Protecting Privilege:
Using Interpreters Responsibly

Privilege and confidentiality are bedrock principles in the legal community. Attorneys are often leery of allowing any third party involvement in legal services, for fear of damaging the sanctity of the attorney-client relationship. However, when serving a client who speaks a different language a third party interpreter is necessary. This memo addresses some of the issues encountered when adding a third party interpreter into the protected attorney-client relationship. The research focuses on DC, MD, and VA but is illustrative for other jurisdictions as well.

Communications Between the Interpreter and the Client Are Privileged if the Interpreter is Acting as the Agent of An Attorney

United States v. Kovel[1] is the bedrock federal decision concerning the use of third parties to facilitate privileged attorney-client communications. In Kovel, the court found that the accountant's presence in the communication did not cause a privilege waiver because the accountant's role was primarily to facilitate the attorney-client communication, rather than to provide accounting (or translation) services for other reasons.[2] Most federal circuits follow the Kovel doctrine, including the District of Columbia and fourth circuit.[3]

Many states have enacted statutes and ethics cannons that expressly recognize the applicability of the attorney-client privilege when an interpreter facilitates confidential communication between lawyer and client.[4] These jurisdictions also require attorneys to properly train and monitor their paraprofessionals, including independent contractors. These ethical obligations strongly place primary responsibility for preserving privilege and communicating effectively on the attorney and interpreter.

That is not to say that a court will automatically confer privileged status on attorney-client communications involving interpreters in each instance. If the court determines that the interpreter's role is not "necessary, or at least highly useful" to the client's ability to receive

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[1] 296 F.2d 918 (2d Cir. 1961).

[2] Id. (finding that the accountant's (or interpreter's) presence is "necessary, or at least highly useful, for the effective consultation between the client and the lawyer.").

[3] See, e.g., In re Grand Jury Proceedings Under Seal, 947 F.2d 1188, 1190 (4th Cir. 1991) (applying Kovel doctrine to uphold attorney-client privilege for communications with client's regular accountant who client later used to help communicate with his lawyer about legal issues concerning accounting); Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207 212 (D.C.Cir. 1980) ("We believe these [Kovel-based] holdings to be correct and necessary to preserve the effectiveness of counsel in our legal system.").

[4] Md. Code Ann., [Cts. & Jud. Proc.] app: Maryland Code of Conduct for Court Interpreters, Cannon 5 (2003) ("Interpreters shall protect the confidentiality of all privileged and other confidential information."); Va. Code Ann. § 8.01-384.1:1 (2004) "Interpreters for non-English-speaking persons in civil cases: . . . Whenever a person communicates through an interpreter to any person under such circumstances that the communications would be privileged, and such persons could not be compelled to testify as to the communications, this privilege shall also apply to the interpreter."); D.C. Code § 31-2708 (1981) ("If a communication made by a communication-impaired person through an interpreter is privileged, the privilege extends also to the interpreter.").

informed legal advice,[5] then the presence of the interpreter may prevent the privilege from arising in the first place.

If an Interpreter Accidentally or Intentionally Reveals Privileged Information to a Third Party, It May Constitute a Waiver of the Attorney-Client Privilege

The attorney-client privilege is easily waived.[6] Once it is waived, it is waived forever with respect to any third party who later requests it during discovery.[7] Waiver most often occurs when the actual attorney-client communication, or substantive details about it, are disclosed to third parties outside of the attorney-client relationship. Such third parties can include friends, family members, or any other person whose role is not necessary to facilitate communication between the attorney and client.[8]

Waiver of the attorney-client privilege does not require specific intent to waive. It can and often does occur where a party mistakenly discloses an attorney-client communication to a third party, especially if a court later finds that the party failed to take adequate steps to prevent the mistake from occurring.[9]

Given the fragility of the attorney-client privilege, and especially considering that it can be waived mistakenly, attorneys should remind their interpreters that good intentions alone, are not a defense to privilege waiver. Attorneys and interpreters should understand that, if the interpreter mistakenly discloses an attorney-client communication to a third party, then a court may later look at whether a lack of proper care in guarding the communication caused the disclosure.[10] If the court finds a lack of care, then it will declare the privilege for the

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[5] See Kovel, 296 F.2d at 921.

[6] See, e.g., In re Howard Industries, Inc., 67 B.R. 291, 293 (D.N.J.1986) ("the attorney-client privilege requires that such privilege be maintained as well as asserted and that at best it is a fragile, easily waivable right with no presumption of its continuance and one required to be strictly construed within the narrowest possible limits.")

[7] See, e.g., 1 Edna S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, § IV (5th ed. 2007) ("Once a waiver of the attorney-client privilege is deemed to have occurred for whatever reason, the privilege is generally treated as relinquished for all purposes and in all circumstances thereafter.").

[8] See, e.g., U.S. v. Stewart, 294 F.Supp.2d 490, 493 (S.D.N.Y. 2003) (holding that Martha Stewart waived attorney-client privilege for email that she forwarded to her daughter); State v. Ingraham, 966 P.2d 103, 121 (Mont. 1998) (paralegal's receipt of privileged information constituted waiver where paralegal was acting only in the capacity of client's friend).

[9] See, e.g., In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) ("The courts will grant no greater protection to those who assert the privilege than their own precautions warrant . . . if a client seeks to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels -- if not crown jewels."); 8 J. Wigmore, Evidence § 2327, at 636 (McNaughton rev. 1961) ("A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that the privilege shall cease whether he intended that result or not.").

[10] See, e.g., Elkton Care Center Assoc. Ltd. Partnership v. Quality Care Management, Inc., 2002 Md. App. LEXIS 128, *16-20 (Md.App. Aug. 29, 2002) (in considering whether an inadvertently disclosed attorney-client communication should result in waiver of privilege protection, the court considered the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measure taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by

communication to be waived and may even allow the communication to be used against the client in later litigation.[11]

Jurisdictions (including the District of Columbia, Virginia and Maryland) take varying approaches to the authority of an attorney to waive her client's attorney-client privilege. Some find that the attorney has implied authority to cause such a waiver,[12] while others look more closely to the degree of client's authorization to waive.[13]

Nearly all cases concerning the power of others to waive the client's attorney-client privilege concern either the client's agent/employee or the attorney. Cases addressing the power of an attorney's agent to waive privilege are very rare.[14]Given the uncertainty surrounding whether, in a particular instance, an attorney has the power to waive the client's attorney-client privilege, attorneys should assume that the same uncertainty surrounds the ability of an attorney's agent – including a foreign language interpreter – to waive privilege (mistakenly or otherwise) without the attorney's or client's express consent. Attorneys should instruct their interpreters that they have no authority to either waive privilege or otherwise divulge the substance of an attorney-client communication absent the attorney's or client's express direction. They should further instruct interpreters not to reveal to a third party anything that the interpreter has learned during the course of providing interpretation services to the client, and that if she/he does so, it could result in the waiver of all facts and discussions between the attorney and the client, not just the specific facts revealed by the interpreter to a third party.

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relieving a party of its error.). New Federal Rule of Evidence 502, which President Bush signed into law on September 19, 2008, applies a similar approach to all federal cases ("When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).") Fed. R. Evid. 502(b).

[11] See, e.g., Bowles v. Nat'l Assoc. of Home Builders, 224 F.R.D. 246, 253 (D.D.C. 2004) (one who fails to take all reasonable steps to prevent disclosure of attorney-client privileged documents waives privilege protection for those documents).

[12] Elkton , 2002 Md. App. LEXIS at *16-20 (mistaken disclosure by attorney, not excused by the doctrine of inadvertence, was attributed to the client and the privilege was waived); U.S. v. Mierzwicki, 500 F.Supp. 1331, 1334 (D.Md. 1980) ("Although the attorney-client privilege is personal to the client, it may be waived by counsel acting within the authority of the client . . . The waiver is not restricted to words or conduct expressing an intent to relinquish a know right, but may be by conduct which would make maintenance of the right unfair."); Bundy v. United States, 422 A.2d 765, 767 n.4-5 (D.C. 1980) (finding privilege waived as to attorney-client communications regarding alibi defense when attorney communicated information to prosecutor); Seventh Dist. Comm. v. Gunter, 212 Va. 278, 183 S.E.2d 713, 719-20 (1971) (stating waiver may be express or implied and holding privilege waived by attorney once he agreed to use falsified statement); Underwater Storage, Inc. v. U.S. Rubber Co., 314 F.Supp. 546, 548 (D.D.C. 1970) ("The court will not look behind [the] objective fact [that lawyer disclosed the letter to the opposing side for examination] to determine whether the plaintiff really intended to have the letter examined.").

[13] Hanson v. United States Agency for Int'l. Dev., 372 F.3d 286 (4th Cir. 2004) (lawyer can waive privilege only with client's explicit consent); Rubin v. State, 325 Md. 552, 556, 602 A.2d 677, 685-89 (1992) (information voluntarily disclosed to police by an attorney's investigator, and without the consent of the client, violated the attorney client privilege and should not have been admitted at trial).

[14] See John T. Handley, Waiver of Evidentiary Privilege by Disclosure – State Law, 51 A.L.R. 5th 603 (1997 & Supp. 1998).

Interpreters and Attorneys Need to Be Cautious About the Unauthorized Practice of Law

Interpreters should be instructed to restrict their communications with the client to strictly interpreting the words of the attorney. If they do more than that, they could under certain circumstances be found to be engaged in the unauthorized practice of law. An interpreter's position as a conduit between an attorney and a non-English speaking client, especially where the client is unfamiliar with the legal system, could create an air of trust between interpreter and client. This may lead the client to believe the interpreter possesses sufficient legal knowledge to actually render, rather than merely pass along, legal advice. An interpreter's role in the attorney-client communication, therefore, requires a heightened sensitivity to what could constitute legal advice.

In Maryland, the unauthorized practice of law can be punished with a fine of up to $1,000 and imprisonment up to one year; if the violation is found to have been willful, he/she may be fined up to $5,000 and imprisoned up to 5 years.[15] In DC, violations can be punished by the Court of Appeals as contempt, including possible remedial compensation to persons harmed.[16] Virginia treats the unauthorized practice of law as a Class 1 misdemeanor,[17] which is punishable with a fine of up to $2,500 and imprisonment up to 1 year.[18]

In all three jurisdictions the rules of professional conduct require that "[a] lawyer shall not [a]ssist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."[19] This means that attorneys could violate their professional duties and become subject to discipline if an interpreter they employ engages in this prohibited activity. An attorney remains responsible for the actions of an interpreter both generally through their duty to supervise and specifically regarding known instances of ethical violations.

Finally, given the interpreter's role in facilitating communication between attorney and client, the attorney's duty to supervise is closely related to his/her responsibility to adequately communicate with the client. Rule 1.4(b) of the ABA Model Rules of Professional Conduct state that, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[20] Where a language barrier exists it is incumbent on the attorney, through the use of an interpreter, to ensure that the client fully understands the situation. This would mean that beyond simply hiring an interpreter to communicate with the client, an attorney should ask clarifying questions of the client to both fully understand his or her questions and properly supervise the work of the interpreter.[21]

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[15] Md. Code Ann., Bus. Occ. & Prof. § 10-606 (2008).

[16] D.C App. R. 49(e)(2).

[17] Va. Code Ann. § 54.1-3904 (2008).

[18] Va. Code Ann. § 18.2-11 (2008).

[19] Amended D.C. Rules of Prof'l Conduct R. 5.5(b) (2007); Maryland Lawyers' Rules of Prof'l Conduct R. 5.5(a) (2005); Virginia Rule of Prof'l Conduct R. 5.5(b) (2007).

[20] Amended D.C. Rules of Prof'l Conduct R. 1.4 (2007); Maryland Lawyers' Rules of Prof'l Conduct R. 1.4 (2005); Virginia Rule of Prof'l Conduct R. 1.4 (2007).

[21] See, e.g., In re Schlemmer, 840 A.2d 657 (D.C. 2004) (The D.C. Court of Appeals found that disciplinary action was appropriate where attorney failed to adequately inform client of fees necessary to appeal immigration decision.

Attorneys Need to be Aware of Potential Conflicts of Interest Posed by the Interpreter

Conflicts of interest for attorneys are governed by the rules of professional conduct in the relevant jurisdiction. The client may waive most potential conflicts after consultation.[22] There are blanket prohibitions on certain, specific activities in all three jurisdictions due to conflict of interest for the lawyer. It appears, however, that this blanket prohibition on representing adverse parties in the same matter would not apply to interpreters because they do not advance positions or claims.[23] To prevent any suspicion of bias in the case, the lawyer should consider obtaining the consent of both parties before proceeding further with an interpreter who has previously interpreted for another party in the case.

Child Abuse and the Duty to Report

Interpreters who are subject to the attorney-client privilege are not permitted to disclose any information learned during the course of their engagements to third parties, including any suspicions the interpreter may have that the client has committed or is engaging in child abuse. As an agent for the attorney, the interpreter should notify the attorney for whom she is working about any such suspicions. The attorney then must decide on the appropriate course of action.

Some state statutes, like Virginia and the District of Columbia, require certain professionals to report suspected child abuse to state agencies. However, the statute applies only while the individual is acting in their "professional or official capacity."[24] Additionally, the District of Columbia explicitly absolves otherwise mandated reporters of their reporting requirement where they are "employed by a lawyer who is providing representation in a criminal, civil, including family law, or delinquency matter and the basis for the suspicion arises solely in the course of that representation."[25] This protection applies irrespective of whether the interpreter is the agent of the attorney or the client but, instead, turns on whether the presence of the interpreter is reasonably necessary to the communication between attorney and client.[26]

Attorney communicated with client through interpreters. Client paid what he understood to be attorney's fee but once discrepancy was discovered, attorney failed to adequately inform client of missing payment and did not file appeal.).

[22] Amended D.C. Rules of Prof'l Conduct R. 1.7 (2007); Maryland Lawyers' Rules of Prof'l Conduct R. 1.7 (2005); Virginia Rule of Prof'l Conduct R. 1.7 (2007).

[23] See Dang v. United States, 741 A.2d 1039 (D.C. 1999). "[I]nterpreter's are bound by oath and by the Interpreter's Code of Ethics to interpret accurately, completely, and impartially. Their function is a ministerial one, and they are not advocates for any party or position. Accordingly, it is unlikely that a conflict would manifest itself in the ordinary case. Id. at 1044, citing Ko v. United States, 722 A.2d 830, 836 (D.C. 1998) (en banc).

[24] Va. Code Ann. § 63.2-1509(A) (2008). The mandatory reporters include: persons licensed to practice medicine or any healing art, persons employed by a private or state-operated hospital, social workers, probation officers, teachers, child care professionals, mental health professionals, law enforcement or animal control officers, court mediators, court-appointed special advocates, adults trained by the Department of Social Services for the purpose of recognizing and reporting child abuse and neglect, and persons who determine eligibility for public assistance.

[25] Id.

[26] Farahmand v. Jamshidi, 2005 WL 331601 at *2 (D.D.C. 2005).

Other states create a statutory duty to report child abuse for all persons.[27] However, those states are likely to include a specific exception for attorney-client communications. As explained by the Maryland Attorney General, "[t]he only exceptions are in FL § 5-705(a)(2) and (3). Paragraph (2) excuses reporting of information otherwise encompassed by the duty of confidentiality owed by an attorney to his or her client, and reporting that would violate the constitutional right to assistance of counsel."[28]

Special Issues for Interpreter Providers

The primary responsibility to train and supervise a legal interpreter falls on the client's attorney. Nevertheless, an interpreter agency that makes certain representations to legal service providers about the qualifications and training of its interpreters, and then fails to take the screening and training steps it claims to have taken, may face liability under a host of negligence theories. For example, a few courts scattered throughout the country have recognized the tort of "negligent referral." This tort most famously arose in the context of physician referral[29], but at least one court found that referral liability could arise in the legal referral context, too. Therefore, the interpreter agency should make full disclosure about the training and qualifications of each interpreter available from the agency.

[27] These states include Delaware, Idaho, Indiana, Kentucky, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Utah and Wyoming. Hansen, Lisa, Attorney's Duty to Report Child Abuse, 19 J. Am. Acad. Matrimonial Law. 59 (2004).

[28] 1995 Md. AG LEXIS 35 at *11-*12(August 4, 1995).

[29] See, e.g., Estate of Tranor v. Bloomsburg Hospital, 60 F.Supp.2d 412, 416 (M.D.Pa. 1999) ("We do not conclude that every referring physician is liable for negligence on the part of a specialist to whom the patient is referred. We conclude only that negligent referral to a specialist . . . when the referring physician knows or has reason to know the specialist is incompetent may be a basis for liability under general negligence principles.").