



National Association of Judiciary Interpreters & Translators  
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September 27, 2022

Lynda C. Shely, Chair  
Standing Committee on Ethics and Professional Responsibility  
American Bar Association  
321 North Clark Street  
Chicago, Illinois 60657

Re: Formal Opinion 500, Language Access in the Client-Lawyer Relationship

Dear Chair Shely:

Thank you for your letter of December 1, 2021, in which you replied to a letter from NAJIT's Board of Directors dated October 26, 2021. We appreciate the information you provided and the time you took to write. Shortly after receiving your reply, we submitted all pertinent correspondence on Formal Opinion 500 to NAJIT's Advocacy Committee for further review. After their careful consideration and analysis, we believe that feedback of a different nature might be a helpful complement to the NAJIT Board's letter. Accordingly, we hope the Standing Committee on Ethics and Professional Responsibility will examine the attached analysis and ultimately strengthen your important opinion.

The enclosed Analysis and Recommendations does two things. First, it takes a deeper look at the two main impressions that the opinion gives attorneys: that interpreters should engage in explaining information to clients and that it's relatively easy to identify persons who can provide competent interpreting or translating services. Second, we offer suggestions on how the opinion could be edited so that it's easier for you to deliberate on the merits of our recommendations and to implement the ones with which you concur.

In addition, please find enclosed a list of links to the resources referenced but not cited in this document. We have also included a bibliography that provides additional references on delivering services through interpreters.

We are grateful for the opportunity to contribute to ameliorating the delivery of legal services to limited-English-proficient clients. Please count on us to be available for any consultation and dialog you believe might be instrumental in advancing the practice of law in areas involving language access.

Sincerely,  
The NAJIT Board of Directors

cc: Javier Castillo, Chair  
Hilda Zavala-Shymanik, Vice-Chair  
Hsiu-Li (Laura) McGilvra, Secretary  
Francesca Samuel, Treasurer  
Anahit Flanagan, PhD, Director

Enclosures:

- Analysis and Recommendations of Two Impressions Given by Formal Opinion 500
- Links to cited materials
- Bibliography regarding delivering services via interpreters

ANALYSIS AND RECOMMENDATIONS OF  
TWO IMPRESSIONS GIVEN BY FORMAL OPINION 500

***I: Re Use of “Explain” in Opinion 500***

We fully agree that it is the lawyer’s ethical duty to be responsible for ensuring effective communication, which sometimes includes an obligation for the lawyer to explain certain concepts. Most instances where a form of “explain” appears in the opinion are clearly appropriate and unproblematic.

However, a close reading of Formal Opinion 500 reveals a lack of precision when using various forms of “explain”: “explaining” (pp. 1, 9, and 10), “to explain” (two instances on p. 4 and one on p. 6), and “explanations” (p. 4). In most instances the meaning is perfectly clear, and we join your committee in affirming that it is the lawyer and the client who are the principals of the communication process taking place between them. The lawyer is described throughout the opinion as being responsible for ensuring that communication between the two agents succeeds and, when necessary to accomplish that goal, to explain whatever needs to be conveyed to the client to ensure the client’s understanding.

We believe that an unintended problem arises from three infelicitous usages of the same word when referring to what an interpreter must be able to do, viz:

- “...accurately explaining the legal concepts involved...” (pp. 1 and 10); and
- “...able to explain the law and legal concepts...” (p. 6).

This is not just subtle semantic quibbling. As written, the opinion implies that an interpreter sometimes becomes an additional primary interlocutor in attorney-client communications, contributing their own substantive input instead of merely interpreting. The interpreter would then be deciding what is important to convey, not the attorney. As presently written, the responsibility for explaining information is shifted from the attorney to the interpreter. We suspect this may be unintended by the authors of the opinion.

In short, using any form of “explain” to describe the professional duties of interpreters is a red flag that has been wrestled with not only by our association but also the nation’s courts.

***Recommendations***

We respectfully propose that the Standing Committee revise Formal Opinion 500 as follows:

- In the two instances where “...accurately explaining the legal concepts involved...” (pp. 1 and 10) appears, substitute “interpreting” for “explaining”; and
- In the one instance where “...able to explain the law and legal concepts...” (p. 6) appears, substitute “interpret” for “explain.”

***II: Re §II.B. Qualifications of a Person Providing  
Translation or Interpretive Services***

The nation's federal and state judiciaries have learned that there is only one way to determine which persons are competent to perform the duties of court interpretation. While we would not claim that the duties as well as the knowledge, skills, and abilities of an interpreter serving in a court proceeding are identical to those of an interpreter serving in the attorney-client context, there are enough similarities to suggest that attorneys would be well served by the lessons learned by the nation's courts.

When the Administrative Office of the United States Courts (AOUSC) implemented The Court Interpreters Act of 1978, it addressed the Act's requirement that the Director of the AOUSC "...prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters in courts of the United States..." The resulting certification program resulted in a failure rate over the first 18 years of 95%. Shortly after the first administration of that exam, the manager of the program at the AOUSC that produced the exam wrote, "We quite frankly had no idea that so many of the interpreters used on a regular basis were as incompetent as they were discovered to be through our certification process."

State courts began implementing similar certification examinations in the ensuing years with similar results. Only one state judiciary publishes outcomes of its court interpreter and legal translator testing program (<https://www.njcourts.gov/public/teststats.html>), but there is little doubt that the results around the country are not significantly different. In any case, the two streams of court interpreter certification testing reveal that the vast majority of people who believe they possess the knowledge, skills, and abilities (KSAs) to perform the duties of court interpretation in fact do not possess those KSAs.

### ***Recommendations***

We respectfully recommend that the Standing Committee:

1. Add something like the following after the end of the first sentence of the second full paragraph on p. 7: "The two best ways of locating professionals with verified credentials are (1) relying on registries of certified court interpreters issued by state and federal judiciaries and (2) persons certified by the American Translators Association (with the understanding that this is a generic certification, not a certification specifically for legal translation). Another solution for spoken languages is to use telephone or video remote interpreting services from a reputable service provider that has access to and uses certified court interpreters and, where none are available, professionally screened and trained interpreters. The parallel for signed languages is to use Video Remote Interpreting for Deaf persons from a reputable service provider that uses certified sign language interpreters."
2. Make a new paragraph starting with "Depending on the circumstances, alternative arrangements may suffice." Then insert the following: "Using any other interpreters or translators is not recommended as the slippery slope to gross miscommunication and bias is a very short and steep one. For example, a lawyer may look to a bilingual lawyer or nonlawyer staff member within the firm to facilitate communication with a client when the subject matter is not sensitive or replete with legal discourse. In rare instances, a client's friend or a family member may function as a viable interpreter or translator, again when the conversation is not sensitive or technical. In no instance should a minor be asked to provide interpreting or translating services. Particular care must be taken when

using a client's relatives or friends because of the substantial risk that an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation or be so desirous of helping that one begins to answer for the client or insert what that person believes would be helpful to the client. In such situations, a lawyer must exercise extreme diligence to guard against the risk that the lay interpreter is distorting or altering communications, or inserting their own contributions, in a way that skews the information provided to the lawyer or the advice given to the client. Lacking accountability to the lawyer or firm derived from an employment or other contractual relationship, relatives and friends of the client may also contribute to making the lay interpreter less reliable in providing interpretation or translation services when needed.”



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## RESOURCES FOR ATTORNEYS AND OTHERS ON HOW TO DELIVER SERVICES THROUGH INTERPRETERS

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Compiled by Robert Joe Lee

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## LINKS TO SOURCES CITED AND SUGGESTED RESOURCES

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Washington Administrative Office of the Courts, “GR 11.2, Code of Professional Responsibility for Judiciary Interpreters,” <https://www.courts.wa.gov/content/publicUpload/Interpreters/StandardsofPracticeandEthics-Online.pdf>