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ARTICLES

Taking Foreign Witness Depositions

By Joseph M. Hanna and Daniel B. Moar

Despite the surge in foreign language testimony through interpreters in depositions and courtrooms, the legal system often is ill-equipped to deal with non-English speaking witnesses and the issues that their testimony brings. Attorneys and the courts often fail to obtain competent interpreters or recognize serious deficiencies in interpreting, which undoubtedly leads to incorrect outcomes for litigants. What follows are strategies for preparing for and taking foreign language depositions.

The State of Modern Interpreting in Legal Proceedings

Interpreter testing by the National Center for State Courts provides an illustrative example of just how damaging bad language interpretation can be to a legal proceeding. In one test, counsel asked the witness, “Now, Mrs. Pena, you indicated that you live in East Orange, at 5681 Grand Street?” The interpreter, however, interpreted the question into Spanish as “You say you were eating an orange?” See William E. Hewitt and Robert Joe Lee, *Behind the Language Barrier, or “You Say You Were Eating an Orange?”*, 20 State Ct. J. 23 (1996) (hereafter *Behind the Language Barrier*).

In this example, the interpretation was so poor that any testimony received would have been meaningless. While this example may present a high watermark in bad court interpreting, it is unfortunately not unique. Deficiencies in language interpretation continue to impact the accuracy of legal proceedings.

For example, in one case, a juror vocally challenged a Spanish interpretation during trial in the following exchange:

JUROR: Your Honor, is it proper to ask the interpreter a question? I’m uncertain about the word La Vado [sic]. You say that is a bar.

COURT: The Court cannot permit jurors to ask questions directly. If you want to, phrase your question to me.

JUROR: I understood it to be a restroom. I could better believe they would meet in a restroom rather than a public bar if he is undercover.



COURT: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the—

JUROR: I understand the word La Vado. I thought it meant restroom. She translates it as bar.

INTERPRETER: In the first place, the jurors are not to listen to the Spanish but to the English. I am a certified court interpreter.

JUROR: You're an idiot.

United States v. Perez, 658 F.2d 654, 662 (9th Cir. 1981). (The juror later claimed that she said, "it's an idiom" and not "you're an idiot." *Id.* at 663.) Such interpretation disputes create significant doubt that the fact finder has received accurate interpretations throughout the legal proceeding.

Even "reasonable" misinterpretations can have unintended consequences in legal proceedings. For example, in one case, an arresting officer gave a suspect a Miranda warning in Spanish stating that an attorney would be "furnished" to the suspect. However, the officer used a word that meant to "fill a room with furniture" and not "provided." Beth Gottesman Lindie, *Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations*, 48 U. Miami L. Rev. 399, 416 (1993) (citing *People v. Gutierrez*, 187 Cal. Rptr. 130, 132 (Cal. Ct. App. 1982)).

The difficulties encountered in legal proceedings involving non-English speaking witnesses are often compounded by the fact that legal professionals often act as if interpreters are an afterthought. For instance, "[j]udges who are unfamiliar with the responsibilities of a court interpreter often accept interpreting services of any bilingual individual assigned to his or her trial session or of any helpful spectator in the courtroom without knowing his or her qualifications." Charles M. Grabau and Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 New Eng. L. Rev. 227, 234 (1996) (hereafter *Protecting the Rights of Linguistic Minorities*). Legal practitioners also tend to assume that someone can serve as an interpreter just because he or she is bilingual when, "[i]n fact, very few bilingual individuals who are called upon to work as court interpreters have the knowledge and skills required to achieve what is expected of them." *Behind the Language Barrier*. The falsity of assuming that a person can serve as an interpreter just because he or she is bilingual is highlighted by the fact that court-interpreting proficiency tests used by the federal courts and several states typically have a pass rate below 10 percent. *Id.* An interpreter must be more than simply bilingual.

Understanding the difficulties in interpreting is particularly important given the increase in the use of interpreting services by the legal system. Each year, court interpreting services are



required for thousands of witnesses and, while Spanish continues to be the predominant non-English language, dozens of other languages are also interpreted in legal proceedings.

The Role of an Interpreter

An interpreter's role is to (1) interpret the foreign language into English, and vice versa, in precisely the way that it was spoken; and (2) place the non-English speaker on equal footing with an English-speaking witness. *Behind the Language Barrier; Protecting the Rights of Linguistic Minorities*, 30 New Eng. L. Rev. at 241. An interpreter should accurately interpret 120 to 180 words per minute. *Protecting the Rights of Linguistic Minorities*, 30 New Eng. L. Rev. at 258–59.

The first Canon of the National Association of Judiciary Interpreters and Translators' Code of Ethics and Professional Responsibility for Interpreters describes the foremost aim of accuracy as follows:

Source language speech should be faithfully rendered into the target language by conserving all the elements of the original message while accommodating the syntactic and semantic patterns of the target language. The rendition should sound natural in the target language, and there should be no distortion of the original message through addition or omission, explanation or paraphrasing. All hedges, false starts and repetitions should be conveyed; also, English words mixed into the other language should be retained, as should culturally bound terms which have no direct equivalent in English, or which may have more than one meaning. The register, style and tone of the source language should be conserved.

The New York State Court System describes the interpreter's role as requiring that he or she:

[p]rovide the most accurate interpretation of a word possible despite a possible vulgar meaning. Colloquial, slang, obscene or crude language, as well as sophisticated and erudite language, shall be conveyed in accordance with the usage of the speaker. An interpreter is not to tone down, improve or edit any words of statements.

New York State Unified Court System, [Court Interpreter Manual and Code of Ethics](#), 7–8, (*NYS Manual*).

Other authorities have provided similar descriptions of the role of the interpreter:

The interpreter "may not edit, summarize, add or omit meaning. The original message must be transmitted exactly, or as closely as possible, into the second language." W. Davis and William E. Hewitt, *Lessons in Administering Justice: What Judges Need to Know About the Requirements, Role, and Professional Responsibilities of the Court Interpreter*, 1 Harvard Latino L. Rev. 121, 128–129 (1994) (hereafter *Administering Justice*).



[A]ccuracy requires the language interpreter to "interpret or translate the material thoroughly and precisely, adding or omitting nothing, and stating as nearly as possible what has been stated in the language of the speaker, giving consideration to variations in grammar and syntax for both languages involved." Franklyn P. Salimbene, *Court Interpreters: Standards of Practice and Standards for Training*, 6 Cornell J. L. & Pub. Pol'y 645, 649–50 (1997) (*Standards of Practice*).

[E]very spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted. This includes apparent misstatements. Supreme Court of Wisconsin Office of Court Operations, [*The Wisconsin Court Interpreters Handbook: A Guide for Judges, Court Commissioners, Attorneys, Interpreters and Other Court Users*](#), 14.

Many courts describe interpreters in an overly simplistic manner as being mere language "conduits." See *United States v. Vidacak*, 553 F.3d 344, 352 (4th Cir. 2009); *United States v. Lopez*, 937 F.2d 716, 724 (2d Cir. 1991); *Mangual v. Wright*, 2007 U.S. Dist. LEXIS 35213, *17 (W.D.N.Y. May 9, 2007); *In re A.X.T.*, 2008 Minn. App. Unpub. LEXIS 649, *8 (Minn. 2008); *In re R.R.*, 398 A.2d 76, 86 (N.J. 1979). Such descriptions mistakenly suggest that interpretation is a mechanistic and precise process akin to punching in an equation in a calculator and receiving a consistent response.

To the contrary, in some circumstances, a literal or verbatim interpretation is not appropriate. The Model Code of Professional Responsibility for Interpreters in the Judiciary recognizes such exceptions and provides that "[v]erbatim, 'word for word,' or literal oral interpretations are not appropriate when they distort the meaning of the source language." See [Canon I commentary](#); *Standards of Practice*, 6 Cornell J. L. & Pub. Pol'y at 650–51. For instance, a verbatim translation of an English idiom such as "let the cat out of the bag," "it was a piece of cake," or "like a bull in a china shop," would have little meaning to a non-English-speaking person unfamiliar with the English expression and would likely leave him or her confused as to why a party was raising issues about felines, dessert, and cattle.

Similarly, a verbatim interpretation of foreign idioms into English would provide little benefit to advancing the legal proceeding. For example, a literal interpretation of the Portuguese expression "É muita areia para a minha camioneta" into English would be "this is too much sand for my truck." An attorney who did not understand that the expression is more akin to the English idiom "this is over my head" would likely be confused by the sudden insertion of references to sand and trucks into an unrelated legal proceeding.

Types of Interpretation

Interpretation can be performed in several ways, including simultaneous, consecutive, sight translation, or summary.

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In simultaneous translation, the interpreter speaks contemporaneously with the speaker with a few second lag between the speaker and the interpreter. *NYS Manual*, at 7. While simultaneous translation has the benefit of avoiding reliance on an interpreter's memory of what was said, it also can be cumbersome because multiple people are speaking at the same time. Given the court reporter's need to accurately type what he or she hears, simultaneous translation should generally be avoided in depositions.

In consecutive mode, the interpretation begins after the speaker finishes a sentence or pauses. Consecutive mode is generally preferred for interpreting witnesses. *Id.*; [Court Interpretation: Model Guides for Policy and Practice in the State Courts](#), 138 (1995) (*NCSC Model Guides*). While consecutive mode is generally easier for a court reporter, the interpreter may not accurately recall what was said if a witness speaks at length. Accordingly, when consecutive mode is used, the interpreter should be allowed to signal to the speaker when pauses are necessary to allow for accurate interpretation. *See Administering Justice*, 1 Harv. Latino L. Rev. at 130 ("Absent such pauses, the interpreter must interpret from memory while simultaneously listening to the witness's continuing response. Without necessary pauses, studies have shown that interpreter error rates increase significantly and, as a result, extended interpretation becomes virtually impossible.").

Sight translation occurs when an interpreter orally interprets a written document containing a foreign language. *NYS Manual*, at 7. Given that written documents can be translated in advance, attorneys should avoid burdening the interpreter with sight translation at the deposition whenever possible.

Summary mode is when an interpreter paraphrases or provides an overview of the non-English-speaking person's words. Because summary mode does not provide an accurate interpretation of the speaker's specific words, it is inappropriate for depositions and "has no place in a court proceeding." *Protecting the Rights of Linguistic Minorities*, 30 New Eng. L. Rev. at 282. As noted by the National Center for State Courts, "summary mode of interpretation should not be used. It is most often resorted to only by unqualified interpreters who are unable to keep up in the consecutive or simultaneous modes." *NCSC Model Guides*, at 138.

Regardless of the mode, an interpreter's foremost responsibility is to provide an accurate interpretation. Even subtle changes in interpretation can impact a legal proceeding: "an interpreter can make the tone of a witness's testimony or an attorney's questions more harsh and antagonistic than it was when it was originally uttered, or, conversely, she can make its effect softer, more cooperative, and less challenging than the original." Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process*, 2 (2002) (Bilingual Courtroom).

As important as providing an accurate interpretation, an interpreter should also avoid engaging in extraneous conversation with witnesses. *Prokop v. Nebraska*, 28 N.W.2d 200, 202 (Neb. 1947) ("The interpreter should be absolutely impersonal, the counsel asking a question the same as if the witness could understand it and the interpreter repeating the question with no added remarks of his own, and giving back the witness' answer in her own words. There should be no extraneous conversations between counsel and the interpreter"). Unfortunately, this is easier said than done. According to one judge, "[i]nterpreters" almost uniformly report" that witnesses ask them questions, including requests for legal advice such as:

- What do you think I ought to do?
- What do you think I should say to the judge?
- Do you think that the jury believes my story?

Administering Justice, at 140. While non-English speaking witnesses might find it natural to ask for advice from the interpreter—the one person in the room who understands them—this is improper. An attorney taking a deposition through an interpreter must ensure that the witness clearly understands that any questions he or she has must be directed back to the attorneys. As stated in Canon 7 of the Model Code of Professional Responsibilities for Interpreters in the Judiciary, "[i]nterpreters shall limit themselves to interpreting or translating, and shall not give legal advice, express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter."

Selecting a Competent Interpreter

Despite the difficulties in language interpretation, competent professional interpreters are available. Attorneys should consider contacting colleges, language instructors, and state and federal courts to identify quality interpreters. Additionally, most states are members of the [National Center for State Courts Consortium for Language Access in the Courts](#), and its website provides contact information for State and Federal Interpreter Programs.

Is the Interpreter Certified?

An attorney should seek a federally certified interpreter when the language is Spanish, Haitian Creole, or Navajo, which are the only languages certified by the federal government. The federal certification process is particularly rigorous. *Bilingual Courtroom*, at 37 ("Clearly the test is a rigorous one, and aims at sorting out the most highly qualified interpreters from among the applicants."); Jan Hoffman, *New York's Court Interpreters: Overworked Link*, N.Y. Times, Dec. 24, 1993, at A1. Thus, an interpreter possessing the language skills needed to receive federal certification is likely to display high competence and professionalism.

However, an attorney should not automatically assume that just because an interpreter is "certified," he or she is competent to perform interpretation in legal proceedings. Outside of the federal certification process, states and private organizations offer certifications with wildly divergent standards and reputations. *See NCSC Model Guides*, 127 ("the term 'certified' is often used by interpreters or private interpreting agencies when the interpreter has received only a rudimentary orientation to the profession."). Not all certifications are created equal.

Identify the Proper Dialect

Beyond simply obtaining an interpreter who speaks the foreign language, an attorney should also attempt to obtain an interpreter who speaks the specific dialect of the witness. Dialects and regional variations of the same language can vary dramatically.

An attorney cannot simply assume that because an interpreter speaks Spanish, he or she is knowledgeable about the various dialects. For example, the word "guagua" means "bus" in Cuba, but means "baby" in Puerto Rico. The word "alpaca" means "nickel silver" in Mexico, but in South America, it refers to an animal that is related to the llama. Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 Clinical L. Rev. 347, 350 (2000). The word "manteca" generally refers to "butter," but in Colombia it is a derogatory word for women and among Latin American drug dealers, it is considered a word for heroin. Jan Hoffman, *New York's Court Interpreters: Overworked Link*, N.Y. Times, Dec. 24, 1993, at A1. Obviously the difference between butter and heroin or between a baby and a bus can be significant in a legal proceeding.

Regional differences in dialect and slang can also present more subtle challenges in language interpretation. For example, in a New York City personal injury case, the injured plaintiff, a Puerto Rican woman, used the verb "chocar" to describe the impact giving rise to her injury. *Santana v. New York City Transit Auth.*, 132 Misc. 2d 777, 778 (Sup. Ct., N.Y. Co. 1986). The interpreter stated that the word meant "to bump." A juror, however, claimed to the court that in the New York City Puerto Rican community, the slang word "bompiar" is used to mean "to bump," and the word "chocar" means "to crash." *Id.* at 778–79.

After questioning the plaintiff, the court determined that the juror was indeed correct and that the plaintiff intended to describe her impact as being a "crash," not a "bump." The court recognized that the difference in words "was concededly important to a determination of liability." *Id.* at 779.

This case illustrates the importance of finding an interpreter who understands not only the witness's language, but also dialect and slang. For a personal injury attorney, the difference between a "bump" and a "crash" could determine the outcome of a case.

Determine Interpreter Experience

Outside of a reputable certification, there are few standard concrete indicators of a person's

ability to serve as an interpreter. Nonetheless, the factors that courts consider in qualifying a person to serve as an interpreter are the same factors that an attorney should consider when hiring an interpreter for a deposition. Accordingly, the following questions are appropriate in determining whether a person is qualified to serve as an interpreter:

- Do you have any training or credentials as an interpreter?
- Do you have any training or credentials specific to legal interpreting?
- What did you have to do to obtain your certification or license?
- What is your native language?
- How did you learn English? How long have you been speaking it?
- How did you learn the foreign language? How long have you been speaking it?
- What is your highest level of education?
- Did you study English or the foreign language?
- Have you lived in a country where the foreign language was spoken?
- Do you have any teaching experience?
- What experience do you have serving as an interpreter in legal proceedings?
- Do you know the applicable legal terminology in both languages?
- Have you ever been qualified by a judge to interpret in court proceedings?
- Has anyone challenged an interpretation that you provided? Have you ever been disqualified to interpret in court proceedings?
- Are you familiar with the code of professional responsibility for court interpreters?
- Are you a potential witness in this case? Do you have any potential conflict of interest?
- Do you know any of the parties?
- Are you familiar with the dialect of the witnesses? How?
- Are you familiar with common slang terms used in this language? How?
- Can you accurately interpret simultaneously?
- Can you interpret consecutively?

The above questions are derived from illustrative questions that judges ask in qualifying an interpreter. *See, e.g., NCSC Model Guides*, at 148; *Administering Justice*, at 146; Supreme Court of Wisconsin Office of Court Operations, [*The Wisconsin Court Interpreters Handbook: A Guide for Judges, Court Commissioners, Attorneys, Interpreters and Other Court Users*](#), 6.

An attorney should also consider having a prospective interpreter speak with the witness in advance of the deposition to determine if there are any communication issues, such as dialect or other problems.

Avoid Interested Interpreters

While attorneys often attempt to rely on relatives or friends of the non-English speaking witness, this should be avoided whenever possible. *See Bilingual Courtroom*, at 9 ("parties to a civil action tend to bring bilingual relatives or friends to serve as their interpreter . . . the quality of interpreting rendered by such nonprofessional interpreters is quite poor indeed."); *Norelus v.*



Denny's Inc., 2000 U.S. Dist. LEXIS 21892, *12 (S.D. Fla. March 21, 2000) (stating in case where plaintiff insisted on using her brothers as interpreters that "[t]hroughout the depositions, the translators would interpret the 'meaning' of questions as well as the actual question, and simultaneously confer with Plaintiff's counsel. This lack of an objective translator was a problem throughout the case."); Model Code of Professional Responsibility for Interpreters in the Judiciary, Canon 3 ("Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.").

Unfortunately, in some circumstances, particularly where the witness speaks a less-common foreign language, an interested person may be the only interpreter available. In some circumstances, otherwise interested persons have been allowed to serve as interpreters. *See, e.g., United States v. Ball*, 988 F.2d 7, 10 (5th Cir. 1993) ("There is, however, no absolute bar against appointing a witness' relative to act as an interpreter when circumstances warrant such an appointment."); *Farahmand v. Jamshidi*, 2005 U.S. Dist. LEXIS 2198, *2 (D. D.C. Feb. 11, 2005) (noting plaintiff's son-in-law served as an "ad hoc interpreter."); 81 Am. Jur. 2d Witnesses § 269 ("While it is no doubt desirable that the interpreter should be impersonal, the court in its discretion may appoint a relative of the witness of the adverse party to the proceeding.").

Conclusion

While "it is axiomatic that one can never translate perfectly," *Serafyn v. Federal Commc'ns Comm'n*, 149 F.3d 1213, 1224 (DC. Cir. 1998), an attorney can take steps to ensure as accurate an interpretation of a non-English speaking witness as possible. Many of the usual deposition disruptions can be avoided through advance preparation of the attorney and interpreter. When the deposition takes place, an attorney should ensure that the interpreter, witnesses, and opposing counsel all understand the interpreter's role and that the interpreter stays within that role. By taking these and the other steps discussed above, an attorney can work to place a non-English speaking witness on equal footing under the legal system.

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Stay tuned for a follow-up article, "Strategies for Taking Depositions Through an Interpreter," in the next issue of *Minority Trial Lawyer*.



Culturally Sensitive Dressing: A Tool for Success in any Setting

By Olga M. Pina

Your appearance is an integral part of the tools you bring to any important transaction, whether it is a business negotiation, an appearance in court, or the mediation or resolution of any legal dispute. A person's dress and appearance convey impressions related to his or her status, competence, authority, credibility, and respect for others. In an international setting, your dress and appearance will often create a lasting first impression that assures your foreign counterpart that you are respectful of his or her culture, trustworthy, reliable, and competent. While the importance of such knowledge to the international business traveler may be readily apparent, we often ignore the fact that we face a multitude of cultures and diversity of perspectives right here at home without ever having to cross a border. We live in a multicultural society where our sense of America is less the "melting pot" and more the "salad" analogy, with each ethnic group retaining more of the singular characteristics that give each group its own identity. How does one effectively handle the differences across cultures with respect to what is appropriate or accepted attire—i.e., variations posed by cultural differences and expectations that do not conform to the mainstream "white" or "Anglo-Saxon" traditions of our legal system—and manage those differences so as to enable clients from diverse cultural backgrounds to succeed in the various settings that they may encounter in our legal system? What about impressions conveyed through choice of dress because of a person's diverse perspectives, such as sexual orientation?

Overview and General Tips

Conservative attire and good grooming are important to keep in mind regardless of your culture. Dark suits accompanied by simple understated accessories are best. This is true in international travel as well as domestic cross-cultural experiences. Black, navy blue, or a medium shade of blue with a white blouse will do well in most settings. While this may seem like common sense to those of us familiar with the decorum that is required in the courtroom as well as in the boardroom, this knowledge is not intuitive to those whose cultural or socioeconomic background has kept them isolated from business or courthouse settings. The experienced criminal lawyer knows to alert his or her client to the manner of dress that will be most favorable to eliciting sympathy and respect from the judge or jury in the courtroom and usually has no problem expressing this to the criminal client. However, many of us outside of the criminal practice area feel less free to think ahead and advise our clients on their appearance. What immigration practitioner among us has thought ahead to advise a foreign client to avoid certain colors or styles when appearing in court or for a U.S. Citizenship and Immigration Services (USCIS) hearing? Yet, those clients are probably the most disadvantaged by not being educated in what is



culturally expected dress in our legal system, since they are foreign not only to our system but also to our culture.

While being sensitive to our client's diversity (whether of culture, race, or socioeconomic level) implies making allowances for dress differences that may express such diversity, it does not mean that we should err on the side of failing to advise our clients on how to best position themselves to face the legal or business situation confronting them—and this includes attire. Jennifer Roeper, an immigration practitioner with Fowler White Boggs, describes mixed feelings about such advice, despite the fact that she feels it is necessary:

I am often conflicted because I enjoy seeing the cultural diversity among my clientele, but while it would be perfectly appropriate to sport ethnic garb other indicia of a particular culture in front of a USCIS officer, such as a sari, or dreadlocks, if a client is appearing before a judge, I usually counsel them to downplay their ethnicity. In such situations, it is advantageous to appear more assimilated into the "American" lifestyle, and avoid ethnic garments and any articles of clothing that are revealing or distracting. Certainly conservative dressing, by U.S. standards, will be the wisest choice for such an occasion.

Joseph Touger, an attorney with Gomez & Touger, P.A., describes a similar experience when representing clients with a different diverse perspective:

You have to be very cognizant of the impression your client may make in front of a jury, and juries tend to have certain expectations. For example, in a case when I was representing a lesbian client, I advised her to soften her look for the jury and wear a dress during the trial. . . . She agonized about her choice of dress for the days preceding the trial, and on the eve of the trial she called to tell me she just couldn't do it. The thought of wearing a dress had caused her a lot of anxiety. I feared that her usual attire of masculine-cut pants and a boxy shirt, a much "harder" look, would not get her the best results from the jury. I then suggested that perhaps she just look for a pantsuit with a softer, more feminine look. This middle-of-the-road solution seemed to work for her; she was still able to feel comfortable in court, but I knew the jury would not bring in their own prejudices just based on her appearance.

Touger obtained a good result for his client and said he would give such advice whether the client was a defendant in a criminal matter or a plaintiff in a personal injury lawsuit.

The following guidelines are generalities that apply when traveling across the globe for business negotiations. Accordingly, no matter what foreign country your client hails from, or his or her respective ethnic, cultural, or socioeconomic backgrounds, or even sexual orientation, abiding by the following rules will be recognized by each of them as safe and respectful, even if these guidelines would depart from such person's individual style. Letting the clients know the perceptions associated with these dress guidelines will also help them accept and internalize them.

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- Deep and dark colors are associated with wealth and authority.
- Neutral, basic colors are considered safe.
- Dark colors do not show wrinkles as much as lighter colors do.
- Clean, good quality shoes are an essential part of your wardrobe and will be noticed. No boots. For women, it is important to note that very high heels are usually not appropriate in business or judicial situations; bring medium to low heels.
- Make conservative selections; for example, avoid bright colored blouses in wild patterns.
- Skirt suits or dresses of appropriate length are always safe and usually preferred to pantsuits. Long-sleeve jackets provide coverage for upper arms. If, as a woman, you feel compelled to wear pants, select a conservative but soft cut, always complemented by a jacket to emphasize a conservative suit look.
- Good quality but simple jewelry works well, but avoid flashy costume jewelry; women should keep makeup conservative.
- If the client sports any tattoos or body piercings, ensure that clothing appropriately conceals such tattoos or piercings (other than earrings, which are acceptable for women).
- Avoid business casual attire; err on the side of formal dress.
- The type of business industry to which the negotiation relates will also be determinative of the flexibility permitted within the business attire; however, if the experience is a judicial one, adopt the most conservative options in dressing.
- If necessary, allow the client to express his or her individuality through a simple accessory, such as a scarf.
- No extravagant hairdos or colors should call attention to your client's hairstyle; it's best to keep it clean, simple, and neat.

Examples

In most of Latin America, women's acceptable business attire includes prints, bright colors, and plenty of accessories. A female client from this region may convey an unintended message to a jury in a conservative part of the country—either of frivolity or lack of respect. You may advise such clients to select dark suiting, for the reasons expressed above, while understanding their desire to add some color and sense of feminine fashion to their court attire. Such clients might also be advised that business entertaining in the United States does not tend to be as dressy as in Latin America, where more formal cocktail attire is expected for evening functions immediately following a business meeting. The American counterparts attend these functions directly from work in their business suits.

If your clients are European, they will generally be more formal and conservative in their dress choices than in the United States. However, watch for details that may surprise you, such as "man purses" or other similar accessories that are acceptable in other cultures. In certain cultures, strong perfumes are acceptable that might prove offensive.

Discuss color choices with your client. In certain countries and cultures, different colors are avoided in dress because they connote meanings such as death, mourning, witchcraft, or even



disrespect for one's nation. The client should be advised that in the United States, we do not tend to attach specific meanings to particular colors. They should not assume any disrespect by the colors worn by any of the other participants in the negotiation, trial, or other proceeding.

As we are respectful of the diverse peoples that make up our American culture, we need to remain cognizant of accepted standards of behavior and dress, and the fairly universal impressions of a person based on dress and appearance. To the extent that we are representing someone from a diverse background, it behooves us to recognize these differences and address them so that our clients can be empowered to overcome the more subtle challenges of cultural differences and impressions conveyed by our dress and appearance.

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Notes on the Practice of Law in Puerto Rico

By Manuel San Juan – November 4, 2010

"This is really a schizophrenic society. Puerto Ricans have two languages, two citizenships, two flags, two anthems, two loyalties. It is very hard for human beings to deal with all this ambivalence."

—Puerto Rican writer René Marqués

A Bit of History

For those who may not be familiar with the island, Puerto Rico is located right smack dab in the middle of the Caribbean, approximately 1,500 miles to southeast of Miami. Its inhabitants, more than 4.5 million at last count, are a motley collection of peoples whose ancestors include Europeans, North Americans, African slaves, native Caribbean Indians, and immigrants from Cuba, the Dominican Republic and other Latin American countries. Puerto Rico's economy is currently one of the strongest in the region, largely as a result of its "special relationship" with the United States. The common language is Spanish, although most Puerto Ricans have at least a basic familiarity with English.

Puerto Rico did not gain its independence from Spain in the 19th century. Rather, it was ceded as war booty to the United States, along with Guam, the Philippines and a large amount of cash, as a result of the Treaty of Paris that ended the Spanish-American war in 1898. The island of "Porto Rico," as it was then known, was initially governed by the U.S. military and then later by governors appointed by the president of the United States.

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As you might imagine, despite the annexation of the island, its Spanish-speaking inhabitants were not immediately brought into the fold of American society. In the so-called *Insular Cases*, decided at the turn of the century, the Supreme Court held that the U.S. Constitution extended only partially to unincorporated territories such as Puerto Rico. *See, e.g., De Lima v. Bidwell*, 182 U.S. 1 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901). Thus, the Court made clear that Puerto Ricans were basically subject to the will and whim of the U.S. Congress. As the Court explained in *Downes*, "[i]t is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race or by scattered bodies of native Indians." 182 U.S. at 282. In other words, the Puerto Ricans, along with their half-brothers, the Filipinos, were simply so alien that they could not possibly be considered on a par with other Americans, despite the United States' annexation of their territory. In 1917, Congress passed the Jones Act, which made all Puerto Ricans U.S. citizens and provided that all statutory laws of the United States would have the same force and effect in Puerto Rico.

During World War I, more than 18,000 Puerto Ricans were drafted or enlisted in the armed forces. Still, Puerto Ricans continued to be governed from Washington, and the Supreme Court continued to deny them the full protection of the Constitution. In *Balzac v. Porto Rico*, 258 U.S. 298 (1922), for example, the Court held that Puerto Ricans had no federal constitutional right to trial by jury, in part because of the Court's misguided belief that the citizens of this "distant ocean community of a different origin and language from [that] of our continental people," who were "not brought up in fundamentally popular government," were therefore incapable of truly grasping the "responsibilities of jurors." 258 U.S. at 310–11.

They may not have been fit to be jurors, but Puerto Ricans were certainly fit to assume other responsibilities of citizenship. During World War II, over 65,000 served in the armed forces, many in front line combat units. The Korean War saw at least 60,000 Puerto Ricans serve in the U.S. military. It was around this time that Puerto Rico finally achieved a measure of self-government. In 1952, Congress allowed the people of Puerto Rico to establish a constitution of their own and elect their leaders. Since then, Puerto Rico has come to operate its own internal affairs much like any of the other states of the Union, electing a governor and legislators, who in turn appoint the judges who serve on the local courts.

Still, the island remains an anomaly within the United States federal system. On the one hand, the federal government maintains a strong presence on the island. Under 48 U.S.C. Section 734, Puerto Rican residents are subject to all federal laws, unless otherwise provided, and Puerto Ricans pay full federal payroll taxes, federal import and export taxes, as well as commodity taxes. Since 1966, Puerto Rico has also had a United States District Court composed of Article III federal judges, equal in every respect to their stateside counterparts. Eighteen island-born



Article III federal judges have been appointed to sit on the federal district court in Puerto Rico between 1966 and the present day.

On the other hand, in constitutional terms, the island continues to be considered a "territory," subject to the plenary powers of Congress. *See, Califano v. Torres*, 435 U.S. 1, n.4 (1978) (per curiam) (relying on the *Insular Cases* to justify denial of supplemental security income to U.S. citizens who relocated to Puerto Rico from the United States). As such, the residents of Puerto Rico do not participate in presidential elections or elect anyone to the U.S. Senate, and they only send one non-voting representative to the House.

Puerto Rico is a part of the United States and operates within the U.S. legal framework, but is more akin to a foreign country in its history, language, and culture. This makes for some interesting contrasts, to say the least.

A Bilingual Legal Practice

I was born in Puerto Rico in 1962 and attended both college and law school on the mainland United States. In 1988, after graduating law school, I returned home to take the Puerto Rico bar examination. The exam, given in Spanish, was a challenge for many reasons, not the least of which was my unfamiliarity with the hybrid Napoleonic Code/Common Law legal system that we have on the island.

Like any state of the Union, Puerto Rico has two parallel court systems—the "commonwealth" courts and the federal court. Unlike any other state, however, proceedings before the local courts in Puerto Rico are conducted in Spanish. Thus, any lawyer wishing to practice in both systems must be fully and completely bilingual. In the federal court, of course, proceedings are in English, but you still need to be bilingual to get along properly. If you do not speak Spanish, you're going to have a hard time in the Puerto Rico federal court.

In court, on the record, the lawyers, judges, and witnesses all speak English, of course. As everyone knows, and as I learned as a clerk for one of our District Court Judges, much of the court's real business is done off the record. And this is where the bilingual nature of proceedings sometimes presented difficulties for non-Spanish speaking stateside counsel who were admitted to the bar *pro hac vice*. Bilingualism is therefore an essential element of practice before the U.S. District Court for the District of Puerto Rico, and the lawyer who is not bilingual is at a distinct disadvantage. Take note, lawyers who don't think they need local counsel in federal court.

It is, indeed, greatly enriching to be bilingual. Straddling two languages makes us special. And yet, as Puerto Rican writer René Marqués has reminded us, bilingual can also tend towards bipolar. A divided psyche can be very hard on one's sense of identity.

Nobody exemplifies the schizophrenic nature of bilingualism better than the Official Court Interpreters in the U.S. District Court for Puerto Rico. These are gifted individuals who are not only perfectly bilingual, but also capable of switching back and forth between English and Spanish with lightning speed and accuracy. But they pay a price for such mental gymnastics. Their minds sometimes can't decide which language is better to express a thought, and they end up speaking a mixture of the two that some call "Spanglish." There are many forms of this phenomenon. For example, there are the hybrid words and phrases that are used nowhere else but Puerto Rico, a sort of Puerto Rican pidgin language that includes such gems as "raitru" ("right true," used to show agreement), "dame un sipi" (give me a sip), and "culéate" ("cool out"). There are numerous verbs that come straight from the English, such as "clipear" (to staple), "hangear" (to hang out), "printear" (to print), and "taipear" (to type). There are also some English words that have taken on new meanings in the Puerto Rican vernacular, such as "cangriman" (from "congressman," to denote a person who is corrupt, opportunistic, a liar, or a bully), "pana" (a close friend, derived from "partner"; also a word for "breadfruit"), and "zafacón" (a garbage can, derived from the term "safety can").

Status Politics: The National Sport

The schizophrenia described by Marqués is not limited to bilingual individuals; it occurs on a fundamental level in many other sectors of Puerto Rican society. Perhaps nowhere is it reflected more dramatically than in our local politics. Because Puerto Rico's status vis-à-vis the United States has remained undefined, our political parties derive their legitimacy from their respective status ideologies. This unhealthy obsession with status permeates every aspect of political and social life on the island.

There are basically two ends of the spectrum. One ideology embraces the island's relationship with the United States along with the economic and political security it represents and seeks full participation for Puerto Rico in the form of statehood. Statehood's main proponent is the New Progressive Party (NPP), which, over the past 30 years, has steadily increased its influence, garnering a significant plurality (but not quite a majority) of the popular vote.

The ideologies that compete against the statehood cause find their strength in the preservation of Puerto Rican culture, heritage, language, and values. The anti-states people fall into a few categories. The principal opponent is the Popular Democratic Party (PDP), which rejects statehood as an affront to Puerto Rican sovereignty, yet insists upon a close relationship with the United States. Less tolerant of the "yanquis" are various smaller pro-independence groups, such as the Puerto Rican Independence Party (PIP). The PDP has allied itself with the PIP and others to defeat the NPP in several recent elections.

The status debate has engendered some very thoughtful and well-written judicial decisions. But again, in classic schizoid fashion, courts from different ends of the spectrum often reach diametrically opposite conclusions. For example, while the majority of courts, and indeed the U.S. Supreme Court, hold that Puerto Rico is a territory of the United States, subject to the will



and whim of Congress, *see, e.g. Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980), at least one Puerto Rican federal judge is of the view that in 1952, an irrevocable "compact" was created between Congress and the island, by virtue of which it could "no longer be considered a possession, dependency or territory subject to the plenary power of Congress." *Mora v. Torres*, 113 F.Supp. 309 (D.P.R. 1953). Another federal judge held more than a half century later that although Puerto Rico was indubitably a territory, it had *de facto* become an "incorporated" territory of the United States, with all of the rights and privileges appertaining thereto. *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d. 22 (D.P.R. 2008).

Similarly contrasting opinions surround the question of the applicability of federal law to the island. For example, the Puerto Rico Supreme Court has held that the federal Constitution's Commerce Clause does not apply to the island. *RCA v. Gobierno*, 91 D.P.R. 416 (1964). The U.S. Court of Appeals for the First Circuit, in contrast, has made clear that it does. *TMT v. Rivera Vazquez*, 977 F.2d 1 (1st Cir.1992).

The commerce clause may not get the average Puerto Rican's blood to boil, but the issue of the applicability of federal law to the island becomes much more interesting when the particular law in question is unpopular or repugnant to Puerto Rican sensibilities. For example, the local U.S. Attorneys' Office has for years sought unsuccessfully to persuade a jury to apply the federal death penalty in Puerto Rico. Puerto Rico's Constitution specifically prohibits capital punishment, and the island's deeply catholic population generally views the death penalty as abhorrent. With one exception, all the federal judges take it as a given that the federal death penalty can be applied in Puerto Rico. But one maverick judge—who belongs to the opposite political persuasion—holds a different view. In a widely publicized opinion, he held the federal death penalty to be inapplicable on the island because, among other reasons, Congress was obliged to respect the prohibition against the death penalty contained in the Puerto Rico Constitution. *U.S. v. Acosta Martinez*, 106 F. Supp 2d 311 (D.P.R. 2000). His decision was lauded by many sectors of Puerto Rican society but predictably reversed on appeal. *U.S. v. Acosta Martinez*, 252 F. 3d 13 (1st Cir. 2001); *cert. denied* 535 U.S. 906 (2002).

Reversal on appeal is indeed par for the course when a judge plunges into the black hole of the Puerto Rico status debate. One federal judge has been reversed no less than three times for insistently holding that Puerto Ricans have a constitutional right to vote in presidential elections. *See Igartúa de la Rosa v. United States*, 107 F.Supp.2d 140 (D.P.R., 2000) and 113 F.Supp.2d 228 (D.P.R., 2000); *rev'd*, 229 F.3d 80 (1st Cir. 2000); *Igartúa de la Rosa v. United States*, 417 F. 3d 145 (1st Cir. 2005), *cert. denied* 547 U.S. 1035 (2006).

Then there is the debate about the U.S. citizenship of those born in Puerto Rico. The Fourteenth Amendment provides that "all persons born or naturalized in the United States . . . are citizens of the United States." Those born or naturalized in the states cannot be stripped of their citizenship involuntarily. *Afroyim v. Rusk*, 387 U.S. 253 (1967). But what about those born in the territories?

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In *Rogers v. Bellei*, 401 U.S. 815 (1971), the Supreme Court held that the Fourteenth Amendment's citizenship clause did not apply to people acquiring U.S. citizenship by virtue of being born outside the United States to an American parent. Yet the question lingers: Do those born in Puerto Rico have the same sort of "second class" statutory (as opposed to constitutional) citizenship, which can be stripped by Congress at will?

Lawyers play a very special role in Marqués's schizophrenic society. At times, it's our job to amplify a particular voice, allowing it to rise above the others and clamor for justice. On other occasions, we are the harmonizers, using the rule of law to bridge the gaps and resolve discord between diverse sectors of a pluralistic and multicultural society.

Next time you encounter a lawyer from Puerto Rico, take note. Bear in mind that you are probably dealing with a very unique and special individual: bilingual, bicultural and most likely quite capable. And if by chance you happen to catch them talking to themselves in Spanglish, don't be too concerned. After all, to paraphrase Oscar Levant, schizophrenia beats dining alone.

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Book Review: Charles Ogletree Reflects on the Arrest of Henry Louis Gates, Jr.

By Taneka Campbell-Larmond

The Presumption of Guilt: The Arrest of Henry Louis Gates, Jr. and Race, Class and Crime in America By Charles Ogletree
Palgrave Macmillan
June 2010, 256 pages

As individuals and as lawyers, we go about our everyday life not understanding many of the challenges and issues that are faced by target groups in our society today—in particular, African American men. Through our own personal experiences, I am sure we each understand that the path to whatever position we hold today was not always a smooth path because at some point in time or another, whether during law school or our professional lives, as minority lawyers, we had to prove our abilities. Despite our individualized experiences, we should be cognizant of the fact that no matter where we work, live, or socialize, we still live in a country where race matters. Over the years, minorities have made great advances, but at the end of the day, the question remains—despite all our advances and achievements, how far have we really come?



In *The Presumption of Guilt: The Arrest of Henry Louis Gates, Jr., and Race, Class, and Crime in America*, Charles Ogletree not only explores in great detail the underlying presumption and issues that led to the arrest of Henry Louis Gates, Jr., but also, more importantly, utilizes the book as an opportunity to call attention to the fact that racial injustice is not a part of our past but rather is an embedded problem in the criminal justice system that continues today. His book emphasizes the point that we still live in a society where racial disparities prevail and people are not judged by "the content of their character but rather by the color of their skin." Charles Ogletree, who is a lawyer himself and a distinguished professor of law at Harvard Law School, acted as counsel to Henry Louis Gates, Jr., and continues to serve as special counsel to President Barack Obama. He has authored four books on race and the law and is well-known for his critically acclaimed book, *All Deliberate Speed*.

The Presumption of Guilt is both insightful and educational on the recurrent problems presented by race and class in American society today. The book successfully highlights the fact that America is not a post-racial society and, despite the election of a black male as the 44th president of the United States of America, we are still a long way from achieving racial equality as evidenced by the arrest of Henry Louis Gates, Jr. The arrest of Gates, a person standing in his own home and who produced proof that he lived there, was primarily predicated on the fact that he was a black man who was, because of his race, presumed to be guilty of a crime even though no crime had in fact been committed. This book helps us gain an understanding of the challenge that was faced by Gates on the night of his arrest and gives us greater understanding in the presumption that African American men always bear the "burden of a presumption of guilt" and are subjected to "arbitrary use of police force and abuse of power" regardless of their class or if they "are accomplished law-abiding citizens."

Ogletree examines stories and experiences relating to racial profiling, including those of Rodney King (whose story is well known); Latisha Harlens (an African American student who lost her life in Los Angeles while attempting to purchase orange juice); Robert Wilkins (an African American lawyer who was stopped while driving) and well-known individuals such as Thurgood Marshall, Johnnie Cochran, Jr., and Spike Lee, all of whom have individually dealt with a race-related experience. Each story in the book serves as a "compelling reminder of the problems" people of color experience in their daily lives. The arrest of Gates, and the stories shared, as Ogletree states in his book, is but "a microcosm of a much larger and more troubling problem of race, class and crime in America." Given the foregoing, the book fulfills the purpose of not only showing us the problem but also showing how deep rooted in the criminal justice system the problem really is. In that regard, the book reveals that the majority of arrests are based on race—not reason. The book further reveals that given the mistrust for the police and the power often yielded by those in power, not many racial-profiling cases are challenged, and for those that are, the result is often disappointing.

In effect, the book achieves its goal of providing both background and statistical data to show that on any given day, regardless of what state we live in, two things hold true: (1) race trumps

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class; and (2) racial profiling has to be eliminated in its entirety before we can truly begin to live in a post-racial America. Additionally, the book achieves an even greater goal in providing the legal community with useful recommendations on where and how we should begin to eliminate racial profiling, such as acknowledgment of police error, police accountability, public apology, and better police training and practices. After reading this book, we should all think about the final question Ogletree presents: "How much progress have we made when there is one black man in the White House and a million black men in prison?" The book, in exploring the arrest of Gates and the stories of so many other individuals who shared similar experiences, demonstrates that there is much work to be done to "overcome the barriers of class and race in our criminal justice system" today.

This book was truly an eye-opener on the issue of racial-profiling. Ogletree, from the title of the book through its content, makes an important point: The unwarranted fear and misguided assumptions about minorities, especially black men, need to be addressed if we are to eliminate racial disparities in the criminal justice system, and opportunities for the police and citizens to achieve mutual respect must be created.

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NEWS & DEVELOPMENTS

Native American Farmers Celebrate \$760 Million Settlement

Native American farmers and ranchers and the U.S. Department of Agriculture ([USDA](#)) announced an historic agreement to settle a nationwide class action lawsuit (*Keepseagle v. Vilsack*) that alleged discrimination in USDA's farm loan program dating back to 1981.

The agreement brings to an end 11 years of litigation, and marks the beginning of what is expected to be a new partnership between USDA and the Native American community.

Under the [agreement](#), which was unveiled in the U.S. District Court in Washington, D.C. before Judge Emmet Sullivan, USDA will pay \$680 million in damages to thousands of Native American farmers and ranchers and forgive up to \$80 million worth of outstanding farm loan debt.

The settlement also provides for a host of initiatives that will improve USDA's farm loan services for Native Americans.

» [Read more: The Washington Post](#)

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Judge Orders Firm to Add Diversity to Case

A federal judge is taking steps to promote diversity in his Manhattan courtroom. Judge Harold Baer of the United States District Court for the Southern District of New York recently issued an order in a class action suit (*In re: Gildan Activewear Inc. Securities Litigation*; 08-cv-5048) directing the two co-lead firms serving as plaintiffs' counsel to assign at least one woman and one minority to the case in order to reflect the diversity of class members they are representing.

» [Read more: Law.com](#)

ASK A MENTOR

How Should You Handle Time-Off Requests for Religious Holidays?

Dear Ask a Mentor,

It is the fall again and along with cooler temperatures and football come the holidays. Even though I'm not especially religious, I generally don't like to work on special religious holidays. Do you have any advice about how to handle asking for time off for religious holidays, such as the Jewish High Holidays, Good Friday, and Eid al-Fitr?

—J.B., Boston, Massachusetts

Dear J.B.,

I would advise you to treat a request for time off for a religious holiday like any other request for time off. Make sure to notify the people you work with as far in advance as possible that you will be out of the office that day. Remind them frequently that you will be gone. Be sure to take care of all of the work that you possibly can ahead of time and, if there is anything that will take place the day you will actually be out, be sure to find someone to cover it. Set up an out-of-office message on your email and voice mail and make sure to provide an alternate point of contact to resolve any emergencies that do arise. As long as you communicate effectively with the people

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you work with and with your clients about your anticipated absence, taking time off for religious observance should be no different than taking a day off to go on a ski trip.

Brian Josias is an associate at Cotsirilos, Tighe and Streicker in Chicago, Illinois.

Dear J.B.,

Just like Emily Post tells you not to talk about religion, politics, or money in a social setting, it is always delicate to tackle any of these topics in a business environment, including a law firm. In the difficult economic times that the legal industry has been experiencing lately, you may feel even more cautious about identifying yourself as being "different," especially when that difference is connected with you needing additional time off from work. Despite that concern, you should feel comfortable asking for time off or a workplace accommodation based on a religious reason because, in part, you are protected from religious discrimination in the workplace by federal law. In addition, many employers are well aware of the benefits that flow from having a diverse workplace and will bend over backwards to make sure that your religious preferences are respected. Nonetheless, common sense should prevail and you should take every effort you can to make certain that your religious observance does not impact your workplace productivity. If, for example, you need to take time off during the week or leave work early to observe a holiday, you should attempt to compensate for that by working a day during the weekend or coming in early. Do your best to limit the impact your religious observance has on the bottom line of your productivity, and you should not have any concerns.

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Keywords: mentoring, vacation request, time off request, holiday

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