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*presents*

**40th Annual Meeting of the Labor and Employment Law Section**

Best Practices and Cultural Competence in Employment Matters Involving Limited-English Speakers: From Client Intake, Through Investigation, To Trial

Friday, July 19, 2024  
10:45 a.m. – 12:00 p.m.

Speakers:

Jennifer Reisch

Leiann Laiks

Karen Carrera

**Conference Reference Materials**

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# Best Practices and Cultural Competence in Employment Matters Involving Limited-English Speakers: From Client Intake, Through Investigation, To Trial

CLA Labor and Employment Section Annual Meeting, Costa Mesa, CA  
July 19, 2024

# Our Presenters

## Moderator:

Andrea Kelly Smethurst



ANDREA KELLY SMETHURST LAW, P.C.

## Presenters:

Karen Carrera



Leiann Laiks



Jennifer Reisch



Employment Law and Civil Rights

# Our Agenda

- ▶ Effective Representation & Client Communication
  - ✓ At the outset: intake, retention, initial investigation, and issue-spotting
  - ✓ During investigation and litigation: discovery, hearings, and mediation/settlement negotiations
- ▶ Recognizing and Mitigating Bias Against Limited-English Speakers
- ▶ Q & A

*Why are we here?*

Meeting Our Legal and Ethical  
Obligations to California's Increasingly  
Diverse Workforce

# Language Diversity Among Workers & Employers

- 31 million immigrant workers in the U.S. workforce<sup>1</sup>
- Nearly 1 in 3 California workers are immigrants and nearly half of all Californians speak a language other than English at home
- Hispanics make up ~ 19% of the U.S. workforce and will account for 78% of net new workers in the U.S. between 2020-2030
- **29.6 million people** in the U.S. identify as limited-English proficient<sup>2</sup>
- Immigrant-owned businesses are found in every sector of the U.S. economy <sup>2</sup>
  - ▶ Nearly 1 in 5 (18%) of U.S. businesses with employees are owned by immigrants
  - ▶ Immigrants own 37% of accommodation and food services and 46% of transportation and warehousing businesses



<sup>1</sup> U.S. Small Business Administration Office of Advocacy

<sup>2</sup> U.S. Census American Community Survey (ACS)

# Effectively Representing Limited-English Speaking Clients



- ▶ **Establishing trust and building rapport;** maintaining open, honest communication across language differences
- ▶ **Considering clients' understanding of legal system,** evidence and role of lawyers
- ▶ **Issue-spotting and advising clients,** witnesses about how immigration status may affect relief sought, litigation strategy
- ▶ **Explaining substantive legal issues:** risks, consequences, and liabilities

# Recognizing & Mitigating Bias Against Limited- and Non-English Speakers

- ▶ **Understanding impact of cultural differences** on attorney-client relationship and relationship to legal system(s)
- ▶ **Considering how immigration status** of clients, witnesses may play out
- ▶ **Anticipating and preparing for external bias** against non-English speakers
- ▶ **Choosing an investigator:** cultural competence and awareness of bias



# Effectively Representing Limited-English Speaking Clients: Sources of Law

- ▶ **Cal. Civil Code § 1632** -- contracts negotiated in (certain common) languages other than English must be translated
- ▶ **ABA Model Rule 1.4 - Communications** (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”)
- ▶ **State Bar Opinion 1984-77** - *Is Attorney Acting Competently When Attorney is Not Able to Communicate Directly with Client in Language Clearly Understood by Client?*
- ▶ **ABA Model Rule 5.3** - Responsibilities Regarding Non-Lawyer Assistance (including by translators, interpreters)

# Advising Limited-English Speaking Workers and Employers in California

## IF >10% OF WORKFORCE SPEAKS LANGUAGE OTHER THAN ENGLISH, EMPLOYERS MUST TRANSLATE:

- Policy Against Harassment, Discrimination and Retaliation (including investigation and complaint procedures) - 2 Cal. Code Regs. § 11023(e)
- Family and Medical Leave rights - 29 CFR § 825.300(a)(4)
- California Family Rights Act Leave - 2 Cal. Code Regs. § 11095 (c)
- Reasonable Accommodation for Employees Disabled by Pregnancy, Pregnancy Disability Leave or Transfer - 2 Cal. Code Regs. § 11049 (d)(4)
- Notice of Rights, Benefits and Obligations under Worker's Compensation Law - e.g., 8 Cal. Code Regs. §§ 9795.2, 9880

## NO ENGLISH-ONLY RULES:

Gov. Code § 12951(a) makes it unlawful for an employer to adopt or enforce a policy that limits or prohibits the use of any language in any workplace.

# Cultural Competency in Workplace Investigations

- ▶ Challenges facing the investigator
- ▶ Linguistic and cultural competence: witnesses may speak the same language but...
  - Come from different countries
  - Use different slang, idiomatic expressions
  - Are first generation vs. second generation immigrants (and different immigration status)
  - Have different levels of education



# Working with Interpreters and Translators: Differences & Desired Characteristics

## Interpreters

- Spoken (Interviews, Depositions, Hearings/Trials)
- Understand nuances of source and subject languages
- Extensive vocabulary in both languages
- Familiarity with both cultures, colloquialisms, dialects, gestures, idiomatic expressions
- Knowledge of general subject to be interpreted
- Excellent listening skills
- Ability to express thoughts clearly and concisely in both languages

## Translators

- Written (Documents)
- Understand nuances of source and subject languages
- Understand culture of source language (language text originally written in)
- Ability to write well in subject language
- Attention to detail, knowledge of words in subject language
- Expertise in field of underlying issue (engineering, medical, etc.)

# Types of Interpreters

- ▶ Administrative Certified - (*e.g.* workers' comp.)
- ▶ Certified and Registered Court - (*e.g.* state courts)
- ▶ Federal Certified - (federal court certification, criminal)

# Working with Interpreters: Ethical & Conflict of Interest Considerations

## ▶ Coworker/Family members as interpreters

⚠ *Conflict of Interest when interpreter has a personal interest in the outcome of the case or is a friend, coworker, or relative of witness*

⚠ *Impact on candor of witnesses*

## ▶ Appearance of bias can compromise interpretation

# Ethical Issues When Working with Interpreters and Translators

## ABA Model Rule 5.3 Responsibilities Regarding Nonlawyer Services

- ▶ Duty to supervise includes obligation to ensure interpreter/translator complies with Model Rule 1.6 Confidentiality of Information
- ▶ Lawyer must take steps to ensure interpreter is not providing own “spin”

# Questions and Answers



# Contact

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# **ANDREA KELLY SMETHURST LAW, P.C.**

## **Andrea Kelly Smethurst**

The daughter of Argentine immigrants, Andrea Kelly Smethurst's first language was Spanish. Andrea's ability to speak Spanish and connect with Spanish-speaking witnesses has been a rewarding part of her practice.

Since the early part of her career as a Labor and Employment Associate at Sheppard, Mullin, Richter & Hampton and Dillingham & Murphy, Andrea has handled matters requiring her to interview witnesses in Spanish and to review evidence written in Spanish. As a workplace investigator, she is regularly called to workplaces with limited-English speakers.

In addition to her work as an investigator, Andrea serves as an expert on workplace investigations.

Andrea is a member of the Executive Committee of Labor and Employment Section of the California Lawyers Association. She holds the AWI-CH certificate from the ANSI-accredited Association of Workplace Investigators' Training Institute for which she now serves as a faculty member. She is a member of AWI and the Contra Costa County Bar Association.

Andrea earned her Bachelor of Arts from the University of Pennsylvania and her law degree from the University of California, Berkeley School of Law. Her website is <https://www.andreakellylaw.com/>

**Jennifer Reisch** – Bio for CLA 2024 WHAM Conference, panel on “Best Practices and Cultural Competence in Employment Matters Involving Limited-English Speakers: From Client Intake, Through Investigation, To Trial” (Friday, July 19, 2024, 10:45 am - 12:00 pm)

Jennifer Reisch (she/her) is a passionate advocate for workers’ rights and a seasoned litigator who has dedicated her legal career to advancing economic, gender, and racial justice. As the founder and principal of Reisch Law, she represents working people of all walks of life and provides strategic legal support to impact litigation, policy advocacy, and organizing campaigns. Jennifer also currently serves as a Supervising Attorney for the Workers, Law, and Organizing Clinic at UC Irvine School of Law. Over more than two decades, Jennifer has served as counsel to scores of employees, students, and organizations in class actions and individual cases challenging discrimination, harassment, wage theft, unequal pay, retaliation, and other unfair and unlawful policies and practices in a wide range of industries and occupations. Prior to launching her own practice in 2021, Jennifer served as the Legal Director of Equal Rights Advocates, a national gender justice advocacy organization. She has published articles, co-authored litigation manuals, and taught law school courses on issues facing low-wage workers in California, the human rights of immigrant workers, and representing Spanish-speaking workers (in English and Spanish). She is a longtime member of the California Employment Lawyers Association and serves on the Board of Directors of East Bay Sanctuary Covenant, which provides legal services and support to low-income immigrants and people fleeing violence and persecution. Jennifer graduated from U.C. Berkeley Law (J.D. 2002) and Yale University (B.A. 1996). She is fluent in Spanish and French and doing her best to raise two bilingual kids, who mostly love speaking Spanglish.

## **Karen C. Carrera, Esq., AWI-CH**

In addition to managing her own workplace investigation practice, Carrera Workplace Solutions, Ms. Carrera is Of Counsel with Renne Public Law Group conducting complex public entity investigations. Ms. Carrera conducts workplace investigations for both public and private employers in response to employee complaints of harassment, discrimination, retaliation, bullying, and other alleged employee misconduct. Ms. Carrera also provides diversity, equity, and inclusion (DEI), and harassment prevention trainings and consultations for companies, government agencies and individuals, in both English and Spanish. She holds a certificate from the Association of Workplace Investigators (AWI) and is an active member. She also holds a Diversity, Equity, and Inclusion Certificate from the School of Industrial and Labor Relations, Cornell University.

Prior to becoming an investigator and trainer, Ms. Carrera was a Plaintiffs' side employment law litigator at Villegas Carrera, Inc. This uniquely qualifies her to determine risk and see where employers are vulnerable to being sued by employees. Before Villegas Carrera, Ms. Carrera was a Deputy City Attorney and litigator with the San Francisco City Attorney's Office, where she filed lawsuits against property owners who violated San Francisco's housing, health, fire, and police codes. Ms. Carrera also formerly worked as the supervising attorney at Legal Aid of Marin and La Raza Centro Legal where she litigated employment and housing cases, and managed a diverse staff, including volunteers. She facilitated community outreach meetings with the Latino community and services agencies and conducted bilingual trainings and drafted Spanish and English self-help manuals.

Ms. Carrera is a 1992 graduate of the University of California College of the Law San Francisco (formerly U.C. Hastings) and has practiced law for 31 years.

### **Recognition**

1. **San Francisco Minority Bar Coalition**, recipient of the Unity Award, for "Outstanding Service to the Legal Community," 2004 and 2023. Nominated by the Marin County Women Lawyers.
2. **County of Marin, Certificate of Recognition, Business Citizen of the Year**, presented by Katie Rice, District 2 Supervisor, and Damon Connolly, September 24, 2021.
3. **Spirit of Marin Award – Business Professional of the Year**, presented by Bank of Marin, 2021.
4. **Certificate of Special Congressional Recognition to Karen C. Carrera**, The Hon. Jared Huffman, for entrepreneurial accomplishments and civic involvement, 2021.
5. **Certificate of Recognition, California State Legislature, Business Citizen of the Year**, The Hon. Assemblyman Marc Levine, 2021.
6. **Certificate of Appreciation, Marin County Board of Supervisors, Business Citizen of the Year**, 2021.

7. **Association of Workplace Investigators Certificate Holder (AWI-CH)**, February 2020 to the present.
8. **Hero Award, AIDS Legal Referral Panel**, for 15 years of service, 2019.
9. **Profile of Karen Carrera, Plaintiff Magazine**, November 2017
10. **Certificate of Special Congressional Recognition to Karen C. Carrera**, The Hon. Jared Huffman, in honor of ongoing commitment to the Latino population in Marin County, 2015.
11. **State of California Senate, Certificate of Recognition to Karen C. Carrera**, The Hon. Mike McGuire, State Senator, for outstanding leadership and professional skills, 2015.
12. **Hispanic Business Professional of the Year**, Hispanic Chamber of Commerce, for outstanding leadership, commitment, and professional skills in representing Latino immigrants, 2015.
13. **Legal Services Corporation, Certificate of Appreciation**, for extraordinary commitment to providing equal access to justice through pro bono work with California Rural Legal Assistance, 2015.
14. **Community Service Award Recipient and 2013 Graduation Keynote Speaker** – Hastings College of the Law, La Raza Law Student's Assoc. May 2013.
15. **Outstanding Benefactor Award**, California Rural Legal Assistance Foundation, Sacramento, California, *"for providing access to justice to low-income workers in California"*. September 2008.
16. **California Assembly**, Certificate of Recognition for providing volunteer legal services to low-income people in Marin, May 2006.
17. **Wiley E. Manual Award** from the State Bar of California in recognition of pro bono work. 2004.
18. **Certificate of Appreciation**, City of San Francisco, Hon. Willie Brown, for prosecuting slumlords on behalf of the City. May 2002.

### **Publications**

- Monthly Newsletter & Blog, Carrera Workplace Solutions, [www.carreraworkplace.com/Blog](http://www.carreraworkplace.com/Blog), 2019-present.

### **Speaking/Teaching**

**University of California College of the Law San Francisco**, September 2009-2019.  
**Adjunct Professor**. Classes taught: Representing Spanish Speaking Clients in Employment Law; Interviewing and Counseling Clients; Negotiation and Mediation Strategies, Legal Writing and Research.

**Berkeley School of Law, University of California**, August – November 2018.  
**Lecturer in Law**. Legal Research & Writing, L.L.M. Legal Research and Writing Department.

- Crossing Borders: Unique Aspects of Investigations Involving Immigrants, Association of Workplace Investigators September 13, 2023.

- Best Practices to Avoid Legal Risks for DEI Programs, Bar Association of San Francisco, November 16, 2022.
- Wage & Hour Law and the Immigrant Low Wage Worker, Marin Trial Lawyers Association, 2015
- Work Life Law for Women in Tech, Google, 2015
- Representing Immigrant Clients in Class Actions, S.F. Trial Lawyers Association, 2014
- U-Visas and Immigrant Clients in Employment Law, Marin Trial Lawyers Association, 2013
- Employment Law Overview, Legal Aid of Marin, 2010
- Wage & Hour Law and the Immigrant Low Wage Worker, PLUS Conference, 2009

### Affiliations

1. **Citizens Advisory Panel, Tiburon Police Department**, appointed April 2023.
2. **Diversity, Equity & Inclusion Task Force – Tiburon Town Council** – appointed March 2021 to present.
3. **Association of Workplace Investigators (AWI)** – *Member*, June 2019 – present.
4. **Association of Latino Marin Attorneys (ALMA)** – *Current Co-President of the Board, Board of Directors*, December 2022-present.
5. **Marin County Women Lawyer’s Association** – *Board of Directors*, 2019-2023.
6. **Association of Workplace Investigators** – *Member*, June 2019 – present.
7. **Marin Trial Lawyers Association** – *Board of Directors*, June 2018– present; *Former Co-President*, 2018-2019, *Secretary* 2024.
8. **Canal Alliance** *Board of Directors*, Jan. 2014-February 2019. Canal Alliance is a non-profit organization assisting immigrant communities in Marin County by providing access to education, youth programs, family counseling and immigration services.
9. **Equal Rights Advocates (ERA)** – *Board of Directors* (2008-2014) ERA represents women and girls in high impact civil rights litigation nationwide.
10. **Aids Legal Referral Panel (ALRP)** – *Volunteer Attorney*, 2005-present.
11. **ACLU of Northern California**, *Board of Directors* (2006-2008).
12. **La Raza Centro Legal**, *Board of Directors*, (2000-2003).
13. **Bay Area Legal Aid**, *Board of Directors* (1999-2000).
14. **General Counsel** – Reed Schools Foundation, Tiburon, CA, June 2004-June 2006.



Leiann Laiks is the leader of Strategy Law's employment law practice area. Her practice focuses on advice and counseling, employment law compliance, and dispute and litigation resolution. After practicing law at a plaintiff-side employment law firm for several years, Leiann felt that her practice was missing a focus on preventative action and education. She believes that employers and employees should be working together, not against each other, so that business owners can spend time growing their business, rather than defending it. This type of work is a call back to her prior corporate Human Resources years where she worked with HR leaders. Leiann's prior experience with plaintiffs' side employment and wage and hour litigation helps her better educate clients about their risks and liabilities.