

Traps for bilingual solicitors: Working with culturally and linguistically diverse clients

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According to 2016 ABS census data, more than 25 per cent of households in New South Wales speak a language other than English at home. In Greater Sydney, the proportion is more than 35 per cent. It is not surprising that, where available, people who are not fluent in English will seek out a bilingual solicitor. Indeed, for many years the Law Society has been collecting and disseminating information on the languages spoken in legal practices to assist culturally and linguistically diverse ('CALD') members of the public to find bilingual solicitors.

Recently, there has been a number of reported decisions that have highlighted the dangers of solicitors acting as translators of important documents. These cases underscore the need to exercise judgment about the circumstances in which a properly qualified and independent translator/interpreter should be engaged.

Circumstances requiring particular care

Issues of dialect

One situation where particular care needs to be taken is where the client or witness speaks a dialect in which the solicitor is not fluent. In *Re Theodoulou* [2018] VSC 601, a Cypriot Greek testator had signed a will which was written in English and translated into modern Greek by his bilingual solicitor. McMillan J held that the translation of a will into a language in which the testator was not fluent, or which was not his native dialect, supports a *prima facie* case that the deceased did not know and approve of the will.

Affidavit evidence

Where affidavit evidence is being prepared, a qualified interpreter should be engaged, even if there is no difficulty in communication between the witness and the solicitor. In *Rocco Condello v Sung Soo Kim* [2018] NSWSC 394, an interpreter fluent both in standard Italian and the Calabrese dialect was required for one of the witness' evidence. It became apparent during evidence that the witness' affidavit had been taken in the Italian language and translated by the plaintiff's solicitor without the assistance of an interpreter, and that it had not been read back to her in English but rather 'more in Italian' before it was sworn.

Kunc J warned that this approach, while convenient, is not proper practice. He pointed out that:

Snapshot

- While it is not surprising that people who are not fluent in English seek out bilingual solicitors, practitioners should be aware of the risks of acting as translator or interpreter.
- Recent cases emphasise the importance of assessing when a qualified and independent translator or interpreter should be engaged.

- (i) being bilingual does not make someone qualified to interpret;
- (ii) even where a solicitor speaks the witness' language, an independent and qualified interpreter must be retained to translate any affidavit evidence given in a foreign language into the English language. An affidavit must then be obtained from the interpreter verifying the fact of translation and that the English version was translated back to the witness before the affidavit was sworn or affirmed.

In *Rogic v Samaan* [2018] NSWSC 1464, the evidence of the plaintiff and his friend was given through a Serbian interpreter, but their affidavits had been interpreted into English by the plaintiff's bilingual solicitor. Again, Kunc J stated that bilingual solicitors should not interpret their client's affidavits into English but should retain a qualified interpreter to do so. He observed that interpreting and translating are highly skilled occupations, and professional interpreters adhere to a professional code of ethics which emphasises the importance of professional competence, accuracy and independence. Furthermore, even a solicitor who is also a professional interpreter should not act as an interpreter in her or his own cases. Difficulties may arise if the accuracy of the interpretation is questioned, raising the possibility of the solicitor having to give evidence which may create a conflict of interest. Allegations of unconscious or even conscious bias could also be raised.

Additional tips for practitioners

Kunc J refers practitioners to the Judicial Council on Cultural Diversity's 'Recommended National Standards for Working with Interpreters in Courts and Tribunals' (see jccd.org.au/wp-content/uploads/2018/02/JCCD-Interpreter-Standards.pdf).

Where an interpreter is needed to facilitate a party's participation in a hearing, practitioners should be aware that the Courts will generally expect that party's solicitor to arrange the interpreter. In *Zhou & Zong* [2018] FCCA 3393 a hearing was unable to proceed because the solicitor for the applicant had failed to arrange an interpreter, and costs thrown away were awarded against the applicant's solicitor personally. **LSJ**