

Improving Access to Private Mediation for Limited English Proficient Persons

By Hon. Stephanie H. Klein (Ret.)

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In the past U.S. election and in recent European elections, immigration has proven a key issue of contention. Putting aside politics, we must deal with the reality that this wave of immigration has diversified America and created a population of persons who have limited English proficiency (“LEP”). In the Philadelphia metropolitan area alone, in 2015, the U.S. Census reports that 146 languages are spoken in the Philadelphia metropolitan area. Census Bureau Reports at Least 350 Languages Spoken in U.S. Homes, Press Release CB 15-185, <http://www.census.gov/newsroom/press-releases/2015/cb15-185.html> (November 3, 2015).

Resolving disputes when people fail to understand the same language poses a tremendous challenge for private mediators. To serve this population and divert their cases from litigation to mediation, mediators must comprehend their barriers to participation and devise methods to surmount them.

In 2003, the Pennsylvania Supreme Court’s Committee on Racial and Gender Bias in the Justice system addressed these issues for judges and stated:

"Due process is a core value of the American judicial system, ensuring that every litigant and criminal defendant receives a fair hearing that is based on the merits of his or her case and presided over by an impartial judge. No one should be put at a disadvantage in court by reason of race, ethnicity, or gender. The basic fairness of the Pennsylvania court system is jeopardized if litigants with limited English proficiency (LEP) are unable to have access to competent interpreters and other language assistance."

Final Report of the Pennsylvania Supreme Court, Committee on Racial and Gender Bias in the Justice System, *p.18* available at

<http://www.pa-interbranchcommission.com/pdfs/FinalReport.pdf> (March 2003). ("Supreme Court Report").

As a result of this report and Act 172 of 2006 enacted by the state legislature, in 2010 the Pennsylvania Supreme Court promulgated comprehensive guidelines regarding interpretation in all court proceedings. Administrative Regulations Governing Court Interpretation for Persons with Limited English Proficiency and for Persons who are Deaf or Hard of Hearing, <http://www.pacourts.us/assets/files/setting-2936/file-231.pdf?cb=983fe1> (May 1, 2010)("Administrative Regulations") and Guidelines for Procurement and Appointment of Interpreters, <http://www.pacourts.us/assets/files/setting-1700/file-229.pdf?cb=942e36> ("Interpreter Guidelines")(last visited January 1, 2017).

These rules guide judges, state and county court administrators about all aspects of interpretation for court proceedings. They further establish the means for certification of interpreters, various levels of qualification, testing, courses for aspiring interpreters, continuing education requirements, and an ethical code of conduct for interpreters.

The rules for Pennsylvania judges are clear, but what should private mediators do when faced with a party who lacks English proficiency? I faced this problem recently when I was surprised to learn, only two days before the mediation, that one of the parties lacked any English. She was working with a business associate, who was going to help her at the mediation and offered to translate. What were my ethical obligations and was it sufficient for her business associate to translate for her?

Private mediators in Pennsylvania lack statewide guidance on standards of conduct, except for 42 Pa. C.S. 5949, which requires mediator confidentiality absent narrow exceptions.

On the other hand, if the mediation were conducted at a federal agency or a state agency that receives federal assistance or funding, Title VI of the Federal Civil Rights Act would require the agency to ensure that LEP person had “meaningful access to its activities”. See e.g.

<https://www.lep.gov/faqs/faqs.html#OneQ7> (last visited January 1, 2017).

In the absence of state rule or statute, I found several provisions pertinent to dealing with LEP parties in the Model Standards of Conduct for Mediators, adopted by the Association for Conflict Resolution, the American Bar Association, and the American Arbitration Association. http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf (last visited January 1, 2017) (“Model Standards”)

Standard I requires the mediator to conduct a mediation based on the principle of party self-determination, which is defined as “the act of coming to a voluntary, uncoerced decision in each which party makes free and informed choices as to process and outcome.” Self-determination would seem to allow a party to decide whether to retain a trained interpreter or use a person of her own choosing.

However, “self-determination “is limited by Standard VI, which places the onus on the mediator for the “quality of the process.” Specifically a mediator must ...” conduct a mediation ... in a manner that promotes...**party participation, procedural fairness, party competency and mutual respect among all participants.**” (Emphasis added). Standard VI. A. Further, “[i]f a **party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination.**” Standard VI. A.10. (Emphasis added). Thus, notwithstanding a party’s wishes, the mediator must ensure that lack of English proficiency does not negate the party’s ability to comprehend and fully participate in the process.

The Standard VI requirement of “procedural fairness “also requires that the interpreter be neutral. The Supreme Court Rules of Professional Conduct for Judiciary Interpreters contained in the Interpreter Guidelines above prohibit friends or relatives, anyone with any interest in the proceedings, or any professional, like a police officer, social worker or attorney

involved in the case to serve as interpreter. Administration Regulations, Schedule F, Rule 3 at pp. 39-40. Using a “fair and unbiased” interpreter as provided in the Interpreter Guidelines would comply with the Model Standards requirements of “procedural fairness” for an LEP party and ensure “quality of process.”

Without an impartial professional interpreter, we cannot fulfill our obligation as mediators. The LEP party would not be able to exercise meaningful self-determination, adequately communicate and negotiate without disadvantage. Such a proceeding would be inimical to the very essence of mediation, and a mediator would be hard pressed to proceed.

What kind of interpretation is necessary? As stated above, it is crucial to have a skilled interpreter trained in simultaneous interpretation. As the March 2003 Gender and Bias in the Judicial System report states:

...[i]naccurate renditions of testimony threaten the integrity of the proceeding. In this regard, many observers do not understand that poorly interpreted witness testimony is similar to hearsay testimony. Professional interpreters adhere to the standard of consecutive interpreting: add nothing, change nothing, omit nothing. Untrained interpreters, on the other hand, tend to summarize questions and answers, respond for the witness, and gloss over nuances in language that may be critical to the evidence. Interpreters may also make simple errors in phrasing or word choice because of an inadequate command of one or both languages. When the factfinders, in turn, misunderstand the interpreters, a second layer of distortion can occur. On another level, an interpreter’s skill and appearance may influence subtle credibility determinations made by the factfinder. Intonation, hesitation, emotion, eye contact, and deference may all contribute to the appearance of honesty or deceit. Supreme Court Report, page 41.

Understanding precisely what a party says and discerning layers of meaning behind her statements are critical to effective mediation. Without a complete understanding of what a party tries to communicate, the mediator cannot gain the trust of each party, discern their interests, isolate common interests and help the parties to find a solution to meet all of those interests.

How would you find a trained interpreter? The Administrative Office for Pennsylvania Courts website maintains a roster of interpreters of many different languages ranging from French and Spanish, to Dari and Albanian. <http://www.pacourts.us/assets/files/setting-3046/file-2488.pdf?cb=a82b24> (last visited January 1, 2017). It states the interpreters’ level of

expertise, which is also defined on the website. Contact information, include address, email and phone are included as well as hourly fees. Every county court has a language access coordinator and their contact information is also listed on the website. The administrative and interpreter guidelines offer a wealth of practice guidance and reading them is highly recommended.

My mediation with the non-English speaking party ended well. Having a trained interpreter helped put the LEP party at ease. The mediation was long but fruitful- we reached a settlement. Most important, the non-English speaking party was able to fully participate in the process and to negotiate competently. Both parties seemed satisfied.

Immigration and the resultant language diversity offer a challenge but also an opportunity for mediators. For mediation to remain a viable alternative to litigation, mediators must inform themselves about language barriers for limited English proficient speakers and the resources to remove those barriers. If we fail to do so, we will deny an entire population the possibility of avoiding expensive litigation and access to the promise of finding their own resolution to their disputes through private mediation.

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