

LANGUAGE ACCESS IN PRIVATE MEDIATION*

INTRODUCTION

The Georgia Commission on Interpreters adheres to the credo, “The essence of due process is the opportunity to be heard.”¹ From my experience, lawyers, judges, and court administrators generally attempt to honor this credo for people with limited English proficiency who appear in the courtroom, though we sometimes fall short. What happens when a person with limited English proficiency participates in ADR – specifically private mediation?²

The opportunity to be heard and, specifically, the right to self-determination is essential to the mediation process. The Georgia Supreme Court Alternative Dispute Resolution Rules and Appendices (“ADR Rules”) are silent on specific language access requirements, recommendations, or guidelines in mediation,³ but the Ethical Standards for Neutrals within the ADR Rules identifies the mediator “as guardian of the overall fairness of the process” and stresses the mediators promise to “protect the self-determination of the parties.”⁴ In pertinent part, in order for parties to exercise self-determination they must (a) understand the mediation process and be willing participants; (b) have the capacity to participate in the mediation conference. “Self-determination includes the ability to bargain for oneself alone or with the assistance of an

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¹ See <http://coi.georgiacourts.gov/> (last accessed October 15, 2018).

² This paper specifically addresses private mediation. Mediation conducted through a federal agency or state agency receiving federal assistance or funding would require adherence to Title VI of the Federal Civil Rights Act, requiring the agency to provide “meaningful access” to any participant with limited English proficiency. Arguably, this same access is required in all court-connected mediations, even if accomplished through a private mediator. But the distinctions between court-ordered, court-connected, and purely private mediations are a topic for another paper, and my experience in court-connected mediation with a private mediator is that it is often treated much like a private mediation with respect to method and manner of providing language access to parties with limited English proficiency.

³ See generally Ga. Supreme Ct. ADR Rules (May 28, 2014).

⁴ Ga. Supreme Ct. ADR Rules, Appendix C, Chapter 1: Ethical Standards for Neutrals.

attorney;” and (c) have sufficient information to craft the agreement and to understand the agreement.⁵

THREE OBSERVATIONS/THOUGHTS/RECOMMENDATIONS

From my experience as a bilingual attorney representing clients with limited English proficiency in private mediation and as a registered mediator with the Georgia Office of Dispute Resolution, here are 3 of my own observations/thoughts/recommendations on adhering to these ethical standards and affording participants with limited English proficiency a true opportunity to exercise self-determination, and to be heard, in private mediation:

(1) Use an interpreter (neutral and in-person, if possible);

From my experience, parties and neutrals are relying on family members (often times children), attorneys, and/or law firm staff members to serve as sole or primary interpreters in private mediation, reasoning that part of self-determination is allowing the participant to choose their own interpreter. It's unclear how often these informal interpreters are actually chosen by the party for mediation, and what, if any, information is presented to the participant in choosing an informal, non-neutral interpreter. In my experience, these individuals may be helpful as a backstop to ensure nothing is being lost between the party, interpreter, and mediator (a role sometimes referred to as a “support interpreter” to the proceedings interpreter), but these individuals may inadvertently insert their own bias into the process and/or may not be sophisticated/well-versed in the terms used by the mediator in the other language (even if fluent). If a family member, attorney, or law firm staff member is used, the mediator should be particularly attuned to any hindrance to full participation by the party with limited English proficiency and be willing to end the mediation, if necessary.

⁵ *Id.*

In-person interpretation is just always better. I have been in situations where telephone interpreters are used and generally find that much of what is being communicated gets lost. I have also heard of situations (investigations, not mediations) where google translate or an equivalent app was being used to interpret. These are nice tools to have, but they should not be relied upon as part of the mediation process without some other safeguard to ensure that the party understands the process, is a willing participant in the process, and has sufficient information to bargain and understand any agreement.

(2) Be mindful of obstacles to understanding even when using an interpreter;

Using an interpreter is not a guarantee of understanding or effective communication. There are linguistic, cultural, educational, socio-economic, etc. obstacles to understanding (e.g., an interpreter from Chile will speak Spanish differently than a party from Ecuador, and the differences are not always minor). When using even a certified interpreter, I routinely catch misunderstandings or errant interpretations. It is ideal to have a back-up/support interpreter to the proceedings interpreter to help catch any issues. But this is not always practical. The mediators and attorneys (if attorneys are involved) need to be particularly attune to any apparent lack of understanding between the mediator and party and repeat or reiterate if it appears necessary to make certain the party actually understands the process and has the understanding necessary to participate in the process.

(3) Beware of losing a limited English proficiency participant in the process;

When there is an attorney present and/or an interpreter present, it becomes natural for the mediator to focus their conversation towards the attorney and/or interpreter. This is a sure-fire way for the mediator to lose rapport with the party; the party will likely feel like they are being negotiated around and not like they are actively engaged in the process. Extra care should be paid to make certain that the mediator addresses the limited English proficient party directly.

If a party gets lost in the process or feels lost in the process, they are no longer a willing participant.

CONCLUSION

While there is no clear guidance in the ADR Rules specifically with respect to language access in the mediation process, the Ethical Standards for Neutrals stress the mediator's promise to ensure the self-determination of the parties in the process. While self-determination arguably may include the right to choose an unsophisticated and/or biased interpreter or no interpreter at all, the mediator is the "guardian of the fairness of the process." Even if the mediator cannot communicate directly with the party in their language, the mediator must be attune to any issues that may affect the party's ability to willingly and competently participate in the process. Otherwise, the party will feel unheard and unconnected to the process.