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# The Multi-Purpose Attorney: The Interpreting Attorney-Mediator

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There is little question that alternative dispute resolution (ADR) is an expanding and dynamic field. With the increasing complications associated with litigation, ADR methods present an attractive option to resolve issues in a timelier and more economically efficient manner.[1] Along with potential monetary savings, ADR also allows the disputing parties more flexibility in creating solutions that may not be accessible through the judiciary system.[2]

With the increase in popularity of ADR, particularly in the mediation field, many attorneys find themselves specializing in mediation services as well as traditional legal counsel.[3] Attorneys who market themselves as mediators now find themselves with a greater number of opportunities in their respective fields given the higher demand for cost and time efficiency in resolving disputes.[4] However, ADR and mediation are not limited to the professional or corporate setting, but apply broadly to the common person who may also seek mediation for the same money-saving purposes. Here, a whole slew of issues arise, including ones that exist alongside the traditional litigation system. Among these is the problem created by language barriers during mediation, which combined with the confused expectations by clients originating from countries with different legal systems, creates a blockade to efficient mediation and communication between mediator and client. Bilingual attorneys and bilingual mediators are not a rarity, but are still in high demand considering the increasing number of non-English speakers or limited English-speakers in this country.[5] Alarmingly, a 2006 report on the U.S. Hispanic economy indicated that 24% of the U.S. Hispanic population

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1. *Benefits of Mediation*, MEDIATE.COM (Aug. 1998), http://www.mediate.com/articles/benefits.cfm.

2. *Id.*

3. Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887, 900 (2012).

4. *Benefits of Mediation*, *supra* note 1.

5. *See* Charles Gabrau, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 238 (1996).

"have little or no command of the English language."[6] Yet, when the attorney takes on multiple functions as mediator and interpreter, some argue that the combination is inherently unethical, and overall, detrimental to the interests of the client.[7]

The attorney-mediator may be a beneficial hybrid, but what happens when another layer is added to the attorney's functions? Specifically, what happens when the attorney takes on the role of both mediator and interpreter?

Part I will provide a brief overview of the increasing role of attorneys as mediators, as well as an overview of the guidelines for mediators and interpreters.

Part II examines the importance of language and culture in mediation, particularly focusing on the vital function of the interpreter in the United States. Given the variety of languages spoken in the United States, interpreters are becoming an essential tool to ensure accessibility to the legal system and justice. This section will also briefly look at the impact of cultural expectations by the client to analyze what the client's expectations are of the attorney-mediator and the effect this has on the relationship and the overall satisfaction of the encounter.

Part III combines the roles of attorney, mediator, and interpreter. While some argue that combining these roles is both inefficient and unethical[8] this article proposes that the guidelines for mediators and interpreters can be crafted to create a harmonious relationship, especially considering that the guidelines for these rules vary from jurisdictions, both in scope and in adoption.

The roles can be reconciled and do not necessarily have to conflict, if there are alterations in the guidelines—which vary greatly by jurisdiction—that allow for a harmonious combination of the roles.[9] There are benefits to having the attorney-mediator also serve as interpreter and that ethical considerations can be overcome; particularly that the relationship between the client and the mediator (not yet legal representative) can be positively influenced when the mediator and interpreter are one in the same because a sense of trust is established. With this rapport, if the case proceeds to litigation, there is already a preceding link between the client and the (now)

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6. HISPANTELLIGENCE, SPECIAL REPORT: THE U.S. HISPANIC ECONOMY IN TRANSITION 5 (2006), http://xa.yimg.com/kq/groups/13699726/38694478/name/The+US+Hispanic+Economy+in+Transition.pdf.

7. Eric M. Bernal, *A Dual-Role Bilingual Mediator is Inefficient And Unethical*, 13 SCHOLAR ST. MARY'S L. REV. ON MINORITY ISSUES, 529, 533 (2011).

8. *Id.*

9. James Alfini, *Mediation as a Calling: Addressing the Disconnect Between Mediation Ethics and the Practices of Lawyer Mediators*, 49 S. TEX. L. REV. 829, 838-39 (2008).

legal representative that is vital from a cultural standpoint, given that many non-English speakers are immigrants that come from different legal cultures where the attorney's role is multi-faceted. When the language barrier exists in conjunction with one of trust, the client's situation is complicated by feelings of mistrust or uneasiness hindering any ADR solutions.[10]

## I. GUIDELINES OF THE MULTI-PURPOSE ATTORNEY

Attorneys have begun to realize that it is necessary to branch out into ADR in order to become more competitive. For the last few decades, mediation has become increasingly prevalent, showing no signs of falling out of favor any time soon.[11] Mediation has become so widespread that many states have codified mediation into their legislative acts, authorizing it as a method to resolve issues, though not making it a mandatory process.[12] Even among litigators, the process of mediation has gained popularity, with some attorneys assuming that mediation is an automatic process before proceeding into time-consuming litigation.[13] Professor John Lande, former director of the LLM Program in Dispute Resolution at the University of Missouri[14], points out that there has been a shift since the 1980s from a "culture of 'litigation'" to what he calls a culture of "liti-mediation," whereby the use of mediation has expanded from niche situations to mainstream problems.[15] He further points out that mediation and litigation are co-evolving, creating a symbiotic relationship and exerting simultaneous influence on each other.[16]

### *A. Mediator Guidelines*

The guidelines for attorneys, mediators, and interpreters are not incredibly dissimilar, but do have some differences. It should be noted that, while attorneys have the obligation to adhere to each of their states ethical

10. Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 754.

11. *See* John Lande, *How Will Lawyering and Mediation Practices Transform Each Other*, 24 FLA. ST. U.L. REV. 839 (1997).

12. *Id.* at 845.

13. *Id.*

14. For more on Professor Lande's credentials, see *Biography of John Lande*, U. MO. SCH. OF LAW, http://law.missouri.edu/lande/ (last visited Oct. 6, 2015).

15. Lande, *supra* note 11, at 846.

16. *Id.* at 879.

guidelines, many states do not have mandatory guidelines for mediators or interpreters.[17] The states that have adopted guidelines for mediators utilize the Model Standards of Conduct for Mediators, created by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution, as a basis for their own guidelines for court-appointed mediators, but not necessarily for private sector mediation.[18] However, some states require special training to handle specific types of cases.[19] For example, in California, the only rules for mediators clearly set out are in child services cases, which explain the expectations of mediators in child custody cases, but even here, these requirements are overall guidelines to seek efficiency.[20] The California Dispute Resolution Council (CDRC), an optional membership association, created Standards of Practice for California, seeking to:

> [P]rovide model standards of conduct; inspire excellence in practice; guide mediation participants, educators, policymakers, courts, government organizations and others in establishing policies and practices for mediation programs; provide a foundation for any mediation credentialing program that may be contemplated by specifying conduct that helps to define ethical, competent, appropriate and effective dispute resolution; and to promote public understanding and confidence in mediation.[21]

Again, these are merely suggestions and not strictly enforced by any one authority, except in cases where the mediator holds specific licenses that require adherence to the rules set out.

Those seeking a mediator are mostly left to use their own discretion when choosing a mediator, though the California courts provide resources in seeking out mediation services. [22] Mediators can be found through private means, such as the internet or personal recommendations, and through nonprofit organizations like the California Dispute Resolution Council and the California Bar Referral services.[23]

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17. MEDIATION TRAINING INST. INT'L, STATE REQUIREMENTS FOR MEDIATORS http://www.mediationworks.com/medcert3/staterequirements.htm (last visited Oct. 6, 2015).

18. Alfini, *supra* note 9, at 830.

19. STATE REQUIREMENTS FOR MEDIATORS, *supra* note 17.

20. *See* CAL. R. CT. 5.210 (2016).

21. CAL. DISP. RESOL. COUNCIL, STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS http://www.cdrc.net/adr-practice/mediator-standards/ (last visited Oct. 6, 2015).

22. *Finding a Mediator*, JUD. COUNCIL OF CAL., http://www.courts.ca.gov/1011.htm (last visited Oct. 6, 2015).

23. *Id.*

*B. Interpreter Guidelines*

Interpreters, on the other hand, have governing rules when in the court setting, though not when in mediation. The Professional Standards and Ethics for California Court Interpreters (CIP Standards) is thoroughly detailed,[24] delving into various issues interpreters encounter within the courtroom, ranging from how to handle interpreting obscenities, to detailing responses, to conflicts of interest.[25] However, this manual does not address how the interpreter should behave during the course of mediation or in relation to it. Within its eighty-seven pages, the word "mediation" appears twice: once as an example of what is considered an assignment[26] and a second time within the text of California Evidence Code section 754, clarifying that those that are hearing impaired or deaf and present at any action are entitled to have someone present to ensure interpretation.[27]

California only has guidelines for certified interpreters, but will also allow the use of registered interpreters who are not vetted like certified interpreters.[28] Certified interpreters are those who have passed a bilingual oral exam,[29] and an English-only written exam, which includes portions on English language grammar and vocabulary, court-related terms and usage and ethics and professional conduct.[30] On the other hand, a registered interpreter is one who has successfully registered with the Judicial Council of California and is determined to be qualified to serve as an interpreter for a language that does not have a certification program or when a certified interpreter is not available.[31]

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24. JUD. COUNCIL OF CAL., PROFESSIONAL STANDARDS AND ETHICS FOR CALIFORNIA COURT INTERPRETERS (5th ed. 2013), http://www.courts.ca.gov/documents/CIP-Ethics-Manual.pdf. The PDF version of the Professional Standards and Ethics for California Court Interpreters is 87 pages long. *See id.* This should be compared to the length of the mediator guidelines by the CDRC, which stands at roughly five pages. *See* STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS, *supra* note 21.

25. PROFESSIONAL STANDARDS AND ETHICS FOR CALIFORNIA COURT INTERPRETERS, *supra* note 24.

26. *Id* at 57.

27. *Id.* at 44.

28. *Id.* at 1.

29. *Language Specific Details,* JUD. COUNCIL OF CAL., http://www.courts.ca.gov/2695.htm (last visited Oct. 6, 2015).

30. NAT'L CTR. FOR ST. CTS., COURT INTERPRETER WRITTEN EXAMINATION: OVERVIEW 1 (Jul. 2012), www.courts.ca.gov/documents/written-exam-overview.pdf.

31. JUD. COUNCIL OF CAL., INFORMATION PACKET 4, http://www.courts.ca.gov/documents/CIP-Info-Packet.pdf.

Certified interpreters must complete a Court Interpreter Certification Examination to receive a license to practice, to test for fluency in both English and a second language.[32] After the exam, the applicant must contact the Judicial Council and register to be added to the Master List of Certified Interpreters of Designated Languages or Registered Interpreters of Non-Designated Language.[33] There is then a mandatory orientation, but it must be noted that licensed applicants do not require any formal training; they must simply pass the exam with a satisfactory score of 80%.[34]

The informality of finding an interpreter for mediation can be seen in some of the forms utilized by the California Superior Courts. Fresno's Family Court, for example, has the interpreter fill out a form asking for the date, case name, her name, the relationship to the party and acknowledgement that mediation is confidential and that if the interpreter feels that she cannot "remain neutral or . . . maintain the confidentiality of the information . . . to excuse [herself]."[35] The form does not request any additional information in regard to qualifications, but simply states very simple rules for interpreting. Namely, accurately interpreting what is being spoken, maintaining confidentiality, and neutrality.[36]

In the less formal mediation setting, however, there is even greater informality so as to facilitate communication between the disputing parties.[37] In this situation, the interpreter may engage in either verbatim or diplomatic interpretation of what is being said.[38] The mediator ultimately makes the decision as to whether the interpreter should provide verbatim interpretation to the client or if diplomatic interpretation should occur.[39] With verbatim

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32. *Become an Interpreter*, JUD. COUNCIL OF CAL., http://www.courts.ca.gov/7996.htm #tab2702 (last visited Nov. 20, 2015).

33. *Id.*

34. PROFESSIONAL STANDARDS AND ETHICS FOR CALIFORNIA COURT INTERPRETERS, *supra* note 24, at 4.

35. *Family Court Services Interpreter Participation Form*, SUPERIOR CT. OF CAL. FOR FRESNO COUNTY, http://www.fresno.courts.ca.gov/family/FCS-Interpreter%20Participation%20Form.pdf.

36. *Id.*

37.

> The most important reason to use interpreters in any mediation involving one or more NES parties is because an interpreter may be necessary to achieve the goals of mediation. The primary goal of mediation is communication between the parties. "In its simplest terms, mediation may be characterized as one mediator trying to get two participants to voluntarily do that which they least desire to do--talk to each other." Mediation is inherently "a communication process." There is no greater barrier to communication than the inability to use the same language. Thus, an interpreter is indispensable when communication could not effectively occur otherwise.

Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 6-7 (1997).

38. Edward Bujosa & Josefina Randon, *Mediating with Interpreters*, MEDIATE.COM http://www.mediate.com/articles/rendon1.cfm (last visited Nov. 20, 2015).

39. *Id.*

interpretation, the issue arises in regards to incendiary comments where the context or meaning of the words or statement are aggravated by the interpretation because the words or statements have a different connotation in the other language and cannot be accurately interpreted to maintain the appropriate context.[40] Thus, the mediator can opt for a diplomatic interpretation, whereby the interpreter uses less provocative words to convey the intended meaning and thus maintain a cooperative and positive environment during the mediation.[41]

## II. EXPECTATIONS OF THE AMERICAN LAWYER AND THE LATINO CLIENT

### *A. Changing Demographics*

The population of the United States is rapidly expanding and its demographic makeup is also changing as it expands. In April of 2010, the Hispanic/Latino population comprised 16.3% of the United States population.[42] In July of 2014, this percentage had expanded to 17.4%.[43] Between these two dates, there is a population increase of 3.3% or the difference between 318,857,056 and 308,758,105.[44] If we take our percentages and translate them into figures, in 2010, just over 50 million people in the United States were of Hispanic descent, compared to 2014 when this figure increased to over 54 million.[45]

It is clear then that the number of Hispanic people in the United States is steadily increasing, and that many of this increasing population are not only racially different, but culturally, with many being immigrants from different Hispanic nations.[46] For example, from 2000 to 2010, immigrants from Mexico numbered over 4 million; from Central and South America just over 2 million; and from the Caribbean contributing just over one million.[47] Encompassed in these groups (and excluding non-Western countries) are nineteen Spanish speaking nations, each with its own distinctive style of

40. *Id.*
41. *Id.*
42. *Quick Facts*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST040215/00/ (last visited Nov. 20, 2015).
43. *Id.*
44. *Id.*
45. *Id.*
46. Steven A. Camarota, *Immigrants in the United States, 2010: A Profile of America's Foreign Born Population*, CTR. FOR IMMIGR. STUDS. (July 2012), http://www.cis.org/2012-profile-of-americas-foreign-born-population#birth.
47. *Id.*

Spanish.[48] These cultural differences manifest in many ways as non-U.S. natives possess idiosyncrasies that can complicate seeking legal remedies, both through litigation and mediation.

For the purposes of this paper the Hispanic population will be broadly generalized, but it should be noted that, like most things, the country of origin lends to distinctive societal norms. Ascancio Piomelli, Professor of Law at University of California Hastings, aptly warns us against the pitfalls of stereotyping, which is:

> [A]scribing presumed attitudes and behaviors to members of other groups. . . . [E]fforts to bridge intercultural differences pose a danger of stereotyping, especially if one makes assumptions about "the values and practices associated with a particular cultural heritage" or assumes that a particular person with that heritage shares the traits ascribed to that culture. Consequently . . . all assertions regarding "cultural differences" [should] be understood as "tentative," for cultures reflect a "continuum of values," with core or mainstream values lying at the mean of a normal distribution (i.e., bell-shaped curve) of the population of that culture.[49]

Given that Latin America consists of dozens of countries, each with its own legal systems, similar and dissimilar, it is simpler to speak of the Latino population broadly as the research is very limited as to individual countries.

### *B. The Lawyer's Expectation*

The American view of the lawyer and client relationship depends heavily on the idea that the client is an autonomous, self-sufficient person with a vested interest in his case, and will thus take the necessary steps to ensure a favorable outcome.[50] This idea is an almost exclusively American idea, springing from the foundational ideals of individuality, free will, and autonomy.[51] Thus, operating under this idea, American lawyers have a higher expectation of the client to be proactive and make the more important decisions as to how to handle the case, with the lawyer providing choices and pathways that the client should choose from.[52] This is particularly problematic in high density Latino areas where it is not absolutely necessary for immigrants to assimilate into the Americanized society because these

48. *Spanish-Speaking Countries Worldwide*, THINKABROAD.NET, http://www.thinkabroad.net/spanishspeakingcountries.htm (last visited Nov. 20, 2015).

49. Ascancio Piomelli, *Cross Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 142 (2006).

50. Liwen Mah, *The Legal Profession Faces New Faces: How Lawyers' Professional Norms Should Change to Serve a Changing American Population*, 93 CALIF. L. REV. 1721, 1726 (2005).

51. *Id.*

52. *Id.*

groups can remain isolated within their own communities, without needing to accept other established social norms, like the role of the American attorney.[53] The view of the Latino client is skewed by any previous experience with the legal society of the originating country, as well as a differing view on individualism and autonomy from societies that emphasize community over the individual.[54]

### *C. The Latino Client's Experience and Expectation*

The Latino community is more likely to view lawyers with distrust than other communities.[55] This may spring from a variety of reasons, but most likely is due to a sense of confusion as to the intricacies of the American legal system.[56] Many Hispanic countries do not have efficient legal systems and the use of a lawyer is not a frequent necessity.[57] Coupling previous inefficient systems with language barriers and complex court system bureaucracies leads many "Latinos/as [to] view the court system as more paternalistic and as a territory which is unfamiliar and unwelcoming to them."[58]

Furthermore, Latinos originating from countries that suffer from rampant corruption obviously have an increased distrust of American lawyers. [59] In many of these Latin American countries, bribery is the way that legal transactions are conducted.[60] Even in criminal cases, many have two options: *plata o plomo.*[61] The literal translation is silver or lead, but

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53. *Id.* at 1734.

54. *Id.* at 1746.

55. Mah, *supra* note 50, at 1749.

56. *Id.*

57. *Id.*

58. Jessica R. Dominguez, *The Role Of Latino Culture In Mediation Of Family Disputes*, 1 J. LEGAL ADVOC. & PRAC. 154, 160 (1999).

59. Susan Eva Eckstein & Timothy P. Wickham-Crowley, *Struggles for Justice in Latin America*, *in* WHAT JUSTICE? WHOSE JUSTICE?: FIGHTING FOR FAIRNESS IN LATIN AMERICA 7-9 (Susan Eva Eckstein et al., eds., 1st ed. 2003).

60.

> Bribery can occur at every point of interaction in the judicial system: court officials may extort money for work they should do anyway; lawyers may charge additional "fees" to expedite or delay cases, or to direct clients to judges known to take bribes for favorable decisions. . . . When defendants or litigants already have a low opinion of the honest of judges and the judicial process, they are far more likely to resort to bribing court officials, lawyers, and judges to achieve their ends.

TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007, at XXIII- XXIV, http://issuu.com/transparencyinternational/docs/global_corruption_report_2007_english?e=2496456/2664845.

61. ECKSTEIN & WICKHAM-CROWLEY, *supra* note 59, at 7-9.

contextually (and because of regional language idiosyncrasies) it translates to money (bribery) or punishment (force).[62] Seeing the constant exchange of money within the legal system[63] has jaded many immigrants into believing that the American system is just more of the same. Lawyers are simply seen as another part of the wider system that cannot be trusted.[64]

Another issue that arises from cultural differences is the Latino habit of oversharing personal information, which clashes with the American tradition of confidentiality. *Personalismo* is a reciprocal relationship whereby the party expects the other party to be open in discussing personal things.[65] By sharing intimate details, a relationship of trust forms between the two parties, which is essential to many Latinos accustomed to dealing with others in a smaller, communal setting.[66] When this sharing does not occur, likely because the American lawyer has been trained to remain neutral and maintain a separate role, the Latino beliefs that personal relationships and trust are paramount are left unattended. This leads to resentment and a hesitation to cooperate, which is particularly detrimental in ADR proceedings.[67] Another feature of this oversharing is that the individual client might have difficulty with the concept of confidentiality, divulging information within her familial (or social) group more widely than makes the American lawyer comfortable.[68] The sharing of information becomes a second-nature result of cultural norms, leading to "the owner of information . . . more likely [being] a group rather than an individual."[69]

Of course, open communication is also hindered by cultural misunderstandings exacerbated by language barriers. For example, in Latino and Asian cultures, it may be rude to say "no" and thus a "yes" is given, but the "yes" does not necessarily represent approbation, but rather is given out of courtesy or "verbal politeness."[70] This "yes" is further marred by the fact that Latinos have a strongly ingrained sense that those that possess an

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62. *Mexican Drug Cartels in America: Plata o Plomo (Silver or Lead) Warning Comes to America*, TRUTH IN MEDIA (May 18, 2014), http://truthinmedia.com/mexican-drug-cartels-in-america-plato-o-plomo-silver-or-lead-warning-comes-to-america/.

63.

> TI's Global Corruption Barometer 2006 polled 59,661 people in 62 countries and found that in one third of these countries more than 10 percent of respondents who had interacted with the judicial system claimed that they or a member of their household had paid a bribe to obtain a "fair" outcome in a judicial case.

GLOBAL CORRUPTION REPORT 2007, *supra* note 60, at xxii.

64. Mah, *supra* note 50, at 1750.

65. *Id.* at 1751.

66. *Id.*

67. *Id.*

68. *Id.* at 1759.

69. *Id.*

70. *Id.* at 1757.

expertise simply know best and thus will simply agree because they believe it is what they *should* do, not perhaps, what is in their best individual interest.[71]

Interestingly, ethnic minorities are more likely to view mediators as more helpful than non-minorities who seek out mediation services.[72] This may be because of the way mediation is set up to encourage verbal communication, thus, the Latino party is free to address his/her grievances in a similar manner as the issue would be resolved within the community context. Ethnic minorities with lesser education and income were more likely to find higher satisfaction in mediation, pointing out particularly that they felt that mediation brought them an awareness of available resources for help for themselves and their families within their own community.[73] This higher satisfaction may be linked to the idea of *familismo*, which encourages "interdependence, cohesiveness, and cooperation with a larger group,"[74] much like a family unit.

## III. TENSIONS OF THE ATTORNEY-MEDIATOR-INTERPRETER

The careers of attorneys, mediators, and interpreters are defined by various overlapping characteristics that sometimes have to be separated to ensure that an effective system is in place.[75] At first glance, some of these characteristics appear to create tension within the multi-faceted role of attorney-mediator-interpreter. However, these tensions can be resolved principally because the main apparent issues are not as grave as they appear, if there are some alterations and considerations made to modify the three distinct role guidelines so that they work harmoniously. The issues that arise in this setting include issues of neutrality or impartiality, confidentiality, and simple language problems. Given the disparity in adoption of guidelines on a national level for interpreters and mediators, the industry may benefit from a uniform adoption where all attorneys follow the Model Rules of Professional Conduct; mediators all follow the Model Standards of Conduct for Mediators; and interpreters adhere the California Court's Interpreter Ethic's Manual.[76]

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71. *Id.* at 1757-58.

72. CAL. FAM. CT. SERVS. SNAPSHOT STUDY REPORT 3: EXECUTIVE SUMMARY 1 (Jan. 1994), http://www.courts.ca.gov/documents/USRS_Report_3_Exec.pdf.

73. *Id.* at 2.

74. Mah, *supra* note 50, at 1755.

75. *See Generally* Berman & Alfini, *supra* note 3; Kentra, *supra* note 10.

76. *Professional Standards and Ethics for California Court Interpreters*, *supra* note 24.

The career of the lawyer is clearly defined by the need to advocate in the best interest of the client.[77] After all, the attorney's role is to help her client, but when the attorney takes on the role of mediator, the need to advocate must be set aside for there to be fair and cooperative mediation. The mediator's principal characteristic is that of neutrality, as is that of the interpreter.[78] Thus, it is the duty of the mediator to inform the parties that she is not participating as an attorney, but as an unbiased, neutral party and not representing either side but facilitating a solution for the disputing parties.[79] The core of interpretation also requires neutrality, which in current practice, requires that the interpreter not communicate with the parties outside of the role as interpreter.[80] Then, issues raised become about the function of interpreter and the interpreter's compromised neutrality.

*A. Impartiality Issues*

The Model Rules of Professional Conduct do not address impartiality because the attorney is not meant to be impartial, but a zealous advocate for the client. Nevertheless, this advocacy is left aside for the attorney-mediator. Mediation and interpretation are both marked by impartiality.[81] The Model Standards of Conduct for Mediators states in Standard II that "[a] mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice."[82] Similarly, the CIP Standards instruct the interpreter to avoid any appearance of bias, quoting the California Rules of Court Rule 2.890(c), which states that "[a]n interpreter must not engage in conduct creating the appearance of bias, prejudice, or partiality."[83] Given that the two roles of mediator and interpreter require impartiality, at first glance, there is little tension. The tension arises because interpreters are discouraged "from having any extended independent conversations with the parties . . . during the pendency of the case."[84]

However, if the interpreter explicitly stated in what capacity the discussion was being made, would there necessarily be a tension? The

77. Note that the ABA Model Rules of Professional Conduct label Rule 3 with the heading of "Advocate."

78. PROFESSIONAL STANDARDS AND ETHICS FOR CALIFORNIA COURT INTERPRETERS, *supra* note 24, at 20.

79. MODEL RULES OF PROF. CONDUCT [MODEL RULES] R. 1.2 (2009).

80. PROFESSIONAL STANDARDS AND ETHICS FOR CALIFORNIA COURT INTERPRETERS, *supra* note 24, at 19.

81. *Id.* at 20; STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS, *supra* note 21.

82. STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS, *supra* note 21.

83. *Id.*

84. PROFESSIONAL STANDARDS AND ETHICS FOR CALIFORNIA COURT INTERPRETERS, *supra* note 24, at 19.

argument is that impartiality is at issue: if the interpreter steps out of these bounds then it is assumed that the interpreter cannot possibly remain neutral and impartial.[85] If interpreters were allowed more discretion within mediation discussions, this problem may be overcome. Interpreters in the court setting—or for official recordings—should be held to this standard because accuracy is of absolute importance. While accuracy in interpretation is important in mediation, discussion and communication is the overarching theme of the meeting, with the ultimate goal of resolving the problem between the parties in a favorable and agreeable way.[86] Overall, the issue of an impartial interpreter can be limited by reminding the parties of what being an interpreter entails and maintaining a more detached relationship, so as to not rouse the resentment or suspicion of the other parties. [87] The mediator must similarly do this, being careful not to form apparent bonds with any one party or else risk having the negotiations fall apart.

Regarding issues of mistrust, not understanding what occurs during a mediation is likely to create tension, particularly if the person interpreting is not a trusted party.[88] For example, a client who has had time to form a relationship with the attorney and had contracted her to act as mediator will, more likely than not, trust her to not misinterpret (or worse, misrepresent) what is being said based on the previous rapport that was created and that is so vital to Latino communities.[89] When an unknown third party is involved, the client may be more hesitant about having to disclose personal information to a person (the interpreter) who cannot carry a normal conversation outside of proceedings so as to not compromise impartiality.[90] This would seriously hinder the mediation proceedings, fostering resentment and distrust, and possibly leading the client to believe that the interpreter is not being accurate or representing the client's words and context fairly.

85. Bernal, *supra* note 7, at 560-62.
86. STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS, *supra* note 21.
87. Bernal, *supra* note 7, at 554.
88. *See* Bernal, *supra* note 7, at 538, 561; *see generally* Grabau, *supra* note 5.
89. *Id.*
90. PROFESSIONAL STANDARDS AND ETHICS FOR CALIFORNIA COURT INTERPRETERS, *supra* note 24, at 19.

*A. Confidentiality Issues*

The conflict of cultural issues regarding confidentiality is a recurring problem.[91] Between the attorney, mediator, and interpreter, there exist varying levels of expected confidentiality. Interpreters have a broader scope of confidentiality than mediators regarding disclosures of the mediation proceedings.[92] This problem may be mitigated if the most stringent of the guidelines governed this multi-faceted role. It would obviously create much more tension if the mediator-interpreter were allowed to keep a lesser degree of confidentiality, regardless of how liberal her client is with private information. Thus, by enforcing the strongest level of confidentiality, there is a higher assurance that inappropriate information will be disseminated, thus protecting the relevant parties' interests.

Rule 2.4 of the Model Rules of Professional Conduct states that lawyers serving as third-party neutrals are assisting people who are not legal clients, but may provide their services in another capacity, such as a mediator to assist in resolving the issue at hand.[93] Subsection (b) of the rule instructs the lawyers to inform the parties involved that they are not a legal representative, and if necessary, explain to the parties the difference between the lawyer-client relationship and the third-party neutral role.[94] Furthermore, Rule 1.12 requires that the lawyer not represent parties with which they have had substantial involvement in the case, unless there is consent by the parties involved.[95] These rules set the groundwork for the attorney to take on the secondary role of mediator and future attorney, if the need arises. Confidentiality is addressed in Rule 1.6, which indicates that the "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure" is an exception as stated in the rest of the rule.[96]

The mediation equivalent of Rule 1.6 is Standard V of the Model Standards of Conduct for Mediators, though this applies strictly to court-appointed mediators,[97] but is used as an overall guideline for mediators in general. Standard V states that "[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."[98]

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91. Mah, *supra* note 50, at 1759-61.
92. *Id.*
93. MODEL RULES R. 2.4.
94. *Id.*
95. *Id.* at R. 1.12.
96. *Id.* at R. 1.6.
97. Alfini, *supra* note 9, at 830.
98. STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS, *supra* note 21, at Part IV.

This standard is similar to Rule 1.6 of the Model Rules of Professional Conduct in that confidentiality may only be waived by consent of the parties. In California, the CDRC mediation standards are worded similarly to the Model Standards of Conduct for Mediators, requiring consent to disclose any information provided in mediation.[99] Both these models, however, allow the mediator to set differing rules as to confidentiality, so long as the parties agree.[100] Thus, between these rules there is little tension, allowing the attorney to play the role of mediator, and in the future, with proper consent, play the role of attorney if necessary.

When the role of interpreter is added in, given that there is no mandated guideline outside of the court setting, there is little to contrast the previously discussed rules with. The CIP Ethic Manual addresses confidentiality within the scope of attorney-client privilege, recognizing "that anything said between a client and his or her attorney is to be kept confidential" and thus the interpreter is "bound by the same confidentiality rule."[101] Therefore, in the fictional setting where these rules apply universally to interpreters, the standard would not be out of phase with the guidelines and rules set out for mediators and attorneys. On the contrary, the threshold for confidentiality would be higher for the interpreters.

If the most stringent standard of confidentiality were adopted when the attorney-mediator-interpreter were in play, then there should be no real conflict within these roles because the standards and guidelines currently in use do not contradict each other directly, but rather allow for varying degrees of freedom. Once the attorney breaks from the mediation setting and into the litigation setting, Rule 1.6 governs entirely because the relationship changes and becomes a more private one than in the mediation setting.[102]

### *B. Language Issues*

Legal concepts are not universal. Each nation has its own legal ideas, jurisprudence, and procedures. The argument that the ideas do not translate from one language to another should not be a deterrent to allowing mediators to act as interpreters. This is an issue that cannot be resolved easily, regardless of who does the interpretation, but the intent behind the

99. *Id.*
100. *Id.*; MODEL RULES R. 1.12.
101. PROFESSIONAL STANDARDS AND ETHICS FOR CALIFORNIA COURT INTERPRETERS, *supra* note 24, at 23.
102. MODEL RULES R. 1.6.

words may be clearer by the person actually behind the thought process. Simple language should be used as much as possible, and explanations should be given to both sides to ensure clear understanding of legal concepts.

The language barrier is obviously the biggest hurdle in successful mediations given that mediation is founded on the principals of open and cooperative communication.[103] Interpreters must have a mastery of both English and the second language of specialization. However, there is no suggestion that mediators who act as interpreters have different standards of language mastery; rather the opposite: their mastery should be even stronger because a mediator has methods unique to mediation and ways of guiding the conversation, which may be lost by a third party interpreter. Nevertheless, it does not stand to reason that all mediators that know two languages should serve as interpreters, but rather that those that wish to interpret should be free to, keeping in mind that their ultimate responsibility is to the disputing parties and in reaching a favorable agreed-upon settlement.

One of the issues that arises in conjunction with language barriers occurs when one party is not comfortable with the language in which the mediation will occur. Basic English, or conversational English, may not suffice in mediation for a non-native speaker, elongating the entire process as discomfort arises from not understanding English-language nuances or, in some cases, more technical speech.[104] Cultural influences may also affect the understanding of the language being used during mediation, particularly when phrases cannot be directly translated because there are words or phrases that do not exist in the second language.[105]

Furthermore, the differences in English-speaking capacity may create a shift in the balance of power during the negotiations.[106] If one party can communicate more clearly with the mediator, that party may have a greater advantage in steering the discussions and may ostracize the other party.[107] Thus, if the mediator serves as the interpreter, this problem may be mitigated because the English speaker should be on more equal footing given that he can communicate clearly with the mediator-interpreter and that the other

103. STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS, *supra* note 21, at *Preamble*.

104. Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 753 (1993).

105. *Id.* ("In some Asian languages, for example, there are no comparable terms distinguishing 'custody' from 'visitation.' Bilingual mediation is likely to be more time-consuming and therefore more costly, and the need for translation makes mediated agreements more susceptible to misunderstandings.").

106. Dominguez-Urban, *supra* note 37, at 48.

107. *Id.*

non-English speaking party can communicate with the mediator-interpreter in his native language as well.

A significant problem that arises with the use of a third-party interpreter regarding the interpreter's qualifications. Mediation requires effective communication to resolve the issues, so what happens when the interpreter does not understand what the mediator *meant* to say? This is particularly an issue when the non-English speaking party uses a friend or a family member to interpret the sessions.[108] When an interpreter is used, there is always a risk of inaccurate interpretation, and if the mediator is monolingual she will have no idea that something is awry. For this reason, it can be surmised that if the mediator is doing the interpreting, this risk is reduced because the mediator has the discretion of phrasing and speaking in such a way that her actual meaning is conveyed to the Spanish speaking party.

Interpretation is generally done in one of three ways: simultaneous, consecutive, and summary interpretation.[109] Summary interpretation is not favored in the legal setting[110], but this is because legal proceedings require accuracy (especially in criminal cases where the stakes are much higher), whereas mediation is not generally transcribed or as formal.[111] Summary interpretation is disfavored in legal proceedings because it requires the interpreter to take what the speaker has said and summarize or paraphrase it so that the party gets the idea of what is being said.[112] It has been noted earlier how informal the requirements for interpreters in mediation can be, mainly because of the flexibility mediation provides the party.[113] While it is clear that summary interpretation should definitely not be used within the court setting, it can be used in the free-flowing mediation setting,

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108.
> In the court setting, this problem sometimes arises and the judge must make the determination that the person will be able to manage the interpretation. This is a hopeful situation, oftentimes, because rarely is anyone else present to check that the interpreter is actually doing a fairly accurate job. Judges are to "consider, among other factors, how the person learned English, the person's education and whether they have had any formal study of English, the person's knowledge of idioms and slang in both languages, and whether the person has training or experience in interpreting in other contexts."

Emily Kirby et al., *An Analysis of the Systemic Problems Regarding Foreign Language Interpretation in the North Carolina Court System and Potential Solutions*, U.N.C. SCH. L. IMMIGR. & HUM. RTS. POL'Y CLINIC 73 (May 5, 2010).

109. Dominguez-Urban *supra* note 37, at 13.

110. *Id.*

111. Gabrau, *supra* note 5, at 234-38.

112. *Id.* at 282. ("This is too dangerous a practice for a judge to allow, especially in a criminal case, because it is the interpreter who then decides what is important to interpret for the defendant.").

113. *Family Court Services Interpreter Participation Form*, *supra* note 35.

particularly because the mediator can maintain the essence of what is being said with less issue than if a third party took the liberty to condense the discussions.

Simultaneous interpretation is not exactly simultaneous, rather the interpreter waits until she hears enough of the sentence to understand the meaning and then interprets it into the target language.[114] One of the greatest disadvantages of simultaneous interpretation is that if the speaker cannot be understood clearly, or if the interpreter gets lost while interpreting, then the whole process may be muddied.[115] Important details could be missed and the interpreter would have no way of recalling them and risks saying nothing, or worse, saying something that was not said.

Consecutive interpreting, on the other hand, requires that the speaker be actively engaged by stopping periodically to allow the interpreter to do her job.[116] The interpreter must take careful notes of what the speaker says to be able to reiterate it in the other language, but this also carries the same risks of simultaneous interpretation that details may be missed, forgotten, or changed.

## IV. CONCLUSION

The American demographic is steadily changing and with it will come increasing problems in how legal issues arise and are handled. Mediation is appealing because it is cost-effective, time-effective, and non-adversarial. The non-adversarial nature of mediation is particularly appealing to those who do not wish to involve themselves in complex litigation. In this current case, mediation is particularly an appealing solution for the Latino community given that this group clusters around core ideas of interdependence and interpersonal relationships, taking into great consideration how their actions will affect others' emotions and situations.[117]

This same sense of interdependence and community requires that Latinos form lasting bonds with those they engage with, which becomes an issue if the person is a newcomer like an interpreter that has never been dealt with. While Latinos feel the need to divulge personal information, as noted

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114. *Types of Interpreting*, LANGUAGE SCI., http://languagescientific.com/translation-services/multilingual-interpreting-services/interpreting-services-types.html (last visited Nov. 20, 2015).

115. *Id.*

116. *Id.*

117. Carol J. Buckner, *Realizing* Grutter v. Bollinger*'s "Compelling Educational Benefits of Diversity": Transforming Aspirational Rhetoric Into Experience*, 72 UMKC L. REV. 877, 902-03 (2004) ("Hispanics discourage autonomy and individual achievement, and devalue behavior creating conflict with interdependence. All forms of confrontation and conflict are prohibited in favor of indirect means of problem solving. Hispanics value personal interdependence, and cherish interpersonal relationships; they are especially sensitive to the feelings of others.").

previously, to strengthen interpersonal bonds, this openness of communication is nearly impossible with strangers because of cultural norms that value privacy, which creates difficulties in settings where personal situations must be expanded upon to reach a resolution.[118] For these reasons, it is vital that a relationship basis be established between the party and the mediator-interpreter, to overcome any societal shyness in front of a new third party.[119] The mediator may be a stranger to the Latino party, but because of the inherent necessity for mediators to manage the dialogue and create a comfortable environment for the parties, the Latino party might be more inclined to speak more openly. This would be more difficult with an interpreter who should not engage in open conversation with the parties.

Furthermore, because Latinos are not culturally ingrained with the need for autonomy and individualism, a mediator-interpreter could transform into a very effective lawyer, if the need arises. Obviously, the attorney can only take on the case if the involved parties give consent, but with this consent, there is already a previously established relationship with the client and the now legal representative. In the lawyer-client relationship, trust and openness are absolutely paramount so that the lawyer can effectively and zealously advocate for the client. With this previous rapport, the barrier of overcoming *personalismo,*[120] *familismo*[121] can be overcome more quickly because the lawyer does not have to invest the time to get to know the client and gain the client's trust.[122] At this point, the lawyer is now a bilingual

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118. Buckner, *supra* note 113, at 904.

119. Consider that because interpreters are only supposed to interpret, and not converse with the Spanish-speaking client that the client may feel a slight offense. Drawing this parallel between the role of mediator and the attorney, we can find:

> The act of communicating with a client in a shared language allows a lawyer to telegraph certain values - namely, her willingness to treat the client as an equal and to encourage the client to be an active participant in the representation. The lawyer's ability to communicate in the client's preferred language can thereby help to strengthen a relationship of mutual respect and trust between that lawyer and the client. And . . . use of a shared language can enhance client dignity by ensuring that the client's voice is understood and relayed in its purest form, and by avoiding the subtle forms of paternalism that sometimes accompany cross-language interactions.

Jayesh M. Rathod, *The Transformative Potential Of Attorney Bilingualism*, 46 U. MICH. J.L. REFORM 863, 884 (2013).

120. Mah, *supra* note 50, at 1751.

121. *Id.*

122.

> Attorney bilingualism can reshape the relationship between lawyers and their clients in ways that are at once subtle and deeply transformative. Naturally, attorney bilingualism facilitates communication with LEP and NEP clients and allows lawyers to work more expeditiously. Beyond these pragmatic benefits, however, the ability to speak in a

lawyer and thus has the benefit of knowing the cultural, linguistic, and perceptive limitations of the client.

Finally, what should be most highlighted is that there is a growing need for accommodation for non-English speakers, not only in the ADR community, but more importantly, in the legal system as a whole. Mediation is a preventive step to avoid litigation, but when ADR methods fail and the client has to proceed to court, there are sometimes increased barriers for the party, which the court system is ill-prepared to handle. Without remedies to these issues, namely the understaffing of court interpreters and interpreters in general, the non-English speaking community will continue to feel ostracized, unaided, and distrustful of the American legal system.[123] Without interpreters, non-English speakers cannot fully participate in the judicial process and thus cannot take advantage of the legal remedies available to Americans to the fullest extent.

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> shared language allows the lawyer to convey certain values about the relationship and also permits a potentially deeper connection to be forged. Moreover, as a corollary to these dignity-related client concerns, thoughtful bilingualism also enables attorneys to more fully realize the ethical standards that guide the profession.

Rathod, *supra* note 116, at 883.

123. "A court interpreter is a 'language mediator' or 'language conduit' whose presence and participation allow an individual who does not speak or understand English to meaningfully participate in the judicial proceeding." Gabrau *supra* note 5, at 241.