrimination by a public accommodation as the failure to provide auxiliary aids and services "necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals" so long as providing those services does not "result in an undue burden."<sup>45</sup> Auxiliary aids and services include "[q]ualified interpreters, note takers" and various electronic communications equipment and enhancements.<sup>46</sup> Thus, mediation services which are not court affiliated may also be required to provide qualified interpreters.

A court recently held that a physician's refusal to provide a patient with a sign language interpreter and suggestion that the deaf patient in the future bring her own interpreter could constitute discrimination under Title III of the ADA.<sup>47</sup> Although the physician and patient had sometimes communicated by passing notes, the patient presented evidence of some miscommunication, thus shifting the burden to the physician to prove that the interpreter was either not "necessary to ensure effective communication" or an undue burden.<sup>48</sup> Similarly, a court could hold private mediators liable for failing to provide sign language interpreters if it found that interpreters were necessary for effective communication during the mediation, unless that requirement would result in an undue burden.

Since communication is the essence of mediation,<sup>49</sup> mediators will likely be required by the ADA to provide sign language interpreters or other communication assistance at their own expense. The ADA regulations do not permit the cost of "auxiliary aids . . . that are required to provide that individual . . . with the [required]

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*service establishment*" as places of public accommodation when they affect interstate commerce. *Id.* (emphasis added).

43. See also 28 C.F.R. § 36.303, app. B (1996) (indicating that it is "not difficult to imagine a wide range of communications involving areas such as health, legal matters and finances that would be sufficiently lengthy or complex to require an interpreter for effective communication").

44. Subsection 7(K) of 42 U.S.C. § 12181 defines as a public accommodation "a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service establishment."

45. 42 U.S.C. § 12182(b)(2)(A)(iii). Because mediation services essentially function to facilitate communication, denial of a sign language interpreter may also qualify as discrimination under the general prohibition against denial of "the opportunity to participate in or benefit from a good, service, facility, privilege, advantage or accommodation that is not equal to that afforded to other individuals." See 42 U.S.C. § 12182(b)(1)(A)(ii). An "undue burden" means "significant difficulty or expense." 28 C.F.R. § 36.303(a).

46. 28 C.F.R. § 36.303(b)(1). The same definition of auxiliary aids and services is used in the regulations governing public entities. 28 C.F.R. § 35.104 (1996). A party with a visual impairment would require similar accommodations with regard to any documents to be read or signed. 28 C.F.R. § 36.303(b)(2).

47. *Mayberry v. Von Valtier*, 843 F. Supp. 1160, 1166-68 (E.D. Mich. 1994).

48. *Id.* at 1166-67.

49. See *supra* note 31 and accompanying text.

non-discriminatory treatment" to be passed on to the hearing impaired individual by either public entities<sup>50</sup> or public accommodations.<sup>51</sup>

Finally, all mediation services receiving federal funds are required under § 504 of the Rehabilitation Act of 1973<sup>52</sup> to ensure that all "qualified handicapped person[s]" receive the same "opportunity accorded others to participate in the program" and receive "an equal opportunity to achieve the same benefits that others achieve in the program."<sup>53</sup> Arguably, because the primary opportunity and benefit of mediation is communication assistance, § 504 of the Rehabilitation Act implicitly requires sign-language interpreters and other communication aids. For mediation programs with fifteen or more employees which receive federal funds, the Rehabilitation Act expressly requires qualified interpreters and other auxiliary aids.<sup>54</sup>

A district court recently held that the Rehabilitation Act applied to a medical group's denial of sign language interpreters for patients with hearing impairments because of the group's receipt of Medicaid and Medicare reimbursements.<sup>55</sup> Arguably, a mediation program that receives federal grants must similarly comply with the Rehabilitation Act and provide sign language interpreters or other communication assistance to the hearing impaired.

Not all deaf or hard-of-hearing individuals communicate using sign language.<sup>56</sup> Moreover, although American Sign Language ("ASL") is the most common form of sign language used in the United States, it is not the only form.<sup>57</sup> Thus, the mediator should consult with the hearing impaired individual about his or her needs and the type of accommodation to be provided.<sup>58</sup> While note passing might suffice for brief, simple interactions, the mediator must make that determination on a case by case

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50. 28 C.F.R. § 35.130(f) (1996).

51. 28 C.F.R. § 36.301(c) (1996).

52. 29 U.S.C. § 794 (1994). The ADA will not lower standards or requirements of a mediation program that is also governed by the Rehabilitation Act. See 28 C.F.R. § 36.103(a) (1996); Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,552 (1991).

53. 28 C.F.R. § 42.503(b) (1996).

54. See 28 C.F.R. § 35.104(f) (1996).

55. *New York v. Mid Hudson Medical Group*, 877 F.Supp. 143, 149-51 (S.D.N.Y. 1995).

56. Leonard A. Hall & Charla V. Beall, *Use of Interpreters for Deaf or Foreign-Speaking People in Kansas*, 63 J. KAN. B. ASS'N 36, 37 (April 1994) (indicating that a "large majority of hard-of-hearing people do not have sufficient knowledge or ability to use sign language"). Some individuals permitted little opportunity to develop language skills, sometimes identified as "minimally language competent," have very little ability to communicate. HEWITT, *supra* note 12, at 161. See generally *id.* at 162-68 (describing the wide variation in the "modes of communication" employed by the hearing impaired).

57. HEWITT, *supra* note 12, at 163-66. Those who have lost some or all hearing ability later in life or who do not affiliate with the deaf community are less likely to use ASL. *Id.* at 160.

58. 28 C.F.R. § 35.160(b)(2) (1996) ("In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities."); 56 Fed. Reg. 35,566-67 (1991) ("strongly encourag[ing] service providers to 'consult with the individual before providing him or her with a particular auxiliary aid or service'"). *Accord McCoy*, *supra* note 32, at 16 (encouraging attorneys to consult with their deaf clients "before arranging interpreter services").

basis.<sup>59</sup> Needless to say, turning away a hearing impaired individual because of their disability would itself constitute discrimination under the ADA<sup>60</sup> and the Rehabilitation Act. Potentially, one in ten parties appearing before a mediator will have some form of hearing impairment, and one in 100 will be profoundly deaf.<sup>61</sup> If an interpreter is required to accommodate a hearing impaired individual, then the mediator must plan for the use of the interpreter and prepare for the difficulties which may be encountered.<sup>62</sup>

### C. Mediation in the International Arena

Mediation has long been used in resolving international disputes.<sup>63</sup> Because of a number of factors, the need for mediation in international contexts, and hence mediation through interpreters, is increasing. Bilingual mediators and translators have even become important in military and humanitarian actions.<sup>64</sup> Perhaps the most significant international humanitarian mediations held recently were those leading to the end of the Bosnian war.<sup>65</sup> In addition, some of the most prevalent international disputes, those resulting from environmental issues, are not only transnational issues, but global ones. As the need for mediation in dispute resolution grows, international political and environmental mediation will grow in importance.<sup>66</sup>

59. *Duffy*, 98 F.3d at 456 (holding a material issue of fact precluding summary judgment was raised by prison's refusal to provide a deaf inmate with a certified interpreter for a disciplinary hearing where inmate can read and write, used written notes to communicate, but "communicates most effectively with the assistance of an interpreter"). In general, writing is a cumbersome way to communicate; thus, there is a tendency to abbreviate or leave out information. Moreover, mediators should be aware that not all deaf persons can read and write in fluent English. See HEWITT, *supra* note 12, at 167.

60. See e.g. 42 U.S.C. § 12182(b)(1)(A)(i) (providing that "[i]t shall be discriminatory to subject an individual or class on the basis of a disability . . . to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity").

61. See McCoy, *supra* note 32, at 17.

62. See discussion *infra* part IV.

63. See KOVACH, *supra* note 31, at 18-19, 242-43. For information about the use of mediation in world conflicts, see INTERNATIONAL MEDIATION IN THEORY AND PRACTICE (Saadia Touval and I. William Zartman eds. 1985).

64. See e.g. James Risen, *Crisis in the Caribbean: Haitian American Troops Part of Evolving Political Thrust*, L.A. TIMES, Sept. 22, 1994, at A5 (describing the use of Haitian Americans to assist the military in humanitarian and military activities and to help prevent antagonism against the military from developing).

65. See Di Mari Ricker, *Closing a War*, 82 A.B.A. J. 69 (1996) (giving an intimate account of one lawyer's role in the cease-fire negotiations which preceded the peace talks.). Another instance of interpretation provided by the child of immigrant parents includes the role played by an Air Force reservist who spoke Serbian and was called to active duty to serve as interpreter for the Serbian delegation in their daily interactions. See *Local Woman Provided Bridge in Bosnian Peace Talks*, DAYTON DAILY NEWS, Dec. 2, 1995, at 2B. See also *Bosnia to Ohio: Peace*, USA TODAY, Oct. 31, 1995, at 12A (describing the scene of the peace negotiations).

66. See Deborah Shmueli & Ariella Vranesky, *Environmental Mediation in International Relations*, in RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION 191, 191-98 (Jacob Bercovitch ed., 1996).

Moreover, market, societal, technological, and legal forces are moving the world toward greater internationalization, and even globalization, of markets.<sup>67</sup> International agreements which remove trade barriers, like NAFTA, will promote increasing interactions between public and private international actors. Inevitably, some of these interactions will lead to conflicts between the parties. Mediation may also present an effective dispute resolution mechanism when conflict arises in the commerce between international actors. Thus, political, environmental, and market factors will likely increase the demand for bilingual and multi-lingual mediation to resolve disputes between international actors. This, in turn, will require the use of one or more interpreters to facilitate communication between the mediator and the parties.

Since the need for foreign language interpreters in national and international mediation is increasing due to demographic and market forces and since the use of sign language interpreters is also increasing due to federal requirements to accommodate the hearing impaired, mediators must understand the interpretation process and the skills required of an interpreter. The mediator is responsible for promoting communication between the parties. To do so, the mediator must control the communication process in the manner which will most effectively enhance the parties' communication. To control the communication process in an interpreted mediation, the mediator must understand the interpretation process as it will be carried out during the mediation.

## II. THE INTERPRETATION PROCESS

Although "translation" can be used interchangeably with "interpretation," interpretation refers only to "the unrehearsed transmitting of a *spoken* or signed message from one language to another."<sup>68</sup> Consequently, although translation is a broader term it is frequently used to refer solely to "converting written text from one language into written text in another language."<sup>69</sup> Translators may not be qualified to interpret<sup>70</sup> because, unlike interpreters, translators usually have more time and greater access to dictionaries and other reference sources. The interpreter, on the other hand, has to perform several cognitive tasks simultaneously while the parties await the performance of these services.<sup>71</sup> Bilingual mediation generally will require

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67. Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 15-19 (1993).

68. HEWITT, *supra* note 12, at 31.

69. *Id.* at 33. This is confirmed by my translation of various documents, including a brochure in English on Sudden Infant Death Syndrome which the local Kiwanis club wanted to distribute among local migrant workers.

70. Mary Ellen Pruess, *How to Choose and Work With an Interpreter*, 20 COLO. LAW. 257, 258 (1991).

71. See generally GONZÁLEZ, *supra* note 2, at 295-358.

only interpretation, with occasional sight translation<sup>72</sup> of documents, including those which the parties may bring to the session. However, comprehensive mediated agreements will require translation services for parties who are blind or not proficient in English.

Interpretation is usually accomplished in one of two modes: simultaneous and consecutive. In simultaneous interpretation, the message is interpreted continuously, but with a slight time lag, while the speaker is talking.<sup>73</sup> In consecutive interpretation, the message is interpreted during the speaker's pauses.<sup>74</sup> Each has different advantages and disadvantages. A third type of interpretation, summary interpretation, in which the gist of the speaker's communication is interpreted, is generally disfavored for legal interpretation.<sup>75</sup>

My experiences as an ad hoc interpreter in the dispute resolution context confirm one of the greatest problems raised by the need for interpreters. One of the most widely held and denounced preconceptions among lawyers, judges, and others involved in dispute resolution is the belief that just about any bilingual individual can provide adequate interpretation services.<sup>76</sup> The complex skills required for interpretation in all legal settings are vastly underestimated. Moreover, because little attention has been paid to the need for interpreters in mediation, the role of the mediation interpreter has not been examined or defined. This section analyzes the parameters of the role to be performed by the mediation interpreter and the skills required to perform that role.

### *A. Defining the Role of the Mediation Interpreter*

Interpreters are frequently used in two types of formal settings: conferences and court rooms.<sup>77</sup> As "a language intermediary in an international, political, or business setting," the conference interpreter was "regarded as the highest standard" in contrast to court interpretation which was believed "to be less precise."<sup>78</sup> In reality, the role of the court interpreter calls for greater "cognitive, linguistic, and interpreting complexity."<sup>79</sup>

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72. In sight translation, "the interpreter reads a document written in one language while translating it orally into another language." HEWITT, *supra* note 12, at 33.

73. GONZÁLEZ, *supra* note 2, at 359-60; HEWITT, *supra* note 12, at 32.

74. GONZÁLEZ, *supra* note 2, at 379-80; HEWITT, *supra* note 12, at 32.

75. GONZÁLEZ, *supra* note 2, at 164; HEWITT, *supra* note 12, at 32.

76. See HEWITT, *supra* note 12, at 5 (noting that as a result of that preconception "they do not realize how often errors committed by untrained interpreters distort evidence relied on by the court, mislead and threaten the fairness of proceedings and deny non-English speaking people equal access to justice"); Beth G. Lindie, Comment, *Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations*, 48 U. MIAMI L. REV. 399, 410 (1993) (criticizing "[t]he use of janitors, secretaries of judges, clerks of libraries, local residents, witness' friends and relatives and other unqualified individuals" as court interpreters).

77. GONZÁLEZ, *supra* note 2, at 25-30 (listing as the six different branches of interpretation: conference, escort, seminar, business, medical/mental health, and legal).

78. *Id.* at 26.

79. *Id.*

The goal of the conference interpreter is to convey concepts, "to facilitate communication in as elegant and unobtrusive a manner as possible."<sup>80</sup> Speech at conferences is usually formal. Conference interpreters may have to master technical jargon, but they also may have time to familiarize themselves with the subject matter and be given prepared statements in advance. Conference interpreters "may often deliberately improve a speaker's delivery" and "since life and liberty are not generally at stake," minor misrepresentations of words or facts are not crucial. In contrast, "court interpretation demands that all facets of the original message be mirrored."<sup>81</sup> "[T]he court interpreter is required to interpret the original source material without editing, summarizing, deleting, or adding, while conserving the language level, style, tone, and intent of the speaker or to render what may be termed the legal equivalence of the source message."<sup>82</sup> Because the interpreter's rendition of the testimony is the record and because the judge and jury must make judgments about the witnesses' veracity and socioeconomic, educational, and cultural backgrounds, the court interpreter must conserve the speaker's style, including "pauses, hedges, self-corrections, hesitations, and emotion," as well as the content of the message.<sup>83</sup> Court interpreters must master the formal and casual forms of two languages, including their slang and idioms.<sup>84</sup> Thus, more recently, court interpretation has been recognized as being equally or more difficult and complex than conference interpretation.<sup>85</sup> In fact, the overall pass rate for the Federal Court Interpreter Certification Examination is only 4%.<sup>86</sup>

The skills needed by the mediation interpreter are a hybrid of those of the court interpreter and the conference interpreter. Of all the types of conference interpreters, those who work in bilateral and multilateral negotiations in business and political settings are probably the most analogous to the mediation interpreter. Unfortunately, there is very little information on negotiation interpreters. The mediation interpreter, like a court interpreter, will need to be familiar with both formal and informal versions of the same language. The requirement of court interpreters to perform the interpretation without adding to or deleting from the message to be communicated dovetails with the prevailing view of the mediator's role as a neutral. Even if the *mediator* takes a pro-active role, the interpreter should still be neutral—a translation tool; otherwise, by editing the parties' statements, the interpreter will be acting as a second mediator without the proper training and the coordination necessary for co-mediation.

In some instances, the mediation, like a conference, may require the interpreter to master technical jargon. When there is flexibility in scheduling the mediation, the interpreter may have time to become familiar with the subject matter. However, the

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80. *Id.* at 27.

81. *Id.*

82. *Id.* at 16.

83. *Id.* at 16-17.

84. *Id.* at 19.

85. *Id.* at 27.

86. *Id.* at 530.

mediation interpreter will seldom be given prepared statements in advance and thus, like the court interpreter, must be prepared and able to interpret whatever the parties say.

Most mediations will not require the degree of clarity and accuracy necessary for a trial record. The level of accuracy required should be commensurate with the goal of effective communication and the gravity of the issues at stake. Similarly, since the mediator makes no formal "judgment" about the parties, the interpreter's rendition need not provide complete verisimilitude. On the other hand, med-arb and other adjudicative forms of ADR would require interpretation closer to the court model. In traditional mediation, the extent to which the interpreter *should* conserve the speaker's style and demeanor will depend on the preference of the mediator and on whether the interpretation is accomplished through the simultaneous or the consecutive mode.

### *B. Conducting an Interpreted Mediation: Selecting Simultaneous or Consecutive Mode*

In order to choose the correct mode of interpretation, the mediator must understand their advantages and disadvantages.<sup>87</sup> Consecutive interpretation is generally preferred when accuracy is important. Consecutive interpretation allows for greater linguistic accuracy because the interpreter has time to hear the whole message and then search for and organize the proper translation.<sup>88</sup> However, consecutive interpretation is more taxing on the interpreter's memory.<sup>89</sup> Simultaneous interpretation will take less time than consecutive interpretation. While simultaneous interpretation may require some additional time for clarification and pauses to await the completion of the interpretation, consecutive interpretation will substantially lengthen the proceedings. Each message in English must be repeated in another language, and vice versa, thus doubling the time needed to complete the communication. Moreover, consecutive interpretation will require all speakers to add pauses which would otherwise not occur so that the interpreter can accurately render a portion of the speaker's message without memory loss. However, the tradeoff is not just one of time versus accuracy.

Consecutive interpretation allows interpreters to have greater control over the process because the interpreters are allowed the opportunity to clarify ambiguities, correct errors, request clarification, determine pauses, and adjust to their audiences' understanding and reception.<sup>90</sup> As a result, this mode is more consistent with the goal of communicating effectively. On the other hand, the lengthy duration of consecutive interpretation, along with the delays necessary for clarification and error correction, may fray tempers and create antagonism which would be counterproductive to the goal of reaching an agreement.

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87. See generally *id.* at 163-66.

88. *Id.* at 164-65.

89. *Id.* at 165, 382-86.

90. *Id.* at 164-65.



In addition, consecutive interpretation allows the parties to focus on the speaker's demeanor and subsequently listen to the interpreter, whereas simultaneous interpretation practically requires the parties to focus and rely on the interpreter.<sup>91</sup> Thus, in simultaneous interpretation, it may be important for the interpreter to conserve the speaker's style and demeanor.

Another difference is that consecutive interpretation requires for normal conversational mode, but simultaneous interpretation requires two people to speak simultaneously most of the time. Unless electronic equipment is used, the babble of simultaneous interpretation, even when whispered, may be disturbing to all the participants.<sup>92</sup>

Finally, it may be harder to find someone who can competently perform simultaneous interpretation because of the inherent difficulty of interpreting and listening at the same time. On the other hand, while translating between English and a sign language, the interpreter's translation via body movements may not present as much of a distraction.<sup>93</sup> Perhaps it is for this reason that sign language interpretation is often accomplished simultaneously when the interpreter is capable of doing so. Nonetheless, because of the cognitive difficulty of interpretation and because of the need to finger spell some words during sign language interpretation, the mediator must be aware of the need for pauses. Thus, in selecting the proper mode of signed or spoken interpretation, the mediator must consider a number of factors,<sup>94</sup> not the least of which are the interpreter's competency and preference.<sup>95</sup>

Another factor to consider when selecting the mode of interpretation is the gravity of the issues at stake. Mediating a nuisance dispute between neighboring

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91. See *id.* at 165.

92. See, e.g., Bill Girdner, *Court Interpreters Bridge the Gap Between Cultures*, L.A. DAILY J., Aug. 20, 1987, at 1 (relating an incident where the director of the Los Angeles federal court interpreters office asked an Asian interpreter to perform simultaneous interpretation; when the interpreter remained silent after the judge had begun to read the defendant his rights she tried again, and the interpreter said, "Shhh, Mrs. Zahler, it is impolite to talk at the same time as the judge.").

93. Apparently, some judges and lawyers have been distracted by the facial and body movements which ASL interpreters use. HEWITT, *supra* note 12, at 159, 171. Unfortunately, ASL interpreters have been asked or ordered "to refrain from using facial grammar and body movements" that are essential to ASL. *Id.* at 159. These restrictions are improper because they limit the interpreter's ability to communicate. *Id.* at 159, 171-72.

94. The factors favoring consecutive interpretation include: a need for accuracy; a topic or subject which is complex or technical; a need for clear communication among speakers with differential levels of understanding, education, power, or familiarity with the dominant culture; a need for the mediator or interpreter to control the pace or intensity level of the mediation; a need to focus on the demeanor of the speaker—e.g., to judge the speaker's credibility—particularly where the interpreter is not skilled in conserving the speaker's style and demeanor; and, the need to avoid distractions and side conversations. See *supra* notes 87-92 and accompanying text.

The factors favoring simultaneous interpretation include: a need to reach a speedy resolution or a limited time frame for the mediation; a simple topic; limitations on the parties' tolerance for each other or for the process of interpreted mediation; an interpreter whose linguistic skills are stronger than his or her skill at remembering long passages; a situation where speaker's demeanor is irrelevant or the interpreter is skilled at conserving style and demeanor; and, the interpreter's familiarity with the interpretation process and the process of simultaneous interpretation. *Id.*

95. *Id.* (relating the dislike many Asian translators have for simultaneous interpretation).

tenants may require less accuracy than settling a border dispute between neighboring nations. Thus, the simultaneous mode may be employed in the former mediation, but the consecutive mode may be preferred in the latter. Misinterpretation and miscommunication, however, can result in a lost opportunity to settle the parties' grievance in both cases.<sup>96</sup> In fact, high level negotiators and mediators prefer the consecutive mode because it allows each party greater opportunity to think and prepare an answer.

Conference interpretation may be performed in either simultaneous or consecutive modes, but it is usually simultaneous and conducted through the use of headsets and broadcast equipment. An example of this is the United Nations. If a qualified interpreter is used, the mediator may prefer to have the interpreter follow the *pattern* of court interpretation unless specialized electronic equipment is available. The general preference in court interpretation is the consecutive mode for testimony or statements in another language and the simultaneous mode to convey to NES parties what other parties in the proceedings are saying.<sup>97</sup> Similarly, the mediator may prefer that the interpreter use consecutive interpretation when one party speaks in a foreign or sign language, thereby, allowing the listeners to observe the speaker's demeanor. Then the interpreter would switch to the simultaneous mode at all other times. This may be harder in the mediation setting because parties are likely to be less observant than court participants about procedural formalities, such as whose turn it is to speak. Even if the mediator is successful at having the parties observe these procedural formalities, the different portions of the mediation session are not as structured and demarcated as they are in court; thus, the interpreter may have difficulty switching between the two different modes of interpretation. These issues should be worked out in advance by the mediator and the interpreter.

Whether the mediation is conducted in the simultaneous or consecutive mode, the mediator should direct all comments, instructions, and questions to the parties. The mediator should avoid using the third person (he, she, they) and speaking about the deaf or foreign language using party as if he or she were not present. Otherwise, the mediator would be giving the impression that the party is incompetent.

Whichever mode is employed, a mediation requiring an interpreter will take longer than a similar mediation without an interpreter. The mediator should schedule breaks for the comfort of the interpreter and the humor and disposition of all the parties.<sup>98</sup> To facilitate the parties' communication in either the simultaneous or consecutive mode, the mediator should reduce the potential causes for delay through advance preparation whenever possible; the mediator can anticipate and

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96. Cf. GONZÁLEZ, *supra* note 2, at 174 (indicating that the use of good interpreters not only avoids misunderstanding but can allow the professional to provide better quality services and avoid malpractice).

97. See *id.* at 163; HEWITT, *supra* note 12, at 34.

98. Under the United Nations standard for court interpreters, interpreters are replaced "with a co-interpreter every 45 minutes." HEWITT, *supra* note 12, at 139. Because court interpretation is deemed to be more demanding, court interpreters in long proceedings should work in tandem and switch every 30 minutes. *Id.* The mediator should use these guidelines and work with the interpreter to avoid communication errors due to interpreter fatigue.

avoid some potential delays due to clarifications, corrections, and interpretation difficulties by becoming familiar with the parties' cultural backgrounds and planning in advance with the interpreter.<sup>99</sup> Ultimately, selecting a qualified interpreter is the best way to ensure that an interpreted mediation is conducted effectively and efficiently.

#### *D. Skills Required for Interpretation*

Both simultaneous and consecutive interpretation require the interpreter to be extremely fluent in two languages and to immediately, competently, and accurately perform several linguistic and cognitive tasks. Because performing these tasks in simultaneous or consecutive mode can be "very taxing mentally," fatigue may become a significant factor.<sup>100</sup> As a result, interpreters sometimes work in teams.<sup>101</sup>

To understand the complexity of the interpreter's task, compare the tasks a court reporter and court interpreter must accomplish within the same span of time. "[A] court reporter must listen and transcribe and engage in a number of complex listening and comprehension tasks in order to transcribe the source message into the record verbatim."<sup>102</sup> Meanwhile, "the...interpreter must listen, comprehend, abstract the message from the words and word order of the message, store the ideas into memory, and...search[] for conceptual and semantic matches to reconstruct the message in the other language, all...within the cultural and linguistic constraints and operating rules of that language," while "listening for the next 'language chunk' to process [and] simultaneously monitoring his or her own output."<sup>103</sup> The selection of either simultaneous or consecutive modes does not change the nature of the necessary skills, only the importance of the different types of skills and the speed with which they must be performed.

Likewise, the interpretation's setting does not change the cognitive and linguistic tasks the interpreter must perform. Some settings may require greater mastery and accuracy in performing these tasks because more is at stake. Other settings may require the interpreter to perform additional tasks at the same time, such as conserving the speaker's style and demeanor. It should be clear that bilingualism does not qualify a person to interpret any more than the ability to type qualifies a person to be a stenographer.

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99. See *infra* part IV.

100. GONZÁLEZ, *supra* note 2, at 165.

101. *Id.* at 26.

102. *Id.* at 23.

103. *Id.*

### III. WHO MAY INTERPRET?

Aside from misconceptions about the ability of bilingual persons to interpret, the next major obstacle to successful interpretation in the dispute resolution context is the lack of qualified interpreters in the face of overwhelming demand.<sup>104</sup> Moreover, qualified interpreters may be expensive.<sup>105</sup> Given the difficulty of locating a qualified interpreter, the mediator may be tempted to rely on an ad hoc interpreter despite the high probability that the individual's skills are not adequate. Alternatively, bilingual mediators may try to avoid the expense and difficulty of locating a professional by performing their own interpretation during the mediation. These shortcuts may be illegal in some cases and are generally unwise because they pose significant barriers to effective communication. Mediators need to locate qualified interpreters. In most cases, that will mean locating an independent, professional interpreter.

#### *A. Reliance on Friends, Relatives and Other Ad Hoc Interpreters*

As the introduction to this article suggests, interpretation is frequently accomplished through the use of a friend or relative accompanying the person who

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104. *Id.* at 61-62 (indicating that the "major dilemma plaguing state and federal courts [is] the lack of objectively tested, competent interpreters"); HEWITT, *supra* note 12, at 6, 172 (noting that the central challenge for the courts is the "scarcity of *qualified* court interpreters" and that "there is an extreme shortage of *competent* court interpreters for the deaf").

105. The compensation paid to interpreters in legal settings varies widely among the jurisdictions. A survey of 1987 court interpreter salaries listed hourly rates from \$6.75 to \$40 and full day rates from \$50 to \$260. GONZÁLEZ, *supra* note 2, at 213-14 (citing Administrative Office of the New Jersey Courts, COMPENSATING INTERPRETERS AND TRANSLATORS: AN INTERNATIONAL SURVEY OF WAGES PAID SALARIED AND CONTRACTED INTERPRETERS AND TRANSLATORS 9-32 (1989)). The higher end of the scale is dominated by certified interpreters in federal court who are paid \$210 a day and interpreters of exotic languages for the District of Columbia Superior Court, who are paid \$260 a day. *Id.* The same survey reported an average hourly rate of \$29.53 for freelance interpreters and \$38.68 for interpreter agencies. *Id.* at 216-17. Conference interpreters may command higher salaries. *Id.* at 211. A more recent article indicated that rates for court interpreters varied from "as little as \$20 an hour in some state courts and as much as \$250 a day in federal courts." Hope Viner Samborn, *Tongue-Tied: Tests and Telephones are Just Some of the Devices Helping to Improve Court Interpretation Services*, 82 A.B.A. J. 22 (1996).

Federally certified interpreters are paid at the higher end of the scale because they must pass rigorous examinations. See GONZÁLEZ, *supra* note 2, at 62 (citing an overall passage rate of 3.9% in the first 10 years). Court interpreters in many jurisdictions have historically been underpaid. *Id.* at 211-15. Thus, in some jurisdictions, the court may be benefiting from quality interpretation at bargain prices. However, my own experience in the state courts as an attorney suggests that in most cases "you get what you pay for." The better quality interpreters may be lured toward conference interpretation or interpretation in the federal courts because of the higher salaries. On the other hand, some suggest that the passage of the Court Interpreters Act should have a "ripple effect" which will improve the testing, pay and quality of all legal interpreters. *Id.* at 60.

does not speak English or through the use of some other bilingual volunteer.<sup>106</sup> There are many reasons why this practice should be avoided.

Relying on ad hoc interpreters will often lead to the use of unqualified interpreters which, in turn, may result in a violation of legal requirements. Under the ADA, a qualified interpreter is "an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary."<sup>107</sup> Formal certification is not necessarily required; instead, the actual ability of the interpreter in the particular context must be examined in order to determine whether the interpreter is qualified.<sup>108</sup> Only a couple of reported decisions address allegations that an interpreter's ability is inadequate in the particular context. The Ninth Circuit for the Court of Appeals in *Duffy v. Riveland* recently held that the use of an ad hoc interpreter might constitute a violation of the Rehabilitation Act and the ADA.<sup>109</sup> Prison officials had offered to use a social worker who was employed by the Department of Corrections, had no formal training in sign language, and was not a professional interpreter, as an interpreter for a deaf inmate's disciplinary hearing. The court held that these factors raised questions about the interpreter's ability to interpret accurately and impartially.<sup>110</sup> Similarly, the Ninth Circuit had previously held that the use of inmate interpreters who were not skilled in ASL, nor trained in language interpretation, to interpret for a fellow prisoner in his counseling sessions, medical treatment and administrative and disciplinary hearings might constitute impermissible discrimination under the Rehabilitation Act.<sup>111</sup> Determining whether an interpreter is qualified to interpret is a fact-intensive issue. Thus, any bona fide dispute under the ADA or the Rehabilitation Act regarding a mediation interpreter's qualifications will not be easy to defend.<sup>112</sup>

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106. See also HEWITT, *supra* note 12, at 13 (noting a report of a Spanish speaking jail inmate who interpreted for the courts, the prison and even a Laotian robbery suspect after picking up some Laotian from a fellow inmate).

107. 28 C.F.R. § 35.104 (1996).

108. See *Duffy*, 98 F.3d at 455-56 (interpreting ADA regulations to not, as a matter of law, require a sign language interpreter certified by the Registry of Interpreters for the Deaf). See also *supra* note 39 and accompanying text.

109. *Duffy*, 98 F.3d at 454, 456.

110. *Id.*

111. *Bonner v. Lewis*, 857 F.2d 559, 563-64 (9th Cir. 1988).

112. In fact, one court granted injunctive relief against defendant prison officials when plaintiff inmates moved for summary judgment on their Rehabilitation Act, ADA and constitutional claims. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1052 (S.D.N.Y. 1995). Prison officials routinely refused or failed to provide sign language interpreters for deaf inmates and, at most, used written notes and ad hoc interpreters (fellow inmates and prison counselors) who were not proficient in sign language, yet the official admittedly never evaluated the adequacy of these modes of communication. *Id.* at 1026-32. The court granted summary judgment in this class action lawsuit since there was no genuine dispute about the inmates' inability to effectively communicate without a sign language interpreter or other accommodation during initial classification and placement interviews, disciplinary hearings, psychiatric evaluations, counseling sessions, medical examinations, parole interviews, and educational, vocational and other programs. *Id.* at 1052.

The ADA does not apply to foreign language interpretation. However, the standards for determining who is qualified to interpret should be the same since the goal in both cases is to provide opportunities equal to those of persons without linguistic impediment. Mediation interpreters, like court interpreters, must not only possess strong skills in at least two languages, but they must also be able to perform several cognitive and linguistic tasks simultaneously. Before using anyone, the mediator must determine that a person is a "qualified interpreter." It is highly unlikely that an ad hoc interpreter is a qualified interpreter because most bilingual individuals do not possess the cognitive and linguistic skills and language mastery required in formal interpretation.<sup>113</sup>

Certain ad hoc interpreters are not qualified even if they possess the requisite skills. Relying on friends and relatives for interpretation is a common practice. Most authorities, however, denounce that practice because of the possibility that the friends and relatives may be "adding to or detracting from" what the mediator or parties actually say.<sup>114</sup> For example, the Justice Department warns against using friends or relatives as interpreters for the hearing impaired, even when the friend or relative is "able to interpret or certified as an interpreter."<sup>115</sup> A friend or relative may be unqualified "because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret 'effectively, accurately, and impartially.'"<sup>116</sup> These ad hoc interpreters may mean well, but they may not understand or be capable of performing impartially and accurately. A mediator who relies on friends and relatives may not be complying with the ADA's requirement to provide a qualified interpreter. Moreover, as with any ad hoc interpreter, the bilingualism of the friend or relative is no guarantee of the ability to interpret effectively.

Another commonly denounced practice is the use of a bilingual interested party to serve as interpreter.<sup>117</sup> The potential for alteration of the speaker's words based on the interpreter's self-interest would seem to be apparent. Nonetheless, lawyers, judges and other government officials have used co-defendants,<sup>118</sup> party

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113. Even among those individuals who perceive themselves to be qualified enough to take the Federal Court Interpreter Examination, very few actually pass. See *supra* note 86 and accompanying text. It follows that it is extremely unlikely that an ad hoc interpreter possesses the requisite skills and knowledge.

114. JANDT, *supra* note 11, at 111. See also GONZÁLEZ, *supra* note 2, at 52 (denouncing the practice as "linguistically hazardous" as well as ethically "perilous" because the "potential lack of objectivity . . . can result in a biased interpretation"); HEWITT, *supra* note 12, at 4-6, 12-13, 27 n.11 (summarizing reports documenting frequent errors made by, miscarriages of justice resulting from the use of, and inappropriate behavior of unqualified interpreters); Rosen, *supra* note 2, at 8 (indicating that most such ad hoc interpreters frequently misinterpret what is said in court).

115. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544, 35553 (1991).

116. *Id.*

117. Cronheim & Schwartz, *supra* note 25, at 307; Piatt, *supra* note 25, at 6.

118. *People v. Rivera*, 300 N.E.2d 869 (Ill. App. Ct. 1973) (affirming trial judge's use of co-defendant as interpreter during jury waiver proceeding where co-defendant's use as interpreter was suggested by defense counsel); *People v. Osorio*, 549 N.E.2d 1183 (N.Y. 1989) (holding use of a co-defendant by defense counsel in jailhouse interview voided communication privilege).

opponents,<sup>119</sup> and other interested parties<sup>120</sup> as interpreters in interviews and trials.

The use of an interested party as interpreter may be unwise for reasons other than the potential for biased alteration. Interested interpreters raise concerns about the confidentiality of the communications.<sup>121</sup> In one case, a defendant was held to waive the attorney-client privilege because a co-defendant was used by the attorney to interpret during an interview with the defendant.<sup>122</sup> Communications with an attorney through an interpreter are generally privileged where the interpreter is the agent of the attorney or of the client. However, the court held that the client must demonstrate a reasonable expectation of confidentiality under the circumstances.<sup>123</sup> Since the communication was not for the purpose of mounting a common defense, the co-defendants' interests were potentially adverse and thus could not result in an expectation of confidentiality. Similarly, using an interested person as interpreter may cause communications during the mediation to lose their confidential status.

Other factors in the communication process suggest that the mediator should seek the assistance of an independent, professional interpreter. While the interpreter may be needed to communicate with both the mediator *and* the other party (or parties) to the mediation, this is not always the case. Particularly in family mediation or other situations where the parties have a pre-existing relationship, both parties may communicate with each other using a common language other than English. However, both parties will not necessarily have the same comfort level or mastery of English, legal concepts, and other important issues. In that case, one party and the mediator will be at a disadvantage in communicating with each other, while the other interested party will have a better understanding of what is being said and will be in a better negotiating position.<sup>124</sup> The use of a qualified, independent interpreter will not only avoid the possibility of biased interpretation but will also help compensate for the imbalances caused by communication barriers.

Mediators who require the use of a foreign language or sign language interpreter should seek independent, experienced interpreters rather than relying on ad hoc interpreters. This policy may be required under the ADA or the

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119. See GONZÁLEZ, *supra* note 2, at 52 (citing a 1986 New Jersey criminal case where the complaining witness was used to interpret for an eye witness despite her obvious partiality).

120. *People v. Romero*, 581 N.E.2d 1048, 1051 (N.Y. 1991) (reversing conviction for the sale of narcotics where an undercover narcotics agent relied on interpretation by informant whose payment was based on the number of "prosecutable" drug sales; informant's statements were not covered by hearsay exception for admissions by agents because the interpreter/informant had a motive to mislead the court and thus could not be acting as an agent for benefit of defendant). See also Mark Hansen, *Litigant Language Barrier: In New York, Court Interpreters can be Quickly Recruited, Poorly Trained*, 80 A.B.A. J. 38 (1994) (citing a New York civil court judge who acted as an interpreter in a case she was presiding over after waiting fruitlessly for several hours for a Spanish-speaking interpreter).

121. See also *Bonner*, 857 F.2d at 563-64 (using fellow inmates to interpret for prisoner in counseling sessions, medical treatment, and administrative and disciplinary hearings raised "serious confidentiality concerns").

122. *Osorio*, 549 N.E.2d at 1186.

123. *Id.* at 1185-86.

124. See Treuthart, *supra* note 19, at 752-53.

Rehabilitation Act for hearing impaired parties and is dictated by the need for effective communication in all mediations. Moreover, potential negligence or malpractice liability presents another problem with relying on ad hoc interpreters who are likely to be unqualified.<sup>125</sup> Although malpractice litigation against mediators is currently sparse, over time it will likely increase, especially in the absence of "before the fact" quality control mechanisms in ADR.<sup>126</sup> Therefore, the use of ad hoc interpreters should be avoided.

### *B. The Mediator as Interpreter*

Because of the risks involved in using an ad hoc interpreter, a bilingual mediator might be tempted to act as interpreter during the session he or she mediates. For several reasons, the bilingual mediator, even if qualified to interpret, should not serve as interpreter for one of the parties. First, the mediator's concentration will be split among conflicting duties, thereby interfering with the mediator's focus on assisting the parties to resolve their dispute. Second, during rapid or heated exchanges, the mediator would be required to wear two hats simultaneously; the mediator would need to enforce the ground rules as well as interpret the message of each party for the benefit of the other party. This would be an extremely difficult, if not impossible, feat. Third, the mediator might be placed in the uncomfortable position of communicating pejorative comments and foul language to the object of the comments, who might become upset at the mediator's seeming departure from a neutral stance. Fourth, the mediator's exchange with the hearing impaired or foreign language using party may be unintelligible to the English-speaking party who may become suspicious and may perceive that the mediator is no longer neutral.<sup>127</sup>

Finally, bilingual mediators should be reluctant to act as interpreters because, like most bilingual individuals, they are not likely to possess the skills and abilities required for effective legal interpretations. There may be many more reasons militating against the practice of the mediator serving as interpreter, but it should be clear that the mediator cannot carry out both roles effectively.<sup>128</sup> The possibility of co-mediating with one bilingual mediator who is also a qualified interpreter might be explored, although some of the same objections would appear to be present. None of these objections, however, precludes a mediator from mediating in another language if the mediator and all concerned parties have sufficient command of that language.

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125. See GONZALEZ, *supra* note 2, at 174.

126. KOVACH, *supra* note 31, at 218-20. See also *id.* at 202-28 (addressing quality control generally).

127. See discussion *infra* part IV.E.2.

128. See GONZÁLEZ, *supra* note 2, at 51-52 (indicating that it is "cognitively impossible to perform both the role of the [court] interpreter and attorney simultaneously and competently" since the attorney's role requires an entirely different analysis of the spoken message). See generally Piatt, *supra* note 25.



### C. Finding a Qualified Interpreter

Most bilingual mediations will require the mediator to find a qualified interpreter. For the mediator who is not bilingual, finding a qualified interpreter presents a "chicken and egg" type of dilemma: How does the mediator know the interpreter *is* qualified if the mediator cannot understand nor evaluate the interpreter's performance? The following two anecdotes illustrate the perils of this dilemma.

In one tale, a king used an interpreter to find the hiding place for a large hoard of treasure that a foreign merchant had brought to the kingdom.<sup>129</sup> As the king became more adamant about the consequences to the merchant for refusing to reveal the secret hiding place, the discussion in the foreign language between the interpreter and the merchant became more heated. The king then threatened to cut off the merchant's head. After speaking to the merchant, the interpreter reported that the merchant absolutely refused to reveal the hiding place. The merchant now stood trembling before the king; both were unable to communicate with each other except through the interpreter.<sup>130</sup> One imagines that while the king was busy beheading the poor merchant, the interpreter made straight for the hiding place and then to parts unknown.

On a more positive note, the fictional character "Honey" of the *Doonesbury* comic strip adroitly averted several international disasters while translating for the intoxicated and stoned "Duke" when he was ambassador to China. Honey habitually turned Duke's offensive speeches into compliments for his communist hosts.<sup>131</sup>

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129. Robert L. Miller, *The Story of a King Who Relied on His Interpreter Too Often*, L.A. DAILY J., Feb. 11, 1983, at 4.

130. *Id.*

131. See, e.g., G. B. TRUDEAU, *DOONESBURY'S GREATEST HITS* (1978) (pages are not numbered). From 1976:

Duke: "Lastly, I come to China in the hope of fulfilling a life-long ambition—dropping acid on the Great Wall."

Honey: "Lastly, he wishes you good health and long life."

Duke: "... I look forward to a new spirit of cooperation from our Chinese friends. I sincerely hope it won't be necessary to shell any pagodas."

Honey: "He also wishes your wife good health."

From 1977:

Duke: "There's been a lot of talk lately that Jimmy Carter has been ignoring China!"

Honey: "He brings greetings from President Carter!"

Duke: "Well, there's a reason for that! The human rights situation here is so bad it boggles the mind!"

Honey: "He brings greetings from Vice-President Mondale!"

While Honey may have believed she was doing her country and Duke a great service, a mediation interpreter should not screen or alter the communication.<sup>132</sup>

Effective communication is crucial to mediation, but a mediator unfamiliar with the interpreted language will not know how accurately the interpreter translated. Even if the mediator possesses some knowledge of the language, he or she may not know enough to adequately judge the capacity to perform the complex cognitive tasks required of a legal interpreter. Conversely, a little knowledge of the foreign language may cause the mediator to misunderstand part of the communication and thus perceive that a misinterpretation has occurred when it has not.<sup>133</sup>

Unfortunately, there are no easy answers. One alternative would be to use those individuals regularly used by local courts as interpreters. However, this is not an assurance of quality. The literature is replete with instances of faulty interpretation in judicial proceedings.<sup>134</sup> In a rather ironic recognition that legal interpreters make mistakes, a prosecutor used preemptory challenges to exclude Latino jurors because they might not accept the interpreter's translation as definitive despite their oath to do so.<sup>135</sup> Although errors in interpretation occur even when a qualified interpreter is used, the better interpreters will make fewer mistakes.<sup>136</sup>

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132. Screening and alteration are inconsistent with the goal of interpretation—removing the language obstacles so that the parties can communicate as much as possible as if no language barrier existed. See discussion *supra* part II.A-B. Moreover, screening and alteration are inconsistent with the mediation goal of assisting the parties to communicate. See *supra* notes 30-31 and accompanying text.

133. For example, a mediator hearing the Spanish word "molestar" may believe that a sexual molestation is being described. In fact, the word is correctly translated as "to bother" rather than "to molest." Alexandre Rainof, *How Best to Use an Interpreter in Court*, 55 CAL. ST. B.J. 196, 196 (1980).

134. See, e.g., GONZÁLEZ, *supra* note 2, at 4-15 (relating several incidents, including one in which the Japanese parliament severely criticized the faulty interpretation at grand jury proceedings which may have led to the subsequent perjury conviction of a Japanese accountant employed by the Reverend Sun Myoung Moon and requested a reversal of the conviction as "a grave miscarriage of justice"); HEWITT, *supra* note 12, at 12-15 (indicating that the judiciary task forces and commissions of several states have "extensively documented widespread breakdowns in due process and equal protection for non-English speaking litigants").

135. *Hernandez v. New York*, 500 U.S. 352, 372 (1991) (rejecting appeal based on denial of Equal Protection under *Batson*). See also Hansen, *supra* note 120, at 38 (indicating that at least one case has ended in a mistrial because members of a jury notified the judge of crucial mistakes in the translation of a witness's testimony); L. Felipe Restrepo, *Excluding Bilingual Jurors May Be Racist*, NAT'L L.J., April 17, 1995, at A21 (criticizing *Hernandez* as "Alice in Wonderland" logic which allows "the exclusion of jurors who could identify incorrect translations rather than address the underlying problem" by improving the quality and accuracy of interpretation).

136. See, e.g., Michael B. Shulman, Note, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175 (1993). Shulman relates a widely reported incident in which a Cuban man was originally convicted on drug charges largely on the basis of an interpreter's translation of "Hombre, ni tengo diez kilos!" as "Man, I don't even have ten kilos!" *Id.* at 176. A more experienced interpreter recognized that given the speaker's dialect and the context of the conversation, a request for a loan, the sentence should have been translated as "Man, I don't even have ten cents!" Not only is "the word 'kilo' commonly used to mean 'cent' among Cuban speakers of Spanish," but drug dealers generally use other euphemisms to refer to kilograms of cocaine. *Id.* at 176 nn.3-4.

There is great variety in court interpreters' skills and ability, just as there is with interpreters' wages.<sup>137</sup> Indeed, the need for quality legal interpreters is an issue the courts are just beginning to address.<sup>138</sup> Courts themselves are hard pressed to find enough qualified interpreters. Consequently, most courts do not offer much in the way of quality control, but the situation is improving.<sup>139</sup>

Addressing the overall need for mediation interpreters is more than the individual mediator can tackle. Instead, professional mediation and interpretation associations need to focus their attention on this concern. Perhaps the best way would be for mediators to join the current movement by the courts to improve the availability and quality of legal interpreters. A good resource is William Hewitt's *Court Interpretation: Model Guides for Policy and Practice in the State Courts*<sup>140</sup> which is published in conjunction with the work of the State Justice Institute's Court Interpretation Project and its Advisory Committee. Since many courts are promoting mediation, the courts might also involve mediators in plans to improve legal interpreter services.

The individual mediator does have some resources to locate an interpreter.<sup>141</sup> For those foreign languages in which interpreter certification is available,<sup>142</sup> the mediator may obtain lists from the Administrative Office of the United States Courts, from the city, county, or state court or administrative agency which administers the certification program, or from the local courts.<sup>143</sup> Presently, only a few courts administer rigorous testing and certification programs.<sup>144</sup> For all other foreign languages there are no reliable lists of competent interpreters, so the mediator would have to make an independent assessment as to the interpreter's qualifications.

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137. See *supra* note 105.

138. HEWITT, *supra* note 12, at 12-13 (indicating that California, Massachusetts, New Jersey and Washington have accomplished a great deal in setting standards, developing test and certification programs and implementing training programs for interpreters, while reforms are underway or being considered in Florida, Kansas, Michigan, Minnesota, Nevada, New York, Oregon, Utah, and Virginia).

139. The federal courts currently certify interpreters in a few foreign languages, such as Haitian Creole, Navajo and Spanish with eight other languages in the works; for all other languages, the court must provide an "otherwise qualified" interpreter. HEWITT, *supra* note 12, at 93. Of the state courts, only California, New Jersey, and Washington have rigorous enough statewide testing programs to be recommended as models. *Id.* at 90-91. The federal certification program has been cited as representing "a level of expertise all court interpreters ideally should attain." Shulman, *supra* note 136, at 181. However, under the federal interpreter testing program, an interpreter can be certified with only an 80% accuracy rate. *Id.* Thus, even though interpreters certified by these programs are competent, they are not perfect. In the rest of the court systems, formal testing of interpreters is "unusual"; only three other states and a few cities screen their interpreters. HEWITT, *supra* note 12, at 90-92. See also *id.* at 27 n.11 (citing a recent study where "only 14% of the responding courts indicated that they required interpreters to have any form of training, prior court experience, or certification").

140. HEWITT, *supra* note 12.

141. See generally GONZÁLEZ, *supra* note 2, at 185-92 (describing various locations where foreign language interpreters might be found).

142. See HEWITT, *supra* note 12, at 93 (listing Arabic, Cambodian, Cantonese, Haitian Creole, Japanese, Korean, Laotian, Navajo, Portuguese, Tagalog, and Vietnamese as languages tested and certified by either California, New Jersey, Washington or the federal courts).

143. GONZÁLEZ, *supra* note 2, at 186.

144. See HEWITT, *supra* note 12, at 90-92. See also *supra* note 139.

The mediator could try to locate interpreters with some experience from "locally situated government agencies that have similar language service needs: neighboring courts, local offices of federal investigatory agencies, and other administrative law agencies"<sup>145</sup> (including administrative law judges and courts). In addition to commercial interpreter agencies,<sup>146</sup> the mediator might find interpreters through "[n]on-government agencies and institutions that are in contact with speakers of the desired language, such as ethnic churches and community organizations, foreign language departments in colleges and universities, local hospitals that use interpreters, and private language schools."<sup>147</sup> National and international agencies with similar language needs, such as the United Nations, the Red Cross, the Organization of American States, the World Bank, and the State Department also have lists available and can serve as "a most worthwhile resource," even if located far away.<sup>148</sup> The various individuals who are involved in locating, providing or supervising interpreters or in enhancing the quality of interpreter services are also a potential resource for mediators.<sup>149</sup> One administrator of a court interpreter's office suggests turning to embassies and consulates as a last resort.<sup>150</sup> However, the mediator would have to assess the qualifications and abilities of interpreters located through these sources.

There are various techniques available to assess the interpreter's interpreting skills and proficiency in English and the foreign language.<sup>151</sup> "Back-translation" is one technique which allows the mediator to assess to some degree the interpreter's proficiency in the foreign language and general ability to translate, even when the mediator is not proficient in that language.<sup>152</sup> Using back-translation, the interpreter candidate is asked to translate English into the foreign language, then, after the lapse of at least an hour, to translate the foreign text back into English. The back-translation is then compared with the original "to determine how faithfully the original message has been preserved."<sup>153</sup>

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145. GONZÁLEZ, *supra* note 2, at 187.

146. Some authorities generally do not recommend interpreting agencies except for their "success[] at finding interpreters with at least marginal skills in unusual languages," because they "seldom rigorously test the interpreters whom they place on their lists." *Id.* at 191. However, one source suggests they are frequently used in depositions. Kim Isaac Eisler, *Court Interpreters Caught in the Middle of Legal Battles: Face Balancing Act Between Impartiality, Rapport with Client*, L.A. DAILY J., Feb. 21, 1985, at 1.

147. GONZÁLEZ, *supra* note 2, at 187. See also HEWITT, *supra* note 12, at 75-77 (listing institutions which are "known or believed to offer specialized training in interpretation").

148. GONZÁLEZ, *supra* note 2, at 187-89.

149. HEWITT, *supra* note 12, at iii-iv, 73-75.

150. Eisler, *supra* note 146, at 18.

151. See GONZÁLEZ, *supra* note 2, at 192-200; HEWITT, *supra* note 12, at 115-19. See also *id.* at 89-115 (providing information on more formal assessment techniques); *id.* at 148 (noting sample set of questions to determine the qualifications of a prospective interpreter in the absence of court testing or prior screening).

152. GONZÁLEZ, *supra* note 2, at 196-99; HEWITT, *supra* note 12, at 118-19.

153. HEWITT, *supra* note 12, at 118. See GONZÁLEZ, *supra* note 2, at 196-99 (providing a sample test).

In addition to many of the sources listed above, a mediator requiring an ASL or other sign language interpreter can contact the closest office of the National Registry of Interpreters for the Deaf. The National Registry of Interpreters for the Deaf sets the "[s]tandards for certification of interpreters for deaf individuals in all of the language modalities used by deaf persons."<sup>154</sup> This certificate is required in many states for court interpretation for the hearing impaired.<sup>155</sup> The mediator can also use telephone relay services to communicate with deaf parties, especially for making preliminary arrangements.

Telephone interpreting presents another possible resource. Although different telephone interpreting programs are being studied by both federal and state courts,<sup>156</sup> the service presently available to mediators is AT&T's Language Line Service. The service is available on a subscription or fee basis.<sup>157</sup> The main advantage of AT&T's Language Line is the ability to provide rapid access to interpretation services in 140 languages.<sup>158</sup> Another advantage is that the interpreters, which AT&T insists be kept anonymous, are probably not connected to the parties or interested in the proceedings.<sup>159</sup> Costs vary with the time of day and the language required, but are comparable to rates for certified interpreters, except that charges are on a per minute basis.<sup>160</sup> For use in the courts, however, the AT&T Language Line is not recommended for long or significant proceedings, such as trials, for several reasons.

The use of telephone interpreting in legal settings is criticized because it does not currently provide the crucial element of visual contact.<sup>161</sup> Moreover, because AT&T telephone service interpreters are not trained as legal interpreters, the particular responsibilities of a mediation interpreter would have to be explained.<sup>162</sup> Other significant drawbacks include that (1) simultaneous interpretation is not

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154. HEWITT, *supra* note 12, at 169.

155. *Id.* at 169-72. *See also* Clarkson v. Coughlin, 898 F. Supp. 1019, 1027 (S.D.N.Y. 1995) (stating that "[t]he certification exam administered by the National Registry of Interpreters for the Deaf is considered the most reliable means of ascertaining the competence of a sign language interpreter").

156. HEWITT, *supra* note 12, at 187-89.

157. *Id.* at 185-86.

158. *Id.* at 180 (indicating that the connection is usually achieved within a minute of the service request); Samborn, *supra* note 105, at 23.

159. HEWITT, *supra* note 12, at 181, 184, 186. There are many drawbacks to using an interpreter affiliated with the parties or connected with the proceedings. *See* discussion *supra* part III.A.

160. Certified interpreters for the federal courts are generally paid \$210 per hour, not including incidental expenses. *See supra* note 105 and accompanying text. After an initial service fee of almost \$500, the AT&T subscription service charges at a rate of \$2.25 per minute for Spanish (with a \$50 monthly minimum charge) or what amounts to \$170 an hour. HEWITT, *supra* note 12, at 185. For the non-subscription service, AT&T charges \$3.50 a minute or \$210 per hour. *Id.* at 186. For Urdu translation in the evening, the charge is \$4.50 a minute or \$270 per hour. Samborn, *supra* note 105, at 23. This is comparable to the \$260 per hour paid for exotic languages by the District of Columbia Superior Court. *See supra* note 105.

161. Samborn, *supra* note 105, at 23.

162. HEWITT, *supra* note 12, at 182-83.

available with ordinary telephone equipment,<sup>163</sup> (2) interpretation quality is not guaranteed, and AT&T requires customers to disclaim reliance on the accuracy of the interpretation,<sup>164</sup> (3) the anonymity which AT&T requires shields telephone interpreters from accountability for the accuracy of the interpretation and the duty to maintain confidentiality,<sup>165</sup> and (4) the anonymity raises concerns about the inability to verify the interpreter's qualifications and background, including his or her lack of connection to the parties.<sup>166</sup> These drawbacks also limit the usefulness of telephone interpretation in mediation and other ADR settings. However, with the proper equipment, telephone interpretation is available to mediators for circumscribed uses, such as the pre-mediation conference.<sup>167</sup>

Competent interpreters for deaf and foreign language users are in great demand; thus, mediators should seek an interpreter as much in advance as possible.<sup>168</sup> The mediator should avoid using ad hoc interpreters because they are unlikely to possess the language proficiency and complex skills required for interpretation. The use of friends and relatives of the party needing interpretation assistance and the use of other interested parties in any legal setting is highly problematic, as is the mediator acting as interpreter during the session. The mediator should seek and, in order to accommodate a hearing impaired party, may be legally required to seek an independent, experienced interpreter who is qualified to interpret. The interpreter's proficiency and skills should be commensurate with the significance of the mediation.

#### IV. PREPARING FOR INTERPRETER-ASSISTED MEDIATION

Once a mediator is faced with a local or international foreign language mediation, more needs to be done besides locating an individual capable of interpreting in the subject language. In order to ensure effective communication and a successful mediation, the mediator must consider additional issues and take various steps *before* the mediation date.

##### *A. Selecting and Preparing the Interpreter*

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163. *Id.* at 180, 186-87 (indicating that ordinary telephone lines do not separate incoming and outgoing signals; in normal conference call mode, while the interpreter is talking, no one else can use the line; if instead the line is kept open, then the interpreter's voice is picked up and fed back creating a "babble" of voices).

164. *Id.* at 182-85 (also indicating that interpreter training is optional for the interpreter and that the administered proficiency exam merely determines whether the individual can carry on a conversation with a foreign language speaker).

165. *Id.* at 184-85.

166. *Id.*

167. *Cf.* KOVACH, *supra* note 31, at 71-77 (describing pre-mediation arrangements by private mediators).

168. *See* HEWITT, *supra* note 12, at 172.

The mediator must first choose the right interpreter, which requires more than knowing what language the individual requiring assistance uses. During the first few minutes of Kenneth Branagh's film *Henry V*, I kept asking: "What did he/they say?" Furthermore, despite my proficiency in English, I frequently experience the same disconcerting inability to understand occasional words, phrases or sentences spoken by British actors. Friends and relatives born in the United States whose native language is English usually fare no better. I am reminded of George Bernard Shaw's observation that England and America are "two countries divided by a common tongue."<sup>169</sup> The Australians and Irish also speak English. However, while we are all speaking English, we sometimes cannot understand each other because there are dialect variations.

The problem of different dialects occurs with Chinese,<sup>170</sup> Spanish, and some other languages. One romance language professor who has also served as a court interpreter indicates that communication problems are more pronounced in Spanish than in English, because there are more than nineteen "dialectal forms of Spanish in the world."<sup>171</sup> Thus, Spanish speakers from different countries are not necessarily able to communicate effectively. Even within the same country, there may be regional and class differences in dialect or accent. The failure to recognize these differences can lead to disastrous consequences.<sup>172</sup> The mediator must ensure that the interpreter and the individual requiring foreign language assistance can communicate with each other, since the fact that they speak the same language is no assurance that they can communicate.

Similarly, in selecting interpreters for the hearing impaired, not only are there different languages, but there are individual variations as well.<sup>173</sup> There are also individual differences in the level of language or lip reading competency, as there is with any mode of communication.<sup>174</sup> Thus, foreign and sign language interpreters and the people they are interpreting for should have time before the mediation begins to assess their ability to communicate with each other and to make any necessary accommodations.

To be qualified, the interpreter should not be affiliated with the parties. The interpreter must also be capable of maintaining neutrality. Moreover, the interpreter must be capable of understanding and fulfilling the role required of a mediation participant, including the ability to keep matters discussed in the mediation

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169. THE OXFORD DICTIONARY OF QUOTATIONS 638 (Angela Partington ed., 4th ed. 1992).

170. Eisler, *supra* note 146, at 18.

171. Rainof, *supra* note 133, at 196. See generally GONZÁLEZ, *supra* note 2, at 227-51 (describing the various aspects of language which can lead to miscommunication).

172. See Shulman, *supra* note 136, at 176-78. Cf. Rainof, *supra* note 133 (discussing various ways in which miscommunication may occur during interpretation and ways to avoid it).

173. See *Clarkson*, 898 F. Supp. at 1027 (comparing signed English (or Manually Coded English), which uses English syntax and word order, to ASL which, like a foreign language, does not); HEWITT, *supra* note 12, at 163-64.

174. HEWITT, *supra* note 12, at 166. Deaf individuals who lip read (called speech reading) may require an oral interpreter to be able to understand most of what is said. *Id.*

confidential.<sup>175</sup> Thus, in selecting an interpreter the mediator must be able to ensure these characteristics. The mediator might discover that the interpreter has the ability to keep confidences and remain neutral but needs to be educated about their importance to the goals of mediation. The mediator should ensure that the interpreter is fully qualified before the day of the mediation.

### *B. Deciding How to Conduct the Interpretation*

Next, the mediator and the interpreter need to address a number of preliminary issues. As discussed above, the mode of the interpretation, consecutive or simultaneous, will affect the length and accuracy of the mediation.<sup>176</sup> How can the appropriate balance between accuracy and duration be achieved? Will the interpreter also be expected to convey the speaker's style and demeanor? What should the interpreter do about foul language, stereotypes, and racial and ethnic slurs?<sup>177</sup> Before beginning the mediation, the mediator should discuss these matters with the interpreter. The mediator may need to educate the interpreter about the mediation process so that the interpreter can assist the mediator in addressing these matters.

Generally, the legal interpreter is not to paraphrase words or phrases because that would be taking a more active role than is appropriate for a conduit of the message.<sup>178</sup> If the interpreter wants to take a more active role in the mediation, then he or she should have some mediation training and should coordinate efforts and strategy with the mediator. Should the interpreter interrupt the mediator or one of the parties if a miscommunication is likely to occur because of the words used or the way they are phrased?<sup>179</sup> Although this would require the interpreter to be somewhat active in the mediation, it is necessary to ensure effective communication. The crucial point is knowing when a miscommunication needs to be avoided, which largely depends on the competency of the interpreter. However, the mediator should advise the interpreter on how to handle the need for interruptions and clarifications.

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175. See *infra* part IV.C. The mediator may also wish to instruct the interpreter not to offer advice or express an opinion. See Gorman, *supra* note 17.

176. See discussion *supra* part II.B.

177. See Mary Jo Eyster, *Integrating Non-Sexist/Racist Perspectives Into Traditional Course and Clinical Settings*, 14 S. ILL. U. L.J. 471, 479-80 (1990) (describing an incident in which a clinic student representing an Indian client at a disability hearing did not respond when the hearing officer asked the client whether she played ping pong because all the Indians he knew played ping pong; the student never explained the question to the client, who spoke some English, but apparently did not understand the question).

178. See *supra* text accompanying notes 81-86.

179. Some words are not capable of being translated. HOWARD RHEINGOLD, *THEY HAVE A WORD FOR IT: A LIGHTEARTED LEXICON OF UNTRANSLATABLE WORDS AND PHRASES* *passim* (1988). This is a dilemma that is encountered often in international translations. See, e.g., Peter Waldman, *Lost in Translation: How to "Empower Women" in Chinese*, WALL ST. J., Sept. 13, 1994, at A1 (discussing the difficulties of translating the term "female empowerment" into Chinese, French and Russian at the 1994 United Nations Population Conference).



Finally, the mediator and interpreter must address a few logistics before the mediation begins, such as the seating arrangements for those who will be present during the mediation. The interpreter must be able to hear all the parties clearly and may also need to be able to see facial expressions and body language.<sup>180</sup> However, as in the case of the mediator's position relative to the parties,<sup>181</sup> where the interpreter sits may also convey subtleties which affect the mediation. Thus, the proper balance must be struck between creating the atmosphere most conducive to mediation and situating the interpreter so that all of the exchanges can be heard.

### C. Confidentiality & Privilege in Interpreted Mediation

Before the mediation, the mediator will need to determine what to tell the parties about the confidentiality of the communications *vis-à-vis* the interpreter. Confidentiality has been considered one of mediation's benefits<sup>182</sup> and is believed by some to be essential to achieving the goals of mediation.<sup>183</sup> To ensure that this benefit is available in an interpreted mediation, the interpreter should be bound by the rules of confidentiality. Moreover, the addition of the interpreter to the mediation setting should not cause confidential communications to lose that status.<sup>184</sup>

There are various methods which encourage parties to keep confidential the revelations made at an event, including oaths<sup>185</sup> and professional or judicial codes of conduct.<sup>186</sup> However, even if the interpreter may be bound by a professional or judicial code of ethics, he or she should be asked as part of the mediator's introduction to abide by the rules of confidentiality. The agreement will heighten the parties' and the interpreter's awareness of the importance of confidentiality and

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180. While these logistics issues have not been addressed in the mediation context, mediators may find guidelines directed at attorneys needing to interview clients with the assistance of a translator to be helpful. See JANDT, *supra* note 11, at 111; McCoy, *supra* note 32, at 16-18.

181. See KOVACH, *supra* note 31, at 71-72 (discussing the importance of location and seating arrangements).

182. *Id.* at 139.

183. See *id.* at 140. See also Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986); Brown, *supra* note 30, at 309-311.

184. See Hall & Beall, *supra* note 56, at 39 (indicating that the use of an interpreter "will no longer be a meaningful accommodation if the confidentiality of the interpretation is not protected").

185. HEWITT, *supra* note 12, at 149.

186. See, e.g., Michael M. Pacheco, *Certified Court Interpreters: A New Era of Professionalism in Oregon Courts*, OR. ST. B. BULL., Aug.-Sept. 1995, at 23 (citing Establishing Code of Professional Responsibility for Interpreters in Oregon Courts, OR. SUP. CT. ORDER NO. 95-042 (May 19, 1995)); CODE OF PROFESSIONAL RESPONSIBILITY OF THE OFFICIAL INTERPRETERS OF THE UNITED STATES COURTS art. 11 (1987); HEWITT, *supra* note 12, at 199-210 (proposing a model code of professional responsibility, including duties of confidentiality for court interpreters). These codes usually apply only to court proceedings. Court interpreters who belong to professional associations may make a more general pledge to uphold the confidentiality of interpreted communications, but the enforcement of these codes is largely voluntary. GONZÁLEZ, *supra* note 2, at 474-75. See also HEWITT, *supra* note 12, at 211 (citing Registry of Interpreters for the Deaf, *Code of Ethics*).

will largely maintain confidentiality through self-enforcement.<sup>187</sup> Moreover, if the confidentiality agreement is reasonably likely to be enforceable in court<sup>188</sup> or the mediator believes the agreement will provide a strong deterrent effect, then having the interpreter execute the agreement will help reassure the parties and make them more comfortable with the interpreter's presence.

Ultimately, the confidentiality issue for lawyers is a question of whether, under most circumstances,<sup>189</sup> the parties can be prevented from testifying in court about the information by way of an evidentiary exclusion, or generally be prevented from divulging information through a privilege, enforceable in the courts. Since mediation is intended to settle the parties' dispute outside of court, a relevant consideration is the effect the interpreter's presence in the mediation might have on any subsequent litigation.

The evidentiary exclusion most relevant to the mediation setting is the exclusion for settlement discussions. Most jurisdictions have an evidentiary exclusion for settlement discussions, but it is not clear whether and to what extent the exclusion applies to mediation and all of the information disclosed in a mediation session.<sup>190</sup> Moreover, the evidentiary exclusion for settlement discussions is limited to attempted disclosures at trial when offered to prove the validity of a claim or its value.<sup>191</sup> Broader protection for mediation disclosures requires a privilege.

Historically, the presence of an interpreter in an otherwise privileged communication does not affect the communication's privileged status so long as the interpreter is reasonably necessary for communication,<sup>192</sup> is an agent of either party

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187. See KOVACH, *supra* note 31, at 147-48.

188. See *id.* The American Bar Association encourages mediators to ask the parties to execute a confidentiality agreement, but indicates the mediator is under a duty "to inform the parties of the limited effectiveness of the agreement as to third parties." *Id.* at 147. Moreover, it is not clear that a confidentiality agreement will prevent disclosure of communication by one of the parties in court. The court will balance the loss of evidence and the public policy disfavoring exclusion of evidence against the harms caused by disclosure. *Id.* Since this is a case by case determination, enforceability is not assured.

189. Lawyers know that all rules have exceptions and rules of confidentiality must give way for certain public policy reasons. For example, it is widely understood that even when there is a well-recognized confidential relation, confidentiality must give way when it is necessary to prevent bodily harm to another. See, e.g., *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976) (establishing the duty of a psychiatrist to take reasonable steps to prevent harm to an identifiable person even when doing so would require a breach of confidentiality); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983) (indicating that a lawyer may reveal confidential communications "to the extent the lawyer believes reasonably necessary . . . to prevent a client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm").

190. KOVACH, *supra* note 31, at 143-44.

191. *Id.* at 144. Disclosure of communications in an interpreted mediation is also problematic under hearsay rules when an English speaking party is testifying, because the witness's understanding of statements made in a foreign or sign language is based entirely on the out of court translation by the interpreter. Lindie, *supra* note 76, at 419.

192. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 218 (3d ed. 1984) (citing *Du Barre v. Linette*, 170 Eng. Rep. 96 (1791) and *State v. Loponio*, 88 A. 1045 (N.J. 1913)). See also 25 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 5532 (1989) (indicating that privileged communications made to physicians and psychotherapists through an

to the communication,<sup>193</sup> and there is a reasonable expectation of confidentiality.<sup>194</sup> A number of states have codified this common law rule, and most states have enacted narrowly drawn statutes which track the common law privilege rule in cases of interpreters for the deaf<sup>195</sup> or of interpreters for both deaf and foreign language using individuals.<sup>196</sup> However, a few states have broader statutes which appear to create a privilege for interpreted communications even when the communication would not otherwise be privileged.<sup>197</sup>

Thus, in most jurisdictions, communications during an interpreted mediation will be privileged only if communications during mediation are generally privileged. While courts have seemed willing to uphold statutory or administrative rules of confidentiality in mediation,<sup>198</sup> it is not clear that a common law mediation privilege

interpreter remain privileged if the use of an interpreter is reasonably necessary); *North American Union v. Oleske*, 116 N.E. 68, 70 (Ind. App. 1917) (In holding that communications by neighbors of unconscious patient to attending physician did not vitiate physician-patient privilege, the court stated that where the intervention of a third person is necessary to facilitate communication between patients and physicians with a view to intelligent treatment, "neither the physician nor the third person may disclose . . . the information so communicated.").

193. See *Loponio*, 88 A. at 1047 (holding that the testimony of a fellow inmate who had acted as scrivener for a letter seeking to employ an attorney and divulging to the potential attorney the circumstances of the shooting could not be used against the defendant who had dictated the letter because the defendant could not write in English, and thus it was reasonably necessary for him to use the fellow inmate as an "agent of the transmission").

194. *Osorio*, 549 N.E.2d at 1185-86 (N.Y. 1989) (holding that communications between attorney and client through the use of a co-defendant interpreter were not privileged because they could not result in a reasonable expectation of confidentiality where the communications were not for the purpose of mounting a common defense and the co-defendants' interests were potentially adverse).

195. See, e.g., FLA. STAT. ANN. § 90.6063(7) (West Supp. 1997) ("Whenever a deaf person communicates through an interpreter to any person under such circumstances that the communication would be privileged, . . . this privilege shall apply to the interpreter"); GA. CODE ANN. § 24-9-107(b) (1995) ("Whenever a hearing impaired person communicates with any other person through the use of an interpreter and under circumstances which make such communications privileged, the presence of the interpreter shall not vitiate such privilege . . .").

196. CONN. GEN. STAT. § 52-146(l) (1990) ("Any confidential communication which is deemed to be privileged under any provision of the general statutes or under the common law made by a person with the assistance of an interpreter shall not be disclosed by such an interpreter " in any case or proceeding); 735 ILL. ANN. STAT., 5/8-911(b) (West 1993) ("If a communication is otherwise privileged, that underlying privilege is not waived because of the presence of the interpreter.").

197. See LA. REV. STAT. ANN. § 46:2371 (West Supp. 1997) ("No interpreter/transliteritor for the deaf is permitted, without consent of the person making the communication, to disclose any communication made in confidence by one seeking situation specific service, or any information that may have been obtained by reason of being such interpreter/transliteritor."); MASS. GEN. LAWS ANN. ch. 221C, § 4(c) (West 1993) ("Disclosures made out of court by communications of a non-English speaker through an interpreter to another person shall be a privileged communication . . . provided, however, that such non-English speaker had a reasonable expectation or intent that such communication would not be so disclosed.").

198. However, courts will uphold the privilege only after balancing the need for the information against the protection of confidentiality and the mediation process. *KOVACH*, *supra* note 31, at 145-46. One source of support for upholding confidentiality in mediation excludes from evidence "conduct or statements made in compromise negotiations." FED. R. EVID. 408. This exclusionary rule, however, is limited in scope in that it does not seem to extend confidentiality to all statements, nor is evidence excluded for all purposes, nor does it extend confidentiality outside of the courtroom as would a

would be recognized.<sup>199</sup> Without a separate interpreter privilege, communications during an interpreted mediation will be confidential only if there is a general privilege for the mediation relationship.

One former interpreter has endorsed a general interpreter privilege,<sup>200</sup> arguing that a broad interpreter privilege would protect the interpreter's reputation and the willingness of new and repeat clients to reveal necessary confidential information.<sup>201</sup> The privilege would also be necessary because requiring the interpreter to reveal some information would lead to uncertainty in the client's mind about what information is truly confidential. This uncertainty might chill subsequent communications in the presence of an interpreter and, thus, damage other relationships, such as doctor-patient and attorney-client, which require full and frank disclosure.<sup>202</sup> A separate interpreter privilege would also avoid uncertainty for the interpreter, who otherwise would be forced to make complex legal distinctions about what information is privileged and whether and to what extent privileges have been waived.<sup>203</sup> An interpreter privilege is said to result in little loss of evidence because in any interpretation setting two other witnesses are available to testify. These other witnesses are also probably better able to testify because most interpreters cannot effectively store communications in long term memory while performing all the other cognitive tasks required during an interpretation.<sup>204</sup>

Since few jurisdictions have recognized a general privilege for confidential communications made in the presence of an interpreter and since the existence of a mediation privilege is uncertain, the mediator must determine the extent to which the confidentiality of communications in an interpreted mediation can be maintained in the particular jurisdiction.<sup>205</sup> The mediator should add a clause dealing with the presence of the interpreter to the confidentiality agreement, and the interpreter should be a party to the agreement. In light of the likely growth of interpreted mediations, mediators can also work to improve the observance of confidentiality and the quality of interpreted communications in mediation by supporting the movement to regulate interpreters and establish professional standards and duties.<sup>206</sup>

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privilege. See KOVACH, *supra* note 31, at 144.

199. *Id.* at 146.

200. Alice J. Baker, Note, *Sign Language Interpreters and Testimonial Privileges*, 2 VA. J. SOC. POL'Y & L. 165 (1994).

201. *Id.* at 168-69.

202. *Id.*

203. *Id.* at 180-82.

204. *Id.* at 183-85.

205. See KOVACH, *supra* note 31, at 85 (indicating that the confidential nature of the mediation and the legal bases should be explained).

206. See, e.g., HEWITT, *supra* note 12, at 199-210 (proposing a model code of professional responsibility for "interpreters in the judiciary" which deals, *inter alia*, with accuracy and completeness of the interpretation, the interpreter's representations of qualifications, impartiality and conflicts of interest, confidentiality, and professional development).

*D. Ensuring Communication Effectiveness - Preparing for  
and Conducting the Mediation*

To communicate effectively in any cross-cultural setting, mediators, particularly those who are also legal advocates, should choose their words carefully when they conduct an interpreter-assisted mediation. Moreover, mediators should take great care when interpreting and using verbal and body language in cross-cultural settings. Finally, the mediator should carefully consider what to say in the introduction to the mediation in order to obviate some common problems.

In order to communicate effectively, the mediator should keep in mind that certain expressions do not translate well. Legal interpreters warn of the difficulty of interpreting "sports analogies, archaic language, passages from Shakespeare and the Bible" and "[m]aking those interpretations meaningful to people of differing cultures and religions."<sup>207</sup> One interpreter cited, as an example of language which is hard to translate meaningfully, a defense attorney's opening statement which involved references to Magna Carta and the battle of Runnymede in 1215.<sup>208</sup> These events, like Woodstock and Watergate may be too culturally specific to be meaningful to those from other cultures without a great deal of elaboration. Archaic, colloquial and culturally-laden references should be avoided in cross cultural mediation. Whenever possible, the mediator should speak using ordinary English and the active voice. The mediator should also sensitize the parties to the importance of avoiding archaic, colloquial or culturally specific references. If the point being made is an important one, then it is also important that the point be understood.<sup>209</sup> However, there is a tendency in all conversational settings to disregard unfamiliar expressions rather than interrupt the speaker or reveal ignorance. Thus, the mediator should make a point of asking the speaker to clarify expressions which may be unfamiliar to some of the recipients of the message and should encourage the parties to seek clarification whenever any speaker fails to be clear.

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207. Holly Spence, *Language: a Barrier to Court Access*, ISBA B. NEWS, Nov. 19, 1994, at 1. See generally GONZÁLEZ, *supra* note 2, at 253-72 (describing the characteristics of legal language which are challenging to interpreters and providing some guidance to interpreters).

208. Gorman, *supra* note 17, at B1.

209. I recently taught a class which had several international students. One day I realized that the expression "CYA" had been used a number of times throughout the semester to refer to defensive action taken to protect the individual from potential tort liability. The next time the expression was used I asked the students how many understood the expression. Most, though not all, the domestic students indicated they understood the expression; but the international students indicated that they did not. Some students' comments indicated that it had never occurred to them that expressions they deemed to be "common" were not universally understood.

Whenever culturally-specific expressions are used, miscommunication may result. Viewed from one perspective, *the listener has failed to understand*. However, the opposite perspective, *that the speaker has failed to be clear*, is an equally valid and less threatening interpretation. An instruction to "please stop me or the interpreter if at any time either of us is not being clear" is preferable to one which focuses on the listener's lack of understanding and may make the listener more comfortable about the need to seek clarification.

Mediators involved in bilingual or cross-cultural interpretation should also be careful with, and perhaps avoid, asking questions that require a yes or no answer and should avoid long explanations followed by a question such as "do you understand?"<sup>210</sup> A yes or no answer may not reflect a party's understanding of the question or explanation. Instead, that party may be responding to nonverbal cues which indicate whether agreement or disagreement is expected by the mediator. The party may also fear that a lack of understanding will reflect negatively on the recipient or offend the speaker. The party may also be inclined to agree because of cultural propensities to defer to authority figures.

Mediators should also be aware of the cultural differences in bodily language and its importance to effective communication. A mediator must never limit the ability of an interpreter for the hearing impaired to use body language or gestures because they are essential to communication.<sup>211</sup> If in doubt about the meaning of body language, the mediator should ask the interpreter.

Even for speakers and listeners using a common language, communication is not entirely verbal. A great deal of our ability to communicate is due to learning to read the facial expressions and body postures of those with whom we converse. However, not all body language is universal. Gestures and body language may have different meanings in cross-cultural settings. For example, one physical cue which United States mediators might rely on and misread in cross-cultural settings is eye contact. In the United States, eye contact is associated with honesty, and its absence may be perceived as shifty-eyedness and untruthfulness. Whereas in Latin American, Native American and eastern cultures, avoiding eye contact may be a sign of deference and respect.<sup>212</sup> In England and among many African cultures, a turning away of the head and a dropping of the eyes indicates that the listener is paying close attention to the spoken message.<sup>213</sup> Mediators and interpreters must be sensitive to these differences in body language if they are to communicate effectively across cultures.

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210. See JANDT, *supra* note 11, at 109. See also HEWITT, *supra* note 12, at 126 (indicating that yes or no questions should be avoided when examining an individual to determine the degree of language competency). Questions which solicit as much information as possible from the listener will not only provide the needed information but will verify that the listener has understood the question. A question such as "At what time did X occur?" should produce a response consistent with an understanding of the question (e.g., "At 8 o'clock"). Whereas a yes or no answer to a leading question such as "Did X occur at 8 o'clock?" does not demonstrate an understanding of the question. Leading questions may produce faster results but not necessarily accurate ones. The use of leading questions to determine language competency (e.g., "Do you understand me?" or "Do you regularly use English at work?") or to determine an interpreter's effectiveness ("Are you able to understand the interpreter?") may result in an overestimation of the individual's ability to understand because an affirmative response may be given even when the individual does not understand the question. *Cf. id.* at 147 (providing a Model Voir Dire for Determining the Need for an Interpreter).

211. See HEWITT, *supra* note 12, at 158.

212. LISNEK, *supra* note 11, at § 2.32.

213. Linda Shrieves, *How to Make Diversity Work: Cultivating Understanding Among Your Employees Makes for a Happier and More Productive Workplace*, ORLANDO SENTINEL, July 6, 1995, at E1.

Mediators should also avoid using certain gestures which in the United States are used to convey positive messages, but which are extremely offensive in other cultures. The A-OK sign with thumb and forefinger forming a circle,<sup>214</sup> the thumbs up sign,<sup>215</sup> and the "Victory" or peace sign (formed by the index and middle fingers) when the palm is turned toward the signer<sup>216</sup> are particularly problematic. How to shake hands and whether to shake hands with a woman (especially from an Islamic country)<sup>217</sup> as well as the amount of physical contact between and among males and females<sup>218</sup> can also present challenges in any cross-cultural mediation. The mediator may consult with the interpreter who may have some knowledge of cultural preferences and taboos.

One final step the mediator should take to ensure that the parties communicate effectively is to plan the introduction carefully, keeping in mind the dynamics of an interpreted mediation.<sup>219</sup> The mediator should explain the reason for the interpreter's presence and the interpreter's expected role in the mediation. The mediator should also use the introduction to provide instructions which will help enhance communication effectiveness and help determine whether the interpretation is proceeding effectively.

Since the introduction is one of the few areas where the interpreter will be working with material which is not extemporaneous, the mediator can give the interpreter a copy of the introduction to prepare ahead of time. Even if the mediator does not usually prepare a written introduction, the mediator should be able to give the interpreter an outline of the introduction. Allowing the interpreter to prepare will improve accuracy and save time, as the introduction can be given in the simultaneous mode. Toward the end of the introduction, the parties requiring language assistance should be asked to indicate whether they can understand the interpreter.<sup>220</sup> The

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214. Jeremy Bagott, *Mixed Signals in Travelers' Body Language: What's Innocuous in One Culture May Be an Insult in Another*, BUFF. NEWS, May 29, 1994, at G5 (describing then Vice-President Richard Nixon's use of the A-OK gesture in Latin America where it is an offensive gesture equivalent to our raised middle finger). See also Jayne Clarke, *Goodwill Gestures Gone Bad*, ST. PETERSBURG TIMES, Mar. 8, 1992, at 6E (reviewing a book which lists varied cultural meanings of the gesture: sign for money in Japan, a symbol for zero in France, and an obscene gesture in Brazil, Germany and the former Soviet Union).

215. *Id.* (describing its offensive meaning in Australia and West Africa).

216. Alfred Borcover, *The V Was No Victory*, REC. NJ., Feb. 16, 1992, at T1 (describing President Bush's use of the gesture in Australia where it is also equivalent to our raised middle finger gesture).

217. Bagott, *supra* note 214, at G5.

218. Borcover, *supra* note 216; Clarke, *supra* note 214.

219. See discussion *supra* part II.B. and *infra* part IV.E. For instance, it might be helpful if the parties knew how the interpretation process was to proceed and that communicating through an interpreter will necessarily take longer.

220. See HEWITT, *supra* note 12, at 150-51 (providing sample text to introduce an interpreter to the court and witnesses, and asks the parties to indicate whether they are able to understand the interpreter). If interpreted mediations in a particular language become common, then introductions can be translated and even provided to the parties ahead of time in writing. See GONZÁLEZ, *supra* note 2, at 222-24 (providing a standard introduction and a Spanish translation explaining the role of the court interpreter to the various court participants). Besides explaining the interpreter's role, experts suggest that the parties be advised that the interpreter is a neutral and not a lawyer, cannot give legal advice, will not

mediator can also determine ahead of time how to ask the party requiring an interpreter whether he or she fully comprehends the interpreter. By listening for that part of the introduction or asking the question directly in the foreign or sign language and then observing its effects, the mediator will be able to tell whether the interpreter is being understood.

The guidelines for effective verbal communication in an interpreted mediation are similar to advice given for effective communication in any setting. All good communicators should speak in concise, ordinary English, avoiding arcane references and colloquialisms. All good communicators should ask questions in a manner which requires their listeners to demonstrate that they have understood the questions.<sup>221</sup> This communication technique is even more important when the parties do not share the same original language because the likelihood of miscommunication is greater. However, the failure to understand that there may be significant differences in *non-verbal* communication also can lead to embarrassment, delays, and miscommunication. Moreover, establishing the proper expectations and ground rules at the beginning can help ensure a smoother and more effective mediation session. Finally, the mediator should be sensitive to cues which indicate whether the mediator and the interpreter are being understood.

### *E. Anticipating Issues Likely to Arise During an Interpreted Mediation*

An interpreted mediation will involve parties from at least two different cultures. Cross-cultural biases and prejudices may impair the effectiveness of the mediation if the interpreter is not prepared to deal with these issues when they arise. In the United States, an interpreted mediation will likely involve a mediation conducted in English, with an interpreter provided to one party who is a member of a minority group. Mediators should anticipate prejudice and bias against members of minority groups and those who need language accommodations. Similar problems may arise in cross-cultural mediations conducted in other countries. Thus, all mediators should be certain that neither their own biases nor their emotional responses to the biases of others impair their ability to mediate. However, even if mediators endeavor to maintain neutrality, they should anticipate charges of bias. Finally, mediators should also be aware that the need for an interpreter may be challenged during the mediation, but they should not allow the parties to become distracted from the goals of the mediation.

#### 1. Biases by Participants Related to Culture or Language Use

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engage in conversations, will not be addressed by speakers, cannot add, omit or summarize what is being said, and finally, that if the interpreter is altering the communications or is not understandable, then the speaker should inform the official in charge. *Id.*

221. See *supra* note 210 and accompanying text.



The mediator should be attentive to two conflicting inclinations Americans have about the use of foreign languages and immigrants in general.<sup>222</sup> On the one hand, we are proud of our immigrant roots and the diversity of our culture and sympathetic to the difficulties encountered by each wave of immigrants in adjusting to a new country. This is merely a reflection of the part of the American psyche which prides itself on neighborliness and the willingness to help out even strangers in times of need. On the other hand, we are impatient with, and sometimes intolerant of new immigrants because of their differentness.<sup>223</sup> In times of perceived scarcity, the latter "territoriality" instinct may become more pronounced.

Some argue that current anti-immigrant biases and language hostility<sup>224</sup> are different or more pronounced because the bulk of the current immigrants are Asians and Hispanics.<sup>225</sup> However, current anti-immigrant sentiments and biases against the continuing use of foreign languages by people intending to reside permanently or semi-permanently on American soil mirror similar sentiments and movements in the past.<sup>226</sup> A similar bias is reflected in the historical impatience with the deaf for communicating in sign language instead of reading lips.<sup>227</sup>

The mediator should be aware that both of these tendencies may be presented by all the parties in the mediation, including the interpreter, and be prepared to deal with them. The most obvious concern might be that the English-speaking parties

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222. This parallels observations that deeply held negative racial attitudes co-exist with our central support of notions of liberty and equality. See Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1383.

223. Compare Patricia A. Schumacher, *Make English State's Official Language*, WIS. STATE J., Feb. 23, 1996, at 9A (complaining that, unlike the author's ancestors who 150 years before gave up German, learned English, and made no demands on the government to communicate in German, today too many foreigners in the Madison area are not speaking English), with Jesse Garza, *To Some, English Bill Offers Bond; to Others, a Barrier*, MILWAUKEE J. SENTINEL, Feb. 25, 1996, at 1 (indicating that in 1848 the territorial legislature directed the state constitution to be printed in German, Norwegian and English).

224. Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1453, 1461-62 (1995) (citing, in addition to California's Proposition 187, some 103 bills introduced in Congress as of March, 1995 to tighten immigration laws or make English the official national language).

225. See, e.g., Kenneth Freed, *Melting Pot of Perceptions: Hispanics, Whites in Towns Both Clash and Commingle*, OMAHA WORLD HERALD, Feb. 18, 1996, at 1A, (quoting some individuals as saying "what makes a difference is that [the Mexican immigrants] are brown" and "[w]hen the Statute of Liberty faces south, it has a different answer").

226. GONZÁLEZ, *supra* note 2, at 37-42, 558-59 (describing past and present "English-Only" movements); Philip Dine, *Americans See Nation Changing: An Invisible Population (Series)*, ST. LOUIS POST DISPATCH, Dec. 17, 1995, at 5B; Philip Dine, *Immigrants Enter a Volatile Environment: An Invisible Population (Series)*, ST. LOUIS POST DISPATCH, Dec. 17, 1995, at 5B; Stephen H. Legomsky, *A Distorted View of Immigrants*, ST. LOUIS POST DISPATCH, Sept. 23, 1993, at 7B (citing the two "venerable" traditions of admitting immigrants and then "complain[ing] vigorously about whatever immigrant group is most visible at the time"). Also compare Diana Beard-Williams, *We Speak English in L.A. - Don't Apologize: Printing City Notices in Half a Dozen Languages a Waste of Money*, L.A. TIMES, Dec. 1, 1994, at B7 with Thomas Suddes, *Listen Up: You Speak English*, THE PLAIN DEALER, June 29, 1995, at 11B.

227. See Edward Dolnick, *Deafness as Culture*, THE ATL., Sept., 1993, at 37 (describing the history of education for the deaf and the banning of sign language in the late 19th century); Richard Epstein, *Meet the Deaf Halfway: Learn to Sign*, REC. NJ., Nov. 1, 1992, at L6 (describing the controversial Oral Approach under which students were sometimes forbidden to use sign language in school).

with them. The most obvious concern might be that the English-speaking parties will harbor bias against those who need a language interpreter because of their inability to speak English, their status as immigrants, or their inability to lip-read. Biases may also appear in other ways which may not be anticipated and, therefore, are more invidious. For example, the English-speaking party or the mediator may also have similar negative feelings toward the interpreter who is also a member of a minority group.<sup>228</sup>

Additionally, a mediator who expects the interpreter to feel sympathy or protectiveness toward the party requiring interpretation may be surprised to discover that an interpreter may instead feel intolerance, or even prejudice, for the use of a particular dialect. Although the interpreter and the party requiring interpretation speak the same language and come from, what may seem to the mediator to be, the same part of the world, the interpreter and the party requiring interpretation may have negative feelings toward each other because of racial or ethnic origins.<sup>229</sup> It should be no more surprising than recognizing that in parts of the southern United States, some northerners are still unwelcome "Yankees." The mediator should be aware of these potential biases so as to sound out and explore them with the interpreter before the mediation.

On the other hand, interpreters must not become too involved with the persons they are assisting.<sup>230</sup> The interpreter needs to walk a fine line. Thus, selection of the right interpreter for the mediation involves more than considering language and translation competency. The mediator should be sure that the interpreter is capable of maintaining neutrality.

Likewise, the mediator will also need to walk a fine line. The mediator should examine beforehand his or her own feelings about members of the particular minority group and the need for translation. The mediator might feel hostility towards or annoyance at the need for an interpreter. Alternatively, mediators might find their neutrality affected by feelings of sympathy or protectiveness toward parties

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228. See GONZÁLEZ, *supra* note 2, at 212 (suggesting that court interpreters may also be the target of negative bias because of their looks or foreign accents).

229. I have seen both of these tendencies reflected in my prior experiences: Cubans looking down on Puerto Ricans and Mexicans, while Mexicans look down on Puerto Ricans and Cubans, and so on. Texans of Mexican ancestry may look down on newcomers, while old Spanish land-grant families may look down on them both. Many Latin Americans also disagree about which country's language has the closest affinity to the "true Spanish," while Spaniards may not identify themselves as "Hispanic" or members of a minority group. In fact, there is no widespread agreement on an inclusive noun to refer to all who hail from countries influenced by Spanish colonization. Even within the same culture, there may be prejudices based on race or religion. See generally EARL SHORRIS, *LATINOS: A BIOGRAPHY OF THE PEOPLE* (1992). Similar prejudices about nationality and language can be seen among Asians; consider, for example, the hatred the Chinese and Japanese displayed during World War II. Some may even feel deep-seated, ancient enmity towards each other. The Bosnian conflict is perhaps the best example of how deeply cultural, ethnic and religious animosity may run.

230. Eisler, *supra* note 146, at 18 (quoting an interpreter who says they must develop rapport "but still not get too close"). I have heard that interpreters for the deaf may feel that the proper role of an interpreter is to advocate for the deaf person. In researching this article I had an extended discussion on this issue with a sign language interpreter and explored the RID Code of Ethics; the professional limits appear to be the same as those required of foreign language interpreters.

protective feelings for the person needing interpretation assistance. Affinity may be expected among those from a similar background or who speak a common language;<sup>231</sup> however, I have heard similar feelings of protectiveness expressed by American mediators who do not speak the foreign or sign language. This may result from the American tendency to root for the underdog, protect the vulnerable, and try to correct power imbalances. Whatever the source of negative or positive feelings toward the party needing an interpreter, the mediator should anticipate those feelings in order to understand the mediation dynamics. Clearly, a mediator who cannot be impartial because of personal biases must withdraw from the mediation.<sup>232</sup> Similarly, the mediator must not use an interpreter who cannot maintain neutrality.

A more difficult issue is presented when the parties involved in the mediation present obvious or latent biases and prejudices toward each other. How the mediator should respond to these biases needs to be the subject of wider discourse. One advantage of mediation is the education it provides to the parties so that they are better able to resolve their own disputes. If part of the parties' dispute results from biases or prejudices the parties bring to the mediation, is the mediator to leave the parties "as is," or can or should the mediator educate the parties about their own biases? If the parties' biases present power or information imbalances or appear likely to result in an unfair settlement, is there anything the mediator can or should do? These issues raise further questions about mediator neutrality.

Although neutrality is central to mediation, there is no widespread agreement on the meaning of neutrality.<sup>233</sup> Some authorities, particularly in family law cases and environmental disputes, indicate that the mediator should raise questions with the parties as to "fairness, equity and feasibility of proposed options for settlement"<sup>234</sup> or "accept responsibility for ensuring that agreements are fair and indicated for the entire community."<sup>235</sup> Other authorities denounce any involvement by the mediator in questions of fairness, and if the mediator tries to ensure fairness,

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231. See LISNEK, *supra* note 11, at § 2.30. When two strangers discover similarities in background, striking changes occur: conversations become friendlier and more social, turning to personal questions about birthplace and background, just as they do when two people discover they come from the same town or attended the same college. A common language often establishes the same "bond and rapport" attributed to common cultural backgrounds.

232. See KOVACH, *supra* note 31, at 100-101 (indicating that at a minimum, most codes and authorities require the mediator to be impartial - free from prejudice, bias, favoritism, and conflicts of interest; although some authorities emphasize that neutrality and impartiality are entirely different concepts). See, e.g., *Joint Code* (Standards of Conduct supported by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution. Final Draft 04/8/94, not yet approved) reprinted in *id.* at 267, 268 ("A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.").

233. KOVACH, *supra* note 31, at 99-103. Cf. *Joint Code supra* note 232, at 267, 268 (requiring a mediator to "Conduct the Mediation in an Impartial Manner" and indicating that "any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw").

234. KOVACH, *supra* note 31, at 100 (quoting from the FAMILY MEDIATION COUNCIL WESTERN PENNSYLVANIA, *ETHICAL PRINCIPLES AND CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS* (1984)).

235. *Id.* at 101.

then the mediator cannot be neutral.<sup>236</sup> Moreover, concepts of fairness implicate decisions based on values and raise questions about whose values are to be used in measuring fairness.<sup>237</sup>

Some commentators argue that mediation is an inherently defective process for members of a minority group who are in conflict with members of the dominant culture<sup>238</sup> and for women involved in family law disputes because of the existence of bias and prejudice.<sup>239</sup> Mediation is said to disserve the disadvantaged and powerless because it does not provide procedural protections and does not confront the powerful with their prejudice. Some of the strengths of mediation, informality and privacy are viewed as being particularly detrimental for minority disputants. While many of these critiques are highly theoretical, some empirical studies provide support for the position that minorities and women will be disadvantaged by institutionalized bias<sup>240</sup> and are better off resolving their disputes in court.<sup>241</sup> These studies do not take into consideration how interpretation assistance affects outcomes in mediation or adjudication. It is not possible to generalize from these limited studies, but they do suggest that although mediation is generally perceived to be superior to adjudication for most disputants,<sup>242</sup> the same cannot be said for disputes involving minorities. However, rather than abandon mediation for resolving disputes where minorities are involved, some would adapt mediation to provide for a greater level of mediator intervention in order to combat negative cultural myths.<sup>243</sup>

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236. *Id.*

237. *Id.* at 102.

238. See, e.g., Richard Delgado, et al., *supra* note 222. For an exploration of the different goals or theories of mediation and their strengths and weaknesses generally see Beryl Blaustone, *Myth: The Conflicts of Diversity, Justice and Peace in the Theories of Dispute Resolution*, 25 U. TOL. L. REV. 253 (1994). Interpreted mediation is likely to, but will not necessarily, involve members of minority groups in conflict with members of the dominant culture. Disputes may arise between members of different minority groups. See Gunning, *supra* note 20, at 76-77 (describing a mediation between an African-American car repair shop owner and a Korean-American food stand owner about the use of parking spaces).

239. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985). Mediation is particularly problematic for battered women because it "places them in an unrestrained bargaining situation with men who are generally economically dominant and more powerful." Treuthart, *supra* note 19, at 719. Precisely because mediation never informs the batterer that his conduct is wrong, the power imbalance of the relationship will be perpetuated in the parties' agreement.

240. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

241. MICHELLE HERMANN, ET AL., THE METROCOURT PROJECT FINAL REPORT (1993) (reporting that generally, minority claimants consistently received less money and minority respondents consistently paid more than non-minorities and did substantially worse in mediation than in adjudication, but perceived mediation to be fairer and less biased than adjudication, whereas no statistically significant differences in outcome were found among white women except that white female respondents paid less with mediation, but were relatively more satisfied with adjudication).

242. *Id.* at xiv; Gunning, *supra* note 20, at 55.

243. Gunning, *supra* note 20, at 86-93.

## 2. Charges of Bias on the Part of the Mediator

After every interpreter-assisted mediation demonstration I have participated in, some observers or participants have charged the mediator(s) with being biased in favor of the party needing the interpreter. The perception of bias seemed particularly striking in the most recent demonstration because we thought we had neutralized the factors that were contributing to those perceptions. In prior demonstrations, observers had suggested that placing the interpreter and the NES party<sup>244</sup> on one side against a single English-speaking party gave the impression of a numerical advantage. In the last session, the demonstration was structured to provide greater balance. On one side of a square table were an English-speaking couple who were living together. On the other side was an NES single neighbor and a female interpreter. Two mediators, male and female, took turns during the different parts of the session. From a numerical perspective, the mediation triangle seemed well-balanced. Nonetheless, observers voiced fairly strong perceptions that the mediators were biased in favor of the NES party.

Upon further reflection, perceptions of bias may have resulted from several factors, some of which can be attenuated by mediators while others may be inherent in the process of interpreter-assisted mediation. First, the interpreter will be there primarily to assist the NES party. The point can be made, however, that in helping the NES party to communicate effectively and to understand what is being said, everyone is benefitting. However, this may not be perceived to be much of a benefit where the NES party is the claimant.

Second, the positioning of the interpreter may contribute to the perception that the interpreter is "on the side of" the NES party. For this reason, I prefer to seat the interpreter at a corner position between the mediator and the NES party.<sup>245</sup> The corner position gives a visual impression of the interpreter as a tool of the communication process, rather than as an advocate for the NES party. It also puts the interpreter in a good position to observe and hear all the parties in the mediation, while giving the mediator a clear view of the NES party.

A third factor which may contribute to perceptions of bias is where the mediator becomes involved in or expresses judgments about the parties' allegations, especially those having to do with the need for the interpreter.<sup>246</sup> This is a factor which is under the mediator's control.

A fourth factor, which the mediator probably cannot control, is the perception that the interpreter and the NES party are conspiring against the English-speaking party in a language that the English-speaking party cannot understand. A

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244. All of these demonstrations involved foreign language translation. Although the perceptions of bias were persistent, it is not clear whether similar issues would arise in the case of a deaf party needing translation assistance.

245. On the other hand, in one mediation where I took this position, the English speaking party insisted that I be present for his private caucus with the mediator. Thus, positioning the interpreter on the same side as the mediator or in a corner position may contribute to the perception that the interpreter is like a mediator.

246. See discussion *infra* part IV.E.3.

conversation by two people conducted in the presence of a third person who cannot follow it, because it is whispered or in a foreign or sign language, may produce uncomfortable feelings in the excluded person. Perhaps explaining and enforcing as a ground rule that the interpreter is to do nothing more than translate the messages from one language to another may alleviate some of this anxiety. If the interpreter is a professional and the parties are properly instructed not to seek advice from nor engage in conversations with the interpreter, then the danger of perceived conspiratorial behavior should be ameliorated. However, even if the interpreter and the NES party are not elaborating or engaging in side conversations, the mediator should also be attentive to patterns in which the amount of conversation between the interpreter and the NES party disproportionately outweigh the English communications. To avoid this potential danger, the mediator can sensitize the interpreter to explain the need for long exchanges.

Another factor the mediator will have little control over is the actual amount of time spent on communicating with the NES party. Unless the interpreter can use simultaneous interpretation accurately and effectively throughout the mediation, the interpretation process will slow down the progress of the mediation. Information will be given in English and will be repeated for the NES party. Although the amount of time the mediator spends communicating with the NES party may be reduced through simultaneous interpretation, any attempts to deal with potential misunderstandings or miscommunications because of the nature of interpretation will also result in more time being spent communicating with the NES party. Furthermore, whether using the simultaneous or consecutive mode, the mediator should generally add more pauses in order to facilitate the interpretation process. The mediator may also be particularly conscientious about slowing down when addressing the NES party. These factors will lead to more actual time spent in the process of communicating with the NES party, even though the communication is not necessarily more effective.

The mediator can help balance the time expenditure through the use of repetition or elaboration when addressing the English-speaking party. However, the mediator should not communicate less information to the NES party. The use of a professional interpreter who can use simultaneous translation in most instances should help. A good introduction to the interpretation process may also alleviate resentment. The parties should have a good understanding of the basic process of an interpreted mediation and should expect that communicating will take longer than when a language barrier does not exist. The mediator should explain the need for an interpreter as an accommodation for the party with the language barrier which is treated like any other need of the parties, such as the scheduling of the mediation, access to telephones, access to headphones, the use of braille or wheelchair accessibility. The mediator could explain that the English-speaking party would receive similar accommodations if needed. In a mediation using a foreign language interpreter, the mediator can enhance the understanding of the interpreter as an accommodation by comparing the use of an interpreter to the use of headphones, documents in braille, or to a sign language translation. The mediator can also increase sensitivity in a mediation involving sign language by comparing it to

foreign language translation. Most hearing individuals are not aware that ASL is not English. Moreover, if the English-speaking party has had any language training, the mediator can tap into those experiences which usually result in little ability to communicate in the foreign language despite years of classes.

However, even if simultaneous interpretation can be achieved for the entire session and all parties understand the process, the fact that two people are communicating with the NES party and only one person is communicating with the English speaking party may raise perceptions of disparity. While reducing the appearance of bias is important, mediators should not bend over backwards to the point where they bias the process against the NES party. Moreover, if the accommodation itself, the use of a sign language or a foreign language interpreter, is what creates the perception of bias, then there is nothing the mediator can do to eliminate the perception except choose not to mediate. Moving forward with a mediation which is certain to be unfair to a party with a language barrier is not an acceptable solution and, in the case of accommodations for persons with disabilities, may violate the Rehabilitation Act or the ADA. Before the mediation begins, the use of the interpreter must be one of the ground rules of the mediation. Finally, mediators may want to take into account external factors which themselves create significant bias against the NES party.<sup>247</sup>

### 3. Responding to Allegations About the Need for an Interpreter

Related to hostility towards those who do not speak English is a misconception about how easy it is for immigrants to understand and master English.<sup>248</sup> I have heard many allegations, like the one illustrated by the quote at the beginning of this article,<sup>249</sup> demonstrating the belief that English is easy to learn and an interpreter is not necessary if an individual speaks some English.

This accusation may be made in the good faith belief that the party requesting the interpreter does not need one because he or she has been overheard speaking some English. Of course it is plausible, and perhaps probable, that a party who speaks some English, even enough to handle daily interactions, nonetheless needs an interpreter in order to communicate effectively with the mediator because of factors such as the complexity of the dispute, unfamiliarity with the dispute

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247. See discussion *supra* part IV.E.1.

248. English is no easier for immigrants to master than foreign languages are for Americans to master. In Cuba, English was routinely taught in primary and secondary schools. One of my brothers learned English easily and has been able to retain it well. The other was unable to learn English in Cuba, despite extra tutoring; he is still not very fluent even after coming to the United States at age 33 and taking many lessons. Language, like all skills, is easier for the young to learn and is acquired more easily by some than others. See also HEWITT, *supra* note 12, at 166. Moreover, immigrants may hold down multiple jobs and not have the time for formal lessons.

249. See *supra* note 1 and accompanying text.

resolution process or the stress inherent in the situation.<sup>250</sup> Similarly, a person who is only partially deaf, perhaps unable to hear certain pitches or voice ranges, may still need a sign language interpreter. People with limited language skills may do quite well in ordinary conversations even though they do not fully understand what has been said. They can tell when the speaker is telling a joke which calls for laughter or a story which requires the occasional nodding of their heads, even when they do not understand the punch line or the plot. In daily commerce, it may not be very crucial that they understand only half the story, but in a mediation or other legal setting, understanding half of the story may be worse than none.

However, most people have never experienced the difficulty of trying to communicate in a setting where they cannot understand fully what is being said and where the ability to convey or understand information matters. Thus, people often overestimate the ability to communicate when they perceive that another individual speaks or understands some English. This may lead, as it did in the mediation demonstration from which the introductory quote has been taken, to allegations that the deaf or foreign language using party is lying about the need for an interpreter, followed by denials, and then charges of manipulation. How the mediator handles this situation can affect the parties' ability to communicate and come to an agreement. The truth cannot be easily and objectively determined. However, this exchange of allegations and denials about one party's need for an interpreter is no different from any of the other "did not/did too" type of allegation that may arise during the mediation process. Thus, it should be treated the same way by the mediator. The mediator should not be drawn into the parties' disagreement about the need for an interpreter.

In fact, to reduce or avoid the possibility that the mediator will be presented with this problem, even before getting to the underlying problem which the parties brought to the mediation, the mediator should address the need for, and use of, the interpreter during the introduction.<sup>251</sup> The fact that an interpreter will be used should be one of the subjects of the parties' agreement or ground rules for the mediation. Even if the allegation is not expressly raised, it may nonetheless be on the minds of the English speaking parties. Thus addressing the need for an interpreter at the outset may help deflect feelings which would have interfered with the negotiations.

If the need for an interpreter is nevertheless challenged during the mediation, the mediator should avoid becoming involved in the merits of the issue and explain

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250. See Lindie, *supra* note 76, at 407-08 (noting that an individual may be able to live in an English-speaking community and hold down a job which requires communication in English yet still have difficulty keeping up with the pace and difficulty of legal proceedings). See also Treuthart, *supra* note 19, at 753 (indicating that even an individual "with an everyday working knowledge of English . . . may not have the capacity to grasp the meaning of terms that may be pertinent to the resolution of the case").

251. My analysis that this series of allegations and denials was a distraction from the goal of the mediation and should be treated like any other allegation raised during a mediation was sparked by Suzanne Schmitz' comment following this mediation demonstration. Professor Schmitz observed that by arguing about the need for an interpreter, the parties had presented a problem before discussing the *presenting problem* - the problem the parties intended to bring before the mediator.



that in the mediation no one will be judging the veracity of the parties. By supporting the allegation or the denial, the mediator will be deviating from a neutral stance. If it is the alleging party's turn to speak, then the mediator should let that party speak. If it is not, then the mediator should try to make it clear to that party that they will soon have an opportunity to speak and that they can talk about that allegation and any others later. The mediator may also want to reinforce the ground rules under which the mediation is being conducted, including the use of the interpreter.

At some point, the mediator may wish to validate the feelings of either or both parties but should display neither belief nor disbelief about the allegation. As with any allegation, the mediator can say something along the lines of: "I understood you to have said X and I understand you feel this way based on Y & Z." The mediator can try to note the plausibility of the need for an interpreter, although after doing this, our student mediator became involved in the debate on the merits. Thus, the mediator must be careful when trying to serve as a reality check. Nonetheless, the mediator cannot assume, nor give the appearance of assuming, that one side is right and the other side is wrong. Otherwise, the mediator may be viewed as having accepted one party's allegation as true, and this may contribute to other perceptions of bias.<sup>252</sup>

In the end, the mediator may be unable to eliminate all perceptions of bias from the mediation process. Cultural and language biases may present a significant obstacle to the mediator's ability to focus the parties on the underlying issues and interests. If bias or hostility present a barrier to effective communication, then the goals of the mediation cannot be achieved and the mediation should be terminated. A more difficult issue arises when bias and hostility do not impair the parties' ability to communicate, but do affect the amount of information available to one of the parties, the balance of negotiating power, or the fairness of the negotiations. Ultimately, the mediator must determine whether the parties can negotiate in good faith and whether the mediator will be a party to an agreement that is not fair to all sides.

## V. CONCLUSION

With the need for interpreted mediation increasing, mediators must understand that interpretation is a complex process that requires special cognitive skills and training which most bilingual individuals do not have. Moreover, mediators must understand the interpretation process and, in consultation with the interpreter, select the mode of interpretation which will maximize communication effectiveness and efficiency.

When an interpreter is the medium of the message, the mediator must ensure that the interpreter can effectively communicate that message. Mediators who

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252. See discussion *supra* part IV.E.2.

provide ad hoc interpreters to hearing impaired individuals may run afoul of the ADA and the Rehabilitation Act. Even if a mediator is not required by law to provide an interpreter, the primary goal of mediation—communication—mandates the use of an interpreter when the parties would otherwise be unable to communicate. Ad hoc interpreters, particularly interested parties, friends, and family of the hearing impaired or the person who does not speak English are not likely to possess the requisite skills, impartiality, and ability to keep confidences. Additionally, bilingual mediators should not serve as interpreters while they are mediating a dispute because the mediator's ability to mediate would be impaired. Only a professional interpreter will be able to deliver the message accurately, rapidly, and impartially.

Unfortunately, there are not enough qualified interpreters available for courts and mediators. Thus, courts and mediators should work together to enhance the pool of available legal interpreters. This article identifies potential resources for locating interpreters. Locating a qualified interpreter provides a challenging administrative task, but the situation is improving. In the meantime, mediators will need to locate the best interpreters available under the circumstances. However, this should not translate into shoddy services for those who are less well off.

In preparing for the mediation, the mediator must consider how the interpretation will affect mediation dynamics. Logistics must be worked out ahead of time. These include the actual ability of the interpreter and of the party needing interpretation to communicate, an understanding between the mediator and the interpreter on how to conduct the mediation, and seating arrangements for the parties which maximize communication but minimize obstacles to settlement, like perceptions of bias. The mediator must also determine what to tell the parties about the interpreter's effect on the confidentiality of the mediation. Although it is not clear that confidences revealed during mediation are generally privileged, it is likely that the presence of an impartial interpreter will not affect the privilege status of the mediation. However, any potential privilege may be waived if the interpreter is not impartial, so that either party to the mediation does not have an expectation of confidentiality. In addition to using an impartial interpreter, a confidentiality agreement may be particularly desirable in an interpreted mediation in order to establish an expectation of confidentiality which might be enforceable. Moreover, the mediator should include the use of an interpreter in the confidentiality agreement, and the interpreter should be a party to the agreement in order to increase the likelihood that confidences will be maintained.

Interpreted mediations are likely to involve cross-cultural communication. Facilitating communication in cross-cultural settings provides additional challenges. Mediators involved in cross-cultural mediations should use clear, simple language and be careful with their choice of body language. They should anticipate that the body language of individuals from other cultures will not convey the meanings which mediators may expect. Moreover, they should be sensitive to cues which indicate a breakdown in the communication process resulting from the use of an interpreter.

Cross-cultural mediations also require the mediator to be sensitive to the presence of bias during the mediation. Mediators must be concerned not only with

their own biases, but with biases held by the interpreter and the other parties to the mediation. Mediators must be concerned with actual biases as well as with perceptions of bias. Some solutions for alleviating bias have been presented, but more feedback is needed from those involved in interpreted and cross-cultural mediation.

Finally, in preparing for the mediation the mediator should carefully consider what to say during the introduction. A carefully considered introduction could do much to obviate potential misunderstandings about the role of the interpreter, the need for the interpreter, and potential perceptions of bias by the mediator. If the parties understand the role of the interpreter and accept the need for the interpreter as part of the ground rules, then the mediator will have eliminated several obstacles to a successful mediation. The mediator, however, must still tread carefully during the mediation to avoid becoming embroiled in the parties' dispute by being forced to justify the mediator's acceptance of the need for an interpreter.

A discourse has already begun about the appropriateness of using mediation to resolve disputes between members of minority groups and members of the dominant culture. To some, mediation is dangerous for minorities because, unlike the courts, the informal process and private nature of conflict resolution in mediation provides no procedural or substantive protection to the powerless. It is like sending an unarmed person into the lions' den with a referee who is willing to let the parties settle their conflict with no holds barred. For others, mediation presents great opportunities for better understanding and more satisfactory results, which will benefit both the conflicting parties and the community. However, to achieve these results mediators must take greater responsibility for the outcome by being willing to take a more active role in enhancing communication, correcting power imbalances, and identifying shared values. There is as yet no consensus on what the mediator should do in these situations.

The discourse on the use of mediation in cross-cultural settings needs to be expanded. Hopefully, this article will begin a dialogue about the need for and effectiveness of interpreters in mediation. The author also invites mediation theorists and practitioners to address ways in which culture and language biases may be overcome in mediation. This article has made some suggestions, but their effectiveness needs to be tested and the results shared. Only when those practicing and conducting research in the area of interpreted or cross-cultural mediation systematically share their experiences will mediators, lawyers, courts and legislators be better able to judge the effectiveness of mediation and its appropriateness to cross-cultural settings.

Although the article focuses primarily on one alternative dispute resolution technique, mediation, many of the issues raised also apply to other forms of dispute resolution. As the ADR process chosen moves from mediative, to evaluative, or to adjudicative, the interpreter's function and qualifications should more closely resemble those required for court room interpretation.

When the ADR process is intended to be evaluative,<sup>253</sup> the use of interpretation should resemble, as closely as possible, the conditions which would be obtained during a trial, although a transcript of the proceedings may not be necessary. In fact, a tool like the summary jury trial may be a good way for the parties to examine how the interpretation affects the merits of the case.

For those dispute resolution techniques which fall more into the adjudicative mode, a greater degree of accuracy and verisimilitude will be required from the interpreter because life, liberty or property are directly at stake, as they are with criminal and civil litigation. When the ADR process is adjudicative, as in arbitration, and the veracity and credibility of witnesses or the need to maintain a record for possible appeals are at issue, greater adherence to the recommendations for courtroom interpretation should be followed. For example, separate interpreters may be required for a witness who is testifying in a sign or foreign language and for a party who must at the same time communicate with English-speaking counsel in that same language. The second interpreter may also help counsel oversee the correctness of the official interpretation and make timely objections; otherwise, a tape recording of the testimony and interpretation may be the only way to capture a misinterpretation of a witness's testimony for the record.<sup>254</sup> Moreover, courts may be more willing to enforce interpreter requirements in the labor law setting where ADR processes are more highly regulated.<sup>255</sup>

The comments in this article are directed at mediators involved in private mediation who make most of their own preliminary arrangements. In court-affiliated mediation or other settings with volunteer mediators, courts and court administrators are likely to make most of the arrangements for the mediation; however, the same issues and problems will arise. Since most of the steps that can ensure effective communication during an interpreted mediation must be completed before the mediation, it is the courts and court administrators who must set up the proper framework. Mediators must make the courts and court administrators aware of the need to find and train qualified interpreters for use in mediation. Mediators must also have thought through the process of interpreted mediation and have gained an understanding of the complexities of interpreted mediation ahead of time. The mediator should still ensure that the interpreter understands the role of a mediation interpreter and is qualified and able to interpret for the parties.

The issues raised in this article and the suggestions made will also assist attorney-advocates whose clients are referred to a mediation setting likely to require interpretation or who are contemplating the use of interpreted mediation. An understanding of the interpretation process and how it impacts upon mediation dynamics will assist the attorney in making recommendations about the use of

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253. Kovach, *supra* note 31, at 8-11.

254. Lindie, *supra* note 76, at 417.

255. *Zamora v. Local 11, Hotel Employees and Restaurant Employees Intl. Union*, 817 F.2d 566 (9th Cir. 1987) (holding that under the Labor-Management Reporting and Disclosure Act's requirement of equal participation, a union in which 48% of its members understood only Spanish was required to provide Spanish-English interpreter at monthly membership meetings).

mediation. Communication in cross-cultural settings is a complex process. Mediation may be useless or detrimental to the client if the medium of the message, the interpreter, is not able to accurately transmit the client's message.