

Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation

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Injustice is doubtless being done from time to time in communities thronged with [linguistic minorities], through failure of the judges to insist on a supply of competent interpreters. The subject is one upon which the profession are in general too callous, for no situation is more full of anguish than that of an innocent accused who cannot understand what is being testified against him [or her].⁽¹⁾

Introduction

The trial judge has the duty to supervise and conduct judicial proceedings so as to afford all parties a fair and impartial trial to the end that justice may be served.⁽²⁾ Courts⁽³⁾ and scholarly commentators⁽⁴⁾ recognize that inadequate or improper court interpretation creates problems of constitutional dimensions.⁽⁵⁾ Moreover, the court interpreter is an impartial officer of the court directly under the control and supervision of

the trial judge.⁽⁶⁾ Therefore, the trial judge has an obligation to ensure that the interpreter performs his or her duties accurately, fairly, impartially, and ethically.⁽⁷⁾

[A] judge ordered the impanelment to proceed despite objections of the defense attorney:

Defense Counsel: Your Honor, I can't even converse with my client until the interpreter arrives.

A.D.A.: Judge, can we have a bench conference?

The Court: Do I understand from what you are saying that you are refusing to go ahead with this trial until the interpreter is here? Is that what you are saying?

Defense Counsel: That's correct.

The Court: We will proceed further without your participation in this trial.⁽⁸⁾

Often some parties are denied a fair and impartial trial because judges, like the judge in the above example, are either insensitive to the necessity of a qualified court interpreter to protect the rights of a non-English speaker--a linguistic minority⁽⁹⁾--or act as if they have no control over the interpreter, and consequently over the proceeding. This situation

arises because the judge is unprepared to deal with an unqualified court interpreter or an interpretation problem that arises during a proceeding.⁽¹⁰⁾ Judges 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⁽¹¹⁾ or of any helpful spectator in the courtroom without knowing his or her qualifications.⁽¹²⁾ Judges frequently must rely on individuals who have received little or no training in the skills needed to be a qualified court interpreter.⁽¹³⁾ These individuals are neither trained in the proper role of a court interpreter nor do they have any knowledge of the Model Code of Professional Responsibility for Interpreters in the Judiciary⁽¹⁴⁾ or of the various state codes or rules of professional responsibility for court interpreters.⁽¹⁵⁾ "This extremely important and fundamental issue has been allowed to become a `stepchild' of the justice system: understudied, underfunded, and in terms of its ultimate impact, little understood."⁽¹⁶⁾

While the focus of this article is on the use of court interpreters in a criminal proceeding, the principles discussed and the suggestions made are generally applicable to any civil or administrative proceeding requiring an interpreter.⁽¹⁷⁾ This article will discuss the statutory and constitutional rights of defendants and witnesses to have access to a court interpreter, court interpreter qualifications, ethical issues in court interpreting, and some common problems that frequently occur during judicial proceedings. Throughout the article there are suggestions that will facilitate the proper use of court interpreters. The article concludes with a recommendation for increased awareness by judges, attorneys, and other participants in the legal system of the unique role a professional court interpreter serves in promoting equal access to the courts, and a recommendation that states adopt uniform court interpreter certification programs.

Background

The lack of qualified, competent, court interpreters is not a recent problem.⁽¹⁸⁾ Nearly thirty-two million people in the United States do not use English as their primary language.⁽¹⁹⁾ Of that number, 43.9% speak English "less than `very well."⁽²⁰⁾ "The language barrier is affecting our court system by `increasingly impeding the swift, effective delivery of justice."⁽²¹⁾ Defendants who do not speak English present a unique challenge to the judicial system. For example, sometimes a defendant is charged with a crime that is common practice in his or her culture,⁽²²⁾ or concepts fundamental to a common law legal system are incomprehensible.⁽²³⁾ Defendants who are unable to speak "English cannot explain their feelings at sentencing directly to a judge who might equate embarrassment or silence with lack of remorse."⁽²⁴⁾ Moreover, they are unable to take advantage of treatment programs because these programs often are "unable to accommodate non-English speakers."⁽²⁵⁾

In 1991, the federal courts required interpreters to be present in more than 68,000 proceedings.⁽²⁶⁾ The shortage of certified court interpreters is very acute. Only sixty staff interpreters are assigned to the "federal courts, and 430 certified free-lance interpreters."⁽²⁷⁾ "Nearly [forty] percent of New York City's population speaks a language other than English."⁽²⁸⁾ In 1992, in the Eastern District of New York alone, "there were a total of 3,019 in-court and 554 out-of-court recorded events requiring interpreters in all

languages."⁽²⁹⁾ "The quality of court interpretation is no better in the state courts. For example, there were 49,094 interpreted events in New Jersey Superior Court in 1992."⁽³⁰⁾ The New Jersey Administrative Office of the Courts estimated that the New Jersey courts experienced a seventy-six percent increase in cases requiring court interpretation between 1983 and 1992.⁽³¹⁾ New York State courts use interpreters on an average of 250 times per day.⁽³²⁾ In 1989, courts in Dade County, Florida, used court interpreters in 155,395 proceedings.⁽³³⁾ Finally, in Massachusetts, seven years after the legislature passed a law providing that each non-English speaker is entitled to a court interpreter, the Commission to Study Racial and Ethnic Bias in the Courts stated "the most pressing need of the court system is to find ways to serve the increasingly large number of people whose primary language is other than English."⁽³⁴⁾

These statistics understate the problem. When court interpreters are not available, conversations between counsel and client or between citizen and court personnel take place in pidgin English or the lucky few non-English speakers have relatives, friends, privately-retained interpreters, or bilingual counsel who interpret for them outside the courtroom.⁽³⁵⁾ Furthermore, these statistics do not demonstrate whether the individuals appointed as court interpreters were qualified to interpret in a judicial context, nor do they reflect the delays in scheduling court time because of a lack of a qualified interpreter.⁽³⁶⁾

The Court Interpreter

The court interpreter plays an important role⁽³⁷⁾ in protecting the rights of a non-English-speaking person.⁽³⁸⁾ A non-English-speaking person is "any principal party in interest or witness participating in a legal proceeding who has limited ability to speak or understand the English language."⁽³⁹⁾ The services of court interpreters should be used to protect the rights of parties in civil cases.⁽⁴⁰⁾ The Model Court Interpreter Act provides that a certified court interpreter should be appointed for a legal proceeding.⁽⁴¹⁾ A legal proceeding is defined as "a civil, criminal, domestic relations, juvenile, traffic or an administrative proceeding in which a non-English speaking person is a principal party in interest or a witness."⁽⁴²⁾

A court interpreter is a "language mediator"⁽⁴³⁾ or "language conduit"⁽⁴⁴⁾ whose presence and participation allow an individual who does not speak or understand English to meaningfully participate in the judicial proceeding.⁽⁴⁵⁾ An interpreter conveys the meaning of a word or a group of words from a source language (e.g., Spanish) into the target language (e.g., English).⁽⁴⁶⁾ "The proper role of the interpreter is to place the non-English-speaker, as closely as is linguistically possible, in the same situation as the English speaker in a legal setting."⁽⁴⁷⁾ "In doing so the interpreter does not give any advantage or disadvantage to the non-English-speaking witness or defendant."⁽⁴⁸⁾ Therefore, an interpreter is not allowed to improve, edit, omit, add meaning or context to the word or words spoken.⁽⁴⁹⁾ Colloquial expressions, obscene or crude language, slang, and cultured or scholarly language have to be conveyed in accordance with the usage of the speaker.⁽⁵⁰⁾ When dealing with terms that may have no literal interpretation (e.g., a vulgar insult), the interpreter may "provide an equally offensive term in English . . . a

literal rendition of the original; or . . . repeat the original . . . word, and allow the attorneys to ask the witness what the word means to the witness."⁽⁵¹⁾ The court interpreter is required to maintain the same register, or level of language spoken, and the same style as that of the speaker.⁽⁵²⁾ A court interpreter is not to tone down, improve, or edit any statements.⁽⁵³⁾ A court interpreter must always remember that "[t]he true message is often in *how* something is said rather than *what* is said; therefore, the style of a message is as important as its content."⁽⁵⁴⁾ To quote a cliché, in court interpretation often "the medium is the message." Thus, an "[i]nterpreter should convey the emotional emphasis of the speaker without reenacting or mimicking the speaker's emotions, or dramatic gestures."⁽⁵⁵⁾

A. Proceedings, Witness, and Defense, or Interview, Interpreters

Some jurisdictions recognize that interpreters perform three separate functions: proceedings interpreting, witness interpreting, and interview or defense interpreting.⁽⁵⁶⁾

A proceedings interpreter interprets for a defendant in a simultaneous mode.⁽⁵⁷⁾ The proceeding interpreter will usually sit at the defendant's side during the proceeding. Proceeding interpreting allows the defendant to be linguistically and cognitively present during the proceeding.⁽⁵⁸⁾

A witness interpreter assists the non-English-speaking witness in testifying before the judge or jury.⁽⁵⁹⁾ This interpreter function is sometimes called "record interpreting," because it permits the witness, judge, attorney or defendant to communicate during the proceeding,⁽⁶⁰⁾ so that the non-English testimony can be preserved "on the record" in English.⁽⁶¹⁾ Witness interpreting is usually in the consecutive mode.⁽⁶²⁾ A leading expert in this field, Professor Holly Mikkelson, prefers a combination of the two modes: English questions interpreted simultaneously for the witness into his or her language and the witness's answers interpreted consecutively back into English for the entire courtroom audience.⁽⁶³⁾

An interview interpreter assists an attorney in communicating with his or her client immediately before, during, or immediately after a proceeding.⁽⁶⁴⁾ In a criminal case, this function is sometimes called "defense interpreting."⁽⁶⁵⁾ The interview, or defense, interpreter enables the attorney to communicate with his or her client at the courthouse. Defense interpreting does not include lengthy communications between the defendant and the attorney.⁽⁶⁶⁾ This interpreter function does not include the interpreting done in an attorney's office.⁽⁶⁷⁾

B. The Translator

A translator uses different skills than a court interpreter.⁽⁶⁸⁾ A translator translates a written document or audiotape recording from one language into a written document in another language.⁽⁶⁹⁾ The translated document or transcript may be treated as substantive evidence during a proceeding⁽⁷⁰⁾ and, therefore, must "convey the same impression to the reader [or listener] as the original source language text would."⁽⁷¹⁾ Court interpreters are

sometimes asked to translate documents⁽⁷²⁾ in court proceedings.⁽⁷³⁾ The court interpreter will read the writing or listen to the audiotape and orally translate the document.⁽⁷⁴⁾ This translation is referred to as a "sight translation"⁽⁷⁵⁾ or a "sight interpretation."⁽⁷⁶⁾

The general rule is that the admission into evidence of a translation of a document⁽⁷⁷⁾ is within the discretion of the trial judge.⁽⁷⁸⁾ The exercise of judicial discretion presumes that the original document is authentic, accurate and trustworthy.⁽⁷⁹⁾ An audiotape recording "must be audible and sufficiently comprehensible for the jury to consider the contents."⁽⁸⁰⁾ A judge should be aware of three major types of errors that can occur in a translated document or audiotape: attribution errors, misinterpretation errors, and coding and decoding errors.⁽⁸¹⁾ "Attribution' errors [are] committed when the translator attribute[s] a conversation to a person who was not a participant in that conversation."⁽⁸²⁾ "[M]isinterpretation' [errors] involve[] the failure of the translator to translate properly the meaning of what was stated."⁽⁸³⁾ "[D]ecoding errors [are] committed when . . . translators fail[] to decode and translate coded words accurately."⁽⁸⁴⁾

Before deciding whether to admit a translation into evidence, a judge should inquire whether the parties are able to stipulate to the authenticity of the source document or audiotape recording in the language other than English and to the accuracy and fairness of the translation.⁽⁸⁵⁾ If one party objects to the translation or to a portion of the translation, that party may submit a motion in limine to request a ruling on its admissibility.⁽⁸⁶⁾ The court should rule on the motion after a full hearing but prior to trial.⁽⁸⁷⁾ The court may appoint an independent certified translator to serve as the court's expert.⁽⁸⁸⁾

There may be situations, however, where the parties contest the meaning or translation of certain words or passages in a language other than English.⁽⁸⁹⁾ This may become an issue of fact rather than one of law.⁽⁹⁰⁾ For example, if a letter written in a language other than English is offered into evidence and is susceptible to two meanings or translations, the trier of fact will have to determine what the author intended by the letter.⁽⁹¹⁾ The jury will receive both translations of the disputed passages and hear testimony from the translators as to their qualifications and as to the basis of their opinions.⁽⁹²⁾ In the case of audiotaped conversations, the jury may listen to the audiotape to hear the nuances, inflections, hesitation, mood or tone.⁽⁹³⁾ "[T]he jury becomes the final arbiter of which version is [the] most accurate" reflection of the speaker.⁽⁹⁴⁾

Some courts have treated the translations of audiotape recordings of conversations in a language other than English as aids for the jury and the non-English language audiotapes as the primary evidence.⁽⁹⁵⁾ The translated transcript is considered a visual aid for the jurors while the audiotape recording is being played.⁽⁹⁶⁾ This approach makes little sense when the audiotape recording is in a language other than English.⁽⁹⁷⁾ Other courts have held that the purpose of the transcript is to assist the trier of fact in understanding the foreign language spoken on the audiotape.⁽⁹⁸⁾ Presumably, the judge and the jurors are not able to understand an audiotape in the non-English language.⁽⁹⁹⁾ Furthermore, there is potential danger that bilingual jurors will disagree as to the meaning of the

conversation.⁽¹⁰⁰⁾ The better line of cases holds that the translations and not the audiotapes in the non-English language are the best evidence.⁽¹⁰¹⁾

Frequently, an audiotape offered into evidence may reflect the rich bilingual culture of many communities. Portions of the recorded conversation will be in the foreign language, portions in English, and some portions a linguistic potpourri of multiple languages.⁽¹⁰²⁾ This raises interesting evidentiary questions in the context of court translations. The audiotape is the best evidence for those portions which are clearly in English.⁽¹⁰³⁾ However, the transcript reflecting the translation is the best evidence for those portions which are in another language.⁽¹⁰⁴⁾ For those portions which reflect a "linguistic potpourri," the judge should instruct the jury that for those portions of the tape which it finds are in English, the jury may disregard the transcript, if it finds that the transcript is inconsistent with the jury's understanding of the audiotape because the audiotape is evidence and the transcript is merely an aid. But, if the jury finds that the speakers are not speaking English, the transcript of the translation is evidence.⁽¹⁰⁵⁾ In deciding how to instruct the jury, the judge must be careful not to remove fact questions from the jury.

If an attorney fails to object to an alleged inaccurate translation, or fails to submit an alternative translation, fails to request a jury instruction,⁽¹⁰⁶⁾ or does not move the court for an opportunity to voir dire the translator as to his or her qualifications, the attorney has waived the right to contest any inaccuracies on appeal.⁽¹⁰⁷⁾

In another context, accurate translations of court documents such as the indictment, applicable statutory provisions, plea agreement and pre-sentence report for a defendant who is not fluent in English, provide due process protection for the accused.⁽¹⁰⁸⁾ "A criminal defendant cannot aid in his own defense without meaningful access to relevant documents he or she can understand."⁽¹⁰⁹⁾ Some courts have begun to translate frequently-used documents into languages other than English.⁽¹¹⁰⁾

C. Qualifications

Generally, there are no formal "qualifications" *per se* to be a court interpreter,⁽¹¹¹⁾ except in those few jurisdictions that have established certification programs for court interpreters.⁽¹¹²⁾ For example, *only* six states--California, New Jersey, Washington, New Mexico, New York and Massachusetts--have formal training or certification programs for court interpreters,⁽¹¹³⁾ and the federal courts only certify interpreters in Spanish, Haitian Creole and Navajo.⁽¹¹⁴⁾ Some court interpreters develop the requisite skills and knowledge through formal educational training,⁽¹¹⁵⁾ while others develop such skills through life experience.⁽¹¹⁶⁾ Although the law is unclear as to which qualifications a court interpreter must possess,⁽¹¹⁷⁾ a defendant has the right to an interpreter who is "competent to render accurate translations."⁽¹¹⁸⁾ At a *bare minimum*, a court interpreter should be able to (1) understand "the terms used in court proceedings"; (2) "explain these terms in the English language and the foreign language which will be used"; (3) "interpret these terms into the foreign language being used";⁽¹¹⁹⁾ and (4) be disinterested in the proceedings.⁽¹²⁰⁾ Because interpreter qualifications are not readily reducible to broad, brightline rules, a trial judge has broad discretion in determining the qualifications of a court interpreter.⁽¹²¹⁾

Granting judges such broad discretion is problematic because it presumes that a judge is able to determine who is a qualified interpreter.⁽¹²²⁾ Even if a judge is bilingual, it is unlikely that the judge has an independent basis to determine the proposed interpreter's linguistic competency.⁽¹²³⁾ Nevertheless, if a judge is able to determine linguistic competency, court interpretation still requires more than mere bilin-gualism.⁽¹²⁴⁾

"[B]ilingualism, or fluency in two languages, is only the starting point" for interpreters.⁽¹²⁵⁾ An interpreter must be able to correctly interpret 120 to 180 words per minute.⁽¹²⁶⁾ The interpreter must do this in a manner that is "accurate, unbiased, comprehensive, and true to the speaker's style, level of usage, and perceived intent."⁽¹²⁷⁾ The interpreter must command a "high level [of] cross-cultural awareness and sophisticated skills, including the ability to manipulate dialect and geographic variation, different educational levels and registers, specialized vocabulary, and a wide range of untranslatable words and expressions."⁽¹²⁸⁾ Once the interpreter has mastered both languages, he or she must also master the legal process and two "legal language[s] which [are] acutely context specific and fraught with redundancies, archaisms, and intentional ambiguities" and the legal systems of countries where the languages are spoken.⁽¹²⁹⁾ After the interpreter has mastered both language and law, he or she stills needs the interpersonal skills to work effectively with judges, lawyers, defendants, and witnesses.⁽¹³⁰⁾ The interpreter must work with individuals under extremely stressful circumstances. Clearly, these skills are not readily susceptible to evaluation during a brief voir dire even if it is conducted by a bilingual judge.

In order to ensure that only qualified individuals serve as court interpreters, many jurisdictions distinguish between a certified interpreter and a non-certified interpreter.⁽¹³¹⁾ A "certified" interpreter is an individual who has passed a valid and reliable oral and written examination, such as the federal court interpreters examination,⁽¹³²⁾ an examination administered by a state court,⁽¹³³⁾ or the United States State Department.⁽¹³⁴⁾ Regardless of whether the interpreter is "certified" or "qualified," the interpreter should be held to the same ethical standards.⁽¹³⁵⁾

Judges should be careful in appointing individuals who are certified by governmental or international agencies other than the judiciary.⁽¹³⁶⁾

[Court interpretation] requires skills that few bilingual individuals possess, including language instructors. The knowledge and skills of a court interpreter differ substantially from or exceed those required in other interpretation settings, including social service, medical, diplomatic, and conference interpreting. Interpreters who routinely work non-court settings often cannot perform adequately as a court interpreter.⁽¹³⁷⁾

If the interpreter is incompetent, the judge is likely to be presented with evidentiary problems.⁽¹³⁸⁾ The federal courts review a claim of inadequate interpretation to determine whether the interpretation "made the trial fundamentally unfair."⁽¹³⁹⁾ State courts use a similar standard: whether "the testimony as presented through the interpreter [was] understandable, comprehensible, and intelligible, and if not, whether such deficiency resulted in the denial of the defendant's constitutional rights[.]"⁽¹⁴⁰⁾

D. Constitutional and Statutory Rights to an Interpreter

The failure to appoint an interpreter or the appointment of an unqualified court interpreter can have a profound effect on the rights of the parties in a civil case,⁽¹⁴¹⁾ a victim⁽¹⁴²⁾ or defendant⁽¹⁴³⁾ in a criminal case, or a witness in any legal proceeding.

1. Civil Proceedings

A non-English speaker's constitutional right to an interpreter in a civil proceeding is unclear. Numerous legal commentators and several courts have cited *Jara v. Municipal Court*,⁽¹⁴⁴⁾ as clearly establishing that there is no constitutional due process right to a court interpreter in a civil proceeding.⁽¹⁴⁵⁾ Even if one accepts the premise that there is no due process right to a court-appointed interpreter for a civil litigant, there may be a First Amendment right to an interpreter in a civil action.⁽¹⁴⁶⁾ Some states have statutes which provide for the appointment of an interpreter in a civil action.⁽¹⁴⁷⁾

2. Criminal Actions

In a criminal case, the Sixth Amendment right to confront witnesses is meaningless if the defendant cannot understand their testimony.⁽¹⁴⁸⁾ In a criminal case, a judge may violate a person's Sixth Amendment right of confrontation by failing to appoint a court interpreter.⁽¹⁴⁹⁾ The right to confrontation includes the right to cross-examination⁽¹⁵⁰⁾ and the right to the effective assistance of counsel.⁽¹⁵¹⁾ The right of cross-examination, which is included in the right of confrontation, is seriously affected if the accused cannot understand the evidence or the witnesses.⁽¹⁵²⁾ The individual's inability to communicate in English can affect the ability of the attorney to conduct a meaningful pre-trial investigation.⁽¹⁵³⁾ "The test for both confrontation and effective assistance cases in this context is the same: was the defendant hampered by a language problem in any meaningful way in presenting his defense?"⁽¹⁵⁴⁾

Defense counsel loses a valuable resource if his or her client cannot understand the charge and supporting facts. Significance of detailed factual representations may escape the lawyer, but not the client who is familiar with the circumstances surrounding his [or her] case. Ultimate success in court may depend on careful pre-trial investigation based on hints from the client. Inadequate input from the client who has failed to understand the evidence to be relied upon by the government cannot be cured by the presence of an official court interpreter at a hearing or at trial.⁽¹⁵⁵⁾

E. The Appointment of an Interpreter

Frequently, a judge learns that an individual needs⁽¹⁵⁶⁾ an interpreter from court personnel, the session clerk or perhaps a probation officer.⁽¹⁵⁷⁾ Attorneys often alert judges of the need to appoint a court interpreter.⁽¹⁵⁸⁾ Generally, judges have little incentive to appoint court interpreters because the presence of the interpreter lengthens the trial,⁽¹⁵⁹⁾ and some judges are reluctant to authorize payment for interpreters.⁽¹⁶⁰⁾ Some judges are insensitive to the needs of linguistic minorities,⁽¹⁶¹⁾ and trial judges are

rarely reversed for failing to appoint a court interpreter.⁽¹⁶²⁾ Failing to appoint a qualified interpreter or the inappropriate use of an interpreter, however, may subject the proceedings to direct or collateral attack under state law or federal law.⁽¹⁶³⁾

A judge may exercise discretion in deciding if the interpreter is *necessary* to interpret in the proceeding.⁽¹⁶⁴⁾

When evaluating a determination as to the necessity of appointing an interpreter, the policy of upholding a lower court's decision based upon informed discretion is strong. The trial judge is in a unique position to evaluate the reactions and responses of the accused and to determine whether he or she does or does not require an interpreter in order to be adequately understood or in order to adequately understand the proceedings. This exercise of discretion should not be reversed unless there is a complete lack of any evidence in the record that the accused does not understand English, thereby rendering the decision totally arbitrary.⁽¹⁶⁵⁾

This discretion does not extend, however, to whether a defendant has a legal right to an interpreter.⁽¹⁶⁶⁾ A judge, when exercising his or her discretion in deciding whether to appoint an interpreter, must ascertain how fluent the individual is in the English language.⁽¹⁶⁷⁾ The judge should conduct a colloquy with the witness or defendant. An attorney's assurance that there is no "language problem" is not sufficient.⁽¹⁶⁸⁾ The reasons for a judge's discretion on this matter are as follows:

Full comprehension is critical in any legal proceeding, and perhaps even more so in a criminal matter where fundamental liberty interests are at stake. It therefore would be neither unreasonable nor an attempt at fabrication for an individual for whom English is a second language to utilize an interpreter at trial to ensure that the questions and responses are fully understood, even though he or she would not do so for ordinary conversational purposes.⁽¹⁶⁹⁾

The inability to communicate can adversely affect a party in a civil case or a defendant in a criminal case if a judge or jury must make credibility findings.⁽¹⁷⁰⁾ If the individual decides to testify and is unable to speak or understand English well, he or she runs the risk of not understanding a question or of being misunderstood by the trier of fact.⁽¹⁷¹⁾ Unfortunately, often trial judges do not consider the level of English that is typically spoken in a courtroom when deciding whether to appoint an interpreter.⁽¹⁷²⁾ In addition, a judge must make credibility findings on the record as to whether an individual needs an interpreter.⁽¹⁷³⁾

One expert in the field of applied linguistics, Dr. Roseann Dueñas González, found "that the language of the law was not common everyday English and that it was something unto itself."⁽¹⁷⁴⁾ The English spoken in court requires the "competence of understanding language, intellectual understanding of the fourteenth grade level . . . [that of] a sophomore in college . . ."⁽¹⁷⁵⁾ Therefore, a knowledge of conversational English is not an accurate test of whether an individual will be able to understand and testify in English and meaningfully participate in the proceeding.⁽¹⁷⁶⁾

A judge should conduct a brief voir dire of the individual needing the interpreter outside the presence of the jury.⁽¹⁷⁷⁾ A judge should *not* ask the individual if he or she speaks English,⁽¹⁷⁸⁾ nor should a judge ask the court interpreter if the individual speaks English.⁽¹⁷⁹⁾ A judge should ask the individual where he or she lives, if he or she works and what kind of work he or she does.⁽¹⁸⁰⁾ A judge may also want to ask the individual how long he or she has lived in the United States or in other English-speaking countries.⁽¹⁸¹⁾ Leading questions and questions that result in yes or no answers should be avoided.⁽¹⁸²⁾ A judge should use a rebuttable presumption when evaluating the individual's language proficiency.⁽¹⁸³⁾ That is, a judge should assume that if the court is alerted about a language problem, it is probable that the person needs the assistance of a court interpreter. There are times when a judge may suspect that an individual is hiding behind an alleged language problem; in other words, there in fact is no language barrier. A judge should, however, err on the side of appointing the interpreter rather than risk depriving a person of a meaningful day in court.⁽¹⁸⁴⁾

F. Interpretation and Attorney-Client Privilege

The attorney-client privilege not only protects attorney-client communication, but it also protects communications with those persons "reasonably necessary for the transmission of the communication."⁽¹⁸⁵⁾ "At least thirty-three states presently have statutes expressly extending privilege to interpreters if the communication is covered by attorney-client privilege."⁽¹⁸⁶⁾ Other states have evidentiary rules or other provisions to protect communication made by a client to an attorney through an interpreter.⁽¹⁸⁷⁾ Even in the absence of a statutory privilege, courts have recognized that the presence of an interpreter does not vitiate the attorney-client privilege.⁽¹⁸⁸⁾ The presence of the interpreter is an exception to the general rule that communications made between a defendant and counsel in the known presence of a third party are not privileged.⁽¹⁸⁹⁾ Courts have recognized this exception because clients have a reasonable expectation that such statements will be used solely for their benefit and will remain confidential.⁽¹⁹⁰⁾ Therefore, communications made to an attorney through an interpreter serving to facilitate communication will be privileged.⁽¹⁹¹⁾ However, the scope of the privilege is not defined by the third party's employment or function.⁽¹⁹²⁾ The privilege depends on whether, under the circumstances, the client had a reasonable expectation of confidentiality.⁽¹⁹³⁾ Accordingly, an attorney may communicate freely with his or her client through an interpreter without jeopardizing the attorney-client privilege.⁽¹⁹⁴⁾

G. Interpreter Training

A judge cannot be expected to train a court interpreter.⁽¹⁹⁵⁾ The office of court interpreter services should be responsible for the training and certification of court interpreters.⁽¹⁹⁶⁾ A judge, however, should ensure that the proposed court interpreter is aware of the basic principles of court interpretation and key ethical principles in court interpretation.⁽¹⁹⁷⁾ Additionally, consistent with the needs of the court, a judge should support court interpreter continuing education programs and other formal and informal training programs.⁽¹⁹⁸⁾

H. Waiver of a Court Interpreter

On occasion, the defendant or his or her attorney may express a desire to waive the service of a court interpreter.⁽¹⁹⁹⁾ The right to a court interpreter is a personal right that cannot be waived by an attorney.⁽²⁰⁰⁾ A judge should not accept a waiver of the service of a court interpreter without first conducting a colloquy with the defendant on the record.⁽²⁰¹⁾ A judge must explain, with the assistance of the court interpreter, that the court will appoint a court interpreter at no expense to the defendant; the judge must also explain the nature and effect of the waiver.⁽²⁰²⁾ A judge may not ask the interpreter for his or her opinion as to whether the defendant understands the waiver.⁽²⁰³⁾ The waiver of the court interpreter must be made knowingly, intelligently and voluntarily.⁽²⁰⁴⁾ Upon making a finding that the waiver has been made knowingly, intelligently, and voluntarily, the judge should accept the waiver on the record.⁽²⁰⁵⁾ In addition, the defendant should sign a written waiver as is done when a defendant waives his or her right to a jury trial.⁽²⁰⁶⁾ A judge should allow a defendant to retract the waiver of the court interpreter at any time.⁽²⁰⁷⁾

I. Disqualification of a Court Interpreter

A court interpreter should disqualify himself or herself if he or she is not linguistically competent to interpret during the proceeding.⁽²⁰⁸⁾ A judge has the authority to disqualify an interpreter at any point in the proceedings.⁽²⁰⁹⁾ A judge should disqualify a court interpreter if the court interpreter is not qualified, is not impartial, has disclosed confidential or privileged information, or cannot effectively work with the defendant or witness for any legitimate reason.⁽²¹⁰⁾ A judge should also disqualify an interpreter if there exists a conflict of interest, or if the interpreter failed to comply with any applicable law or the Model Code of Professional Responsibility for Interpreters in the Judiciary.⁽²¹¹⁾ If an attorney is dissatisfied with the interpreter, the judge should inquire as to the nature of the problem and take remedial measures if necessary.⁽²¹²⁾ "During a trial, both the opposing counsel and the judge should be informed of any difficulties which develop with the court-appointed interpreter."⁽²¹³⁾ Minor errors or general disagreements standing alone are generally insufficient to disqualify an interpreter.⁽²¹⁴⁾ Moreover, neither party unilaterally may substitute or replace a court interpreter without the consent of the presiding judge.⁽²¹⁵⁾

J. Orienting a Court Interpreter

Preparation is especially important in lengthy, complex civil or criminal cases.⁽²¹⁶⁾ In the event that a court interpreter makes a request to prepare for the hearing or trial, both parties should be notified and cooperate so that only neutral materials are released for the interpreter's trial preparation.⁽²¹⁷⁾ In order to utilize scarce court interpreter resources most effectively, a judge should order the party requiring the court interpreter to notify the office of court interpreter services and the clerk as soon as the party is aware that an interpreter is required.⁽²¹⁸⁾ Such notice gives the court an opportunity to locate an interpreter, and gives the interpreter an opportunity to consult with the party requiring the interpreter and to prepare for the proceedings. Finally, if the assigned interpreter is for

some reason unqualified, an alternate can be located in enough time to prevent delaying the proceedings. If a proceeding is rescheduled, the party requiring the interpreter is responsible for notifying the office of court interpreter services and the assigned interpreter that interpretation services are no longer required for that day and that the proceeding has been rescheduled.⁽²¹⁹⁾

1. Preparation

It is good practice, when possible, to allow the court interpreter to speak to the attorney requesting the interpreter so that the interpreter may orient himself or herself regarding the specific vocabulary to be used during the trial or hearing.⁽²²⁰⁾ The interpreter will be better prepared if he or she knows the nature of the case, the charges or claims being tried and for whom the interpreter is interpreting: a witness, a party in a civil case or a defendant in a criminal case.⁽²²¹⁾ The interpreter may request a photocopy of the charges or complaint, grand jury minutes, deposition transcripts, police reports, medical records, and the like.⁽²²²⁾ A judge should inform the attorney representing the party needing the interpreter services that the court interpreter has requested an examination of the documents. The interpreter may also want to briefly speak to the defendant or witness, with the attorney's permission and in his or her presence, to determine the source language, dialect, idioms and colloquialisms that the defendant or witness may use while testifying.⁽²²³⁾ It is important for the court interpreter to have the opportunity to assess the defendant's or witness's level of education, accent and any other relevant traits, which will be helpful in reproducing testimony later in English.⁽²²⁴⁾

2. Location and Placement of an Interpreter

The court interpreter must maintain a low profile during the proceedings.⁽²²⁵⁾ To accomplish this, the court interpreter should position himself or herself to provide the interpretation without being conspicuous.⁽²²⁶⁾

The court interpreter is responsible for placing himself or herself so that the interpretation can be performed comfortably.⁽²²⁷⁾ A record interpreter must be able to see and hear and be seen and heard by the court, attorneys, the witness, and the jury.⁽²²⁸⁾ The interpreter must inform the judge if he or she has difficulty hearing due to the noise level in the courtroom.⁽²²⁹⁾ The judge, in turn, has the responsibility to support and assist the interpreter.⁽²³⁰⁾ The judge may ask the attorney or witness to repeat a question⁽²³¹⁾ or answer, or to raise his or her voice, or may order the attorneys to speak one at a time.⁽²³²⁾ The interpreter and judge should work together so that there is minimal disruption in the flow of the testimony.⁽²³³⁾ If the court interpreter is interpreting for a defendant at counsel table (defense interpreting), and the attorney is monolingual, then the court interpreter should be seated between the attorney and the defendant.⁽²³⁴⁾ This seating arrangement will permit the attorney to speak with the defendant with the assistance of the interpreter. A bilingual attorney may prefer to sit next to the defendant and have the interpreter sit on the other side of the defendant. In most cases, the placement of the interpreter, attorney(s), and defendant(s) at the attorneys' table is a matter best left to the individuals involved.⁽²³⁵⁾

3. Equipment

Court interpreting, as are all aspects of modern trial practice, is increasingly using advanced technology. The proper use of technology can reduce the number of court interpreters needed for a multi-defendant trial.⁽²³⁶⁾ Three popular configurations of sound equipment in the courtroom are: (1) Portable Wired Equipment--the microphone, amplifier, and the headsets are all hardwired together; (2) Portable Wireless Equipment--microphone, transmitter, receiver, and headset work on a radio frequency; (3) Infrared Equipment--microphone, wire, infrared transmitter, and headsets.⁽²³⁷⁾ Each configuration has its own advantages and disadvantages.⁽²³⁸⁾ If the interpreter will be working with multiple defendants, the judge should discuss with the interpreter which configuration should be used. Arrangements should be made with the clerk for electrical outlets and to ensure that computer or other electronic devices in the courtroom do not interfere with the interpreter's equipment. The judge may need to make arrangements with court officers responsible for security to "clear" this equipment.

K. Oath

Before every proceeding, the court interpreter should swear, in open court, to faithfully, accurately and impartially interpret the proceedings using his or her best skill and judgment.⁽²³⁹⁾ While some courts have held that a defense interpreter does not have to be sworn and limit the oath to witness or record interpreters,⁽²⁴⁰⁾ all interpreters involved in the proceedings should be sworn. The defense interpreter sits at counsel table and interprets the proceeding for the defendant so that he or she is "linguistically present" and is able to follow the proceedings.⁽²⁴¹⁾ If the interpreter fails to interpret the proceedings fully and accurately, the defendant is no longer linguistically present and the defendant's Sixth Amendment and Due Process rights are violated.⁽²⁴²⁾ Because the defense interpreter's role is as vital to the proceedings as the witness interpreter's, *both* should be sworn at the commencement of the proceedings.⁽²⁴³⁾ However, if the witness interpreter inadvertently fails to take the oath, this failure is not necessarily fatal to the admissibility of the interpretation.⁽²⁴⁴⁾

In a busy arraignment session, the interpreter may be sworn at the beginning of the session in order to save time. However, it is advisable for the judge or the session clerk to indicate on the record that the interpreter has been previously sworn.

The Mechanics of Interpretation

A judge should expect that a court interpreter will speak clearly.⁽²⁴⁵⁾ The interpreter's rendition should reflect pauses, hesitations, the rate of speed of the witness, and should be delivered in a manner that reflects but does not exaggerate the tone and emotions of the speaker.⁽²⁴⁶⁾

A. Modes of Interpretation

Generally, qualified court interpreters use three modes of interpretation: simultaneous, consecutive, or sight interpreting (translation).⁽²⁴⁷⁾ A court interpreter may use the simultaneous mode of interpretation or the consecutive mode of interpretation, but should *never* use the summary mode of interpretation.⁽²⁴⁸⁾ The simultaneous mode of interpretation is the preferred mode in judicial proceedings.⁽²⁴⁹⁾ When using the simultaneous mode of interpretation, the interpreter is required to speak contemporaneously with the speaker.⁽²⁵⁰⁾ This mode of interpreting is often used when the court interpreter is seated at counsel table assisting a non-English-speaking party.⁽²⁵¹⁾ When using the consecutive mode, the interpreter listens and speaks in a sequential manner after the speaker has completed a thought.⁽²⁵²⁾ The speaker may pause at regular intervals to facilitate the conveyance of his or her statements through the interpreter.⁽²⁵³⁾ The consecutive mode of interpretation is often used during plea hearings or with witness testimony.⁽²⁵⁴⁾ Sight interpreting, or translation, occurs when the interpreter orally converts a document written in one language to a different language.⁽²⁵⁵⁾ The trier of fact hears the interpreter's rendition in English.⁽²⁵⁶⁾

The summary mode of interpretation has *no* place in a court proceeding.⁽²⁵⁷⁾ When using this mode of interpretation, the interpreter summarizes and paraphrases the statements of the speaker.⁽²⁵⁸⁾ 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.⁽²⁵⁹⁾ This mode of interpretation is used by unqualified interpreters who have difficulty keeping up in the consecutive and simultaneous modes.⁽²⁶⁰⁾

B. Register

"Register" is the "language level or style used in different settings."⁽²⁶¹⁾ "Various registers might include the legal, the deliberately obscure, the academic, scientific, elegant, cultured, polite, low-rent, vulgar, and deliberately offensive."⁽²⁶²⁾ An interpreter is obligated to duplicate the register or the degree of formality or level of language used by the speaker.⁽²⁶³⁾ "Conservation of register is the most essential element in the preservation of the 'voice' of the speaker in combination with precise word choice and the maintenance of paralinguistic elements."⁽²⁶⁴⁾

The Interpreter at Trial

The court interpreter's responsibility is more than merely to provide an accurate and legally equivalent rendition. The interpreter must be knowledgeable of court procedures for maintaining an accurate and clear record of the proceeding. This includes how the interpreter will identify himself or herself on the record when speaking as "the interpreter" rather than as the voice of a witness or defendant. The interpreter may be faced with a "runaway" witness and must be able to follow the judge's directions for controlling such a witness. Also, at times the interpreter may be faced with challenges to his or her rendition of the testimony. The interpreter should be aware of the procedures the judge may adopt to resolve the challenged rendition.

A. Interpreter on the Record and Accuracy of the Record

A court interpreter should never simplify the questions or statements for a non-English speaker even when the interpreter believes that the non-English speaker cannot understand the speaker's language level.⁽²⁶⁵⁾ The court interpreter must not correct factual errors made in questions put to the non-English speaker.⁽²⁶⁶⁾ The interpreter may not correct the testimony of non-English speakers, even if errors are obvious.⁽²⁶⁷⁾

A qualified court interpreter will always refer to himself or herself as the "interpreter" when addressing the court.⁽²⁶⁸⁾ This practice is followed to avoid confusion on the record.⁽²⁶⁹⁾ For example, if the interpreter does not hear the question posed by the attorney to the witness, the court interpreter should raise his or her hand and address the judge and state, "The interpreter did not hear the question. Would the Court order the attorney to repeat the question?" The judge should then order the attorney to repeat the question.

A court interpreter is obligated to stop the proceeding whenever he or she is unable to understand a word or phrase or needs clarification.⁽²⁷⁰⁾ The court interpreter will signal to the judge and inform him or her of the problem. The judge can order the attorney to repeat or to rephrase the question.⁽²⁷¹⁾

An interpreter may not interpret for more than one party at a trial.⁽²⁷²⁾ For example, if the interpreter is sitting at the defense table serving as a defense interpreter, then the interpreter must not also serve as a witness interpreter if one is required.⁽²⁷³⁾ There are at least three very good reasons for this rule. First, while the defense interpreter is serving as a witness interpreter, the defendant cannot communicate with counsel; thus, depriving the defendant of valuable constitutional rights.⁽²⁷⁴⁾ Equally important, but a less obvious reason, is that the factfinder may associate the interpreter with one party. The factfinder may thus discount part of the interpretation or mistakenly give it more credibility, believing that a party has adopted the testimony of a witness. Also, the interpreter, through long association with the defendant, may become biased.⁽²⁷⁵⁾ Finally, the defendant's interpreter assists defense counsel in ensuring that testimony is being accurately interpreted.⁽²⁷⁶⁾

If an error occurs in the interpretation during a jury trial and the court interpreter realizes the error, the court interpreter must immediately correct the record.⁽²⁷⁷⁾ The interpreter must ask the court's permission to correct the error.⁽²⁷⁸⁾ In the alternative, the court interpreter may request a side-bar conference with the judge and the attorneys to report the error and await the court's instructions.⁽²⁷⁹⁾ The court interpreter should avoid alerting the jury of the problem until the judge has an opportunity to address the jury with appropriate instructions. Often the problem can be solved by the judge ordering the attorney to ask the question again and by having the witness answer the question with the court interpreter providing the correct interpretation.⁽²⁸⁰⁾

If the court interpreter realizes that an error was made after testimony has been completed, the court interpreter must request a bench or lobby conference with the judge and attorneys to explain the problem.

Sometimes the court interpreter needs to consult a dictionary and may ask, "Your Honor, may the interpreter consult a dictionary (or other source) to clarify the meaning of the word?"⁽²⁸¹⁾ The interpreter may ask permission from the judge to request an explanation of a word or phrase used by the witness which is linguistically ambiguous.⁽²⁸²⁾ Again, any departure from the interpreter role should be a last resort.⁽²⁸³⁾

The judge has to rule, in view of the evidence, as to the correct interpretation. If the correct interpretation is different from the original interpretation, the judge must instruct the jury to disregard the first interpretation. The attorney can then repeat the question originally posed to the non-English speaker, so that the correct interpretation can be heard by the jury. Curative instructions will be necessary to inform the jury that the misinterpreted answer is no longer evidence and must be disregarded.

B. Objection to Witness Testimony

Whenever an objection is made, the court interpreter must interpret everything that is said by the attorney who made the objection.⁽²⁸⁴⁾ The court interpreter must unobtrusively instruct the witness not to speak until the court has ruled on the objection.⁽²⁸⁵⁾ The interpreter must interpret what the attorney or attorneys say to the judge as well as the judge's response when ruling on the objection.⁽²⁸⁶⁾ The reason for this procedure is that a non-English-speaking witness or party in a civil or criminal case is entitled to hear everything that everyone else hears in the courtroom.⁽²⁸⁷⁾

The interpreter, upon hearing the attorney object to a question posed to the witness, must immediately switch from the consecutive mode to the simultaneous mode. This means that the interpreter may not complete the interpretation of the question for the witness. The interpreter abandons the consecutive interpretation of the question and begins simultaneously interpreting the colloquy regarding the objection.

C. Legal Status of a Court Interpreter and Objections to Interpretations

The legal status of a court interpreter is unclear.⁽²⁸⁸⁾ Courts have been unable to articulate a theoretical framework that adequately defines the unique status of a court interpreter.⁽²⁸⁹⁾ Courts have, for evidentiary purposes, considered a court interpreter to be a witness, an expert witness, an agent, or an officer of the court.⁽²⁹⁰⁾ The legal status of a court interpreter is unclear because a court interpreter is *sui generis*. A court "interpreter is perhaps the only 'officer of the court'" who provides expert services.⁽²⁹¹⁾ This section discusses the theoretical models for admitting "interpreter evidence," concludes that it is unnecessary to resolve the conflicting lines of cases, and then suggests a model for handling objections to the interpretation.

Older cases treated the interpreter as a witness because "[h]e [or she] states, under oath, to the jury what the other witness said; and this testimony--as clearly such as the statement of any ordinary witness who testifies to the declaration or admissions of another person."⁽²⁹²⁾

Relying on evidentiary rules, such as the Federal Rules of Evidence, 604⁽²⁹³⁾ and 702,⁽²⁹⁴⁾ some courts have held that an interpreter is an expert witness.⁽²⁹⁵⁾ Under Rule 604, the interpreter must qualify as an expert,⁽²⁹⁶⁾ and under Rule 702, the interpreter must "assist the trier of fact to understand the evidence or to determine a fact in issue."⁽²⁹⁷⁾ Because these courts found that the interpreter was an expert witness, the courts concluded that the appropriate method of resolving any objection to the interpretation was to examine the interpreter on the stand as a witness.⁽²⁹⁸⁾ However, the more recent and better trend is to reject considering the court interpreter as a witness.⁽²⁹⁹⁾

Courts which treat the interpreter as a "fact witness" permit challenges to the interpretation as they permit challenges to any evidentiary issue.⁽³⁰⁰⁾ The attorney desiring to challenge the interpretation calls the interpreter and examines him or her as a fact witness before the jury.⁽³⁰¹⁾ The disputed rendition then goes to the jury as a pure fact question.⁽³⁰²⁾ This model presumes that the interpreter is testifying as a percipient witness. The second model used is the interpreter as an "expert witness."⁽³⁰³⁾ Both sides call their language expert witnesses and the jury observes the battle of the experts (in essence a time-consuming trial within a trial⁽³⁰⁴⁾), and the jury then decides which side's experts are more credible.⁽³⁰⁵⁾ Both of these models ignore the essential function of the interpreter as a language mediator or conduit. Because the witness whose testimony is in dispute is present, the most efficient and accurate method of resolving what the witness "really meant" is to put further fact questions to the witness at side-bar to resolve the challenged rendition.⁽³⁰⁶⁾

To clarify the confusion, the Model Code of Professional Responsibility for Interpreters in the Judiciary treats the interpreter as "an officer of the court"⁽³⁰⁷⁾ rather than as a witness, expert or otherwise. Because the interpreter is no longer a witness or expert, a court may adopt new procedures to address challenges to the interpreter's rendition.⁽³⁰⁸⁾ No longer must a court look to evidentiary analogies to find a basis for admissibility of court interpretation. Treating the court interpreter as an officer of the court allows a judge to consider challenges to the interpretation outside the presence of the jury, and the judge may decide in the case of a disputed rendition, which rendition will be evidence in the trial. Under the court interpreter as witness or expert witness model, this finding was a question of fact for the jury.⁽³⁰⁹⁾

The exception to the interpreter being treated as officer of the court occurs if a judge has to resolve a dispute regarding an interpretation that is objected to by an attorney or a juror.⁽³¹⁰⁾ In these circumstances, the judge should appoint a second certified court interpreter to resolve the dispute regarding the interpretation given by the first court interpreter.⁽³¹¹⁾ The second court interpreter acts as an expert witness by providing an opinion as to the correct usage or meaning of the word or expression in dispute. The judge can believe or disbelieve the opinion of the expert witness called upon to opine on the interpretation provided by the first interpreter. That expert witness should not later perform interpreter services in that same case.⁽³¹²⁾

D. Handling Objections at Trial

Objections to an interpreter's rendition by attorneys should be handled by the court in the same manner as other objections, and the court should ensure that the objection does not become a debate between the attorney and the interpreter.⁽³¹³⁾ The 1988 draft regulations to the Court Interpreter Amendments Act suggest the proper procedure that a judge should follow when an attorney objects to the interpreter's rendition of testimony:⁽³¹⁴⁾

(a) If a party or counsel to a proceeding concludes that an interpreter has made a mistake in interpretation that *might materially* alter the understanding of the words or phrases interpreted, they shall call the matter to the attention of the presiding judicial officer. The presiding judicial officer shall conduct an inquiry out of the hearing of the jury, if any, as to the materiality of the alleged error. If the presiding judicial officer finds that the error might affect the understanding of the finder of fact, they shall:

(1) request that the question and answer at issue be read back;

(2) obtain from the challenger a specification of the alleged error and the interpretation advanced by the challenger as the correct interpretation of the challenged material; and

(3) inquire of the interpreter if the alternative proposed by the challenger is acceptable to the interpreter.

(b) If the dispute cannot be resolved by agreement, the presiding judicial officer shall decide after hearing both sides of the question which interpretation is the proper one under the circumstances. In making such determination, the version offered by the assigned [certified] interpreter shall be presumed correct, and the burden of proof shall be upon the party or counsel challenging the interpreter.⁽³¹⁵⁾

If the interpreter does not accept the attorney's proposed alternative rendition, the conflict may be resolved by having the judge or an attorney ask the witness a clarifying question at side-bar or outside the presence of the jury. If the judge accepts the interpreter's rendition, then the objection should be overruled. If the judge rejects the interpreter's rendition, the judge should sustain the objection on the record, make appropriate findings on the record, and ask the attorneys how the accepted rendition should be conveyed to the jury. The most effective method of doing this is to instruct the jury to disregard the previous question and answer, to have the attorney re-ask the question, and to have the witness re-answer the question with the interpreter providing the accepted rendition.

E. Controlling a Witness Through an Interpreter

If an interpreter is faced with a witness giving rambling or non-responsive answers, the interpreter should interpret the answer of the witness, neither editing nor adding to the witness's words.⁽³¹⁶⁾ It is the duty of the court, not of the interpreter, to determine whether the answer is responsive or admissible.⁽³¹⁷⁾

When . . . it is obvious that the witness is repeatedly giving non-responsive, overly lengthy answers, the judge should adopt special procedures . . . to control the

witness [I]t may be necessary frequently to instruct the witness to limit his or her answer when a "Yes" or "No," or other specific response, is all that is called for by the question. Non-English speaking witnesses [when repeatedly giving non-responsive or overly lengthy answers] present problems since the judge is often unable to stop the witness in midstream in order to focus the [witness's] attention on the question asked.⁽³¹⁸⁾

The judge may also request that attorneys formulate their questions so that a specific answer must be given. A judge cannot delegate the responsibility to determine admissibility of the evidence to the interpreter.⁽³¹⁹⁾ "For example, an instruction to the interpreter to [interpret] only that part of the answer that is responsive to the question would be error."⁽³²⁰⁾

F. Preserving the Record

Frequently, appellate judges complain about the paucity of the trial court record and their inability to review the interpretation at trial.⁽³²¹⁾ Absent special efforts by the attorney or the court, the record is only a transcript of the English language that is spoken in the courtroom.⁽³²²⁾ The court reporter does not maintain a record of non-English testimony.⁽³²³⁾ Accordingly, absent an audio record of the proceedings, there will be nothing in the English language record for an appellate court to review.⁽³²⁴⁾ In order to preserve interpreter error for review, the judge or attorney must take steps to record the foreign language testimony.⁽³²⁵⁾ This is as simple as using an audiotape recorder⁽³²⁶⁾ or the better choice is a videotape recording of the witness and interpreter.⁽³²⁷⁾

The interpreter will not preserve the record to reflect visual or oral cues or demonstrations.⁽³²⁸⁾ For example, if a witness points to the defendant, or if a witness slurs his or her speech or stutters, the record will not reflect such activities. If visual or oral characteristics are relevant, the judge or attorney must place the relevant characteristics on the record.⁽³²⁹⁾ For example, the judge may state that "the record will reflect that the witness pointed to the defendant and screamed, 'he did it.'"

G. Interpreter Burnout--The Fatigue Factor

A presiding judge should be aware that it is very tiring to interpret for long periods of time.⁽³³⁰⁾ When an interpreting session does not exceed thirty minutes, one interpreter is usually sufficient.⁽³³¹⁾ Because interpreting requires intense concentration to hear each word to then render it into the target language, the United Nations, the United States Department of State, and the federal courts have determined that thirty minutes is the period of maximum efficiency for an interpreter using the simultaneous mode.⁽³³²⁾ Generally, court interpreters should change every twenty minutes or so "during natural breaks in the [proceedings] such as bench conferences" or between witnesses.⁽³³³⁾ However, if a court interpreter believes that he or she is not able to provide accurate interpretation due to fatigue, the interpreter is obligated to inform the court.⁽³³⁴⁾ If a court interpreter informs the court that he or she is tired, the court should, consistent with the needs of the trial, take a brief recess at the next available opportunity. Some jurisdictions provide for teams of two court interpreters when the proceeding will be longer than two

hours.⁽³³⁵⁾ If it is feasible, "two court interpreters should . . . be assigned so that they can relieve each other at periodic intervals and prevent fatigue and delays."⁽³³⁶⁾

H. Commenting on an Interpreter

Occasionally, an attorney will try to impeach a defendant or witness by showing that the defendant or witness does not normally use an interpreter for ordinary conversation purposes. The language of the courts, however, is not akin to ordinary conversation; therefore, a defendant or witness should not be "penalized" because he or she requires a court interpreter.⁽³³⁷⁾ "[A]n attack on a defendant's credibility based on his [or] her desire to testify through an interpreter should not be the preferred mode of impeachment, as it comes perilously close to impinging upon the defendant's exercise of his [or] her fundamental constitutional rights."⁽³³⁸⁾

Bilingual Judge, Clerk, or Other Court Officers and the Court Interpreter

Bilingual court officials often serve as the only "check" on the accuracy of the court interpreter.⁽³³⁹⁾ This section will briefly discuss the relationship of the bilingual judge and his or her staff and the court interpreter. The underlying assumption of this section is that if the court interpreter has been certified after successfully passing a reliable and valid test or that if the judge has properly qualified the interpreter through a voir dire, the interpreter is entitled to a presumption that his or her interpretation is correct.⁽³⁴⁰⁾ While a bilingual judge, clerk, or court officer *may notice* putative errors in interpretation, the judge, clerk, and court officer all have other demanding duties to ensure the proper administration of justice and cannot be expected to monitor the interpreter's accuracy. For example, a bilingual judge cannot monitor the testimony in the source language and the interpretation into the target language, observe the manner and demeanor of the witness, anticipate objections and rulings of law, as well as all the other details the judge must monitor during a trial.⁽³⁴¹⁾ Therefore, neither attorneys nor appellate courts should consider the mere presence of bilingual court personnel to be a guarantee of accurate interpretation.⁽³⁴²⁾

A. The Bilingual Judge

There are times when a bilingual judge plays a special role in detecting obviously incompetent court interpretation.⁽³⁴³⁾ However, while a bilingual judge may be competent to evaluate an interpreter's bilingual ability, the judge still is not a court interpreter, nor does he or she have any expertise in this area.⁽³⁴⁴⁾ As discussed previously, a court interpreter is much more than a bilingual individual.⁽³⁴⁵⁾ A bilingual judge should not serve as an interpreter and should conduct *all* the proceedings in English.⁽³⁴⁶⁾ A bilingual judge, although well intentioned, is not competent to determine an interpreter's abilities. "Real errors may go unperceived, or correct interpretations may be falsely perceived as erroneous, as when there are regional variations in usage, or if there are false cognates."⁽³⁴⁷⁾ Furthermore, a judge should not have to take on the additional burden of monitoring the proceeding and the interpretation at the same time.⁽³⁴⁸⁾ The only way that

an interpreter's abilities can be judged, is to administer a reliable and valid certification examination developed by experts in the field.⁽³⁴⁹⁾

A judge may desire, as a matter of courtesy, to briefly greet an attorney, witness, or defendant in his or her native language.⁽³⁵⁰⁾ But the practice of greeting attorneys, witnesses or parties in a language other than English should be discouraged.⁽³⁵¹⁾ This practice may create the appearance to attorneys, jurors, witnesses, or spectators, who do not share the judge's and party's or witnesses's common language, that the judge is biased for or against the person being greeted, or that in the future the judge may show some favoritism toward members of that linguistic group.⁽³⁵²⁾ Also, an attorney may become worried about the ex parte communication.⁽³⁵³⁾ Therefore, if a judge does use a language other than English, the judge should put on the record that the judge greeted the person in the foreign language.⁽³⁵⁴⁾ If the comments are more than a brief greeting of the day, the judge should instruct the interpreter to interpret into English the judge's comments and the response for the record. The judge should then explain, in *English*, through the interpreter to the person why the judge will conduct the remaining proceedings entirely in English and instruct the person to communicate through the interpreter.⁽³⁵⁵⁾ Finally, "[s]ince all proceedings must be conducted in English, it should be obvious that it is what the interpreter states on the record, not what the court may, conceivably, have understood the witness to say, that must control both the trial and the appeal."⁽³⁵⁶⁾ Therefore, in cases tried before a bilingual judge, the judge must be careful to correct the record and to make appropriate findings as to the rendition, prior to making findings of fact that may differ from the interpreter's rendition of the testimony.

B. Clerk or Court Officer

A judge who is fortunate enough to have bilingual court personnel should discuss with them potential problems with unqualified court interpreters and establish a policy of how to deal with errors or problems with the interpretation that the clerk, court reporter, or bailiff may be aware of during the course of the trial. The best course of action is to ask the bilingual court officer to send a note to the bench or to bring it to the judge's attention privately at side-bar or during any other convenient break in the proceedings. Regardless of the outcome, the judge should thank the court officer even if the judge ultimately accepts the interpreter's rendition. Fortunately, this type of vigilance or concern is usually unnecessary when using a certified interpreter.⁽³⁵⁷⁾

C. The Court Interpreter

A bilingual judge, clerk, or court officer should be sensitive to the dual role of the court interpreter as an officer of the court and as a language expert. If the judge is bilingual or is notified by a bilingual attorney or court personnel of an error in the interpretation rendered by an uncertified interpreter,⁽³⁵⁸⁾ the judge should discuss the questioned interpretation at side-bar with the interpreter and attorneys.⁽³⁵⁹⁾ The judge should not automatically assume that the alternative rendition is more accurate. The judge should question the interpreter about the challenged rendition with extreme tact and due respect to the interpreter's role as a language expert.⁽³⁶⁰⁾ Most interpreters will have a

bilingual dictionary or other reference sources available. Such sources may quickly resolve the dispute. If they do not, usually any problems with the interpreter's rendition can be resolved through the judge or attorney asking the witness additional questions to clarify the disputed rendition.

The judge or attorney should avoid asking leading questions to clarify the disputed interpretation.⁽³⁶¹⁾ For example, the word "*maceta*" in Spanish "can mean flowerpot, small mallet, stonemason's hammer, or large drinking glass."⁽³⁶²⁾ The witness testifies that the defendant threw a *maceta* at the victim.⁽³⁶³⁾ Rather than asking the witness if the defendant threw "a flowerpot," the witness should be asked, "what was the *maceta* used for?"⁽³⁶⁴⁾ because a leading question could suggest the "right" answer to the witness.⁽³⁶⁵⁾ Alternatively, in many jurisdictions, the judge has broad discretion to put questions to a witness during the course of a trial, and may wish to ask a clarifying question without formally questioning the interpreter's rendition.⁽³⁶⁶⁾ When using a certified interpreter, a judge should presume that the court interpreter's rendition is correct.

Unfortunately, at times, an attorney or judge may challenge an accurate rendition of a witness's testimony--and may even do so in a brusque manner. The interpreter must attempt to avoid personalizing the attorney's or judge's questioning of the interpreter's rendition. Such objections arise out of the judge's duty to ensure a fair trial.⁽³⁶⁷⁾ This may mean that at times when a bilingual judge hears a rendition of witness testimony that materially differs from the original language testimony, the judge may wish to question the interpreter as to the accuracy of the interpretation. At other times, a bilingual attorney may object to the interpreter's rendition of the testimony. The duty of attorneys at trial is to zealously advocate the position of the parties they represent. Consequently, it is rare that the attorney for each side is satisfied with the interpreter's rendition. One side is almost always going to argue that the rendition unnecessarily minimized or maximized some aspect of the witness's testimony. Moreover, each attorney must place his or her objections to the interpretation on the record, so that the judge may rule on the objection and to preserve the objection for further judicial proceedings.

The interpreter should not view objections as an attack on his or her professional competence, but rather as an opportunity to demonstrate to the judge that the rendition was correct or as an opportunity to correct an error in the rendition. When faced with an objection to a rendition, the interpreter should patiently remain silent.⁽³⁶⁸⁾ If the objection results in a side-bar conference, the interpreter should not interrupt the side-bar discussion between the judge, the attorneys, and/or a bilingual juror unless asked a question. Because the judge and attorneys are not language experts, there may be occasions when the interpreter should request permission from the judge to make a recommendation on the objection. Ultimately, an interpreter should remember that the objection is a question of law that the judge must decide.

The Bilingual Attorney

A bilingual attorney should be appointed when available to assist a non-English-speaking, indigent defendant,⁽³⁶⁹⁾ but a defendant has no right to a bilingual attorney.⁽³⁷⁰⁾

Some judges appoint bilingual attorneys to avoid the need of appointing a court interpreter for the proceedings.⁽³⁷¹⁾ The appointment of a bilingual attorney, however, will not solve the language problem in the courtroom.⁽³⁷²⁾ Asking a bilingual attorney to serve both as counsel and as a defense interpreter denies the defendant of both effective representation and effective court interpretation of the proceedings.⁽³⁷³⁾ This is so because an attorney cannot represent a client and interpret in the courtroom simultaneously.⁽³⁷⁴⁾ Moreover, when a bilingual attorney serves multiple roles in the proceedings, it may confuse the issue as to whether the attorney is "counsel" or "interpreter."⁽³⁷⁵⁾ A bilingual attorney who desires to challenge an interpreter's rendition of a witness's testimony is placed on the horns of a dilemma. As an attorney, the lawyer must zealously advocate the client's position by placing the objection on the record.⁽³⁷⁶⁾ For example, if a defense interpreter is present, the bilingual attorney would call the defense interpreter as an expert witness and place both the error and preferred rendition of the interpretation on the record.⁽³⁷⁷⁾ If only a bilingual attorney is present, he or she risks becoming the expert witness in order to preserve the objection for the record.⁽³⁷⁸⁾ Attorneys are ethically prohibited from being witnesses in cases in which they are also counsel.⁽³⁷⁹⁾ Finally, a bilingual attorney should not communicate with his client "on the record" except through the court interpreter and in English.⁽³⁸⁰⁾ The attorney may, of course, use whichever language he or she chooses for confidential client communications.

VIII. The Bilingual Juror

Attorneys often object to having bilingual individuals serve as jurors in a case in which interpreted or translated evidence will be important. Usually, these objections are "based on one or both of [the following] two fears":

First, that the interpreter's version of the testimony will differ materially from the actual testimony, so that bilingual jurors will hear and rely upon a different version of the testimony than monolingual English-speaking jurors. Second, assuming that the interpreter's version is faithful to the original [non-English] testimony, bilingual jurors could claim that the [non-English] testimony was different from what the interpreter said it was, and so undermine potentially the jury's deliberations.⁽³⁸¹⁾

As for the first fear, if the interpreter is faithfully interpreting the proceedings, this fear is groundless, and there is no reason to remove the bilingual individual from the jury pool.⁽³⁸²⁾ However, if the interpreter is unqualified, removing a bilingual individual from the jury pool because he or she may be the bearer of the bad news is an irrational response to a failure in the criminal justice system.⁽³⁸³⁾ The appropriate response is for the judge and attorneys to work together to ensure that only qualified individuals serve as interpreters, so that both bilingual and monolingual persons hear the same true voice of the witness.

As for the second fear, it too is groundless if the judge provides the bilingual juror with an avenue to correct any problems with a misinterpretation and properly instructs the jury that *only* the English language interpretation is evidence.⁽³⁸⁴⁾ For example, the judge may instruct the bilingual juror that if he or she has any questions regarding a rendition, he or

she should send a note to the judge through a court officer. If the bilingual juror fails to do so, he or she cannot credibly go into the jury room and argue his or her preferred rendition of the evidence and that the interpreter was wrong.⁽³⁸⁵⁾

Full discussion of the legal role of a bilingual juror is beyond the scope of this article.⁽³⁸⁶⁾ The focus of this Part is on working with court interpreters and bilingual jurors. However, this is what should *not* happen:

[Bilingual 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.

THE 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.

THE 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* [sic]--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 [or it's an idiom].⁽³⁸⁷⁾ First, there is never a reason for a juror and a court interpreter to engage in this sort of conversation. The proper procedure is for the interpreter to wait for the court to handle the problem. If the judge or

the attorneys had any questions, they would have posed them to the interpreter. The interpreter's response to the challenged rendition, while understandable, was impermissible;⁽³⁸⁸⁾ however, problems like this may be avoided with proper planning. If interpreted testimony is going to be significant, then the judge should discuss with the attorneys how to instruct the jury. If bilingual jurors are on the panel, the jury must be instructed that *only* the English language rendition, as provided by the court interpreter, is evidence in the case, and that they must disregard any contrary meaning from the source language.⁽³⁸⁹⁾ Second, the judge should discuss with counsel how to address any concerns of bilingual jurors relating to the accuracy of the interpreter's rendition. A slight modification of the procedure used in *Perez* is an excellent option. After the above dispute, the court in *Perez* instructed the jury as follows: The Court recognizes that some of the jurors may be able to understand Spanish, and your own ears will tell you what you hear. This witness is testifying through an interpreter, but if those of you who can in fact understand Spanish hear certain words differently that you understand the interpreter to relate them, then you may, when the witness is finished with his testimony, you may

place your question, you may raise the question that you have with the Court. If the Court feels that it is a question that can be properly answered, then the Court will take care of attempting to get it answered. But we are obviously going to break down if individual jurors want to ask questions of the interpreter or of the witness directly. The reason for that is, some of those questions may be what the law declares to be incompetent. That would result in prejudicial error either to the defendant or to the government.⁽³⁹⁰⁾

This instruction allows the bilingual juror to resolve any questions he or she may have regarding the interpretation and assists the court by bringing possible problems with the interpretation to the court's attention.⁽³⁹¹⁾ Therefore, such an instruction should be given at the beginning of trial. In sum, the court should also instruct the bilingual juror that he or she should send a note to the court through a court officer, if he or she questions the interpretation. Further, the juror should not say anything to the other jurors until the court responds to the juror's question regarding the rendition. The court should consult with the attorneys and the interpreter and then respond to the question. Often this can be resolved by an appropriate instruction and by permitting the attorney to re-ask or rephrase the question.

Ethical Considerations for Judges and Court Interpreters

A judge must be sensitive to many different aspects of ethical conduct in the proper use of court interpreters. First and foremost, the judge, attorneys, court personnel, and parties must remain aware at all times that the court interpreter is a professional who is bound by a code of professional ethics, which the interpreter takes just as seriously as a judge does the Canons of Judicial Ethics, or as the attorneys do the state Code of Professional Responsibility. Accordingly, the judge, attorneys, and other court officials should be aware of the ethical norms for interpreters, avoid asking a court interpreter to act unethically, and respect the interpreter's judgment on interpreter ethical issues that may arise during trial. For example, a judge should not order an interpreter to engage in unethical conduct, such as not fully or completely interpreting the proceedings.⁽³⁹²⁾ Because the Model Code of Professional Responsibility for Interpreters in the Judiciary is reproduced as an appendix,⁽³⁹³⁾ and because ethical issues are presented throughout the article, this section is rather brief and does not indicate the relative importance of court interpreter ethical issues in protecting the rights of linguistic minorities.

A. Model Code of Professional Responsibility for Interpreters in the Judiciary

The Model Code of Professional Responsibility for Interpreters in the Judiciary (Model Code) is the most definitive statement of a court interpreter's ethical and professional responsibility. The Model Code is based on essential principles derived from "statutes, rules, case law, and professional experience."⁽³⁹⁴⁾ The Model Code was prepared with the assistance of an advisory group of "judges, lawyers, court administrators, and state and federally certified professional interpreters."⁽³⁹⁵⁾ The goal of the Model Code is to establish "a core set of principles . . . recommended for incorporation in similar [state] codes," to be referenced in jurisdictions where no code of conduct exists, and to provide guidelines for the "training of interpreters and other legal professionals."⁽³⁹⁶⁾ The Model

Code provides that the goal of court interpretation is to remove the "communication barrier . . . as far as possible, so that these persons [with limited English speaking ability] are placed in the same position as similarly situated persons for whom there is no such barrier."⁽³⁹⁷⁾ The Model Code is not only binding on court interpreters but also "upon all persons, agencies and organizations who administer, supervise use, or deliver interpreting services to the judiciary."⁽³⁹⁸⁾

B. Ten "Musts" for Ethical Court Interpretation

Both the Model Code and the Model Court Interpreter Act have strong prohibitions against court interpreter misconduct and provide aspirational goals for court interpreters. For a trial judge, these prohibited practices and aspirational goals can be distilled into ten "musts" in order to ensure fair judicial proceedings.

A court interpreter:

- (1) must never give any legal advice to anyone;⁽³⁹⁹⁾
- (2) must refer any legal questions to the attorney;⁽⁴⁰⁰⁾
- (3) must remain impartial;⁽⁴⁰¹⁾
- (4) must never disclose confidential or privileged information or make a false interpretation;⁽⁴⁰²⁾
- (5) must inform the court when he or she has made a mistake in interpreting *as soon as* it becomes known to the interpreter;⁽⁴⁰³⁾
- (6) must completely interpret the proceedings;⁽⁴⁰⁴⁾
- (7) must at *all times* behave as an officer of the court;⁽⁴⁰⁵⁾
- (8) must avoid unnecessary discussions with the attorneys, parties and witnesses, inside and outside the courtroom;⁽⁴⁰⁶⁾
- (9) must not perform the duties of other court officials, such as court clerks, pre-trial release investigators, probation counselors, and social workers;⁽⁴⁰⁷⁾ and
- (10) must notify the court if for *any reason* the interpreter cannot provide an accurate interpretation.⁽⁴⁰⁸⁾

C. Ethical Relations Between Court Interpreters

If an interpreter is present in court and notices that another interpreter has made an error in interpretation, the observing interpreter should tactfully bring the error to the attention of the interpreter providing the interpreting services to the court at the earliest possible

point in the proceedings, and provide that interpreter with an opportunity to correct the record.⁽⁴⁰⁹⁾ If the interpreter fails to do so, the observing interpreter should then request a side-bar conference with the court, the attorneys, and the other interpreter to notify the court of the disputed interpretation.⁽⁴¹⁰⁾

Coloring the Interpretation

Legal literature is replete with instances in which a misinterpretation affected the substantive rights of parties,⁽⁴¹¹⁾ and linguists have discovered what attorneys naturally know--that the manner and demeanor of a witness affects credibility. For example, a defendant testifying using complete sentences is more likely to be acquitted than a defendant testifying in sentence fragments.⁽⁴¹²⁾ However, many judges and attorneys are not aware of the impact that even minor alterations by an interpreter may have on a juror.⁽⁴¹³⁾ Even minor differences such as dialect, accent, voice quality, and linguistic fluency are related to how a listener views the speaker's trustworthiness, "likability," and benevolence.⁽⁴¹⁴⁾ Accordingly, interpreters may subtly, even unconsciously, affect the outcome of the proceedings through their interpretation strategy.⁽⁴¹⁵⁾ This section discusses six ways a court interpreter may "color" the interpretation and affect how a juror evaluates a witness or attorney in four areas: convincingness, competence, intelligence, and trustworthiness. These four areas are essential in making a credibility determination.

A. Interpretation Strategies that Bias the Jury

This discussion of how interpreters influence the factfinder is based on research reported in Professor Susan Berk-Seligson's seminal work, *The Bilingual Court Room: Court Interpreters in the Judicial Process*.⁽⁴¹⁶⁾ To briefly summarize the research methodology, the study involved over 500 mock jurors (subjects),⁽⁴¹⁷⁾ some of whom were bilingual in English and Spanish.⁽⁴¹⁸⁾ The basic methodology was to expose a mock juror to an audiotape of Spanish language testimony and an audiotape of an English language interpretation.⁽⁴¹⁹⁾ The variables were changes in the interpretation or manner of interpretation.⁽⁴²⁰⁾ The mock jurors then evaluated the witness, testimony, or attorney based on four characteristics: convincingness, competence, intelligence, and trustworthiness.⁽⁴²¹⁾ Only the statistically significant results are discussed in this article.⁽⁴²²⁾

1. Politeness

When interpreting, interpreters will often use a polite form of address even if such was not used in the original.⁽⁴²³⁾ An example of this is the witness saying "No," and the interpreter saying "No, Sir." Linguistic research supports that the mere adding of a "Sir" or a "Ma'am" to a "yes" or "no" may affect how a juror evaluates a witness.⁽⁴²⁴⁾ In one study, the witness answered politely in Spanish, and the variable was whether the interpreter provided the English polite term.⁽⁴²⁵⁾ Using mock jurors, researchers discovered the jurors evaluated witnesses who used terms like "sir, ma'am, or miss" more favorably for the traits of "convincingness, competence, intelligence, and

trustworthiness."⁽⁴²⁶⁾ The interpretation affected even how Spanish-speaking mock jurors viewed the witness's intelligence and competence.⁽⁴²⁷⁾ Note that the Spanish-speaking mock jurors were able to understand both the original and the interpretation; yet the interpretation still affected how the jurors viewed the witness.⁽⁴²⁸⁾ Accordingly, the interpretation had some impact on even the Spanish-speaking mock jurors who understood both versions of the testimony. Therefore, a trial judge should be very sensitive to even very minor "errors" in the interpretation if brought to his or her attention.

2. Hyperformality

A change in the witness's register⁽⁴²⁹⁾ from the casual to the formal affects how jurors evaluate a witness for convincingness, competence, intelligence, and trustworthiness.⁽⁴³⁰⁾ Professor Berk-Seligson examined the use of a hyperformal style.⁽⁴³¹⁾ A hyperformal style

sounds bookish and stilted on account of two principal speech characteristics: (1) the lack of ellipsis or syntactic deletions . . . which produces overly-complete surface construction (e.g., in answer to the questions "how old are you?," a hyperformal response would be "I am twenty-one years old," rather than the more typical reply "I'm twenty-one" or, simply, "Twenty-one"); and (2) the failure to contract linguistic elements that are frequently contracted in consultative style (e.g., . . . "am not" for "aren't" and "is not" for "isn't").⁽⁴³²⁾

Some interpreters regularly interpret Spanish language testimony of a witness in a hyperformal style of English.⁽⁴³³⁾ Witnesses whose testimony is interpreted in a formal style were evaluated by mock jurors as more convincing, competent, intelligent, and qualified than witnesses whose testimony is interpreted in a less formal style.⁽⁴³⁴⁾ Professor Berk-Seligson concluded that "one can never speak too formally on the witness stand, so long as one does not end up producing hypercorrections."⁽⁴³⁵⁾

3. Active Versus Passive Voice

A witness whose testimony was interpreted in the passive voice was generally evaluated by mock jurors as less intelligent or trustworthy than witnesses whose testimony was interpreted in the active voice.⁽⁴³⁶⁾ "The active voice is usually more direct and vigorous than the passive."⁽⁴³⁷⁾ The passive voice is "less direct, less bold, and less concise."⁽⁴³⁸⁾ The passive voice in English is created using a form of the verb "to be" and the past participle. For example, "The court interpreter translated the document" is the active voice and "The document was translated by the interpreter" is the passive voice.

4. Hedging

"Hedging" is the use of a word or phrase that leaves the listener the option of determining how seriously to take the statement.⁽⁴³⁹⁾ Hedging is significant in the judicial setting because it may be used by a witness to mitigate or soften testimony.⁽⁴⁴⁰⁾ Hedges create an impression that the witness is hesitant or uncertain.⁽⁴⁴¹⁾ Consequently, a juror listening to

"hedged" testimony is uncertain of that testimony.⁽⁴⁴²⁾ Hedging is often interpreted as "obfuscation or deception,"⁽⁴⁴³⁾ and leads the listener to conclude that the witness did not want to testify to the unvarnished truth.⁽⁴⁴⁴⁾

In the context of court interpretation, what is significant is that even relatively innocuous words like "well" may hedge a subsequent statement.⁽⁴⁴⁵⁾ The use of "well" and other hedges weakens the apparent certainty of the witness.⁽⁴⁴⁶⁾ Because some hedges like "well" are *so innocuous, so minor*, the interpreter may add them when not in the original, or delete them in interpretation, thus affecting credibility determinations.⁽⁴⁴⁷⁾

5. Interrupting the Attorney

Attorneys who were interrupted by an interpreter during the examination of a witness were viewed by mock jurors as less competent.⁽⁴⁴⁸⁾ Hispanic jurors viewed the attorney as both less competent and less intelligent.⁽⁴⁴⁹⁾ To the extent that the attorney as an advocate is "on trial," these studies indicate that the interpreter can affect how the factfinder views the defense.

6. Interrupting or Prodding the Witness

Mock jurors evaluated witnesses and attorneys who were interrupted or cued by interpreters to slow down their responses.⁽⁴⁵⁰⁾ In their evaluation, Hispanic jurors found the witness to be less convincing and competent.⁽⁴⁵¹⁾ This effect, however, did not spill over to how mock jurors viewed the attorney.⁽⁴⁵²⁾

Mock jurors also evaluated witnesses who were prodded to answer in an intelligible fashion rather than paralinguistic sounds like "mhm" or "aja" ("ahuh" in English). Witnesses whose testimony was literally interpreted were viewed as less intelligent than those whose testimony was prodded.⁽⁴⁵³⁾ Interestingly, in cases where there was no prodding by the interpreter, the attorney was also viewed as less competent and less persuasive.⁽⁴⁵⁴⁾

B. Some Final Thoughts on Coloring the Interpretation

Existing research demonstrates even minor errors in interpretation may affect how a factfinder views a witness.⁽⁴⁵⁵⁾ Accordingly, judges, attorneys, and interpreters must be constantly vigilant that at all times the interpreter is interpreting *everything* that is said in the appropriate grammatical form and register.⁽⁴⁵⁶⁾ Moreover, the "visibility" of the interpreter in the courtroom may affect how the jury views the counsel, the witness, and possibly, the court itself.⁽⁴⁵⁷⁾ This research further supports the need for professional certified court interpreters because most of the problems discussed above can be eliminated or minimized through proper court interpreter training.⁽⁴⁵⁸⁾

A Few Misconceptions

There are a few popular misconceptions that must be dispelled. The first misconception is that if a person is bilingual, the person is qualified to interpret a court proceeding.⁽⁴⁵⁹⁾ The

experience of the Administrative Office of the Courts of New Jersey in testing bilingual persons in several languages demonstrates poor test results achieved by individuals seeking employment as court interpreters.⁽⁴⁶⁰⁾ As of April 25, 1995, only 7.6% of the bilingual individuals who took the Spanish court interpreter screening test passed.⁽⁴⁶¹⁾ Of the individuals who took the Haitian Creole test, only 7.4% passed the interpreter screening test.⁽⁴⁶²⁾ The experience of Washington State is similar.⁽⁴⁶³⁾ Through February 23, 1995, only 12.5% of the individuals who took the Spanish test passed.⁽⁴⁶⁴⁾ The Federal Court interpreter examination statistics are more surprising. The overall certification rate for the Spanish/English written and oral examination from 1980 through 1993 was only 3.9%.⁽⁴⁶⁵⁾ The overall certification rate for the written and oral Navajo examination from 1989 through 1992 was 8.6%.⁽⁴⁶⁶⁾ Finally, the overall certification rate for the Haitian Creole/English examination between 1989 through 1992 was 3.8%.⁽⁴⁶⁷⁾

Another misconception is that defendants in criminal cases have little to contribute in their own defense.⁽⁴⁶⁸⁾ Perhaps this is true in some cases, but it is wrong to assume that it is true in *all* cases. A defendant in a criminal case has the constitutional right to the effective assistance of counsel.⁽⁴⁶⁹⁾ That means that the defendant should be able to communicate with the attorney.⁽⁴⁷⁰⁾

We recognize that it may be of value to a defendant in a criminal case to be able to communicate orally with his counsel in the course of a witness's testimony, for he may have information which may aid counsel in examining the witness. Ordinarily, however, his counsel is in control of the examination of witnesses and the tactics he wishes to employ and normally is far more skilful in the conduct of the defence than is the defendant.⁽⁴⁷¹⁾

The Future of Court Interpretation

The future of court interpretation is unclear; however, the trend appears to be increasing cooperation between the state courts, and between state and federal courts. It appears that the future will also involve a growing reliance on technology in the courtroom to compensate for scarce financial resources and the lack of certified court interpreters. Another positive sign is the increasing awareness of judges, attorneys, and other public officials of the need for qualified court interpreters.⁽⁴⁷²⁾

A. The State Court Certification Consortium

The National Center for State Courts and state court administrators from the states of Washington, New Jersey, Oregon and Minnesota have established a national State Court Interpreter Certification Consortium to pool resources for developing and administering interpreter testing and certification programs.⁽⁴⁷³⁾ Maryland, New Mexico and Virginia recently joined the Consortium.⁽⁴⁷⁴⁾ Utah and the First Judicial District of Pennsylvania are seeking budgetary authorizations to become members.⁽⁴⁷⁵⁾

Minnesota and Oregon are underwriting costs of the Consortium organization, development of the prototype testing model, modifications of the Consortium model test,

and new test development in Russian and Hmong.⁽⁴⁷⁶⁾ The National Center for State Courts has assisted in the planning and establishment of this organization and has served as the Consortium administration entity. The National Center for State Courts will serve as a repository for all tests and coordinate new applications for member states.⁽⁴⁷⁷⁾ The National Center for State Courts also plans to establish a national registry of certified court interpreters.⁽⁴⁷⁸⁾

Under current guidelines, the member states must contribute \$25,000 to a fund dedicated to the development of interpreter examinations in several languages.⁽⁴⁷⁹⁾ Membership in the Consortium binds the member states to compliance with test preparations and administration standards to ensure the security and integrity of the testing process.⁽⁴⁸⁰⁾

States could join the Consortium and achieve tremendous cost-saving in the design and development of language certification tests. Another advantage of the Consortium is that interstate standardized tests will permit interpreters to be certified in more than one jurisdiction; thus, increasing the supply of certified court interpreters.

B. Technology in Interpretation

Several states and the federal courts are experimenting with using telephonic interpretation as opposed to the more traditional in-person interpretation.⁽⁴⁸¹⁾ Telephonic or televideo interpretation can offer much to the courts.⁽⁴⁸²⁾ Courts in rural areas can have instant access to a wide variety of languages at a moment's notice.⁽⁴⁸³⁾ Even courts in large metropolitan areas can have instant access to languages spoken by only a handful of people.⁽⁴⁸⁴⁾ Therefore, defendants are not held in jail waiting for an interpreter.⁽⁴⁸⁵⁾ Court interpreters do not waste valuable time commuting between courts or down time waiting for the case in which they are interpreting to be called.⁽⁴⁸⁶⁾ Attorneys and court personnel do not have to spend time tracking down an interpreter.⁽⁴⁸⁷⁾ In addition, judges do not have to delay, schedule, or reschedule proceedings around the availability of an interpreter.⁽⁴⁸⁸⁾ While technology holds great promise in this area, so far that promise has not been fulfilled.⁽⁴⁸⁹⁾

1. Federal Court Use

The federal courts experimented with telephonic interpreters between 1990 and 1993, but the federal courts may only use interpreters who are certified or qualified by the Administrative Office of the United States Courts.⁽⁴⁹⁰⁾ Because simultaneous interpretation is not possible with ordinary phone equipment,⁽⁴⁹¹⁾ federal courts use special equipment and two telephone lines.⁽⁴⁹²⁾

Using two telephone lines and the specialized equipment, it is possible for simultaneous interpretation to take place and also to accommodate private conversations between defendant and counsel. The first telephone line is attached to a speaker phone in court. This allows the interpreter to hear what is said in court. The second telephone line is attached to a handset provided to the defendant. The interpreter listens to the signal coming in on the first line and [interprets] into the second line, which only the defendant

can hear. (Extensions on the line would allow more than one defendant to listen to the interpreter.)⁽⁴⁹³⁾

The system can be easily set up so that when the attorney picks up his or her extension, the courtroom speakerphone is disconnected so as to allow private attorney-client communications.⁽⁴⁹⁴⁾ Overall, this is an effective method of providing certified or qualified interpreters anywhere they are needed.

2. National Center for State Courts Experiment

The National Center for State Courts tested a prototype speakerphone in 1994.⁽⁴⁹⁵⁾ Designed by Jefferson Audio/Video Services of Louisville, Kentucky, this equipment made simultaneous interpretation possible using just one telephone line.⁽⁴⁹⁶⁾ The equipment permitted only the defendant to hear the interpretation during simultaneous interpretation, and the court to hear it through a speaker during consecutive mode interpretation.⁽⁴⁹⁷⁾ The equipment included a second headset and microphone for counsel, so that attorney and client could communicate privately.⁽⁴⁹⁸⁾ Overall, the experiment was a success.⁽⁴⁹⁹⁾ The flaw was that the interpreter could only initiate communication with the court through the defendant, if there was a problem.⁽⁵⁰⁰⁾ "This problem, however, appears to be simple to remedy, by providing the interpreter with a means to control the public/private mode settings on the speaker phone."⁽⁵⁰¹⁾

Courts with the facilities to use telephonic interpretation should consider whether they should instead create their own list of "on-call" interpreters.⁽⁵⁰²⁾ State and federal courts could share lists of certified or qualified interpreters.⁽⁵⁰³⁾ This would ensure greater judicial control over the interpreting and the interpreter; thus, possibly increasing the quality and reducing the cost of interpreter services.

C. AT&T Language Line[®] Services⁽⁵⁰⁴⁾ Telephonic Interpretation

At least eleven states are experimenting with telephonic court interpretation.⁽⁵⁰⁵⁾ This service is provided by AT&T Language Line[®] Services.⁽⁵⁰⁶⁾ AT&T Language Line[®] Services provides access to interpreters in "as many as 140 different languages, 7 days a week, 24 hours a day . . . within moments."⁽⁵⁰⁷⁾

LANGUAGE LINE SERVICES MAKES NO REPRESENTATION, WARRANTY, OR GUARANTEE, EXPRESS OR IMPLIED ABOUT THE INTERPRETER SERVICES, INCLUDING BUT NOT LIMITED TO THE AVAILABILITY, ACCURACY, COMPLETENESS, OR TIMELINESS OF ANY INTERPRETATION. . . . LANGUAGE LINE SERVICES SPECIFICALLY DISCLAIMS ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. CUSTOMER RECOGNIZES THAT OVER-THE-PHONE INTERPRETATION MAY NOT BE ENTIRELY ACCURATE IN ALL CASES.⁽⁵⁰⁸⁾

Despite its disclaimer of warranty, AT&T endeavors to provide interpreters who "are not only skilled in the language you need, but are also well versed in cultural nuances and the terminology of your business."⁽⁵⁰⁹⁾

AT&T requires the following "LIMITATION ON USE OF SERVICE" in the Interpreter Services Agreement to be signed by courts using AT&T Language Line[®] Services:

Language Line Services' Interpreter Services should be limited to court proceedings of *short duration* wherein the conversation can be carefully managed so that *only one participant speaks at a time* and adequate telephone equipment is available. Examples of uses that may be appropriate include bail hearings, pre-trial arraignments, and hearings for restraining orders. Customer has also been fully advised and acknowledges that Language Line Services' *interpreters are not certified as court interpreters nor trained to interpret in trial situations*. Further, customer has been fully advised that over-the-phone interpretation is not appropriate for lengthy court proceedings or ones that involve a large number of participants or a jury.⁽⁵¹⁰⁾

To activate AT&T Language Line[®] Services, one first must establish an account with AT&T Language Line[®] Services,⁽⁵¹¹⁾ then call a toll-free "800" number to Monterey, California where an AT&T operator will connect the caller to an AT&T interpreter usually within a minute.⁽⁵¹²⁾ The only equipment that is required is a telephone.⁽⁵¹³⁾ "The cost of the initial hook-up is the same, regardless of the number of stations installed (e.g., 5 judges and 5 courtrooms cost the same as 1 judge and 1 courtroom)."⁽⁵¹⁴⁾ Courts find that using AT&T Language Line[®] Services does not require high-technology equipment to compensate for courtroom acoustics.⁽⁵¹⁵⁾ Placing phones on counsel tables, the bench, and the witness stand, and then connecting them to a no-hands-headset is an inexpensive solution that works well to provide AT&T Language Line[®] Services in most courtrooms.⁽⁵¹⁶⁾ *However, absent high-technology telephonic equipment, AT&T Language Line[®] Services interpretation is limited to the consecutive mode.*⁽⁵¹⁷⁾

1. Qualifications for AT&T Language Line[®] Services Interpreters

AT&T interpreters must meet the American Council on the Teaching of Foreign Languages, Inc. (ACTFL) Proficiency guidelines.⁽⁵¹⁸⁾ AT&T uses an oral proficiency examination created by ACTFL to determine the individual's level of proficiency in a language other than English.⁽⁵¹⁹⁾ Interpreters are rated according to their qualifications as educated native speakers of English and the second language.⁽⁵²⁰⁾ Potential AT&T interpreters take a proficiency test over the telephone.⁽⁵²¹⁾ The examination takes between thirty and sixty minutes.⁽⁵²²⁾ AT&T interpreters range between "Advanced level" and "Superior level" using the ACTFL Proficiency Guidelines.⁽⁵²³⁾ Generally, AT&T Language Line[®] Services interpreters are rated as "Superior" under the ACTFL Proficiency Guidelines in most languages spoken by large groups of United States residents.⁽⁵²⁴⁾ Occasionally, AT&T will hire an interpreter rated as "Advanced" or "Advanced-High" in a rare language.⁽⁵²⁵⁾

An "Advanced" speaker is "able to satisfy the requirements of everyday situations and routine school and work requirements."⁽⁵²⁶⁾ A "Superior" speaker is "able to speak the language with sufficient accuracy to participate effectively in most formal and informal conversations on practical, social, professional, and abstract topics."⁽⁵²⁷⁾ A superior speaker "[c]an support opinions and hypothesize, but may not be able to tailor language to audience or discuss in depth highly abstract or unfamiliar topics."⁽⁵²⁸⁾ "Usually[, however,] the Superior level speaker is only partially familiar with regional or other dialectical variants."⁽⁵²⁹⁾ The lack of familiarity with regional dialectical variants may be a major limitation in some interpretation contexts; for example, "*pato*" (literally: duck), can mean "forklift" in Peru, "homosexual" in Dominican Republic or Cuba, or "womanizer" in Panama.⁽⁵³⁰⁾ This may be a problem in court contexts where precision of language is critical.⁽⁵³¹⁾

2. Advantages of AT&T Language Line[®] Services Interpreters

The five major advantages of telephonic interpretation over in-person interpretation are

(1) that AT&T Language Line[®] Services interpreters in "as many as 140 languages are available 24 hours a day, everyday, at a moment's notice"; therefore, a defendant does not have to remain in jail for hours or days until an interpreter can be located;⁽⁵³²⁾

(2) that rarely, if ever, will the interpreter have a personal interest in the litigation or know the parties to the litigation,⁽⁵³³⁾

(3) that generally, AT&T Language Line[®] Services are cheaper than in-person interpretation when used for short periods;⁽⁵³⁴⁾

(4) that a court is assured that the interpreter passed some language proficiency examination,⁽⁵³⁵⁾ and

(5) that if the court does not know which language the defendant is speaking, AT&T Language Line[®] Services can quickly go through a number of possible languages in order to locate an interpreter.

Overall, based on published reports, court administrators and judges are pleased with AT&T Language Line[®] Services.⁽⁵³⁶⁾

3. Disadvantages of AT&T Language Line[®] Services Interpreters

The major disadvantages of AT&T Language Line[®] Services are that

(1) the knowledge and interpretation skills of interpreters may not meet requirements of states with interpreter certification examinations;

(2) it does not allow for private attorney-client communications;

(3) the quality of the equipment can have a dramatic impact on how well the judge and the interpreter can hear each other;

(4) it is limited to consecutive mode which increases the length of the proceedings;

(5) it has a high per-minute cost; and

(6) it is unable to translate documents.

4. Suggestions for Working with AT&T Language Line[®] Services Interpreters

Courts should experiment with telephonic interpretation prior to implementing such a program for regular use. Before accepting the services of an AT&T interpreter, the court should

(1) inform the court interpreter that if he or she is accepted as an interpreter, he or she is under the jurisdiction of the court and could be, if necessary, compelled to testify in person;⁽⁵³⁷⁾

(2) voir dire⁽⁵³⁸⁾ and swear⁽⁵³⁹⁾ the interpreter on the record;

(3) impress upon the interpreter key principles of court interpretation; for example, use consecutive mode for interpretation and *never* use the summary mode;

(4) impress upon the interpreter the need to stop the proceeding if necessary. For example, the interpreter should be instructed to stop the proceeding if the interpreter is uncertain of a word, if the witness or party is speaking too quickly, if the interpreter is tired, or if, for *any other* reason, the interpreter cannot completely and accurately interpret the proceedings;

(5) to always refer to himself or herself as "the interpreter";

(6) to use good quality telephone equipment; and

(7) if there are special rules or privileges involved, the court should make the interpreter aware of the nature and scope of the rule or the privilege.⁽⁵⁴⁰⁾ If the communications involved are lawyer-client or otherwise privileged, the interpreter should be instructed not to reveal the communication to *anyone* absent a court order.⁽⁵⁴¹⁾ If the testimony is taken under seal or as part of some other confidential proceeding, the court should instruct the interpreter as to when and under what conditions, if any, this information may be revealed.

AT&T interpreters should be reminded of Canon 6 of the Model Code of Professional Responsibility for Interpreters in the Judiciary that "[i]nterpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been

engaged, even when that information is not privileged or required by law to be confidential."⁽⁵⁴²⁾

5. Recommendations

Telephonic interpretation and, in the future, televideo interpretation hold great promise. As the leader in this area, AT&T Language Line[®] Services should negotiate special arrangements with the state courts to meet the unique requirements of each state's courts. For example, AT&T Language Line[®] Services should note in its interpreter profiles any prior experience that interpreters may have had as court interpreters, and any special qualifications as court interpreters; for example, passing the federal or a state certification test. Courts should then be allowed to request the services of individuals who have previously been qualified or certified, if they are reasonably available.

AT&T Language Line[®] Services should provide interpreters with copies of the Model Code of Professional Responsibility for Interpreters in the Judiciary and train them in the most elementary ethical and legal principles of court interpretation.

Judges should also be extremely sensitive to acoustic, telephonic, mechanical, or other problems that may arise during the proceeding and should be prepared to stop the hearing if necessary. Back-up equipment should be readily available. Invariably, the proceedings should be audiotaped for the record. Tape recording through one of the telephones, rather than a speaker phone, will facilitate recording the proceeding and interpretation.

Finally, the court should use AT&T Language Line[®] Services interpreters only for procedural matters where the substantive rights of the party will not be affected, or in an emergency, such as a bail hearing or temporary restraining order.⁽⁵⁴³⁾ Judges should balance the relative costs both to the defendant in terms of his or her liberty interests and interest in a full and complete interpretation, and the economic or time costs to the court and decide appropriately.

D. Televideo Conferencing

Telephonic interpretation has one inherent limitation: all the communication is oral or aural. Accurate interpretation involves more than listening to words in the source language and converting them into a target language. Hand gestures, facial movements, and other forms of body language are integral parts of full and complete communication.⁽⁵⁴⁴⁾

To convey fully the total message from one person to another, interpreters must be sensitive to the nuances of all aspects of the communication. Thus, attention must be paid not only to the words, but also to the tone, changes of intonation, facial cues, and, especially, gestures, because the full context of an interpreted statement involves verbal as well as nonverbal communication. Body language and gestures are of particular relevance for interpreters working in the legal setting.⁽⁵⁴⁵⁾

Videoconferencing⁽⁵⁴⁶⁾ provides all the advantages of telephonic interpretation, such as courts having instant access to a wide variety of languages at a moment's notice; interpreters not having to waste valuable time commuting between courts or downtime waiting for the case in which they are interpreting to be called; court personnel not having to spend time locating an interpreter; and judges not having to delay, schedule, or reschedule proceedings around the availability of an interpreter.⁽⁵⁴⁷⁾ Videoconferencing also has the advantage of supplementing oral and aural information with visual cues. Courts are already using videoconferencing for proceedings ranging from arraignments and bail hearings⁽⁵⁴⁸⁾ to appeals.⁽⁵⁴⁹⁾ As the price of videoconferencing equipment declines, courts should gradually substitute videoconferencing-interpretation for telephonic-interpretation.⁽⁵⁵⁰⁾ Videoconferencing does not require expensive high-tech equipment.⁽⁵⁵¹⁾ Adding video to telephonic interpretation may result in the future in improving the quality to interpreter services and decreasing costs.

E. Machine-Assisted Translation

Although it is not likely that in the foreseeable future a machine will be able to recognize the subtleties in language, context, and meaning to the same degree as a professional court interpreter, computers appear to offer much promise in providing interpretation services.⁽⁵⁵²⁾ Currently, there are two computer-based technologies that may be useful in providing or supporting court interpretation: computer assisted dictation software and translation software. Computer assisted dictation programs can recognize speech and turn words into text. Translation software converts text from a source language to a target language. Presently, programs exist that convert speech to text at rates approaching 100 words per minute with greater than ninety-seven percent accuracy.⁽⁵⁵³⁾ This is inadequate when compared to court reporter standards of 225 to 250 words per minute.⁽⁵⁵⁴⁾ However, given the strides in computer technology and software development, computers eventually will reach or exceed 225 to 250 words per minute.

Dictation software is already available in English, French, German, Italian, and Spanish.⁽⁵⁵⁵⁾ If dictation software lives up to its potential, a court will be able to have a written source language original as part of the record. A written source language original may lead to a second innovation--machine-assisted translation. Currently, absent bilingual court personnel or a second interpreter, there is no on-going review of the interpretation.⁽⁵⁵⁶⁾ Integrating a computer-generated record in the source language with a translation program would allow monolingual judges, attorneys, and others to compare the in-court interpreter's interpretation with the computer generated translation of the source language text. If the two diverge *greatly*, the judge or attorney could question the interpreter or ask further questions of the witness in order to resolve the disputed rendition. Further, this sort of software will provide the interpreter with feedback with which to check his or her rendition and to continually improve as an interpreter. Because this software is based on the personal computer (PC), controlled experimental programs could be implemented for little more than the cost of the software and a card for an existing courtroom PC. While judges should be ready to embrace and to experiment with technological changes that improve access to the courts, until such technology is proven,

a conservative approach must be taken in adopting technological innovations which may affect the substantive rights of parties.

XIII. Conclusion

The United States is experiencing a growth in linguistic pluralism.⁽⁵⁵⁷⁾ The multitude of languages spoken by the population present new opportunities and challenges for the judiciary.⁽⁵⁵⁸⁾ Protecting the rights of a linguistic minority requires sensitivity on the part of the trial judge to the fact that proceedings using court interpreters may be longer and more expensive.⁽⁵⁵⁹⁾ Yet, "[i]f we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."⁽⁵⁶⁰⁾

Statutes and rules that provide for the appointment of court interpreters rarely give the judge any guidance in determining what is required of a qualified interpreter. Therefore, the individuals appointed on an ad hoc basis by the judge generally lack the skills necessary to ensure that the individual in need of a court interpreter is linguistically present⁽⁵⁶¹⁾--the standard required for adequate court interpretation. Unqualified court interpreters prevent the factfinder from hearing the "true voice" of the witness, and in so doing, prevent the factfinder from fairly evaluating the manner and demeanor of the witness and his or her testimony or prevent the defendant from assisting counsel in his or her own defense. These interpreting errors are not captured in the appellate record. Generally, appellate courts review the interpretation to ensure that the factfinder understood the "gist" of the testimony or its essential meaning. The authors hypothesize that many appellate courts are not aware of the research which reveals that minor changes in register, or the failure to conserve all the linguistic elements, affect how the factfinder evaluates a witness's testimony.

The shortage of qualified court interpreters is a long-term, endemic problem for the judiciary. Only a few states have effective programs to recruit, train, and certify court interpreters. At the present time, these states certify court interpreters in only a handful of languages. The establishment of the National State Court Certification Consortium holds great promise.⁽⁵⁶²⁾ Member states will be able to share the cost of developing and administering validated exams in many languages.⁽⁵⁶³⁾ Those states which do not have certification and training programs for court interpreters will continue to dispense rough justice.

Many court interpretation problems that occur daily in our courts affect the substantive and constitutional rights of parties and witnesses. These problems could be minimized or eliminated through formal training and certification programs for court interpreters.⁽⁵⁶⁴⁾ State courts must establish such programs to ensure the appointment of qualified court interpreters who are guided by a strong code of professional responsibility. States should adopt the Model Court Interpreter Act.⁽⁵⁶⁵⁾ The Act provides a framework for establishing a court interpreter program.⁽⁵⁶⁶⁾ It includes certification procedures and provides guidance for a trial judge in determining court interpreter qualification and in appointing court interpreters.⁽⁵⁶⁷⁾

In addition to being linguistically competent, it is essential that a court interpreter take an oath of professional responsibility before he or she is to be considered truly qualified to interpret a judicial proceeding. The authors propose that each state adopt the Model Code of Professional Responsibility for Interpreters in the Judiciary.⁽⁵⁶⁸⁾ Judges should embrace programs that establish a cadre of professional court interpreters instilled with the utmost professional ethics.

The increasing use of technology in the courtroom has the potential of including translation services that can reduce court interpreter costs and provide a wider variety of qualified interpreters in a matter of moments.⁽⁵⁶⁹⁾ Courts should experiment with using videoconferencing in the courtroom.⁽⁵⁷⁰⁾ Judges, attorneys and interpreters, however, should be careful that nothing is "lost in translation," as courts move into the twenty-first century. Accordingly, judges, attorneys, interpreters and linguistic experts should use scientific methodology to study the efficacy of technology on court interpretation and the fact-finding process.

All people involved in the justice system--judges, court personnel, attorneys, litigants, witnesses, police and, ultimately, society--must recognize that court interpreters are professionals who are obligated to conform to a code of professional responsibility.⁽⁵⁷¹⁾ Court interpreters should never be approached by anyone to act contrary to their code of professional responsibility.

This article has focused on common problems that trial court judges may experience when using court interpreters. With advance notice of the need for a court interpreter and advance preparation, a judge should be able to anticipate most problems that may arise during the proceedings, and resolve them with sensitivity and due concern for the rights of all parties and witnesses in civil and criminal cases. Accurate court interpretation protects the rights of all participants.

Throughout the article, there are practical suggestions to resolve court interpreter-related issues. Hopefully, the readers will also have acquired an understanding of the legal and ethical issues involving the proper use of court interpreters. This article strives to demonstrate the need to train and certify court interpreters in order to provide a meaningful opportunity for a non-English-speaking party or witness to fully and fairly have access to the judicial system. Every judge and attorney should "adopt" the problem of court interpretation so that it is no longer the unwanted step-child of justice.

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1. 5 John W. Wigmore, *Evidence* § 1393, at 143 (Chadbourn rev. ed. 1974) (footnotes omitted), *quoted in* *United States v. Mosquera*, 816 F. Supp. 168, 176 (E.D.N.Y. 1993).
2. *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979); *Johnson v. Hill*, 274 F.2d 110, 116 (8th Cir. 1960).
3. *See Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994); *United States v. Yee Soon Shin*, 953 F.2d 559 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2933 (1993); *United States v. Gomez*, 908 F.2d 809 (11th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991); *United States v. Joshi*, 896 F.2d 1303 (11th Cir.), *cert. denied*, 498 U.S. 986 (1990); *Jackson v. Cintron Garcia*, 665 F.2d 395, 396 (1st Cir. 1981); *Prince v. Beto*, 426 F.2d 875 (5th Cir. 1970); *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); *Giraldo-Rincon v. Dugger*, 707 F. Supp. 504 (M.D. Fla. 1989); *People v. Rodriguez*, 205 Cal. Rptr. 556 (Ct. App. 1984); *State v. Kounelis*, 609 A.2d 1310 (N.J. Super.), *cert. denied*, 627 A.2d 1136 (N.J. 1992); *People v. Ko*, 520 N.Y.S.2d 412, 413 (App. Div. 1987), *appeal denied*, 520 N.E.2d 558 (1988); *Lara v. State*, 761 S.W.2d 481, 482 (Tex. Ct. App. 1988); *State v. Woo Won Choi*, 781 P.2d 505 (Wash. App. 1989), *review denied*, 788 P.2d 1002 (Wash. 1990); *State v. Neave*, 344 N.W.2d 181 (Wis. 1984).
4. *See generally* Lynn W. Davis & William E. Hewitt, *Lessons in Administering Justice: What Judges Need to Know About the Requirements, Role, and Professional Responsibilities of the Court Interpreter*, 1 Harv. Latino L. Rev. 121, 126-28 (1994); Debra L. Hovland, *Errors in Interpretation: Why Plain Error is not Plain*, 11 Law & Ineq. J. 473 (1993); Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. Rev. 1 (1990); Beth G. Lindie, Comment, *Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations*, 48 U. Miami L. Rev. 399, 404-06 (1993); Michael B. Shulman, Note, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 Vand. L. Rev. 175 (1993); Note, *The Right to an Interpreter*, 25 Rutgers L. Rev. 145 (1970).

5. "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. *See generally* 27 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 6056 (1990); Model Court Interpreter Act § 1 (1995) (reproduced in Appendix C).

6. *See infra* part V.C; *see also* Judicial Council of California Administrative Office of the Courts, *Professional Ethics & the Role of the Court Interpreter* 27 (1994); Model Code of Professional Responsibility for Interpreters in the Judiciary Preamble (1995) (reproduced in Appendix B).

7. "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct. These expectations extend to those who make up the contemporary judicial family, the judge's law clerks and secretaries." *Hall v. Small Bus. Admin.*, 695 F.2d 175, 176 (5th Cir. 1983). The court interpreter should be added to this list.

8. Charles M. Grabau & David-Ross Williamson, *Language Barriers in our Trial Courts: The Use of Court Interpreters in Massachusetts*, 70 Mass. L. Rev. 108, 112 (1985) (quoting the transcript filed in *Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 430 N.E.2d 866 (1982)). The law is well established that a defendant has a constitutional right to be physically present when the jury is empaneled. *See Peretz v. United States*, 501 U.S. 923 (1991); *Lewis v. United States*, 146 U.S. 370, 375 (1892) (reversing a conviction because the record did not show "that the prisoner and the jury were brought face to face at the time the challenges were made"); *Commonwealth v. White*, 37 Mass. App. Ct. 757, 759, 643 N.E.2d 1053, 1054 (1994) ("A defendant has a constitutional right, Federal and State, to be present at all critical stages of a criminal proceeding, including the jury empanelment stage in which jurors are examined and peremptory challenges are exercised." (citing *Commonwealth v. Owens*, 414 Mass. 595, 602, 609 N.E.2d 1208, 1213 (1993))). Here, although the defendant was physically present, the defendant's constitutional right to be linguistically present was violated. "[I]f the right to be present is to have meaning [it is imperative that every criminal defendant] possesses "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."" *Mosquera*, 816 F. Supp. at 172-73 (alterations in original) (quoting *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960))).

9. Linguistic minorities are defined as follows:

"Linguistic minorities" are persons who have limited or no proficiency in English." [sic] This includes persons who, because . . . their mother tongue is a language other than English, do not speak or comprehend what others say in English to the extent that they cannot use English effectively as a functional tool of communication for sending and receiving information, thereby partially or completely excluding them from full

participation in legal proceedings or court support services, inhibiting their understanding of charges against them or the nature of legal proceedings, or substantially prejudicing their rights. Administrative Office of the Courts of New Jersey, Standards for Court Interpreting, Legal Translating, and Bilingual Services § 2:1(H) (Working Draft Aug. 8, 1995) [hereinafter New Jersey Standards for Court Interpreting] (on file with the *New England Law Review*).

10. According to the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System:

Judges, attorneys and court personnel are not trained in the proper use of interpreter services.

.....

The Chief Justice should recommend that the state's law schools and continuing legal education providers offer instruction to attorneys and legal personnel on how best to provide effective services which are sensitive to the diverse backgrounds of people in need of interpreters, as well as how to work with a court interpreter. *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, 16 Hamline L. Rev. 477, 621, 623 (1993) [hereinafter *Racial Bias in the Judicial System*]; see also Massachusetts Commission to Study Racial and Ethnic Bias in the Courts: Final Report, *Eliminating the Barriers: Equal Justice* 22 (1994) [hereinafter *Eliminating the Barriers*] ("Judges, court personnel, and attorneys often have a limited understanding about how to use interpreters effectively.").

11. See Grabau & Williamson, *supra* note 8, at 110 (noting that "procedures clerks," court officers, attorneys, secretaries, and janitors have been used as court interpreters).

12. See *id.*; see also John Caher, *Food Stamp Case Defendant Talks the Judge's Language; Woman Acts as Court Interpreter Shortly Before Her Arraignment*, Times Union, Nov. 5, 1994, at B8 (stating that judge was informed that someone in the court spoke Chinese, but judge later discovered that the interpreter was a defendant in another criminal proceeding).

13. William E. Hewitt, *Court Interpretation: Model Guides for Policy and Practice in the State Courts* 198 (1995); Grabau & Williamson, *supra* note 8, at 110; Hovland, *supra* note 4, at 485 (noting that interpreters had 15 hours of training); see also The Committee on the Legal Needs of the Poor, *Equal Justice and the Non-English-Speaking Litigant: A Call for Adequate Interpretation Services in New York State Courts*, 49 Record 306, 307 (1993) (noting that interpreters received fifteen days of training with voluntary continuing education); Carlos A. Astiz, *But they Don't Speak the Language: Achieving Quality Control of Translation in Criminal Courts*, Judges' J., Spring 1986, at 32, 34 ("[V]ery few interpreters in the criminal justice system, and almost none of their administrative supervisors, were familiar with the various interpreting techniques commonly used by professional interpreters.").

14. Model Code of Professional Responsibility for Interpreters in the Judiciary (1995) (reproduced in Appendix B).

15. See Code of Professional Responsibility for Interpreters in the Minnesota State Court System (1995); Code of Professional Responsibility for Interpreters in Oregon Courts (1995); California Rules of Court App. Div. I: Standards of Judicial Administration Recommended by the Judicial Council § 18.3 (1995) [hereinafter California Judicial Council Standards]; New Jersey Code of Professional Conduct for Interpreters, Translitterators, and Translators; Utah Code of Judicial Administration Rule 3-306 (1990).

16. *Racial Bias in the Judicial System*, *supra* note 10, at 611; see also Astiz, *supra* note 13, at 56.

17. Although, the use of American Sign Language (ASL) interpreters for the deaf is also beyond the scope of this article, many of the principles discussed are helpful in the proper utilization of an ASL interpreter. For a discussion of court interpretation in the context of the deaf community, see generally Deirdre M. Smith, Comment, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial*, 46 Me. L. Rev. 87 (1994).

18. For example, in 1940, Professor Wigmore commented that

[i]t may be suspected that Courts in the metropolitan cities do not exercise sufficient care to provide a staff of honest and competent interpreters. . . . [Courts] tend to forget that one of the cruelest injustices is to place at the bar a [non-English speaker] and then fail to provide him [or her] with the means of defending himself [or herself] by intelligible testimony.³ John W. Wigmore, Evidence § 811, at 226 (3d ed. 1940), *quoted in The Right to an Interpreter*, *supra* note 4, at 146 n.5.

19. United States Bureau of the Census, Statistical Abstract of the United States: 1994 No. 57, at 53 (114th ed.). Thirty-two million translates into approximately 13% of all United States residents over the age of 5. See Farhan Haq, *United States: Status of English Sparks New Political Tussle*, Inter Press Serv., Sept. 5, 1995, available in WESTLAW, 1995 WL 10134108.

The majority of non-English speakers are Hispanic, with Spanish-speaking immigrants and native-born speakers accounting for some 55% of the non-English speakers recorded. *Id.* Asian languages, such as Korean, Mandarin Chinese, Japanese and Vietnamese, are spoken by a significant percentage of the population. *Id.* Approximately 327 languages are spoken in the United States. *Id.* "There are nearly 3,000 languages spoken in the world today. That number jumps to 8,000 if you count local dialects, according to Victoria Franklin of the University of California at Los Angeles. But one half of the world's population speaks only 15 of those languages." Stephen Karel, *Language (Commonly Spoken Languages)*, Am. Demographics, May 1, available in WESTLAW, 1989 WL 2571566. For a discussion of statistics of interpreters used in New York courts, see Elena M. de Jongh, *An Introduction to Court Interpreting: Theory & Practice* 21

(1992) (citing Alain L. Sanders, *Libertad and Justicia for All: A Shortage of Interpreters is Leaving the Courts Speechless*, Time, May 29, 1989, at 65).

20. United States Bureau of the Census, *supra* note 19, No. 57, at 53.

21. United States v. Mosquera, 816 F. Supp. 168, 171 (E.D.N.Y. 1993) (quoting John M. Knox, *Courts are Dialing for Interpreters*, Nat'l L.J., Feb. 1, 1993, at S10); *see also* Eliminating the Barriers, *supra* note 10, at 18.

22. *Mosquera*, 816 F. Supp. at 171 (citing Katherine Long, *Immigrants Pose Challenge for Courts--Critical Differences Cause Trouble*, Seattle Times, Nov. 30, 1990, at C3). *See generally* Diana C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 Cal. L. Rev. 1053 (1994); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 Stan. L. Rev. 1311, 1311 (1991); Note, *The Cultural Defense in the Criminal Law*, 99 Harv. L. Rev. 1293 (1986).

23. For example, Latin American countries do not have a grand jury or jury trial tradition. Alicia B. Edwards, *The Practice of Court Interpreting* 97 (1995). Most trials are by one or more judges. *Id.* Dr. Edwards, a federally-certified court interpreter with many years of experience, recounted the difficulty of translating terms that are unique to common law legal systems; for example, "grand jury" or "due process." *Id.*; *see also* Eliminating the Barriers, *supra* note 10, at 44; Elena M. de Jongh, *Foreign Language Interpreters in the Courtroom: The Case for Linguistic and Cultural Proficiency*, 75 Mod. Lang. J. 285, 291 (1991).

24. *Racial Bias in the Judicial System*, *supra* note 10, at 612.

25. *Id.*; *see also* Eliminating the Barriers, *supra* note 10, at 47 (noting that a Polish-speaking defendant assigned to an alcohol awareness group did not speak a word of English and that another non-English-speaking defendant was assigned to classes given in English for sexually dangerous persons).

26. *Mosquera*, 816 F. Supp. at 171 (citing *Court Interpreters Adapt to Changing Populations*, Third Branch, Feb. 1993, at 2). Even as late as 1994, there were only 558 federally-certified Spanish interpreters in the United States. Edwards, *supra* note 23, at 7. The numbers speak for themselves. In fiscal year 1994, Spanish interpreters were used 93,825 times in the federal court system. Hope V. Samborn, *Tongue Tied: Tests and Telephones are Just Some of the Devices Helping to Improve Court Interpreter Services*, A.B.A. J., Feb. 1996, at 22, 22.

27. *Mosquera*, 816 F. Supp. at 171 (citing *Court Interpreters Adapt to Changing Populations*, *supra* note 26, at 2).

28. *Id.* (citing *Agencies Face Language Barriers*, N.Y. Times, July 4, 1992, at B8).

29. *Id.* (citing Records, Clerk of the Court, Eastern District of New York).

30. Administrative Office of the Courts, Statistical Tables on Court Interpreting Services in New Jersey: Calendar Year 1992, at 1 (June 30, 1993) (on file with the *New England Law Review*).

31. *Id.*

32. de Jongh, *supra* note 19, at 21. For a discussion of the state of court interpreter services in New York State, see The Committee on the Legal Needs of the Poor, *supra* note 13, at 307. New York is moving rapidly in this area. Jan Hoffman, *Pay, Training, and Standards for Interpreters in Courts are to be Raised*, N.Y. Times, June 16, 1994, at B3. New York has testing in approximately 12 languages, including Cantonese, Mandarin, Polish, Russian, Greek, Haitian Creole, Vietnamese, Arabic, and Spanish. *Id.*

33. de Jongh, *supra* note 19, at 21.

34. Elizabeth N. Weld, *Bias Study Cites Court Language Problems*, Boston Globe, Oct. 9, 1994, N. Wkly., at 1. In Massachusetts, 6.2% of the population over the age of 5, or 850,000 people, live in homes "where English is not spoken or is spoken as a second language." *Id.* Approximately 350,000 people do not "speak English well," and more than 96 languages are spoken in Massachusetts. *Id.* See generally *Eliminating the Barriers*, *supra* note 10, at 34-35.

35. See *United States v. Valdivia*, 60 F.3d 594 (9th Cir. 1995) (defendant's daughter); *Commonwealth v. Garcia Brito*, 402 Mass. 761, 767, 525 N.E.2d 383, 387 (1988) (fellow prisoner); *Commonwealth v. Garcia*, 379 Mass. 422, 436 n.6, 399 N.E.2d 460, 469 n.6 (1980) ("[A]t pretrial stages informal interpreters (such as relatives and friends) are available." (citing *Jara v. Municipal Ct.*, 578 P.2d 94 (Cal. 1978), *cert. denied*, 439 U.S. 1067 (1979))).

36. Weld, *supra* note 34, N. Wkly., at 1 (noting that trials cannot proceed until an interpreter is present); *Eliminating the Barriers*, *supra* note 10, at 45 (In Massachusetts, a "survey of judges revealed that 13% of the white judges and 30% of the minority judges report that they have translated for non-English speaking litigants appearing before them").

37. See *infra* notes 40-55.

38. See *United States ex rel. Negron v. New York*, 434 F.2d 386, 389-91 (2d Cir. 1970) (noting that Sixth Amendment right of confrontation, applicable to the states through the due process clause of the Fourteenth Amendment, gave non-English-speaking defendants the right to an interpreter at the government's expense); *People v. Carreon*, 198 Cal. Rptr. 843, 847 (Ct. App. 1984) ("Various courts and commentators have noted denial of interpreter services impairs not only the defendant's due process rights, but also his rights to confront adverse witnesses, to the effective assistance of counsel, and to be present at

his own trial." (citations omitted)); *People v. DeArmas*, 483 N.Y.S.2d 121 (App. Div. 1984) (noting that Sixth Amendment right of confrontation, applicable to the states through the due process clause of the Fourteenth Amendment, gave non-English-speaking defendants the right to an interpreter at the government's expense); *Commonwealth v. Pana*, 364 A.2d 895 (Pa. 1976) ("A defendant's ability to use an interpreter encompasses numerous fundamental rights. The failure to understand the proceedings may deny him his right to confront witnesses against him, his right to consult with his attorney, or his right to be present at his own trial." (citing *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); *United States ex rel. Navarro v. Johnson*, 365 F. Supp. 676, 681 n.3 (E.D. Pa. 1973))); *Commonwealth v. Garcia*, 379 Mass. 422, 437, 399 N.E.2d 460, 470 (1980) ("The right to confront witnesses, and to be present at the proceedings, encompasses the right not to face a "Kafkaesque specter of an incomprehensible ritual, which may terminate in punishment." (quoting *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974))). *See generally* Jean F. Rydstrom, Annotation, *Right of Accused to Have Evidence or Court Proceedings Interpreted*, 36 A.L.R.3d 276 (1971), *cited in Carreon*, 198 Cal. Rptr. at 847.

39. Model Court Interpreter Act § 2B (1995) (reproduced in Appendix C); *see also* D.C. Code Ann. § 31-2701(4) (1993) ("Non-English speaking person' means, a person who is unable to readily understand oral and written communications in the English language or who cannot communicate effectively in the spoken English language."); Wash. Rev. Code Ann. § 2.43.020(1) (West Supp. 1995) ("Non-English-speaking person' means any person involved in a legal proceeding who cannot readily speak or understand the English language . . ."). The Federal Court Interpreters Act requires the appointment of a court interpreter

if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including the defendant in a criminal case) . . . (A) speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer . . . "*Gonzalez v. United States*, 33 F.3d 1047, 1049 (9th Cir. 1994) (omissions in original) (quoting 28 U.S.C. § 1827(2)(d)(1)-(A) (1988)).

40. Congress recognized the need for court interpreters in civil actions commenced by the United States. *See* 28 U.S.C. § 1827(d)(1) (1988). The Court Interpreters Act provides for an interpreter in "all proceedings whether criminal or *civil*, including pretrial and grand jury proceedings (as well as proceedings upon a petition for writ of habeas corpus initiated in the name of the United States by a relator) conducted in, or pursuant to the lawful authority and jurisdiction of a United States district court." 28 U.S.C. § 1827(j) (1988) (emphasis added). However, there is no provision for the appointment of court interpreters in civil actions not commenced by the United States. *Gomez v. Myers*, 627 F. Supp. 183, 187 (D. Tex. 1985). Some states, for example Kansas, provide for the appointment of interpreters in civil and administrative actions. *See* Kan. Stat. Ann. §§ 75-4351 to -4355 (Supp. 1994); New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:1-1 (stating that New Jersey authorizes the appointment of interpreters in juvenile,

administrative hearings, and arbitration proceedings); *see also* Ark. Code Ann. § 25-15-101(a) (Michie 1992) ("Every person who cannot speak or understand the English language . . . who is a party in any administrative proceeding or a witness therein, shall be entitled to an interpreter to assist that person throughout the proceeding.").

41. Model Court Interpreter Act § 4 (1995) (reproduced in Appendix C).

42. *Id.* § 2C (footnote omitted).

43. Roseann D. González et al., *Fundamentals of Court Interpretation: Theory, Policy and Practice* 156 (1991).

44. *United States v. Cordero*, 18 F.3d 1248, 1253 (5th Cir. 1994); *United States v. Nazemian*, 948 F.2d 522, 526 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992); *State v. Chyo Chiagk*, 4 S.W. 704, 709 (Mo. 1887) ("[Interpreter] medium and conduit of an accurate and colorless transmission of questions to and answers from the witness.").

45. *See* Code of Professional Responsibility for Interpreters in the Minnesota State Court System Preamble (1995).

Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency, or a speech or hearing impairment. It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier. As officers of the court, interpreters help assure that such persons may enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively. Interpreters are highly skilled professionals who fulfill an essential role in the administration of justice. *Id.* The legal status of a court interpreter, as a witness, expert witness, or court officer, is unclear. *See infra* part V.C.

46. González et al., *supra* note 43, at 296. The process of interpretation is broken into the following five stages:

[(1)] auditory perception of a linguistic utterance in the source language; [(2)] comprehension of the message through a process of analysis and exegesis; [(3)] immediate and deliberate discarding of the source language wording; [(4)] retention of the mental representation of the message (concepts, ideas, etc.); and [(5)] the production of a new utterance in the receptor or target language which expresses the original source-language meaning in its entirety.

de Jongh, *supra* note 23, at 289; *see also id.* at 289-90, figs. III, IV; *id.* at 294 n.10 ("Exegesis . . . [is the] `process of reconstructing the communication event by determining its meaning (or meanings) for participants in the communication.").

47. Code of Professional Responsibility for Interpreters in the Minnesota State Court System Canon 1 cmt. (1995) ("The interpreter has a twofold duty: 1) to ensure that the proceedings reflect in English precisely what was said by a non-English speaking person, and 2) to place the non-English speaking person on an equal footing with those who understand English."); *see also* United States v. Gomez, 908 F.2d 809, 811 (11th Cir. 1990) ("Although defendants have no constitutional 'right' to flawless, word for word [interpretations], ('occasional lapses' from word to word [interpretation] mode will not render trial 'fundamentally unfair'), interpreters should nevertheless strive to [interpret] exactly what is said; courts should discourage interpreters from 'embellishing' or 'summarizing' live testimony."), *cert. denied*, 498 U.S. 1035 (1991); California Judicial Council Standards, *supra* note 15, § 18.3(a) ("A court interpreter's best skills and judgment should be used to interpret accurately without embellishing, omitting, or editing."); Wash. Ct. GR 11.1(b). The Washington Court General Rule states the following:

A language interpreter shall interpret . . . 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. A language interpreter shall use the level of communication that best conveys the meaning of the source, and shall not interject the interpreter's personal moods or attitudes. Wash. Ct. GR 11.1(b); *see also* González et al., *supra* note 43, at 155-56.

48. González et al., *supra* note 43, at 155-56.

49. *See* Code of Professional Responsibility for Interpreters in the Minnesota State Court System Canon 1 cmt. (1995) ("Verbatim, 'word for word' or literal oral interpretations are not appropriate when they distort the meaning of what was said in the source language, but every spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted."); Utah Code of Judicial Administration Rule 3-306(2)(c)(v) (1990) ("The interpreter shall interpret all communication including slang, vulgarisms and epithets."); People v. Vandiver, 468 N.E.2d 454, 458 (Ill. App. Ct. 1984) (admonishing interpreter not to rephrase or repeat counsel's question if answer is non-responsive). "The interpreter is required to render in a verbatim manner the form and content of the linguistic and paralinguistic elements of a discourse, including all the pauses, hedges, self-corrections, hesitations, and emotion as they are conveyed through tone of voice, word choice, and intonation; this concept is called conservation." González et al., *supra* note 43, at 16.

50. *See supra* notes 43-49.

51. Edwards, *supra* note 23, at 100. Professor Holly Mikkelsen gives the following advice for this situation:

The interpreter should provide what is known as a "dynamic equivalent" of the term in question, meaning a term that has the same impact on the listener in the target language as the original term has on the listener in the source language (the concept of dynamic

equivalence was developed by Eugene Nida who has written extensively on translation theory). In the case of "cabron," it no longer has the meaning of a big goat, or, in this case, the specific meaning of cuckold, if it is used to provoke a fight. Even if the speaker did intend to call his interlocutor a cuckold, [a qualified interpreter] would not use that term in English because it is not a common insult (most people don't even know what it means). [A qualified interpreter] would use a very offensive term that would also provoke a fight in English: bastard, son of a bitch, etc. E-mail from Professor Holly Mikkelson to the authors 1 (Nov. 15, 1995) (on file with the *New England Law Review*); see also *Ortega v. State*, 659 S.W.2d 35 (Tex. Crim. App. 1983) (approving the use of interpreting foreign language colloquialism into an English colloquialism). For a discussion of the concept of dynamic equivalence, see generally Eugene A. Nida & Charles R. Taber, *The Theory and Practice of Translation* (1974).

In addressing the use of code words by witnesses and how these terms should be interpreted, Professor Holly Mikkelson made several suggestions. For example, if a witness uses the term "chocolate," which in Spain is sometimes used as a slang term for hashish, the interpreter should interpret the word as "chocolate" in Spanish during a trial for illegal narcotics.

When [the interpreter is] dealing with code words that are used specifically to confuse or conceal information, [the interpreter has] to be as literal as possible. If [the interpreter] translated "chocolate" as "hashish," defense counsel would "eat [him or her] for lunch." The concept of dynamic equivalence is that the target language message should have the same impact on the audience as the original, and in the original Spanish, the listener is left to figure out for himself [or herself] what the reference to chocolate means. In both English and Spanish, chocolate is something desirable but forbidden, so the analogy translates well. The problem arises when the code word has a connotation in one language that it does not have in the other. That is why "cabron," in the previous example . . . has to be adapted to have the same impact on the target-language audience. The other example of "perico" (parrot) for cocaine is similar to the term "chocolate" for hashish, in that the two terms have similar associations in both English and Spanish (a parrot has a big beak, people who use cocaine snort it through their "beaks," etc.). E-mail from Professor Holly Mikkelson to the authors 1 (Nov. 27, 1995) (on file with the *New England Law Review*).

52. Judicial Council of California Administrative Office of the Courts, *supra* note 6, at 6-7; Code of Professional Responsibility for Interpreters in the Minnesota State Court System Canon 1 cmt. (1995) ("[There is an] obligation to conserve every element of information contained in a source language communication when it is rendered in the target language.").

53. Judicial Council of California Administrative Office of the Courts, *supra* note 6, at 6-7; see also *supra* notes 43-50.

54. González et al., *supra* note 43, at 16; see also de Jongh, *supra* note 19, at 292 ("How something is said may at times be more important than *what* is actually said. Research

has shown that unless paralinguistic features (intonation, pitch, etc.) and non-verbal cues (gestures) support the message content, jurors will question the sincerity and validity of the messages.").

55. Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 1 & cmt. (1995) (reproduced in Appendix B). Judges should not assume that a certain gesture or body movement has the same meaning in two cultures. de Jongh, *supra* note 19, at 58. For example, the Anglo-American sign "OK" using the thumb and forefinger is considered obscene in Brazil, or the twirling of the index finger, which means "crazy" in the United States, means one is wanted on the telephone in the Netherlands. *Id.* at 58-59. A more pertinent example in the courtroom is that many Hispanics and Haitians look at the floor when asked a question as a sign of respect for the judge, and not because of a feeling of shame or guilt. *Id.*; Eliminating the Barriers, *supra* note 10, at 161 ("For example, in many Asian cultures, it is considered rude and disrespectful to look an authority figure in the eye."). Judges should be aware of cultural miscommunication. For example, a defendant from a country where an accused does not enjoy a presumption of innocence, an accusation is tantamount to conviction. The judge may need to take extra steps to ensure that the defendant is knowingly and voluntarily waiving a valuable constitutional right, rather than waiving it because the defendant thinks that an exercise of that right is futile.

56. *See People v. Aguilar*, 677 P.2d 1198, 1201 (Cal. 1984) (en banc). The *Aguilar* court explained the three functions as follows:

Interpreters play three different but essential roles in criminal proceedings: "(1) They make the questioning of a non-English-speaking witness possible; (2) they facilitate the non-English-speaking defendant's understanding of the colloquy between the attorneys, the witness, and the judge; and (3) they enable the non-English-speaking defendant and his English-speaking attorney to communicate . . . an interpreter performing the first service will be called a 'witness interpreter,' one performing the second service, a 'proceedings interpreter,' and one performing the third service a 'defense interpreter.'" *Id.* (quoting Williamson B.C. Chang & Manuel U. Araujo, *Interpreters for the Defense: Due Process for the Non-English Speaking Defendant*, 63 Cal. L. Rev. 801, 802 (1975)); *see also State v. Neave*, 344 N.W.2d 181, 183 n.2 (Wis. 1984); 27 Wright & Miller, *supra* note 5, § 6056, at 324; Hewitt, *supra* note 13, at 141. New Jersey recognizes several other categories of interpreters. *See New Jersey Standards for Court Interpreting*, *supra* note 9, § 2:2(A)-(G). 27 Wright & Miller, *supra* note 5, § 6056, at 324, describes the different functions of interpreters as follows:

There are three different contexts in which courtroom interpreters function. First, an interpreter may translate questions posed to and answers provided by a witness during examination by counsel. An interpreter performing this function is known as a "witness interpreter." Next, an interpreter may translate communications between counsel and a party during trial. An interpreter providing this service is known as a "party interpreter" or, since such services are most commonly needed by the defendant in a criminal prosecution, a "defense interpreter." Finally, an interpreter may interpret for a party

statements made by the judge, opposing counsel or others during the proceedings. These interpreters are known as "proceedings interpreters."²⁷ *id.*

57. Hewitt, *supra* note 13, at 44; New Jersey Standards for Court Interpreting, *supra* note 9, § 2:2(D).

58. *See supra* note 53.

59. Hewitt, *supra* note 13, at 141; *see also* State v. Gonzalez-Gongora, 673 S.W.2d 811, 816 (Mo. Ct. App. 1984) ("A witness-interpreter is used to translate, for the benefit of the court . . . the testimony of a witness who is unable to testify in the language of the forum."). Simultaneous interpretation of witness testimony is becoming increasingly common, primarily because it saves time. *See* González et al., *supra* note 43, at 163-64.

60. Hewitt, *supra* note 13, at 141; New Jersey Standards for Court Interpreting, *supra* note 9, § 2:2(E).

61. *See supra* parts V.A, F.

62. Hewitt, *supra* note 13, at 141; New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-10(C).

63. E-mail from Professor Holly Mikkelson to the authors 1 (Dec. 6, 1995) [hereinafter Mikkelson E-mail, Dec. 6] (on file with the *New England Law Review*); *see also* Alan J. Cronheim & Andrew H. Schwartz, *Non-English-Speaking Persons in the Criminal Justice System*, 61 Cornell L. Rev. 289, 310 (1976).

64. *Gonzalez-Gongora*, 673 S.W.2d at 816 ("A defense-interpreter, on the other hand, serves as a[n interpreter] for a criminal defendant who, [because of] . . . non-familiarity with the language of the forum, is otherwise inhibited in his ability to comprehend the proceedings and communicate with counsel."); Hewitt, *supra* note 13, at 141-42. The attorney may wish to conduct a brief "voir dire" of a potential interpreter to assure that the interpreter is certified or otherwise qualified and is familiar with the Model Code of Professional Responsibility for Interpreters in the Judiciary or the state code of ethics for interpreters.

65. New Jersey Standards for Court Interpreting, *supra* note 9, § 2:2A.

66. *Id.*

67. *Id.* Compare *supra* note 35 (noting that family members, fellow prisoners, and court personnel acted as interpreters for pre-trial proceedings) with The United States Department of Justice, which noted the following in drafting the regulations implementing the Americans with Disabilities Act:

Public comment also revealed that public accommodations have at times asked persons who are deaf to provide family members or friends to interpret. In certain circumstances, notwithstanding that the family member or friend is able to interpret or is a certified interpreter, the family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret "effectively, accurately, and impartially." 28 CFR § 36.104 App. B (1995). These issues are raised whenever a family member or friend provides interpretation services, especially in the legal context where a defendant must honestly reveal intimate medical, personal, social, and financial information in order to receive competent legal advice and representation. A judge should appoint, and an attorney should request, an impartial qualified interpreter for all phases of the proceedings including pre-trial interviews. *See Commonwealth v. Brito*, 402 Mass. 761, 767, 525 N.E.2d 383, 387 (1988) (claiming that the use of fellow prisoner violated defendant's rights); *Eliminating the Barriers*, *supra* note 10, at 44-46, 49; *see also* N.Y.C. Bar Ass'n Formal Ethics Op. 1995-12 n.2 (1995), *reprinted in* N.Y. L.J., July 17, 1995, at 6, which states the following:

These practices may also unnecessarily imperil the preservation of non-English speaking or deaf clients' secrets and confidences, in violation of the fiduciary relationship between lawyer and client. They impinge on the lawyer's ability to "exercise reasonable care to prevent . . . others whose services are utilized by the lawyer from disclosing or using confidences or secrets of the client," since the lawyer may have little or no control over these persons.

Id. (citing Model Code of Professional Responsibility DR 4-101(D) (1980)).

68. Lourdes Galvan-Sather, *Finding the Right Expert: Interpreters and Translators are Not the Same*, 55 Or. St. B. Bull. 19, 21 (1995) ("What exactly differentiates a translator from an interpreter? An interpreter is a translator of the oral language, while a translator is an interpreter of the written language. The interpreter enjoys the benefit of having the speaker at hand to clarify any obscure information.").

69. *See* New Jersey Standards for Court Interpreting, *supra* note 9, § 2:1(O); Hovland, *supra* note 4, at 474 n.3. As Hovland explains:

Interpreters translate spoken communication from one language to another. Translators, on the other hand, translate written communication from one language to another language. The definitions in *Black's Dictionary* vary somewhat from those above. Translation is defined as "[t]he reproduction in one language of a book, document, or speech in another language." Interpreter is defined as "[a] person sworn at a trial to interpret the evidence of a foreigner or a deaf person to the court." Many cases and articles use the terms interpreter and translator interchangeably. Hovland, *supra* note 4, at 474 n.3 (alterations in original) (citations omitted); *see also* González et al., *supra* note 43, at 33 (using translation and interpretation interchangeably).

70. González et al., *supra* note 43, at 445 (citing Administrative Office of the Courts, New Jersey Supreme Court Task Force on Interpretation and Translation Services 63 (1985)); *see also* Tippecanoe Bev., Inc. v. S.A. EL Aguila Brewing Co., 833 F.2d 633, 636 (7th Cir. 1987); Rodriguez v. State, 502 So. 2d 18, 19 (Fla. Dist. Ct. App. 1987); Viragh v. Foldes, 415 Mass. 96, 107 n.12, 612 N.E.2d 241, 248 n.12 (1993); Clark v. State, 409 So. 2d 1325, 1327 (Miss. 1982); International Commercial Bank of China v. Hall-Fuston Corp., 767 S.W.2d 259, 261 (Tex. Ct. App. 1989).

71. González et al., *supra* note 43, at 445 (citation omitted). *See generally* Lindie, Comment, *supra* note 4, at 420-29.

72. For the purposes of this discussion, a "document" includes audiotapes and videotapes.

73. de Jongh, *supra* note 19, at 35-36.

74. *Id.*; González et al., *supra* note 43, at 401-02.

75. de Jongh, *supra* note 19, at 33; Edwards, *supra* note 23, at 105.

76. González et al., *supra* note 43, at 404; New Jersey Standards for Court Interpreting, *supra* note 9, § 2:3(A).

77. A translation of an original audiotape recording in a language other than English

must exactly reflect the content of the original tape, including all hesitations and pauses, slang words, swear words, and even an indication of unintelligible words A proper transcript should faithfully and accurately reflect every utterance of the speakers, as well as pauses. Grammatical errors and improper usage by the speakers should not be corrected, nor should incomplete phrases be completed. The transcriber/translator must observe the same strict standards of accuracy that govern the interpretation of oral testimony, bearing in mind that any mistranscription will result in an error in translation and ultimately will distort the evidence. González et al., *supra* note 43, at 440.

78. *See* United States v. Taghipour, 964 F.2d 908, 910 (9th Cir.), *cert. denied*, 506 U.S. 899 (1992); United States v. Mayes, 917 F.2d 457, 462 (10th Cir. 1990), *cert. denied*, 498 U.S. 1125 (1991); United States v. Mittleider, 835 F.2d 769, 773 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988); United States v. Rengifo, 789 F.2d 975, 980 (1st Cir. 1986); United States v. Devous, 764 F.2d 1349, 1354 (10th Cir. 1985); United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983); United States v. Watson, 594 F.2d 1330, 1336 (10th Cir.), *cert. denied*, 444 U.S. 840 (1979); United States v. Onori, 535 F.2d 938, 947 (6th Cir. 1976); United States v. McMillan, 508 F.2d 101, 105 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); People v. Lanfranco, 574 N.Y.S.2d 323, 324 (App. Div.), *appeal denied*, 508 N.E.2d 107 (N.Y. 1991).

79. *Taghipour*, 964 F.2d at 910; United States v. Carbone 798, F.2d 21, 26 (1st Cir. 1986). The *Taghipour* court stated the following:

We think that when transcripts are offered for use, either as evidence or a jury aid, they should be authenticated in the same manner as tape recordings that are offered in evidence, *i.e.*, by testimony as to how they were prepared, the sources used, and the qualifications of the person preparing them.

Id. (citing *Rengifo*, 789 F.2d at 983; *Robinson*, 707 F.2d at 876).

80. *Robinson*, 707 F.2d at 876 (citing *United States v. Bryant*, 480 F.2d 785, 789 (2d Cir. 1973)).

81. *See United States v. Mosquera*, Nos. CR92-1228, CR93-0036, 1994 WL 593977, at *11 (E.D.N.Y. Mar. 17, 1994) (report of Coordinating Counsel to the court).

82. *Id.*

83. *Id.*

84. *Id.* at *12.

85. *United States v. Font-Ramirez*, 944 F.2d 42, 48 (1st Cir. 1991); *United States v. Zambrana*, 864 F.2d 494 (7th Cir. 1988); *United States v. Vinson*, 606 F.2d 149, 155 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *United States v. Llinas*, 603 F.2d 506, 509 (5th Cir. 1979) ("Initially, the district court and the parties should make an effort to produce an "official" or "stipulated" transcript, one which satisfies all sides." (quoting *United States v. Wilson*, 578 F.2d 67, 69 (5th Cir. 1978))), *cert. denied*, 444 U.S. 1079 (1980); *United States v. Onori*, 535 F.2d 938, 948 (6th Cir. 1976); *United States v. McMillan*, 508 F.2d 101, 105 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975).

86. *United States v. Armijo*, 5 F.3d 1229, 1234-35 (9th Cir. 1993); *Zambrana*, 864 F.2d at 497; *Llinas*, 603 F.2d at 509-10.

87. *Font-Ramirez*, 944 F.2d at 48 ("Where . . . a defendant has possession of the transcript and tape prior to trial and raises no pretrial objection, the district court is not obliged to interrupt the trial to screen the transcript for accuracy prior to its use by the jury." (citing *Carbone*, 798 F.2d at 26; *United States v. Mazza*, 792 F.2d 1210, 1226 (1st Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987))); *Carbone*, 798 F.2d at 25 ("The preferred way of handling challenges to the accuracy and audibility of tape recordings is at a pretrial hearing."); *Rengifo*, 789 F.2d at 983.

88. *In re Audibility of Certain Recorded Conversations*, 691 F. Supp. 588, 595 (D. Conn. 1988); *In re Kenneth C.*, 479 N.Y.S.2d 396, 404 (N.Y. Fam. Ct. 1984) (using two court interpreters to translate a videotape of an interrogation that was conducted in English-Spanish).

89. Because the person whose statement has been translated may be unavailable at trial, issues of fact may be submitted to the jury. However, inaccuracies of interpretation at

trial, should be resolved by asking the witness additional questions to clarify meaning. *Clark v. State*, 409 So. 2d 1325, 1327-28 (Miss. 1982). The *Clark* court stated the following:

As to any document written in a foreign language, it was first incumbent upon the prosecution to have a knowledgeable person translate the meaning of the words into English. The jury should not have been left to conjecture as to the meaning of almost all the words thereon.

After translation, the trial court must examine the documents and their translation to determine whether they are innocuous and irrelevant, or material. If irrelevant, they should be excluded. If material, and the words after translation need no further explanation by an expert, they should be submitted to the jury. If an expert is required to show the true purpose and intent of the documents, a duly qualified expert may do so.

Id. (citation omitted).

90. *United States v. Cruz*, 765 F.2d 1020, 1023 n.4 (11th Cir. 1985); *State v. Moon*, 117 P. 757, 760 (Idaho 1911). The *Moon* court stated the following:

It was defendant's privilege to have a translation made by some person more competent if he deemed the translations incorrect. In the absence of any showing to the contrary, the court was bound to accept as a basis for admitting the testimony the statement of the witness as to his competency as an interpreter and correctness of his interpretations. The jury, however, were in no manner bound to accept either as true. *Moon*, 117 P. at 760.

91. *Cruz*, 765 F.2d at 1023 n.4. Even simple plain English language statements can be subject to multiple interpretations, and selecting among these possible interpretations is the province of the jury. The following examples are in English to simplify the analysis: "D, an organized crime figure, was accused of conspiracy to murder [JP]:

T: And then we killed that [JP].

D: Yeah."

Peter Meijes Tiersma, *The Judge as Linguist*, 27 *Loy. L.A. L. Rev.* 269, 270 (1993) (footnote omitted).

The prosecution may contend that the above statement proves that D and T jointly killed JP. *Id.* However, to a linguist, this statement is not the "smoking gun" that the prosecutor had hoped for. *See id.* When ascribing meaning to this example, the juror must make at least two interpretations. *See id.* What does "yeah" mean and who constitutes "we." *Id.* at 270-71. First, "the word 'yeah' does not necessarily signal agreement." *Id.* at 270. "Yeah" may "indicate[] that the hearer has processed the preceding statement; by saying 'yeah'" D informed T that D understood and to continue. *Id.* A juror finding that D meant to say "I understand, please continue" probably will not infer that D and T jointly killed JP. *Id.*

Second, the word "we" is also ambiguous. *Id.* "We" has both an "inclusive and exclusive use of [meaning]." *Id.* The "[i]nclusive `we' refers to the speaker and the hearer ('We should stop meeting like this'), while exclusive `we' refers to the speaker and a third party ('We hope you'll come to our party tonight')." *Id.* at 270-71. "Thus, even if D is held to have agreed with T's statement by saying `yeah,' it is unclear what exactly she agreed with because T's statement is ambiguous." *Id.* at 271. "It can be paraphrased either as `then you and I killed [JP],' or as `then I and someone else killed [JP].'" *Id.* (footnote omitted). In this case, the jury must select which of the above permutations D and T intended at the time of the conversation. *See id.*

Normally, two interpreters hear the same source utterance, but they differ on the interpretation into the target language. In this example, the interpreters differ on the utterance they hear and consequently on the rendition. Professor Roger W. Shuy provides the following example of different renditions:

In one case I worked on, the crucial disagreement between the prosecution and the defense was over one taped statement. What I heard clearly on the tape was "I wouldn't take a bribe, would you?" but the government transcript reported the statement as "I would take a bribe, wouldn't you?"

Roger W. Shuy, *The Hidden Witness: When Evidence is on Tape, Put a Linguistic Expert on the Stand*, 8 *Crim. Just.* 26, 27 (1994). In such a situation as that related by Professor Shuy, the question of fact is both what was said and what import, if any, does it carry. Again, this is a question for the jury. *See Tiersma, supra*, at 271.

92. *Id.* In *Cruz*, the defendant argued that he had never used the word "cocaine" and that the word which the prosecution claimed meant "cocaine," had other meanings. *Id.* The court held that this was a credibility determination for the jury. *Id.* (citing *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd on other grounds*, 462 U.S. 365 (1983)); *see also In re Audibility of Certain Recorded Conversations*, 691 F. Supp. at 591-92.

93. *In re Audibility of Certain Recorded Conversations*, 691 F. Supp. at 592 n.9 ("[S]how the mood or tone of the speakers, or the general context or ambiance of their conversation."); *People v. Lanfranco*, 574 N.Y.S.2d 323, 324 (App. Div.) ("The jury did not hear the `inflections' and `nuances' of the recorded voices . . ."), *appeal denied*, 508 N.E.2d 102 (N.Y. 1991); *see also United States v. Valencia*, 957 F.2d 1189, 1194-96 (5th Cir.), *cert. denied*, 506 U.S. 889 (1992).

94. *United States v. Robinson*, 707 F.2d 872, 876 (6th Cir. 1986); *see also United States v. Slade*, 627 F.2d 293, 302 (D.C. Cir.), *cert. denied*, 449 U.S. 1034 (1980); *United States v. Carson*, 464 F.2d 424 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *In re Audibility of Certain Recorded Conversations*, 691 F. Supp. at 607.

95. *United States v. Gomez*, 67 F.3d 1515, 1526 (10th Cir. 1995). In *Gomez*, the defendant argued unsuccessfully on appeal "that the jury was never informed the

primary evidence was the tape itself not the transcripts; and they were never informed that, should they detect a discrepancy between the tape and the transcripts, the tape should control." *Id.* (quoting Appellant's Brief at 49, *Gomez* (No. 94-4049)).

96. *Id.* at 1526.

97. *See United States v. Fuentes-Montijo*, 68 F.3d 352, 355 (9th Cir. 1995).

98. *Gomez*, 67 F.3d at 1526-27 (citing *United States v. Mayes*, 917 F.2d 457, 462 (10th Cir. 1990), *cert. denied*, 498 U.S. 1125 (1991); *United States v. Mittleider*, 835 F.2d 769, 773 (10th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988); *United States v. Devous*, 764 F.2d 1349, 1354 (10th Cir. 1985); *United States v. Watson*, 594 F.2d 1330, 1336 (10th Cir.), *cert. denied*, 444 U.S. 840 (1979)).

99. In *Carbone*, a case arising out of the United States District Court for the District of Puerto Rico, the court handled admission of wiretapped audiotape recordings differently. *Carbone*, 798 F.2d at 21, 24-26. The trial judge "ascertained that Spanish was the native language of all the jurors." *Id.* at 25. The judge allowed the jurors to hear the tapes that were in "street" language Spanish and provided the jurors with a transcript in Spanish with a parallel translation into English. *Id.* The judge then instructed the jury that the tapes were evidence and that the transcripts were merely aides, not evidence. *Id.* at 26. If a judge has ascertained that the foreign language is native to the entire jury panel, the procedure may be adopted. *See id.*

100. *See People v. Cabrera*, 281 Cal. Rptr. 238, 240-41 (1991).

101. *See Fuentes-Montijo*, 68 F.3d at 355-56 ("When faced with a taped conversation in a language other than English and a disputed English translation transcript, the usual admonition that the tape is the evidence and the transcript only a guide is not only nonsensical, it has the potential for harm where the jury includes bilingual jurors."); *In re Audibility of Certain Recorded Conversations*, 691 F. Supp. 588, 592 n.9 (D. Conn. 1988) ("In most cases little or no purpose would be served by playing to a jury in a United States courtroom a tape of conversation in a language other than in English."); *see also United States v. Valencia*, 957 F.2d 1189, 1194 (5th Cir.), *cert. denied*, 506 U.S. 889 (1992); *United States v. Bahadar*, 954 F.2d 821, 829 (2d Cir.), *cert. denied*, 506 U.S. 850 (1992); *United States v. Cruz*, 765 F.2d 1020, 1024 (11th Cir. 1985); *State v. Moon*, 117 P. 757, 760 (Idaho 1911). *Contra United States v. Taghipour*, 964 F.2d 908, 910 (9th Cir.), *cert. denied*, 506 U.S. 899 (1992).

The pragmatic approach to the best evidence rule mentioned above is recognized in other contexts where the source document ("best evidence") would not be helpful or would be confusing without expert testimony. *See Pinkerton v. State*, 283 N.E.2d 376, 382 (Ind. 1972) ("It appears by the evidence that the radiographs in question were not susceptible to being understood by one not skilled in their interpretation, and without explanation would be unintelligible to the jury. Under such conditions the best evidence was not the plates themselves, but the testimony of one skilled in their interpretation." (quoting

Lafayette St. Ry., Inc. v. Ullrich, 168 N.E. 709, 710 (1930)); Kollmorgan v. Scott, 447 S.W.2d 236, 238 (Tex. Civ. App. 1969) ("X-ray films require explanation by medical experts and are not intelligible without an interpretation by one skilled in the art. . . . The best evidence is the doctor's testimony concerning his interpretation of the film and not the film itself." (citation omitted)); Goetsch v. State, 172 N.W.2d 688, 690-91 (Wis. 1969) (noting that "best evidence rule" does not require prosecution to introduce original tests whose value lay wholly in expert witnesses' interpretation thereof).

102. For example, a New York City dialect "Spanglish" is a unique blend of Spanish and English. Santana v. New York City Transit Auth., 505 N.Y.S.2d 775, 778-79 (Sup. Ct. 1986). Words do not necessarily retain the meaning usually ascribed to them by the larger Spanish and English speaking communities. *See id.*

103. United States v. Bahadar, 954 F.2d 821, 829-30 (2d Cir.), *cert. denied*, 506 U.S. 850 (1992).

104. *Id.* In *Bahadar*, the court instructed the jury that the audiotapes of the English portions of the recording were evidence, and the transcripts of the Punjab and Urdu sections were evidence of the other portions. The Second Circuit concluded that "we find it hard to imagine any other proper and effective handling of this evidence." *Id.* at 831; *see also* United States v. Fuentes-Montijo, 68 F.3d 352, 355 n.2 (9th Cir. 1995) (citing *Bahadar* with approval); United States v. Taghipour, 964 F.2d 908, 909 (9th Cir.) ("The jury was also given a transcript of the tape in which the Farsi was translated into English and the English was merely transcribed."), *cert. denied*, 506 U.S. 899 (1992); *cf.* United States v. Zambrana, 841 F.2d 1320, 1325 (7th Cir. 1988).

105. *See Bahadar*, 954 F.2d at 829-31; *Fuentes-Montijo*, 68 F.3d at 355 n.2; *Taghipour*, 964 F.2d at 909; *Zambrana*, 841 F.2d at 1325.

106. United States v. Gomez, 67 F.3d 1515, 1527 n.15 (10th Cir. 1995) (noting that attorney failed to request a limiting instruction that the transcripts were aids in understanding the audiotapes); United States v. Pena-Espinoza, 47 F.3d 356, 360 (9th Cir. 1995) (noting that defendant's attorney failed to check the transcripts for accuracy and failed to show in the district court or on appeal that the transcripts were substantially inaccurate); *Cruz*, 765 F.2d at 1023 (noting that defense attorney did not submit his own version of the transcript as a tactical decision).

107. *Gomez*, 67 F.3d at 1525-27; United States v. Armijo, 5 F.3d 1229, 1234 (9th Cir. 1993); United States v. Valencia, 957 F.2d 1189, 1195 (5th Cir.), *cert. denied*, 506 U.S. 889 (1992); United States v. Font-Ramirez, 944 F.2d 42, 49 (1st Cir. 1991); United States v. Zambrana, 864 F.2d 494, 498 (7th Cir. 1988); *Cruz*, 765 F.2d at 1023.

108. United States v. Mosquera, 816 F. Supp. 168, 177 (E.D.N.Y. 1993).

109. *Id.* at 175.

110. For example, the Massachusetts Superior Court has a Spanish/English language version of the "waiver of defendant's rights" used when defendants offer to enter a guilty plea. (A copy of this waiver is on file with the *New England Law Review*). Also, Massachusetts courts plan to have orders entered under Mass. Gen. L. ch. 209A (Domestic Abuse) translated into Spanish. For a Spanish language translation of parts of the United States Sentencing Guidelines, see *Selecciones del Manual de Pautas de la Comision Federal de Sentencias* (David Zapp ed. 1994).

111. For example,

[t]here are no formal educational requirements, either in languages or interpreting, for [federal] certification [as a court interpreter]. However, the difficulty of the examination is at the college degree level of proficiency. Successful completion of the oral portion of the examination normally would require prior training or professional experience in simultaneous, consecutive, and summary interpreting.

Spanish/English Certification Examination Notice, 58 Fed. Reg. 13,736 (1993).
According to 27 Wright & Miller, *supra* note 5, § 6054, at 312:

[Federal] Rule [of Evidence] 604 makes . . . interpreters subject to the "rules relating to qualification as an expert." Thus, under Rule 702 it must be shown that the proposed interpreter is qualified by virtue of his "knowledge, skill, experience, training, or education." No specific certification, schooling, or other qualifications are required In the usual case, an interpreter's qualifications will be sufficient if he is shown to be fluent both in English and the other language²⁷ *id.* (footnotes omitted); *see also* 9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 2d* § 2417 (1995) ("[Interpreters] should have the necessary experience, training, or education to act in that capacity."); Alaska R. Evid. 604 ("In determining whether an interpreter is qualified and impartial, the court shall inquire into and consider the interpreter's education, certification and experience in interpreting relevant languages; the interpreter's understanding of and experience in the proceedings in which the interpreter is to participate").

112. Hewitt, *supra* note 13, at 90-91; *Racial Bias in the Judicial System*, *supra* note 10, at 618.

113. *See infra* notes 471-72. A number of other states, such as Nevada and Minnesota, are in the process of creating formal certification programs for court interpreters. Telephone Interview with David Mello, Court Administrator, State of Nevada (Dec. 22, 1995). States implementing certification programs may wish to join the National Center for State Court's Consortium to avoid the need to develop their own testing instruments. *See infra* part XII.A.

114. Edwards, *supra* note 23, at 6. The federal courts anticipate providing certification in Cantonese, Mandarin, and Korean. *Id.* The federal courts also have a procedure in place

to determine "otherwise qualified status" for Arabic, Polish, Italian, Russian, Mien, and Hebrew. *Id.*

115. de Jongh, *supra* note 19, at 121-22.

116. For example, in *State v. Van Pham*, 675 P.2d 848, 856-57 (Kan. 1984), the interpreters were qualified based on a combination of living and working in Viet Nam.

117. But, it is clear that "[o]ccasional errors in translation do not demonstrate that an interpreter is not qualified." *Commonwealth v. Carrillo*, 465 A.2d 1256, 1265 (Pa. Super. 1983) (quoting 3 David W. Louisell & Christopher B. Mueller, *Federal Evidence* § 272, at 65 (1979) (citing *United States v. Guerra*, 334 F.2d 138 (2d Cir.), *cert. denied*, 379 U.S. 936 (1964))).

118. *United States v. Villegas*, 899 F.2d 1324, 1348 (2d Cir.) (citing *United States v. Moon*, 718 F.2d 1210, 1213 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984)), *cert. denied*, 498 U.S. 991 (1990); *see also* *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir.) ("[A]dequate translation of trial proceedings requires continuous word for word translation of everything relating to the trial a defendant conversant in English would be privy to hear." (citing *United States v. Lim*, 794 F.2d 469, 470 (9th Cir.), *cert. denied*, 479 U.S. 937 (1986); *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980); *United States v. Diaz Berrios*, 441 F.2d 1125, 1127 (2d Cir. 1971))), *cert. denied*, 498 U.S. 986 (1990).

119. *See* Utah Code of Judicial Administration Rule 3-306(1)(A)(i)-(iii) (1990). However, this is the *bare minimum*; for example, Kansas provides for a higher standard for both in-person and telephonic interpreters. *See* Kan. Stat. Ann. § 75-4353(b) (Supp. 1994). Kansas law requires the following:

1. a general understanding of cultural concepts, usage, and expressions of the foreign language being interpreted, including the varieties, dialects and accents of the foreign language; 2. the ability to interpret and translate in a manner which reflects the educational level and understanding of the person whose primary language is other than English; 3. basic knowledge of legal rights of persons involved in law enforcement investigations, administrative matters and court proceedings and procedures, as the case may be; and 4. sound skills in written and oral communication between English and the foreign language being translated, including the qualified interpreter's ability to translate complex questions, answers, and concepts in a timely, coherent and accurate manner. Leonard A. Hall & Charla V. Beall, *Use of Interpreters for Deaf or Foreign-Speaking People in Kansas*, 63 J. Kan. B. Ass'n, Apr. 1994, at 36, 38 (citing Kan. Stat. Ann. § 75-4353(c)(1)-(4) (Supp. 1993)).

120. Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 3 & cmt. (1995) (reproduced in Appendix B); *see also* *State ex rel. R.R., Jr.*, 398 A.2d 76, 86 (N.J. 1979). In *State ex rel. R.R., Jr.*, the court related the following regarding the disinterested nature of a court interpreter:

Any interpreter selected should also ordinarily be an individual who has no interest in the outcome of the case. This is so because the danger that a primary witness' message will be distorted through interpretation is compounded when the interpreter is biased one way or the other. Thus, for example, relatives of a party to the proceeding are not usually allowed to act as interpreters. Nor are persons who serve as primary witnesses ordinarily deemed competent to act as interpreters for other witnesses.

It has been recognized, however, that situations may arise in which it is necessary to appoint an "interested" interpreter. Courts have agreed, however, that such an interested person should not be utilized unless and until the trial judge is satisfied that no disinterested person is available who can adequately translate the primary witness' testimony. Even if this requirement is satisfied, however, the trial judge must still interrogate the "interested" interpreter in order to gauge the extent of his bias, and to admonish him that he must translate exactly what the primary witness has said. *State ex rel. R.R., Jr.*, 398 A.2d at 86 (citations omitted); *see also* *Henry v. State*, 462 S.E.2d 737, 743 (Ga. 1995) ("A disinterested interpreter should be used whenever possible to prevent a biased or slanted translation."); *In re James L.*, 532 N.Y.S.2d 941, 942 (App. Div. 1988) ("Even where the court permissibly appoints an interested interpreter, the Trial Judge must interrogate him in order to gauge the extent of his bias and admonish him that he must [interpret] exactly what the primary witness has said." (citing *State ex rel. R.R., Jr.*, 398 A.2d at 86)); *State v. Van Tran*, 864 S.W.2d 465, 476 (Tenn. 1993) ("[T]he better practice is to avoid appointing a friend or relative of a party or witness as an interpreter. The court should attempt to appoint a neutral, unbiased interpreter, one who has no interest in the outcome of the trial." (citing *Almon v. State*, 109 So. 371, 372 (Ala. Ct. App. 1926))), *cert. denied*, 114 S. Ct. 1577 (1994).

121. *See State v. Marcham*, 770 P.2d 356, 357 (Ariz. 1988) ("Whether a person is qualified to act as an interpreter is a matter resting within the sound discretion of the trial judge." (citing *State v. Burris*, 643 P.2d 8 (Ariz. Ct. App. 1982))); *State v. Cervantes*, 814 P.2d 1232, 1234 (Wash. App. 1991). According to the *Cervantes* court: "[C]ourts should not make use of a biased interpreter during trial proceedings. Whenever possible, an interpreter should be entirely disinterested." *Cervantes*, 814 P.2d at 1234 (citing 21 C.J.S. *Courts* § 141, at 216 (1940)). "Whether a person is too interested in a proceeding to be qualified as an interpreter is ordinarily within the discretion of the trial court." *Id.* (citing *State v. Bell*, 788 P.2d 1109 (Wash. Ct. App. 1990)); *see also* 27 *Wright & Miller, supra* note 5, § 6054, at 312 ("Under the common law, the trial court was held to have broad discretion to determine the qualifications of a proposed interpreter." (footnote omitted)).

The following cases illustrate circumstances in which "interested" or biased interpreters have been appointed to interpret: *Prince v. Beto*, 426 F.2d 875 (5th Cir. 1970) (noting that trial court's appointment of husband to serve as interpreter for wife found to be error), *cited in The Right to an Interpreter, supra* note 4, at 164 n.82; *People v. Mendes*, 219 P.2d 1 (Cal. 1950), *cited in The Right to an Interpreter, supra* note 4, at 165 n.85; *State v. Lazarone*, 57 So. 532, 534 (La. 1912) (reversing conviction because interpreter who had been summonsed as a prosecution witness of the state had also contributed to the prosecution of the accused); *State v. Chiagk*, 4 S.W. 704 (Mo. 1887); *Sellers v. State*,

134 S.W. 348, 349-50 (Tex. Crim. App. 1910), *cited in The Right to an Interpreter, supra* note 4, at 164 n.82; *State v. Boulet*, 106 P.2d 311, 314 (Wash. 1940) (noting that court qualified the interpreter based on a statement despite not living in Japan for 38 years), *cited in The Right to an Interpreter, supra* note 4, at 165 n.85.

122. Shulman, Note, *supra* note 4, at 185.

123. *Id.* at 186-87. A recent article in the San Diego Union-Tribune demonstrates that qualifying interpreters through interview or a voir dire with a bilingual judge does not assure a qualified court interpreter. See Bill Callahan, *Reno Court Interpreter Held; His S.D. Sex Offense Turns Up*, San Diego Union-Trib., Jan. 31, 1996, at B1. An interpreter "opened an interpreting business in Reno[, Nevada where] the court system" had been trying to remain current with numerous cases involving non-English-speaking Hispanics. *Id.* The interpreter's skills were "approved by two bilingual judges, and he contracted his interpreting services with the district attorney and public defender, working for about nine months before his arrest" for three felonies. *Id.* On his resume, he listed fake degrees "from the Universities of San Diego, Arizona and Madrid," and "appeared superbly trained to translate for the increasing number of Hispanics flowing through the Nevada justice system." *Id.* The Public Defender's Office questioned his qualifications after it received "complaints that he was paraphrasing, rather than translating literally." *Id.*

124. Model Court Interpreter Act § 2 cmt. (1995) (reproduced in Appendix C).

125. de Jongh, *supra* note 23, at 285 (footnote omitted). This divide between language proficiency and skilled interpretation or translation is recognized in European institutions of higher learning. In Europe, education to become an interpreter or translator is clearly separate from language studies. Virginia Benmaman, *Legal Interpreting: An Emerging Profession*, 76 Mod. Lang. J. 445, 448 (1992). Interpretation and translation are "not [part of] language and literature studies, but constitute an independent program that is viewed as a specialty in interlingual communication and is interdisciplinary in composition." *Id.* See generally Spiridon Adamopoulos, *La Spécialisation en Interpretation Juridique* (1989) (discussing court interpreter training).

126. de Jongh, *supra* note 23, at 290.

127. Benmaman, *supra* note 125, at 445-46.

128. *Id.* at 446.

129. *Id.* The court interpreter may also need to be familiar with the legal terminology and procedures for federal government and all fifty states. As any lawyer who has had trouble remembering that the trial court in New York is the Supreme Court may appreciate.

130. *Id.*

131. *See* Cal. Gov't Code § 68561 (West Supp. 1995); D.C. Code Ann. § 31-2711 (1993); Mass. Gen. L. ch. 221C, § 1 (1994); N.M. Stat. Ann. § 38-10-3 (1987); Or. Rev. Stat. § 45.288(1) (1993) ("[W]henver a court is required to appoint an interpreter . . . the court shall appoint a qualified interpreter who has been certified If no certified interpreter is available . . . the court shall appoint a qualified interpreter."); Wash. Rev. Code Ann. § 2.43.020 (West Supp. 1995). The Model Court Interpreter Act provides that only certified court interpreters should be appointed by a judge. Model Court Interpreter Act § 2D (1995) (reproduced in Appendix C). But the commentary to § 2D recognizes the need for flexibility in certification standards which may vary from state-to-state and by availability of "bilingual persons to serve as interpreters and other practical concerns." *Id.* § 2D cmt. At least one state, New Jersey, has three levels of certification: master, journeyman and conditionally approved. Administrative Office of the Courts of New Jersey, Guidelines for Contracting Free-Lance Interpreters in the Superior Court 3 (Revised Draft Dec. 1, 1994).

132. 28 U.S.C. §§ 1827-1828 (1988); *Seltzer v. Foley*, 502 F. Supp. 600, 602 (S.D.N.Y. 1980) (discussing the development of the Spanish language court interpreter certification test).

133. Mass. Gen. L. ch. 221C, § 1 (1994) (distinguishing between certified and qualified interpreters).

134. *See* Edwards, *supra* note 23, at 8 (District of Columbia uses federally-certified interpreters in Spanish or individuals who have passed the United States State Department's simultaneous interpreting examination). *But see* Model Court Interpreter Act § 1 cmt. (1995) (reproduced in Appendix C).

135. *See, e.g.*, Wash. Rev. Code Ann. § 2.43.080 (West Supp. 1995) ("All language interpreters serving in a legal proceeding, whether or not certified or qualified, shall abide by a code of ethics established by supreme court rule.").

136. *See* Model Court Interpreter Act § 2 cmt. (1995) (reproduced in Appendix C).

137. *Id.*

138. *See, e.g.*, Fed. R. Evid. 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .").

139. *See, e.g.*, *United States v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991) (quoting *United States v. Tapia*, 631 F.2d 1207, 1210 (5th Cir. 1980)).

140. *See* *State v. Casipe*, 686 P.2d 28, 32 (Haw. App.) (citing *People v. Harris*, 433 N.E.2d 343 (Ill. App. Ct. 1982); *People v. Rivera*, 390 N.E.2d 1259 (Ill. App. Ct. 1979)), *cert. denied*, 744 P.2d 781 (Haw. 1984); *People v. Costales*, 520 N.E.2d 421, 424 (Ill. App. Ct. 1988) (applying the standard of "whether the testimony presented through the

interpreter is understandable, comprehensible, and intelligible, and, if it was not, whether such a lack of intelligibility was brought out by an ineffective or incompetent interpreter" (citing *People v. Harris*, 433 N.E.2d 343, 346 (Ill. App. Ct. 1982); *People v. Niebes*, 387 N.E.2d 800, 803 (Ill. App. Ct. 1979)); *People v. Starling*, 315 N.E.2d 163, 166-67 (Ill. App. Ct. 1974) (applying a "sufficient comprehensibility standard," conviction reversed where off-the record discussions occurred between interpreter and witness and neither trial judge, nor attorneys, nor defendant understood Spanish-language testimony of state's chief witness).

141. Eliminating the Barriers, *supra* note 10, at 45-47. Professor Bill Piatt has commented as follows:

Courts and legislatures should continue the process of identifying the fundamental legal rights which should not be foreclosed to persons with a language barrier. Where such a right is identified, society should provide bilingual assistance where the right would otherwise be foreclosed to persons with limited English proficiency.

One area where the right should be extended immediately is in the civil courts and before administrative bodies. The relative financial interests at stake (for example, tenant eviction proceedings or hearings to terminate public assistance) may be greater than in relatively minor criminal proceedings. We choose not to allow our criminal courts to be a "babble of voices." We may have a right to maintain business records in an understandable language. Why should not litigants in civil and administrative proceedings be afforded more than the facade of justice that may now exist for those not completely proficient in English? Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 *Hous. L. Rev.* 885, 903 (1986) (footnotes omitted).

142. Most of the reported cases address how the appointment of an unqualified interpreter, the denial of an interpreter or a misinterpretation violated the substantive rights of the defendant. However, if a court denies a witness or the victim a qualified interpreter, the right of the prosecution and the citizens of the state to a fair trial is also denied. Professor González cites the example of the 1977-80 Hanigan Trials in Arizona. González et al., *supra* note 43, at 12. The Hanigans were accused of kidnapping and torturing three undocumented Mexican men and were acquitted at their state trial and subsequently retried in federal court. *Id.* During the federal court proceedings it was revealed that most of the inconsistencies had been caused by poor interpretation. *Id.* Professor González concludes "that had a competent interpreter been present, the case would never have had to be retried in a federal court. It was also clear that the use of a certified interpreter at the federal proceeding was the major difference between the facts uncovered at the two trials." *Id.* at 15. One of the defense attorneys in the state criminal proceeding, Alex Gaynes, commented after the trial that "translation is an inherently difficult process. If the lawyers are smart enough to take advantage of the salient meaning differences between languages, they can exploit the translation for their own ends." *Id.* at 14 (quoting a personal communication with Mr. Gaynes, Mar. 12, 1990). At least one state permits judges to appoint court interpreters for victims so that the victim may follow the proceeding. *See Va. Code Ann.* § 19.2-164 (Michie 1995).

143. *See generally* Prince v. Beto, 426 F.2d 875, 876 (5th Cir. 1970) ("The manner in which the interpreter could have presented such testimony, the inflections of his voice, and his demeanor before the jury, could have easily swayed the jury to the detriment of petitioner's rights."); United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676, 681 n.3 (E.D. Pa. 1973) (discussing background to right to a court interpreter); People v. Barreto, 64 Cal. Rptr. 211, 217 (1967). The *Barreto* court noted that, in the context of Miranda warnings, "even if [the defendant] was advised [of his rights], he did not understand the word '*licenciado*' to signify '*lawyer*'; in Colombia the word signifying attorney is '*abogado*'; the word '*licenciado*' [in Columbian Spanish] refers to 'anyone that has a license such as a nurse or electrician.'" *Barreto*, 64 Cal. Rptr. at 217. Shulman, Note, *supra* note 4, at 176 provides the following example of mistaken interpretation:

"¡Hombre, ni tengo diez kilos!" A Cuban man was convicted on drug charges for uttering the words above. He used the words in response to a request for a loan, and given the dialect of the speaker and the context of the statement, they can be properly translated as "[m]an, I don't even have ten cents." Instead the court interpreter mistakenly translated them as, "[m]an, I don't even have ten kilos." *Id.* (footnotes omitted) (first and second alterations in original) (noting that the conviction was overturned as a result of the error); *see also* Hovland, *supra* note 4, at 481-88 (discussing cases of interpreter error).

144. *Jara v. Municipal Ct.*, 578 P.2d 94 (Cal. 1978) (en banc), *cert. denied*, 439 U.S. 1067 (1979).

145. *See* Wendy Olson, *The Shame of Spanish: Cultural Bias in English First Legislation*, 11 Chicano-Latino L. Rev. 1, 12 (1991) ("In addition, there are some rights or entitlements that are not protected by existing federal law, including the right to have a[n interpreter] at a civil, as opposed to a criminal, trial."); Piatt, *supra* note 4, at 4 ("Courts have repeatedly determined that there is no constitutional right to an interpreter in civil proceedings." (footnote omitted)). *Contra* Lindie, Comment, *supra* note 4, at 408, which states the following:

Courts disagree of [sic] whether the right to an interpreter exists only in criminal proceedings or whether it also extends to civil and administrative proceedings. The courts' extension of the right to an interpreter has been inconsistent, with some courts holding that there is no constitutional right to an interpreter in civil proceedings and other courts requiring full and continuous interpretation of the entire proceedings in civil cases.*Id.* (footnotes omitted); *see also* Ann S. Kim, Note, *Rent-a-Judges and the Cost of Selling Justice*, 44 Duke L.J. 166, 187 n.52 (1992) ("In *Jara*, however, the litigant was represented by counsel, who did know English and presumably understood the proceedings. If the litigant had been unrepresented, he would have been entitled to a free interpreter.").

146. *Cf.* Casey v. Lewis, 43 F.3d 1261, 1267 (9th Cir. 1994) ("[F]ailure to provide bilingual assistants or law clerks in many [prison] facilities denies non-English-speaking inmates meaningful access [to the courts]."), *cert. granted*, 115 S. Ct. 1997 (1995); Gonzalez v. Cimock, Nos. CIV.A.93-0252, CIV.A.93-0841, CIV.A.93-1057, 1994 WL

172730 (E.D. Pa. May 6) (noting that the English-only requirement and refusal to provide an interpreter do not create an access barrier of constitutional magnitude because the prison's provision of a paralegal and permission to seek assistance from inmate writ-writers satisfies the Constitution in circumstances such as this), *aff'd*, 40 F.3d 1240 (3d Cir. 1994). *Contra* NLRB v. Union Nacional de Trabajadores, 540 F.2d 1, 5-6 n.3 (1st Cir. 1976) (rejecting claim that NLRB's failure to provide parties with interpreters during agency proceedings constituted denial of due process), *cert. denied*, 429 U.S. 1039 (1977).

147. *See, e.g.*, Or. Rev. Stat. § 45.275(1)(a)-(c) (1993), which states the following:

In any civil or criminal proceeding in which an indigent person who is in need of an interpreter is a party, the court shall appoint a qualified interpreter whenever it is necessary:

(a) To interpret the proceedings to a non-English speaking party;

(b) To interpret the testimony of a non-English speaking party; or

(c) To interpret the testimony of any non-English speaking witness testifying on behalf of the indigent party.*Id.*

148. *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974); *Commonwealth v. Marquiz*, 14 Mass. App. Ct. 1301, 1303 (1982) (summary disposition) (remanding for resentencing pending a further hearing where defendant would have the benefit of an interpreter); *Baltierra v. State*, 586 S.W.2d 553, 556-59 (Tex. Crim. App. 1979).

149. *Cf. Pointer v. Texas*, 380 U.S. 400, 403-05 (1965) (noting that Sixth Amendment rights are fundamental rights); *Commonwealth v. Fordham*, 417 Mass. 10, 18, 627 N.E.2d 901, 906 (1994) (explaining the purposes of confrontation).

150. *Carrion*, 488 F.2d at 14-15; *State v. Vasquez*, 121 P.2d 903, 906-07 (Utah 1942). The right to counsel is more than just physical presence of a person licensed to practice law. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at the trial alongside the accused . . . is not enough to satisfy the constitutional command."). Therefore, "[a defendant] is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Id.* Effective assistance of counsel contemplates open communication unhampered by unnecessary barriers to the exchange of information. *See Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984).

151. *See Commonwealth v. Robichaud*, 358 Mass. 300, 303, 264 N.E.2d 374, 376 (1970) (citing *Guerin v. Commonwealth*, 339 Mass. 731, 734-35, 162 N.E.2d 38, 40-41 (1959)).

152. *See Carrion*, 488 F.2d at 14.

153. *United States v. Mosquera*, 816 F. Supp. 168, 175 (E.D.N.Y. 1993); *Eliminating the Barriers*, *supra* note 10, at 44.

154. *Commonwealth v. Garcia*, 379 Mass. 422, 437 n.7, 399 N.E.2d 460, 470 n.7 (1980).

155. *Mosquera*, 816 F. Supp. at 175.

156. According to *State v. Neave*, 344 N.W.2d 181, 183 n.2 (Wash. 1984):

There are three principal reasons why a non-English speaking criminal defendant needs an interpreter: (1) To translate during the defendant's testimony if he takes the stand; (2) to facilitate communication between the defendant and his English speaking attorney; and (3) to enable the defendant to reasonably understand the trial proceedings conducted in English.*Id.*

157. *Grabau & Williamson*, *supra* note 8, at 112.

158. *See id.*; *United States v. Mayans*, 17 F.3d 1174, 1177-78 (9th Cir. 1994); *cf.* N.Y.C. Bar Ass'n Formal Ethics Op. 1995-12 (1995), *reprinted in* N.Y. L.J., July 17, 1995, at 6 ("[W]hen a language barrier impedes the ability for the lawyer and the client to communicate effectively, the lawyer must be sensitive to the needs for interpreter services and take steps to secure interpreter services . . .").

159. *The Right to an Interpreter*, *supra* note 4, at 146; *see also Mayans*, 17 F.3d at 1178 ("[T]estimony takes `twice as long' with an interpreter."); Shulman, Note, *supra* note 4, at 184.

160. Shulman, Note, *supra* note 4, at 184 ("For many judges the problem of delaying the trial is secondary to that of paying an interpreter. . . . Some judges do not consider these expenditures a good use of taxpayers' money."); *see also Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (noting that court must weigh "economical administration" in deciding to appoint an interpreter (citing *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980))); *Hernandez v. State*, 862 S.W.2d 193, 197 (Tex. Crim. App. 1993) (reversing trial court that was "more concerned about the cost of the [interpreter] than the plight of the non-English speaking defendant"). As for costs, many states provide that a judge may authorize payment for interpreter services for an indigent defendant if an attorney is unable to communicate with the non-English-speaking client. *See* Mass. Gen. L. ch. 261, §§ 27A-G (1992); *Commonwealth v. Garcia*, 379 Mass. 422, 436 n.6, 399 N.E.2d 460, 469 n.6 (1980).

161. *See People v. Escalante*, 627 N.E.2d 1222, 1228 (Ill. App. Ct. 1994). In *Escalante*, the Illinois Appeals Court considered a case in which the trial court judge had proceeded without an interpreter. *Id.* When the trial court judge had been informed that the interpreter was not present, the judge responded: "Well, the matter's been set for trial. It's not my job to make sure an interpreter is present. If she [the interpreter] shows up, fine. If she doesn't, I'm not going to worry about it. Objection is on the record. Let's go ahead."

Id.; see also *Commonwealth v. Rosario*, 13 Mass. App. Ct. 920, 430 N.E.2d 866 (1982) (failing to wait for an interpreter before empaneling a jury).

162. See *People v. Annett*, 59 Cal. Rptr. 888 (1967), *cert. denied*, 390 U.S. 1029 (1968); *State v. Hernandez*, 820 P.2d 380 (Idaho App. 1991); *People v. Soldat*, 207 N.E.2d 449 (Ill. 1965). *But see Mayans*, 17 F.3d at 1180. At least one judge was disciplined at least in part for failing to appoint court interpreters. See *In re Russell Heaton, Jr.*, No. 90-988-F-21, Wash. Comm'n. Jud. (Mar. 1, 1991), available in WESTLAW, JDDD database.

163. See 28 U.S.C.A. § 2254 (West 1994); Mass. R. Crim. P. 30; *Hrubec v. United States*, 734 F. Supp. 60 (E.D.N.Y. 1990); *Giraldo-Rincon v. Dugger*, 707 F. Supp. 504 (M.D. Fla. 1989); *Guerrero v. Harris*, 461 F. Supp. 583 (S.D.N.Y. 1978). See generally Gregory G. Sarno, Annotation, *Ineffective Assistance of Counsel: Use or Nonuse of Interpreter at Prosecution of Foreign Language Speaking Defendant*, 79 A.L.R.4th 1102 (1990).

164. See *Perovich v. United States*, 205 U.S. 86, 91 (1907) ("This is a matter largely resting in the discretion of the trial court, and it does not appear from the answers made by the witness that there was any abuse of such discretion."); *United States v. Coronel-Quintana*, 752 F.2d 1284, 1291 (8th Cir.) ("Because the decision to appoint an interpreter will likely hinge upon a variety of factors, including the defendant's understanding of the English language, and the complexity of the proceeding, issues, and testimony, the trial court, being in direct contact with the defendant, should be given wide discretion."), *cert. denied*, 474 U.S. 819 (1985); *United States v. Carrion*, 488 F.2d 12, 14-15 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974); *Giraldo-Rincon v. Dugger*, 707 F. Supp. 504 (M.D. Fla. 1989) (noting that discretion must be tempered with reason and concern for rights of defendant seeking assistance of interpreter balancing the constitutional rights of defendant and concern with economical administration of criminal law); *State v. Hernandez*, 820 P.2d 380 (Idaho 1991) (holding that the test to determine whether court abused its discretion in failing to appoint interpreter is whether failure denied defendant his right to fair trial or any due process considerations: including the right to communicate with his attorney, to understand proceedings, to assist in defense, and to meaningfully confront witnesses); *People v. Escalante*, 627 N.E.2d 1222 (Ill. Ct. App. 1994) (holding that decision to appoint interpreter to assist defendant is within trial court's discretion); *State v. Montano*, 855 P.2d 979 (Kan. Ct. App. 1993) (holding that the role of interpreter and use of that interpreter at trial is a matter which rests within sound discretion of trial court); *Commonwealth v. Garcia*, 379 Mass. 422, 437-38, 399 N.E.2d 460, 470 (1980) ("Unless the record reveals blatant insensitivity to a language problem, with the result that the defendant was deprived of a fair trial, an appellate court will not disturb the exercise of that discretion."); *Commonwealth v. Wallace*, 641 A.2d 321 (Pa. Super. 1994) (holding that determination of whether interpreter is warranted is within sound discretion of trial court); *State v. Van Tran*, 864 S.W.2d 465 (Tenn. 1993) (holding that appointment of interpreter of witness's testimony is a matter for trial court's discretion subject to reversal only for abuse of such discretion); *People v. Warren*, 504 N.W.2d 907 (Mich. Ct. App.) (reviewing trial court's decision for an abuse of discretion; standard of review is equally applicable to court's decision regarding whether to appoint

interpreter for witness; abuse of discretion will be found only if it appears from record that witness was not understandable, comprehensible, or intelligible and that absence of interpreter deprived defendant of some basic right), *appeal denied*, 519 N.W.2d 155 (Mich. 1993).

165. *In re Raymundo B.*, 250 Cal. Rptr. 812, 817 (Ct. App. 1988).

166. *State v. Neave*, 344 N.W.2d 181, 183 (Wis. 1984). Moreover, the appointment of a court interpreter is constitutionally mandatory, if the judge determines "need" in some states. *See, e.g.*, Cal. Const. art. 1, § 14; N.M. Const. art. 2, § 14 ("In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; . . . to have the charge and testimony interpreted to him in a language that he understands.").

167. *See California Judicial Council Standards*, *supra* note 15, § 18(a), which states the following:

An interpreter is needed if upon examination by the court a party or witness is unable to speak English so as to be understood directly by counsel, court, and jury, or if a party is unable to understand and speak English sufficiently to comprehend the proceedings and to assist counsel in the conduct of the case.*Id.*; *see also* Hewitt, *supra* note 13, at 125-27.

168. *See State v. Woo Won Choi*, 781 P.2d 505, 509 (Wash. App. 1989) ("[P]rudent for the court to engage in a direct colloquy with [defendant] to determine extent of [defendant's] language ability."), *review denied*, 788 P.2d 1002 (Wash. 1990); *see also infra* part VII.

169. *Commonwealth v. Garcia*, 661 A.2d 1388, 1395 n.13 (Pa. Super. Ct. 1995) (citation omitted); *accord*, *United States v. Cheung Kin Ping*, 555 F.2d 1069 (2d Cir. 1977) (holding that even where it is demonstrated that a defendant comprehends the language used in court fairly well, error is not committed by permitting him to testify through an interpreter); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) ("If the defendant takes the stand in his own behalf, but has an imperfect command of English, there exists the additional danger that he will either misunderstand crucial questions or that the jury will misconstrue crucial responses."), *cert. denied*, 416 U.S. 907 (1974); *People v. Johnny P.*, 445 N.Y.S.2d 1007 (N.Y. Crim. Ct. 1981); *State v. Grubbs*, 570 P.2d 1289, 1291 (Ariz. 1977) (holding that no error existed in appointing an interpreter for a witness who was fluent in English but more comfortable in foreign language).

170. For example, a Mexican Native American who spoke only Mixtec was assigned a Spanish interpreter and served four years in prison before it was discovered that he had not understood the courtroom proceedings, and a Trique speaking Native American spent years in a state mental hospital after he was arrested on trespassing and indecency charges. George Rede, *Bias Task Force Wants Interpreter Standards*, *Portland Oregonian*, Feb. 17, 1993, at B5. Judges agree that "[i]t is very difficult to judge

credibility in an interpreter case." *Racial Bias in the Judicial System*, *supra* note 10, at 612.

171. *See, e.g., supra* notes 152-56 and accompanying text.

172. *Seltzer v. Foley*, 502 F. Supp. 600, 606 n.4 (S.D.N.Y. 1980) ("[W]ords used in simple hearings never appeared or appeared three times or less in a normal million words of print.").

173. *See California Judicial Council Standards*, *supra* note 15, § 18(b), which states the following:

Upon request by a party or counsel, or whenever it appears that a party's or witness' primary language is not English or that a party or witness may not speak and understand English sufficiently to participate fully in the proceedings, the court should conduct an examination on the record to determine whether a court interpreter is needed. After the examination, the court should state its conclusion on the record, and the file in the case should be clearly marked to ensure that an interpreter will be present when needed in any subsequent proceeding.*Id.*

174. *Id.* at 606.

175. *Id.*

176. *Id.*; *see also supra* note 169 and accompanying text.

177. *In re Muraviov*, 13 Cal. Rptr. 466, 486 (1961); *United States v. Mayans*, 17 F.3d 1174, 1180-81 (9th Cir. 1994); *see also California Judicial Council Standards*, *supra* note 15, § 18(c), which states the following:

The examination of the party or witness to determine if an interpreter is needed should normally include questions on the following:

- (1) Identification (for example: name, address, birthdate, age, place of birth);
- (2) Active vocabulary in vernacular English (for example: "How did you come to the court today?" "What kind of work do you do?" "Where did you go to school?" "What was the highest grade you completed?" "Describe what you see in the courtroom." "What have you eaten today?"). Questions should be phrased to avoid "yes-no" replies;
- (3) The court proceedings (for example: the nature of the charge or the type of case before the court, the purpose of the proceedings and function of the court, the rights of a party or criminal defendant, and the responsibilities of a witness). *California Judicial Council Standards*, *supra* note 15, § 18(c). *See Appendix A* for a sample defendant-witness voir-dire.

178. California Judicial Council Standards, *supra* note 15, § 18(c).
179. González et al., *supra* note 43, at 155-56; New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-14.
180. *See supra* note 177.
181. González et al., *supra* note 43, at 155-56.
182. *See Gonzalez v. United States*, 33 F.3d 1047, 1053 (9th Cir. 1993) (Reinhardt, J., dissenting) (commenting on an inadequate voir dire to determine linguistic competency).
183. *See State v. Drobelt*, 815 P.2d 724, 737 (Utah App.) ("While this decision is a matter of discretion, our supreme court has held that it is better, in a questionable case, to err on the side of providing an interpreter." (citing *State v. Vasquez*, 121 P.2d 903, 906 (Utah 1942))), *cert. denied*, 836 P.2d 1383 (Utah 1991); *see also* New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-1 ("[A]n interpreter should be presumed to be necessary and be provided for any principal party in interest when a representation is made either by that person or by his or her attorney that such person is unable to understand or communicate readily in the English language.").
184. *See United States v. Cheung Kin Ping*, 555 F.2d 1069, 1078 (2d Cir. 1977).
185. Alice J. Baker, *Sign Language Interpreters and Testimonial Privileges*, 2 Va. J. Soc. Pol'y & L. 165, 174 & n.35 (1994) (citing proposed Fed. R. Evid. 503(a)(4)).
186. *Id.* at 175 (citing Ala. Code § 12-21-131(i) (Supp. 1994); Ariz. Rev. Stat. Ann. § 12-242E (1992); Ark. Code Ann. §§ 16-64-112(g), 16-89-105(i) (Michie 1987 & Supp. 1993), 25-15-102(g) (Michie 1992); Cal. Evid. Code § 754.5 (West Supp. 1994); Colo. Rev. Stat. §§ 13-90-107(h), 13-90-209 (1987); Conn. Gen. Stat. Ann. § 52-1461 (West 1991); D.C. Code Ann. § 31-2708 (1993); Fla. Stat. Ann. ch. 90.6063(7) (Harrison Supp. 1993); Ga. Code Ann. § 24-9-107(b) (Supp. 1994); Ill. Rev. Stat. ch. 735, para. 5/8-911(b) (Smith-Hurd 1992); Iowa Code Ann. § 622B.6 (West Supp. 1993); Ky. Rev. Stat. Ann. § 30A.430 (Michie/Bobbs-Merrill 1992 & Supp. 1994); La. Rev. Stat. Ann. § 46:2371 (West 1982 & Supp. 1994); Mass. Gen. Laws Ann. ch. 221C, § 4 (West 1993); Mich. Comp. Laws Ann. § 393.506(2) (West 1988); Minn. Stat. Ann. § 595.02(h) (West 1988 & Supp. 1994); Mo. Ann. Stat. § 476.760.1 (Vernon Supp. 1994); Mont. Code Ann. § 49-4-511 (1993); Neb. Rev. Stat. § 20-158 (1991); N.H. Rev. Stat. Ann. § 521-A:11 (Supp. 1993); N.J. Stat. Ann. § 34:1-69.17 (West 1988); N.M. Stat. Ann. § 38-9-10 (Michie 1987); N.C. Gen. Stat. § 8B-5 (1991); N.D. Cent. Code § 28-33-06 (1991); Or. Rev. Stat. § 40.272 Rule 509-1 (Supp. 1994); S.D. Codified Laws Ann. § 19-13-31 (Supp. 1993); Tenn. Code Ann. §§ 24-1-103(f) (1980 & Supp. 1994), 24-1-210(b) (Supp. 1994); Tex. Civ. Prac. & Rem. Code Ann. § 21.008 (West 1986); Utah Code Ann. § 78-24a-10 (1992); Vt. Stat. Ann. tit. 1, § 334 (Supp. 1992); Va. Code Ann. § 8.01-400.1 (Michie 1992); Wash. Rev. Code Ann. § 2.42.160 (West 1988 & Supp. 1994); Wis. Stat. Ann. § 905.015 (West Supp. 1990)).

187. *Id.* (citing Alaska R. Evid. 503(a)(5); Del. R. Evid. 501(a)(5); Haw. R. Evid. 503(a)(5); Idaho R. Evid. 502(a)(5); La. Code Evid. art. 506(A)(5)(b); Md. Code Ann., Cts. & Jud. Proc. § 9-108 (1989) ("citing in annotation" *Pratt v. State*, 387 A.2d 779, 782 (Md. Ct. Spec. App. 1978), *aff'd*, 398 A.2d 421 (Md. 1979) ("holding that the attorney-client privilege extends to those persons necessary for effective operation of the attorney's counsel")); Miss. R. Evid. 502(a)(5); Nev. Rev. Stat. Ann. §§ 49.055, 49.095 (Michie 1986); N.Y. Civ. Prac. L. & R. 4503(a) (McKinney 1992); R.I. R. Evid. 501, advisory committee's note 3).

188. *Id.* at 175, 208.

189. *People v. Osorio*, 549 N.E.2d 1183, 1186 (N.Y. 1989).

190. *Id.*; *Insurance Co. of N. Am. v. Superior Court of Los Angeles*, 166 Cal. Rptr. 880 (Ct. App. 1980).

191. *See supra* notes 183-90.

192. *Osorio*, 549 N.E.2d at 1186.

193. *Id.* Thus, attorneys should caution their clients that statements made within the hearing of an interpreter when the interpreter is not serving as an interpreter may be admissible against the client. *Cf. People v. Mitchell*, 448 N.E.2d 121 (N.Y. 1983) (holding that statement made to the attorney's secretary in common area of a shared office where secretaries of other attorneys were present, was not privileged because client had no cognizable expectation of confidentiality even though client was unaware of the attorneys' office arrangement).

194. *See supra* notes 183-90.

195. *See Model Court Interpreter Act § 3A-D & cmts.* (1995) (reproduced in Appendix C).

196. *Id.*

197. *See California Judicial Council Standards, supra* note 15, § 18.1; *González et al., supra* note 43, at 202.

198. The Internet newsgroups and World Wide Web are wonderful resources for court interpreters and translators. There are discussion groups and Web sites with useful information for interpreters. There are also topical discussions in many different languages so interpreters who are geographically isolated can maintain their proficiency and learn the latest new words. There are newspapers and other on-line periodicals in numerous languages. Finally, the Internet is the best place to learn the latest computer jargon. Several computer and software companies have their manuals on-line. Often these manuals have glossaries. Because World Wide Web sites (URLs) change so frequently,

this article does not list any. However, list *lantra-l* generally has a lively and interesting discussion of language and translation issues and is a great place to start exploring language resources in Cyberia (Cyberspace).

199. *See, e.g.*, Mass. Gen. L. ch. 221C, § 3(a) (1994).

200. *See* United States v. Perez, 918 F.2d 488, 490-91 (5th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991); United States *ex rel.* Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970). The *Negron* court stated the following:

Nor are we inclined to require that an indigent, poorly educated Puerto Rican thrown into a criminal trial as his initiation to our trial system, come to that trial with a comprehension that the nature of our adversarial processes is such that he is in peril of forfeiting even the rudiments of a fair proceeding unless he insists upon them. *Negron*, 434 F.2d at 390; *see also* State v. Natividad, 526 P.2d 730, 733 (Ariz. 1974) ("A defendant who passively observes in a state of complete incomprehension the complex wheels of justice grind on before him can hardly be said to have satisfied the classic definition of waiver as 'the voluntary and intentional relinquishment of a known right.'" (quoting Tucson v. Koerber, 313 P.2d 411, 418 (Ariz. 1957))); People v. Chavez, 177 Cal. Rptr. 306, 313 (Ct. App. 1981) (holding that no valid waiver of defendant's right to an interpreter without an affirmative showing on the record of a waiver which was intelligent and voluntary); State v. Kounelis, 609 A.2d 1310 (N.J. Super.), *cert. denied*, 627 A.2d 1136 (N.J. 1992); State v. Neave, 344 N.W.2d 181, 185-89 (Wis. 1984) (holding that right to an interpreter is personal and must be affirmatively waived by the defendant); *cf.* 28 U.S.C. § 1827(f)(1) (1988); United States v. Tapia, 631 F.2d 1207 (5th Cir. 1980) (holding that the Court Interpreters Act of 1978 requires that any waiver of the right to an interpreter be made by the defendant after the court has explained the nature and effect of a waiver). *But see* Gonzalez v. Virgin Islands, 109 F.2d 215, 217 (3d Cir. 1940) ("Where, as here, a defendant fails to state to the court that he cannot understand the language of the prosecution witnesses and fails to request an interpreter, his right must be deemed to be waived." (footnote omitted)); People v. Ramos, 258 N.E.2d 197, 198-99 (N.Y. 1970) (holding that failure of defendant represented by counsel to request an interpreter constitutes a waiver; however, a court might have the duty to appoint an interpreter *sua sponte* if it were clear that the defendant did not fully comprehend the proceedings).

201. *See Neave*, 344 N.W.2d at 188-89.

We conclude that due regard for the right of a criminal defendant who does not understand English to the services of an interpreter requires that whenever a trial court is put on notice that the accused has a language difficulty, the court must make a factual determination of whether the language disability is sufficient to prevent the defendant from communicating with his attorney or reasonably understanding the English testimony at the preliminary hearing or trial. If the court determines that an interpreter is necessary, it must make certain that the defendant is aware that he has a right to an

interpreter . . . *Id.* (footnote omitted); *see also* New Jersey Standards for Court Interpreting, *supra* note 9, § 3B:1-1 to :1-5.

202. *See* Mass. Gen. L. ch. 221C, § 2 (1994); *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980); *Neave*, 344 N.W.2d at 188-89; *Hewitt*, *supra* note 13, at 229.

203. *See* *People v. Ovalle*, 307 N.W.2d 685, 686-87 (Mich. 1981).

204. *See* *United States v. Mayans*, 17 F.3d 1174, 1180 (9th Cir. 1994); *Neave*, 344 N.W.2d at 188-89; *see also* Mass. R. Crim. P. 12(a)(2). For a related view, compare D.C. Code Ann. § 31-2702(e) (1993), which states the following:

No person who has been arrested but who is otherwise eligible for release shall be held in custody pending arrival of an interpreter. No answer, statement, or admission, written or oral, made by a communication-impaired person in reply to a question of a law-enforcement officer in any criminal or delinquency proceeding may be used against that communication-impaired person unless either the answer, statement, or admission was made or elicited through a qualified interpreter and was made knowingly, voluntarily, and intelligently or, in the case of a waiver, unless the court makes a special finding upon proof by a preponderance of the evidence that the answer, statement, or admission made by the communication-impaired person was made knowingly, voluntarily, and intelligently.*Id.*

205. *See* *Neave*, 344 N.W.2d at 188-89; *cf.* 28 U.S.C. § 1827(f)(1) (1988); *People v. Carreon*, 198 Cal. Rptr. 843, 853 (Ct. App. 1984).

206. *Cf.* *People v. Delgado*, 294 N.E.2d 84, 86 (Ill. App. 1973) (written jury waiver). A sample form to be used in the event that a defendant wishes to waive the services of a court interpreter is reproduced in Appendix A-6.

207. New Jersey Standards for Court Interpreting, *supra* note 9, § 3B:1-6.

208. *González et al.*, *supra* note 43, at 508-09.

Proficiency: A court interpreter shall withdraw from any case in which his/her performance will be adversely affected due to lack of proficiency, preparation or difficulty in understanding the speaker for any reason, including insurmountable linguistic and/or cultural differences, or complexity of conceptual or technical terms to be used in the proceedings. Such withdrawal may be made at the time of the pre-appearance interview with the non-English speaker, or at any other appropriate time.*Id.*; *see also* Office of the Chief Administrative Justice: Massachusetts Trial Court, Code of Professional Conduct for Court Interpreters of the Trial Court § 1.03(4)(c) (1988) [hereinafter Massachusetts Code of Professional Conduct for Court Interpreters].

209. *See* Iowa Code Ann. § 622A.6 (West Supp. 1995) ("Any court or administrative agency may inquire into the qualifications and integrity of any interpreter, and may

disqualify any person from serving as an interpreter."); Mass. Gen. L. ch. 221C, § 5(a)-(d) (1994).

210. *See* Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 7 & cmt. (1995) (reproduced in Appendix B); *see also* Mass. Gen. L. ch. 221C, § 5(a)-(d) (1994). This Massachusetts statutory provision reads as follows:

Any of the following actions shall be good cause for a judge to remove an interpreter:

- (a) knowingly and willfully making false interpretation while serving in an official capacity;
- (b) knowingly and willfully disclosing confidential or privileged information obtained while serving in an official capacity;
- (c) failing to follow the standards prescribed by law and the ethics of the interpreter profession; or
- (d) being unable to interpret adequately, including where the interpreter self-reports such inability.*Id.*; *see also* Or. Rev. Stat. § 45.288(3)(a)-(c) (1993). The Oregon statute reads as follows:

The court may not appoint any person under this section, ORS 45.275 or 45.285 if:

- (a) The person has a conflict of interest with any of the parties or witnesses in the proceeding;
- (b) The person is unable to understand the party or witness, or cannot be understood by the party or witness; or
- (c) The person is unable to work cooperatively with the person in need of an interpreter or the counsel for that person.*Id.*; *see also infra* part IX.B (noting that, generally, a judge should disqualify an interpreter for any violation of the "ten musts" of court interpretation).

211. *See* Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 7 & cmt. (1995) (reproduced in Appendix B); *see also* Mass. Gen. L. ch. 221C, § 5(a)-(d) (1994).

212. *See* *United States v. Anguloa*, 598 F.2d 1182, 1184 (9th Cir. 1979); *United States v. Addonizio*, 451 F.2d 49, 68 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

213. *Anguloa*, 598 F.2d at 1184.

214. *See supra* part III.C. If an attorney questions the interpreter's rendition, the attorney should place the alternative rendition of the interpretation on the record. *See* Edwards,

supra note 23, at 70-71. This sometimes stops the attorney from coaching a witness through objections or from needlessly objecting to the interpretation. *See id.*

215. *Anguloa*, 598 F.2d at 1184 ("It is the duty of the trial judge, not the prosecutor, to appoint and replace interpreters." (citing Fed. R. Crim. P. 28)); *Addonizio*, 451 F.2d at 68 (noting that prosecutors' ex parte substitution of court interpreter was improper).

216. *Davis & Hewitt*, *supra* note 4, at 133-34.

217. *González et al.*, *supra* note 43, at 507-08.

218. *See, e.g.*, Massachusetts Rules of Court, Standing Orders of the Boston Municipal Court 2-83 (1995). Standing Order 2-83 states the following:

STANDING ORDER 2-83
INTERPRETERS

In all cases in which the services of an interpreter are required, it shall be the obligation of the litigants to file with the Court a request, in writing, seeking the appointment of the interpreter at least forty-eight hours prior to the hearing or trial at which said services are required. Such request shall specify the language for which the interpreter is required.

In the event that the hearing or trial is continued, it shall be the obligation of the litigants to renew the request for an interpreter in the same manner prescribed in the foregoing paragraph.

This Order is made in accordance with Rule 43(f) of the Massachusetts Rules of Civil Procedure and Rule 41 of the Massachusetts Rules of Criminal Procedure.*Id.*

219. *See, e.g., id.*

220. *See* Massachusetts Code of Professional Conduct for Court Interpreters, *supra* note 208, § 1.03(6)(a)-(b); New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:2-4(A)(1).

221. New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:2-4; *Edwards*, *supra* note 23, at 17-18; *González et al.*, *supra* note 43, at 177-79; *Hewitt*, *supra* note 13, at 134.

222. *See supra* note 205.

223. *Edwards*, *supra* note 23, at 17-18; *González et al.*, *supra* note 43, at 179; *Hewitt*, *supra* note 13, at 134.

224. *Hewitt*, *supra* note 13, at 134.

225. González et al., *supra* note 43, at 497; *see also* Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* 231 (1990); Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 4 cmt. (1995) (reproduced in Appendix B).

226. González et al., *supra* note 43, at 484.

227. Edwards, *supra* note 23, at 80; González et al., *supra* note 43, at 511.

228. González et al., *supra* note 43, at 175-76, 511.

229. Edwards, *supra* note 23, at 80. Dr. Edwards recommends the purchase of a small battery-operated directional amplifier with earphones, if the acoustics are particularly poor. *Id.*

230. González et al., *supra* note 43, at 509; *see also* New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-8.

231. González et al., *supra* note 43, at 487.

232. New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-8(B).

233. González et al., *supra* note 43, at 175.

234. This arrangement is sometimes called "whisper simultaneous." *See* Edwards, *supra* note 23, at 77. Interpreters complain that it is not good for the voice or posture nor can the parties easily hear what is being said by the interpreter. *Id.* Finally, in some proceedings, having the court interpreter too close to the defendant may raise security concerns. *Id.*

235. *Cf.* *Frescas v. State*, 636 S.W.2d 516, 517-18 (Tex. Ct. App. 1982).

Prior to trial, Appellant's counsel requested the services of a[n interpreter]. During *voir dire*, counsel instructed the [interpreter] to stop [interpreting]. He advised the court that the continuous [interpretation] from English into Spanish was distracting his attention from the selection process. . . . The court advised counsel to separate himself from the [interpreter] and his client. Absent a waiver, [the court] required the continuous [interpretation] to proceed.*Id.* at 517.

236. Edwards, *supra* note 23, at 77-78.

237. *Id.* at 78-79.

238. *Id.*

239. *See* Ark. Code Ann. § 16-89-104 (Michie 1987); Cal. Evid. Code § 751 (West 1995); Colo. Rev. Stat. § 13-90-207(1)(a) (1987); D.C. Code Ann. § 31-2707 (1993); Fla. Stat. Ann. § 90.606(3) (West 1979); Ind. Code Ann. § 34-1-14-3(d) (Burns 1986); Kan. Stat. Ann. § 75-4354 (Supp. 1994); Haw. R. Evid. 604; *see also* Mass. Gen. L. ch. 221C, § 4(a) (1994) (providing that an interpreter shall be sworn to "make a true and impartial interpretation using his best skill and judgment"); Massachusetts Code of Professional Conduct for Court Interpreters, *supra* note 208, § 1.03(7). *See generally* Model Code of Professional Responsibility for Interpreters in the Judiciary (1995) (reproduced in Appendix B); Model Court Interpreter Act (1995) (reproduced in Appendix C).

240. *E.g.*, *People v. Carreon*, 198 Cal. Rptr. 843, 854-55 (Ct. App. 1984).

241. *See supra* parts III.A, D.2.

242. *See supra* parts III.A, D.2; *cf.* *Chacon v. Wood*, 36 F.3d 1459, 1463-64 (9th Cir. 1994) (noting that interpreter's intentional mistranslation of attorney's advice stated as ineffective assistance of counsel claim).

243. The linguistic minority defendant is not linguistically present for the purposes of exercising his or her Sixth Amendment rights until a qualified interpreter is actually providing adequate interpretation services. *See Chacon*, 36 F.3d at 1463-64.

244. *See* *Marxuach v. United States*, 398 F.2d 548 (1st. Cir.), *cert. denied*, 393 U.S. 982 (1968); *People v. Delgado*, 294 N.E.2d 84, 88 (Ill. App. 1973); *Lara v. State*, 761 S.W.2d 481, 482 (Tex. Ct. App. 1988).

245. Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 4 & cmt. (1995) (reproduced in Appendix B).

246. *Id.* at Canon 1.

247. New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-10(A)-(D) (describing modes of interpretation and their proper use); Hewitt, *supra* note 13, at 137-38.

248. For example, "A court interpreter shall not summarize court proceedings at any time unless instructed to do so by the court (e.g., side-bar, jury selection, charge to the jury)." Massachusetts Code of Professional Conduct for Court Interpreters, *supra* note 208, § 1.03(8)(c). "The summary mode should never be employed in [witness or] record interpreting . . ." New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-10(D) ("The summary mode should never be employed in record interpreting and should be energetically avoided in all other situations."). A judge should not permit the court interpreter to use the summary mode at any point in the proceedings where litigant or witness is entitled to the services of a court interpreter. *See* *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990); *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir.), *cert. denied*, 498 U.S. 986 (1990); *State ex rel. R.R., Jr.*, 398 A.2d 76, 86 (N.J. 1979)

("[Interpreter may not] merely render a `summary' of what the primary witness has stated.").

249. *See* 28 U.S.C. § 1827(k) (1988) (requiring the use of simultaneous interpretation except in the case of witnesses where the interpreter will use the consecutive mode); *United States ex rel. Negron v. New York*, 310 F. Supp. 1304, 1307 (E.D.N.Y.) (holding that right of confrontation for a non-English speaker requires simultaneous translation for the purpose of communicating with counsel to enable counsel to effectively cross-examine witnesses), *aff'd*, 434 F.2d 386 (2d Cir. 1970).

250. *Edwards*, *supra* note 23, at 83-85.

251. *Id.*

252. *Id.* at 84.

253. *Id.* at 83-85; New Jersey Standards for Court Interpreting, *supra* note 9, § 2:3(B).

254. New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-10(C).

255. *Id.* § 2:3(A); *de Jongh*, *supra* note 23, at 288.

256. New Jersey Standards for Court Interpreting, *supra* note 9, § 2:3(A).

257. For example, in *United States ex rel. Negron v. New York*, 434 F.2d 386, 388 (2d Cir. 1970), the court held that summary interpretation made the trial of a criminal defendant constitutionally unsound and violated the Due Process Clause of the Fourteenth Amendment.

New Jersey permits summary interpretation under the following circumstances:

[O]nly when it is absolutely impossible for the proceedings interpreter to interpret everything as required in the simultaneous mode and reasonable efforts by the presiding officer to adapt all discourse to the interpreters' level of skill have been made to no avail. When a presiding officer determines that summary interpreting is necessary, the reasons therefor should be stated on the record. The mere fact that the judge, attorneys, or witnesses talk too fast for the interpreter to keep up should not be cause of permitting summary interpreting. New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-10(D). *United States v. Huang*, 960 F.2d 1128, 1130-33 (2d Cir. 1992), resulted in a mistrial when the trial judge learned that an interpreter hired by the prosecutor to interpret for a government witness had summarized the testimony.

The legislative history of the Court Interpreters Act, 28 U.S.C. §§ 1827-1828 (1982), states the following:

[A]ll interpretations are to be made in the consecutive mode except in those limited situations where the court determines, *and all the parties agree*, that the simultaneous or summary mode will aid in the efficient administration of justice. The committee anticipates that the summary mode of translation will be used very sparingly. *United States v. Torres*, 793 F.2d 436, 443 (1st Cir.) (quoting H.R. Rep. No. 1687, 95th Cong., 2d Sess. 7-8, *reprinted in* 1978 U.S.C.C.A.N. 4652, 4658-59), *cert. denied*, 479 U.S. 889 (1986).

258. Hewitt, *supra* note 13, at 32.

259. *See Negron*, 434 F.2d at 389-90 (holding that use of summary mode violated due process clause of the Fourteenth Amendment); New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-10(D). *Contra Commonwealth v. Garcia*, 379 Mass. 422, 438, 399 N.E.2d 460, 470-71 (1980) (holding that interpreter was "qualified interpreter" notwithstanding the interpreter's use of the summary mode of interpreting).

260. Hewitt, *supra* note 13, at 138.

261. González et al., *supra* note 43, at 248.

262. Edwards, *supra* note 23, at 92-93.

263. González et al., *supra* note 43, at 248-49.

264. *Id.* at 249.

265. Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 1 & cmt. (1995) (reproduced in Appendix B); González et al., *supra* note 43, at 475.

266. González et al., *supra* note 43, at 478. For example, if the attorney refers to "Peter" and it is clear that he means "Paul," the interpreter cannot change "Peter" to "Paul," nor can the interpreter inform the attorney or judge of the error. *See id.*

267. *Id.* For example, often the attorney and interpreter are of different genders, and the witness will respond to the interpreter's gender rather than to the attorney's. The interpreter cannot interpret a witness's "Yes, Sir" as the factually correct "Yes, Ma'am." *See id.*

268. *See State v. Van Pham*, 675 P.2d 848, 858 (Kan. 1984).

269. Professor Piatt provides the following example:

The creation of a clearer record through the use of the first person when the interpreter translates the witness's response (and the use of second person by counsel) can be illustrated by the following exchange:

1. Attorney (in English): "What is your name?"
2. Interpreter (in foreign language to witness): "What is your name?"
3. Witness (in foreign language): "My name is John Doe."
4. Interpreter (in English): "My name is John Doe."

Use of the first person creates a more intelligible record than if the interpreter responds, "He says his name is John Doe." The court reporter will only be transcribing the English dialogue. In the example above, only lines 1 and 4 would appear in the transcript. In this simple example, no great confusion would occur if the interpreter had responded in the third person. In more complicated exchanges, however, the record could become garbled if the interpreter translates in the third-person [sic]:

Q. Ask him who was there.

A. He says his friends, Juan and Fred.

Q. Ask him if he signed the paper.

A. He said they did.

Q. Who did?

A. He said him and Juan. Piatt, *supra* note 4, at 7 n.47 (citations omitted).

270. *See* González et al., *supra* note 43, at 505.

271. *Id.*

272. *See* People v. Resendes, 210 Cal. Rptr. 609, 612 (Ct. App. 1985) ("It is not only constitutionally essential but also eminently reasonable to require the appointment of a separate interpreter to facilitate communication between a defendant and his counsel "throughout the proceedings" and or to permit the defense interpreter to perform an additional role of interpreting witnesses' testimony for the court." (quoting People v. Carreon, 198 Cal. Rptr. 843, 847 (Ct. App. 1984))); State v. Dam, 825 P.2d 286, 288 n.1 (Or. Ct. App.) ("The better practice would be to have one interpreter to work with the defendant and his counsel and a different one to translate for witnesses."), *review denied*, 832 P.2d 456 (Or. 1992). The judge should also be sensitive for potential conflicts if the same interpreter is interpreting for more than one defendant at trial. *See* United States v. Sanchez, 928 F.2d 1450, 1455 (6th Cir. 1991) ("For example, a personal interpreter should be provided if the district court were to make a finding of direct conflict between defendants because their respective positions were so diverse."); Eliminating the Barriers, *supra* note 10, at 45-46.

273. See *Resendes*, 210 Cal. Rptr. at 611.

274. *Id.*

275. An example of the danger of a judge using an interpreter biased in favor of one party is recounted in the following testimony given before the Commission to Study Racial and Ethnic Bias in the Courts:

One attorney testified that in a contested divorce action, the judge directed the husband's privately-paid interpreter to interpret for the wife as well. The judge eventually ruled in favor of liberal visitation rights for the husband because the interpreter mis-stated the wife's testimony. When the wife violated the visitation order, the judge again directed the husband's interpreter to interpret for the wife, who eventually lost custody of her children. She hired her own interpreter and once her testimony was properly received, the judge reversed the contempt order.

Eliminating the Barriers, *supra* note 10, at 46 (footnote omitted).

276. See *Resendes*, 210 Cal. Rptr. at 611.

277. González et al., *supra* note 43, at 487.

278. *Id.*

279. New Jersey Standards for Court Interpreting, *supra* note 9, § 3B:2-2(A).

280. See generally *id.*

281. A judge should consider it to be a mark of professionalism and competence for an interpreter to have bilingual dictionaries and other reference materials available in the courtroom. Michael M. Pacheco, *Certified Court Interpreters: A New Era of Professionalism in Oregon Courts*, Or. St. B. Bull., Aug.-Sept. 1995, at 23, 25.

282. González et al., *supra* note 43, at 488.

283. *Id.*

284. *United States v. Torres*, 793 F.2d 436, 443 (1st Cir.), *cert. denied*, 479 U.S. 889 (1986).

[Defendant's] final assignment of error is his argument that the district court erred in barring the interpreter from [interpreting] statements made by the defendant during his cross examination of government witnesses. While . . . the court should not have restricted interpretation, we conclude that the error was harmless beyond a reasonable doubt.

We have been unable to locate a precedent directly on point, but we are satisfied that the interpreter's duty is to [interpret] all statements, without restriction by the court. *Id.* at 442-43. The First Circuit noted that "[i]n effect [when the court limited what portions were interpreted], the district court directed the interpreter to use the summary mode of translation without obtaining the consent of all parties." *Id.* at 443.

285. *Id.*

286. *See supra* notes 47-57 and accompanying text.

287. *Cf. Torres*, 793 F.2d at 443; *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir.), *cert. denied*, 498 U.S. 986 (1990).

288. *See State v. Van Pham*, 675 P.2d 848, 860 (Kan. 1984). In regard to the status of interpreters, the *Van Pham* court stated the following: While a person who is engaged in discharging the duties of an interpreter is a witness, and may even be regarded as acting in the capacity of an expert, he or she is more than a mere witness. Though in a sense he or she is an officer of the court, an interpreter is best described not as a court officer but merely an attendant.

Id. (citations omitted).

289. *See, e.g., id.*

290. At least one court has held that a court interpreter is all three. *Id.*; *see also Kley v. Abell*, 483 S.W.2d 625, 628 (Mo. App. 1972) ("[A]n interpreter is at once a witness and to a certain extent an officer of the court.").

291. *González et al.*, *supra* note 43, at 159. The closest analogue to the court interpreter is the stenographic court reporter. *See Charles M. Grabau, Court Interpretation Services in the Massachusetts Trial Courts: One Step Forward, Two Steps Back*, Boston B.J., Sept.-Oct. 1995, at 24, 26 & n.31.

292. J.E. Macy, Annotation, *Use of Interpreter in Court Proceedings*, 172 A.L.R. 923, 926 (1948) (quoting *People v. Lem Deo*, 64 P. 265, 266 (Cal. 1901)).

293. "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." Fed. R. Evid. 604.

294. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702.

295. *State v. Burris*, 643 P.2d 8, 14 (Ariz. App. 1988) ("[T]he position of the court interpreter was no more than that of an expert witness."). *See generally* 27 Wright & Miller, *supra* note 5, § 6052.

296. Fed. R. Evid. 604.

297. Fed. R. Evid. 702; *see also* *United States v. Miller*, 806 F.2d 223, 224 n.1 (10th Cir. 1986).

298. Macy, Annotation, *supra* note 292, at 926; *People v. Bradley*, 879 P.2d 410, 412 (Colo. App. 1993) (citing *State v. Burris*, 643 P.2d 8 (Ariz. Ct. App. 1982)).

299. *See, e.g.*, *Commonwealth v. Belete*, 37 Mass. App. Ct. 424, 426, 640 N.E.2d 511, 512 (1994) ("Interpreters are not witnesses, nor do they normally possess any knowledge of a fact or occurrence sufficient to testify in a case. Rather, '[a]n interpreter is a bilingual person who has the duty to act as the medium between the court and the non-English-speaking person.'" (alteration in original) (citing *González et al.*, *supra* note 43, at 155)).

300. *Garcia v. State*, 887 S.W.2d 862, 875 (Tex. Crim. App. 1994) ("Appellant objected specifically to the inaccuracy of a[n] interpretation], interpreting a witness' testimony into English. Upon study . . . we conclude . . . [that] it is a factual question which ultimately only the jury can answer" (citing *United States v. Manos*, 848 F.2d 1427, 1432-33 (7th Cir. 1988) (noting that "questioning of [interpretation] could be probed thoroughly upon cross examination"); *State v. Burris*, 643 P.2d 8, 14 (Ariz. App. 1982) ("The accuracy of the sworn interpreter's interpretation may be impeached and is ultimately to be determined by the jury."); *Skaggs v. State*, 8 N.E. 695, 697 (Ind. 1886); Macy, Annotation, *supra* note 292, at 923 ("The interpreter is a witness in the sense that the accuracy of his [interpretation] is a question of fact for the jury."))), *cert. denied*, 115 S. Ct. 1368 (1995); *see also* *United States v. Rayas*, 20 C.M.R. 195, 198-99 (1955), which states the following:

Essentially, an interpreter is a witness, and one whose conduct must be subjected to the most careful scrutiny. The accuracy of his translation of testimonial questions and answers is in the nature of a question of fact for the jury and may, therefore, be the subject of impeachment. This right to challenge [interpreter] accuracy may be exercised either through cross-examination of the interpreter

Id. (citations omitted).

301. *See* cases cited *supra* note 300.

302. *See* cases cited *supra* note 300.

303. *See, e.g.*, *supra* notes 291-93 and accompanying text.

304. *See Rayas*, 20 C.M.R. at 199.

It would seem to us, however, that much caution should be exercised in the application of the principles thus enunciated. On the one hand, it is evident that an accurate rendition of the testimony of witnesses is essential to a tribunal's discovery of the truth, and it must, therefore, be open to a party to bring claimed mistranslations to the attention of its personnel. Yet on the other, it is equally certain that the situation contemplated may be fruitful of vastly multiplied issues, and resultantly of disorder and indignity, confusion in the mind of the fact-finder, and an undue consumption of judicial time. And it cannot be denied, of course, that the rules of which we are speaking may, on occasion, lend themselves to obstructive--at least to improperly diversive--tactics in the unchecked hands of a desperate litigant with few valid strings to his bow.

Id.

305. *See, e.g.*, *United States v. Ladell*, 30 M.J. 672, 676 (U.S.A.F. 1990) ("This right to challenge [interpretive] accuracy may be exercised . . . by means of calling other witnesses to test the interpretation." (citing *Rayas*, 20 C.M.R. at 199)); *see also* cases cited *supra* note 300.

306. Questioning the witness to resolve an interpretation problem should be done at sidebar or outside the presence of the jury. Questions placed to the witness in the presence of the jury could have the unintended impact of impeaching the witness rather than the interpreter should the official rendition change.

An analogous and equally absurd example is an attorney, during a trial while the witness is still on the stand, challenging the court stenographer's record of the proceeding. So, the trial judge and the parties call expert court stenographers as witnesses to what the court stenographer's notes "really mean," rather than asking the witness, "what did you say?"

307. Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 3 cmt. (1995) (reproduced in Appendix B) ("The interpreter serves as an officer of the court . . .").

308. *Cf. People v. Torres*, 262 Cal. Rptr. 323, 328 (Ct. App. 1989) (citing *Boicelli v. Giannini*, 224 P. 777 (Cal. Ct. App. 1924)).

309. *United States v. Gibert*, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15204); *People v. Lem Deo*, 64 P. 265 (Cal. 1901); *Garcia v. State*, 887 S.W.2d 862, 875 (Tex. Crim. App. 1994).

310. *Cf. Commonwealth v. Festa*, 369 Mass. 419, 429-30, 341 N.E.2d 276, 283 (1976).

311. For a discussion of handling objections to the interpreter's rendition, see *infra* part V.D.

312. Many jurisdictions will not be able to assign different court interpreters due to a limited number of qualified interpreters. This is another reason to train interpreters and to

insist that they understand and comply with the Model Code of Professional Responsibility for Interpreters in the Judiciary.

313. *See State v. Van Pham*, 675 P.2d 848, 856 (Kan. 1984).

314. The draft regulations were not adopted. *Compare* Administrative Office of the United States Courts, Interim Regulations of the Director of the Administrative Office of the United States Courts Implementing the Court Interpreters Amendments Act of 1988 [hereinafter Implementing the Court Interpreters Amendments Act]. In *Van Pham*, 675 P.2d at 861, the Kansas Supreme Court approved the trial judge's method for resolving challenges to alleged misinterpretations. In *Van Pham*, the trial court had adopted the following procedure:

"[If] any of your interpreters disagree either among yourselves or disagree with what the Court's interpreter interprets the testimony of any Vietnamese witness, then no counsel is to stand up and relate that fact to the jury. What I want to happen is the attorney can make objection--we'll stop the proceeding--to approach the bar and advise me in a voice that cannot be overheard by the jury that we have a dispute over what is said by one of the witnesses. At that time I will excuse the jury to go back to the jury room and we will get to the bottom of it.

If there is an error in any translation, I'm also going to tape record the testimony given by the Vietnamese. That testimony will not be preserved, please understand, on the tape recording. It will merely be preserved for short durations at a time being the time limit on each side of the tape cassettes. The reason for that being that if there is a disagreement on what a Vietnamese witness testified to, including the defendants, then I would have the actual recording of what was said so that it could be played back." *Id.* at 858.

315. González et al., *supra* note 43, at 161-62 (emphasis added) (quoting Administrative Office of the United States Courts, Draft Regulations: Subsection 1.62, Challenges to Interpretation (1988)).

316. *See* Code of Professional Responsibility for Interpreters in the Minnesota State Court System Canon 1 cmt. (1995) (stating that it is the duty of the interpreter to interpret non-responsive answers); *People v. Vandiver*, 468 N.E.2d 454, 458 (Ill. App. 1984) (admonishing court interpreter to relay non-responsive answer without rephrasing the question); González et al., *supra* note 43, at 479-80; *cf.* *United States v. Torres*, 793 F.2d 436, 443 (1st. Cir.) (holding that it was error to instruct interpreter to only interpret "questions" as opposed to "statements" made by defendant acting pro se in cross-examining government witnesses), *cert. denied*, 479 U.S. 889 (1986).

317. *Commonwealth v. Festa*, 369 Mass. 419, 429 n.2, 341 N.E.2d 276, 283 n.2 (1976); *see also* *People v. Wong Ah Bang*, 4 P. 19 (Cal. 1884); *State v. Deslovers*, 100 A. 64 (R.I. 1917).

318. *Festa*, 369 Mass. at 429 n.2, 341 N.E.2d at 283 n.2.

319. *Id.*

320. *Id.*

321. *United States v. Anguloa*, 598 F.2d 1182, 1185 n.3 (9th Cir. 1979) (noting the difficulty "in attempting to evaluate the accuracy of interpretations"). *United States v. Urena*, 834 F. Supp. 1282, 1286 (D. Kan. 1993) ("[The] court cannot resolve the accuracy of the translation by reviewing the transcript . . ."), *aff'd*, 27 F.3d 1487 (10th Cir.), *cert. denied*, 115 S. Ct. 455 (1994); *Garcia v. State*, 887 S.W.2d 862, 875 (Tex. 1994) ("[A]n appellate court, can no more determine whether a translation is accurate or which of two translations is more accurate, than we can determine which of two witnesses is telling the truth . . ."); *In re Raymundo B.*, 250 Cal. Rptr. 812 (Ct. App. 1988); *State v. Gomez*, 815 P.2d 166, 168 (N.M. Ct. App.) ("[I]t is defendant's burden, as movant, to establish the inadequacy of the interpreter . . ."), *cert. denied*, 814 P.2d 457 (N.M. 1991); *Liveoak v. State*, 717 S.W.2d 691 (Tex. Crim. App. 1986); *see also* New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-9, which states the following:

(A) *Capital Cases*

In all capital cases, a permanent record of all record and proceedings interpreting should be made . . . regardless of the qualifications of the interpreter.

(B) *Non-capital Cases*

In non-capital cases and especially when record or proceedings interpretation is rendered by an uncertified interpreter [the court] . . . may order that a permanent record be made of . . . [the court interpretation]. *Id.* *See generally* *Hovland*, *supra* note 4. For cases in which defendants have complained about the absence of some record of Spanish-language testimony to enable a meaningful challenge to the accuracy of interpretation, see *United States v. Boria*, 371 F. Supp. 1068, 1069 (D.P.R. 1973), *aff'd*, 518 F.2d 368, 370 (1st Cir. 1975); *Gonzales v. State*, 819 P.2d 1159, 1161 (Idaho Ct. App. 1991). At least two courts have commented on the near-impossibility of appellate challenge to the accuracy of an interpretation. *See United States v. Anguloa*, 598 F.2d 1182, 1185 n.3 (9th Cir. 1979) (recognizing that "there is an inherent difficulty in attempting to evaluate the accuracy of interpretations on appellate review" because the transcript contains only "the questions in English and the answers after they have been translated into English"); *Gonzales*, 819 P.2d at 1161.

322. *See United States v. Anguloa*, 598 F.2d 1182, 1185 n.3 (9th Cir. 1979) ("[T]here is an inherent difficulty in attempting to evaluate the accuracy of interpretations on appellate review. The reporter's transcript can only contain the questions in English and the answers after they have been translated into English."); *People v. Martinez*, 289 N.E.2d 76 (Ill. App. Ct. 1972).

323. *Anguloa*, 598 F.2d at 1185 n.3. The need to preserve the source language may not be readily apparent.

[Professor Piatt] frequently used the following (admittedly absurd) example to demonstrate why, without the presence of two interpreters, an interpretation error could be made without anyone in the courtroom even being aware an error had occurred:

1. Attorney (in English): "What is your name?"
2. Interpreter (in foreign language to witness): "What did you eat for breakfast?"
3. Witness (in foreign language): "Ham and eggs."
4. Interpreter (in English): "My name is John Doe."

Obviously there is no "third person" problem with this translation. The problem is a misinterpretation. If all attorneys and parties only speak English and if the witness only speaks the foreign language, the only person in the room who knows an error has been made is the interpreter. If the interpreter does not intentionally make the error, but rather makes the error for a lack of precision in one or both languages, nobody will catch the error. The record will only contain lines 1 and 4, which is not an accurate reflection of the witness's testimony. Piatt, *supra* note 4, at 7 n.48.

324. *See supra* note 323.

325. *See* Iowa Code Ann. § 622A.8 (West Supp. 1995) ("A tape recording of the portion of proceedings where non-English testimony is given shall be made and maintained."); Mass. Gen. L. ch. 221C, § 4(b) (1994) ("[T]he judge may order all of the testimony of a non-English speaker and its interpretation to be electronically recorded for use in audio or visual verification of the official transcript of the proceedings.").

326. Professor Susan Berk-Seligson describes her problems using court-supplied equipment and the process by which she recorded court interpretation for her research in detail. *See* Berk-Seligson, *supra* note 225, at 48-49. In her detailed recitation of her research methodology, she provides brand names and models of equipment. *Id.* Although the authors have not attempted to duplicate Professor Berk-Seligson's experience with this equipment, this is a good starting place for experimentation in preserving a record of the interpretation.

327. For a discussion of the way in which minor interpreter errors can affect credibility determinations, see *infra* part X.

328. Pacheco, *supra* note 281, at 23.

329. *Id.*

330. Davis & Hewitt, *supra* note 4, at 135-36.

331. Edwards, *supra* note 23, at 14.

332. *Id.*

333. *Id.*

334. Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 8 cmt. (1995) (reproduced in Appendix B).

335. *See* Implementing the Court Interpreters Amendments Act, *supra* note 314, § 14(a) ("Generally, two or more interpreters should be designated to work in lengthy or multi-defendant trials in order to assure that the quality of interpretation does not decrease due to interpreter fatigue.").

336. *See* Massachusetts Code of Professional Conduct for Court Interpreters, *supra* note 208, § 1.03(13)(a)-(b).

337. *See* Commonwealth v. Garcia, 661 A.2d 1388, 1395 n.13 (Pa. Super. 1995). *Contra* People v. Gomez, 406 N.E.2d 886, 887-90 (Ill. App. Ct. 1980).

338. *Garcia*, 661 A.2d at 1395 n.13. Generally, courts do not permit prosecutors to comment on a defendant's exercise of other fundamental constitutional rights. *See* Doyle v. Ohio, 426 U.S. 610, 617-18 (1976) (Fifth Amendment right to remain silent); Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983), *cert. denied*, 469 U.S. 920 (1984) (Sixth Amendment right to counsel); People v. Meredith, 405 N.E.2d 1306, 1311-12 (Ill. Ct. App. 1980) (same); People v. Stephens, 349 N.W.2d 162, 163-64 (Mich. Ct. App. 1984) (Fourth Amendment rights); People v. Spencer, 343 N.W.2d 607, 609-11 (Mich. Ct. App. 1983) (marital privilege).

339. Hovland, *supra* note 4, at 479; Shulman, Note, *supra* note 4, at 186 ("Typically, errors in interpretation are corrected only when another interpreter or other courtroom personnel fluent in that language are present.").

340. *See* State v. Puente-Gomez, 827 P.2d 715, 718 (Idaho Ct. App. 1992) ("The competency of an interpreter must be challenged prior to the time she begins translating, and it is presumed she will translate accurately. The [party challenging the interpretation] bears the burden of negating this presumption." (citation omitted)).

341. *Cf.* Piatt, *supra* note 4, at 8-16 (discussing why bilingual attorney cannot serve as both interpreter and attorney).

342. *Mares v. United States*, 391 F.2d 538, 539-40 (5th Cir. 1968) (considering the fact that judge and attorney were fluent in Spanish).

343. *Mares*, 391 F.2d at 539-40 ("The record is replete with instances in which the trial judge intervened to make crystal clear items which the interpreter might not have covered with absolute clarity.").

344. See Shulman, Note, *supra* note 4, at 187; see also *supra* part V.C (describing skills possessed by interpreters).

345. Model Court Interpreter Act § 2 cmt. (1995) (reproduced in Appendix C).

346. Hewitt, *supra* note 13, at 140; see also New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-12(A)-(B).

347. Mikkelson E-mail, Dec. 6, *supra* note 63, at 1. For an example of a false cognate, see *infra* note 573.

348. Mikkelson E-mail, Dec. 6, *supra* note 63, at 1; cf. Piatt, *supra* note 4, at 8-16 (discussing the inability of bilingual attorneys to serve as both interpreter and attorney).

349. Mikkelson E-mail, Dec. 6, *supra* note 63, at 1.

350. *Id.*

351. *Id.*

352. See Model Code of Judicial Conduct Canon 3(B)(5) & cmt. (1990). "A judge must be alert to avoid behavior that may be perceived as prejudicial." *Id.* at cmt.

353. An attorney who is physically present but does not speak the foreign language is linguistically absent for the purposes of an "ex parte" communication in this situation. Such an attorney is unable to protect the interests of his or her client and may become suspicious of the non-English communication.

354. Mikkelson E-mail, Dec. 6, *supra* note 63, at 1.

355. *Id.*

356. *Bordas & Co. v. Serrano*, 314 F.2d 291, 292 (1st Cir. 1963) (citation omitted).

357. Although the presumption is that a qualified interpreter will be used, there will be occasions when a qualified interpreter will not be available. In such circumstances, the judge can continue or reschedule the matter for another court date when a qualified interpreter will be available. Trial courts should have a policy to address emergency situations when qualified interpreters are not available. Telephone Interview with Robert Joe Lee, Supervisor, Court Interpreting Section, New Jersey Administrative Office of the Courts (Feb. 14, 1996). In such a case, trial court administrators should establish testing programs for language proficiency for those bilingual employees who are willing to serve as interpreters in emergencies. *Id.* The objective of the language proficiency test is to identify the most qualified bilingual employees in any given situation. *Id.* Those bilingual employees who pass the proficiency test should be required to familiarize themselves with the Model Code of Professional Responsibility for Interpreters in the Judiciary. *Id.*

Thus, a judge faced with a genuine emergency in which the imminent liberty or safety of an individual is at stake, and a qualified interpreter is not available, he or she may use the most qualified and available bilingual employee who has passed the proficiency test. *Id.* New Jersey has developed a similar system. *Id.*

358. While a judge always has the discretion to call an interpreter and attorneys to sidebar to discuss a challenged rendition, the authors assume that a certified interpreter's rendition would rarely be challenged.

359. The judge may wish to consider whether the dispute can be resolved through the use of judicial notice of adjudicative facts under the rules of evidence. *See, e.g.,* Fed. R. Evid. 201(b)(2) ("[Facts] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). For example, a judge may take judicial notice of a bilingual dictionary. *See* State v. Mays, 615 N.E.2d 641, 644 (Ohio Ct. App. 1992) (taking judicial notice of Physician's Desk Reference (1992)); Barrett v. Coast Range Plywood, 661 P.2d 926, 928 n.1 (Or. 1983) (taking judicial notice of the dictionary definition of "functional overlay"); Settlers Village Community Improvement Ass'n v. Settlers Village 5.6, Ltd., 828 S.W.2d 182, 184 (Tex. App. 1992) (taking judicial notice of Webster's New World Dictionary of the American Language (2d ed. 1982)). The bilingual judge should also be careful that the dispute does not result in the judge effectively "testifying" at the trial as a witness. *See, e.g.,* Fed. R. Evid. 605.

360. The discussion should be on the record, and the disputed word or phrase should be S-P-E-L-L-E-D out for the court reporter to preserve the dispute for further judicial review. *See* Edwards, *supra* note 23, at 82. This should be done, even if an audio record is made of the interpretation.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. Edwards, *supra* note 23, at 82.

366. *See* United States v. Manko, 979 F.2d 900 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2993 (1993); People v. Rega, 648 N.E.2d 130, 134 (Ill. Ct. App. 1995). The Rega court stated the following:

"It is the judge's duty to see that justice is done, and where justice is liable to fail because a certain fact has not been developed or a certain line of inquiry has not been pursued it is his duty to interpose and either by suggestions to counsel or an examination conducted by himself avoid the miscarriage of justice"

Rega, 648 N.E.2d at 134 (quoting *People v. Lurie*, 115 N.E. 130, 134 (Ill. 1917)).

367. Ensuring a fair trial also requires the judge to support the court interpreter and to prevent attorneys from needlessly harassing or intimidating the court interpreter through unfounded objections or otherwise.

368. If the interpreter becomes unnecessarily involved with the discussions, the interpreter may say something that may lead one or both attorneys to question whether the interpreter is biased. If the question comes from a bilingual juror, the interpreter could inadvertently say something that may result in either the juror being disqualified or a mistrial. *See United States v. Perez*, 658 F.2d 654, 662-63 (9th Cir. 1981) (removing bilingual juror from panel after she engaged in verbal confrontation with interpreter).

369. *See Baltierra v. State*, 586 S.W.2d 553, 559 n.11 (Tex. 1979) (en banc) ("The trial court commendably appointed counsel fluent in the Spanish language and thereby afforded appellant a basic aspect of effective assistance of counsel, ability to communicate."); *State v. Quiñones*, No. 44463, 1982 WL 5957 (Ohio Ct. App. Oct. 14, 1982) (noting that trial court assigned bilingual counsel because of language barrier); *Hovland*, *supra* note 4, at 499-500.

370. *See United States ex rel. Torres v. Brierton*, 460 F. Supp. 704, 706 (N.D. Ill. 1978) ("[N]o unqualified constitutional right to counsel able to speak defendant's native tongue." (citing *Cervantes v. Cox*, 350 F.2d 855 (10th Cir. 1965))); *Commonwealth v. Garcia*, 379 Mass. 422, 436 n.6, 399 N.E.2d 460, 469 n.6 (1980) ("[A] per se entitlement to bilingual attorneys is neither necessary nor desirable for several reasons.").

371. *See generally People v. Chavez*, 177 Cal. Rptr. 306, 313 (Ct. App. 1981) (holding that constitutional rights were denied when bilingual counsel served as interpreter); *Baltierra*, 586 S.W.2d at 559 n.11 (holding that appointment of a Spanish-speaking attorney did not satisfy defendant's right of confrontation); *Garcia*, 379 Mass. at 436 n.6, 399 N.E.2d at 469 n.6 ("[A]t the trial stage the court will provide qualified interpreters, and neither the prosecution nor the defense should have to depend on a bilingual defense counsel for interpreting the proceedings."); *Piatt*, *supra* note 4, at 8-16.

372. *See Piatt*, *supra* note 4, at 9.

373. *See United States ex rel. Negron v. New York*, 434 F.2d 386, 389-90 (2d Cir. 1970); *State v. Kounelis*, 609 A.2d 1310, 1314 (N.J. Super.) ("For defense counsel to cross-examine witnesses, listen to testimony and objections of the prosecuting attorney hear rulings and remarks of the presiding judge and simultaneously render an accurate and complete translation to his [client] is an impossible task." (alteration in original) (citing *State v. Rios*, 539 P.2d 900, 901 (Ariz. 1975))), *cert. denied*, 627 A.2d 1136 (N.J. 1992); *Baltierra*, 586 S.W.2d at 559 n.11; *United States v. Martinez*, 616 F.2d 185, 187-88 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *González et al.*, *supra* note 43, at 51-52; *Hovland*, *supra* note 4, 499-500; *Piatt*, *supra* note 4, at 1. Generally, bilingual attorneys are not qualified court interpreters, are not sworn, nor are their qualifications as

interpreters known when the judge orders the attorney to interpret for his or her client. As discussed throughout this article, mere bilingualism is not sufficient for proper court interpretation.

374. Piatt, *supra* note 4, at 13.

375. For example, in *Yi v. Commonwealth*, 646 A.2d 603, 605 (Pa. Commw. Ct. 1994), an attorney was used as an interpreter. The court held that the defendant's belief that the attorney was acting as an attorney-interpreter was insufficient to establish the attorney-client privilege. *Id.*

376. Piatt, *supra* note 4, at 13.

377. *Id.* at 7 n.48; *see also id.* at 13 n.97 (citing Model Code of Professional Responsibility DR 5-102(A) (1980); Model Rules of Professional Conduct Rules 1.7(b), 3.7 (1983)).

378. *Id.* at 13.

379. *Id.* at 13 n.97.

380. Hewitt, *supra* note 13, at 140; New Jersey Standards for Court Interpreting, *supra* note 9, § 3A:3-13(A)-(B).

381. Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 Hofstra L. Rev. 1, 22 (1992).

382. Professor Susan Berk-Seligson, after a series of studies involving mock jurors and court interpreters, determined that bilingual individuals "are affected by the English interpretations that they hear, which means that to a large extent they are able to minimize the effects of tuning in to the foreign language testimony. In effect, they are able to comply with the desire of the Court in so doing." Berk-Seligson, *supra* note 225, at 196. We offer this as some empirical evidence that bilingual jurors can comply with the court's instruction that only the English language interpretation is evidence.

383. *Id.*

384. *Id.*

385. Sarah B. Clasby, Note, *Understanding Testimony: Official Translation and Bilingual Jurors in Hernandez v. New York*, 23 U. Miami Inter-Am. L. Rev. 515, 535-38 (1991-92), which states the following:

[*Santana v. New York City Transit Auth.*, 505 N.Y.S.2d 775 (Sup. Ct. 1986)] illustrates a procedure that minimizes disruption and allows the trial to proceed with a record that more closely reflects the statements of the witnesses.

For such an optimal result, jurors must be properly instructed. For example, they may be instructed that if they disagree significantly with a[n interpretation], they may, when the witness is finished testifying, bring the matter to the attention of the court by explaining the nature of the difference in writing and giving it to the court officer. The court, after consulting with counsel beyond the hearing of the jury, could then seek to clarify the testimony by questioning the witness or, if there is an objection, the court may seek first to explore the nature of the difficulty further by meeting with the court interpreter, counsel, and the juror in chambers. If the court poses further questions to the witness, counsel should have an opportunity to ask follow-up questions.

A written inquiry procedure decreases the risk of a prejudicial question or statement during the proceedings. To avoid interrupting the flow of the questioning, jurors would be allowed to express their concerns only at the end of the witness's testimony.

....

The procedure outlined above gives jurors a judicially-sanctioned channel in which to direct frustration or confusion caused by a discrepancy between what their senses tell them and what they are told by the official translator. The added benefit is that it obviates the potential that the bilingual juror may have an undue influence on the rest of the jury by presenting an alternative version of the testimony that is at odds with the official [interpretation]. If the jury is properly instructed to raise difficulties with the [interpretation] at the end of the witness's testimony, then a bilingual juror will have no need, during deliberation, to say "the witness really said X even though the translator said Y." This matter will already have been dealt with during the trial itself.

Id. (footnotes omitted).

386. For example, this article does not discuss the constitutional questions raised by using peremptory challenges to remove bilingual jurors from the panel by using language as a proxy for race, ethnic, or national origin bias.

387. *United States v. Perez*, 658 F.2d 654, 662 (9th Cir. 1981) (emphasis added). The record states the juror said "You're an idiot" to the court interpreter. *Id.* The juror stated that she said "it's an idiom." *Id.* at 663. Professor Berk-Seligson suggests that the "juror was confusing *lavado* ('wash' or 'laundry') with *lavabo* ('washroom' or 'lavatory')." Berk-Seligson, *supra* note 225, at 282.

388. As a result of this incident, the juror was struck from the panel, and an appeal followed. *See Perez*, 688 F.2d at 661-62. The incident could have resulted in a mistrial or could have implicated other fundamental rights.

389. *Santana v. New York City Transit Auth.*, 505 N.Y.S.2d 775, 780 (Sup. Ct. 1986); *see also* Clasby, Note, *supra* note 385, at 538 n.166.

The trial court should instruct the jury in appropriate procedure any time a witness will testify through an interpreter, regardless of what languages the court or counsel believe the jurors understand. This is for two reasons. First, a juror may not be sufficiently proficient in a language to be considered "bilingual," but may understand just enough of the witness's testimony, as relayed directly by the witness, to sense a conflict between the "official version" and the witness's version. Second, stereotypes are often wrong. For example, the blond-haired blue-eyed juror with the light complexion whom no one even thought to ask, may turn out to be quite well-versed in Spanish, Japanese, or even sign language. Either one or both of these considerations may have been at work in the case of Dorothy Kim, the *Perez* juror.

Id. (citing *United States v. Perez*, 658 F.2d 654, 662 (9th Cir. 1981)).

390. *Perez*, 658 F.2d at 662-63.

391. See Miguel A. Méndez, *Hernandez: The Wrong Message at the Wrong Time*, 4 *Stan. L. & Pol'y Rev.* 193, 193 (1992-93).

If the adversarial system can accommodate jury questioning without apparent damage, then it should be able to tolerate jurors' challenges to the accuracy of an interpreter's translation. My experience is that a short interrogation by the judge in the presence of the jurors will generally suffice to clear up questions about the accuracy of the interpretation. *Id.* at 194-95; see also *Hernandez v. New York*, 500 U.S. 352, 379 (1991) (Stevens, J., dissenting). *But see supra* parts V.C-D (noting that questions of interpretation should be resolved at side-bar or outside the presence of the jury).

392. See Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 1 & Applicability (1995) (reproduced in Appendix B).

393. See Appendix B.

394. Hewitt, *supra* note 13, at 197.

395. *Id.*

396. Model Code of Professional Responsibility for Interpreters in the Judiciary Preamble (1995) (reproduced in Appendix B).

397. *Id.* (footnote omitted).

398. *Id.*

399. See Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 7 & cmt. (1995) (reproduced in Appendix B); Massachusetts Code of Professional Conduct for Court Interpreters, *supra* note 208, § 1.04(5)(a); Utah Code of Judicial Administration Rule 3-306(2)(c)(ii) (1990).

400. Massachusetts Code of Professional Conduct for Court Interpreters, *supra* note 208, § 1.04(5)(a).

401. Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 3 (1995) (reproduced in Appendix B).

402. *Id.* at Canon 5; Mass. Gen. L. ch. 221C, § 4(c) (1994); Utah Code of Judicial Administration Rule 3-306(2)(c)(i) (1990).

403. Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 1 & cmt. (1995) (reproduced in Appendix B).

404. *Id.*

405. *Id.*; *see also id.* at Canon 4 & cmt.

406. *Id.* at Canons 3 & 4.

407. *Id.* at Canon 3.

408. Model Code of Professional Responsibility for Interpreters in the Judiciary Canon 8 (1995) (reproduced in Appendix B).

409. González et al., *supra* note 43, at 488.

410. *Id.*

411. *See* cases and sources cited *supra* note 8; *see also* United States v. Gomez, 908 F.2d 809, 811 (11th Cir. 1990) (substituting the location "Elks Lodge" for the word "disco" in an interpretation); Santana v. New York City Transit Auth., 505 N.Y.S.2d 775, 777-78 (Sup. Ct. 1986) (interpreting "to crash" as "to bump").

412. Berk-Seligson, *supra* note 225, at 149. Problems also arise from what interpreters see as their own shortcomings and the manner in which attorneys address witnesses. Most interpreters view vocabulary as their major problem. *Id.* at 2. Most interpreters are generally unaware of a branch of linguistics called "pragmatics." *Id.* at 2, 271 n.2. Court interpreters often consciously change the tone of the witness or defendant (i.e., making the question or answer harsh or antagonistic or making the question or answer more soft and cooperative). *Id.* at 2. Also, the court interpreter's interaction with attorneys and witnesses may make them appear more or less cooperative or aggressive. *Id.* at 3. Attorneys often attempt to manipulate what a witness or defendant will say by how the question is crafted. *Id.* at 24-25. For example, some studies demonstrate that eyewitnesses will recall seeing things at the site of the event that were not there when the examiner used the definite article "the" rather than the indefinite article "a." *Id.* at 25. So the question, "did you see *the* gun?" is more likely to receive an affirmative response than "did you see *a* gun?" *Id.* Attorneys also manipulate lexical presuppositions. *Id.* So the

question, "how fast were the cars going when they *bumped* into each other?" will result in an answer of a lower rate of speed than "how fast were the cars going when they *smashed* into each other?" Interpreters have the ability to strip out these linguistic cues in the interpretation. *Id.*

413. Interpreters are often faced with attorneys and judges "who still believe that the way to make a non-English-speaking defendant [or witness] understand [English] is to shout louder." David L. Lewis, *The Bilingual Courtroom: Court Interpreters in the Judicial Process*, 9 Crim. Just. 48, 48 (1994) (book review).

Interpreters are often seen as yet another piece of furniture in the well of the court. . . . This view fails to recognize that the interpreter's own sense of self, sense of the courtroom, conscious or unconscious biases, and relationship to the defendant's or witness's culture all influence the affect of the interpreter and, therefore, influence the defendant's or witness's ability to "understand" the proceedings.

. . . .

. . . Because tone is conveyed by means of vocalization and nuance in word choice, the interpreter's mediation subtly can alter, intentionally or unintentionally, the tactics chosen by the examiner to address a witness.

. . . .

In the end, even the best interpreter has an active role in the proceeding. Attorneys should be aware of that role in advance and do everything possible to minimize the interpreter's intrusion. Simple rules of clarity of speech and of thought often resolve conventional problems.

Id.

414. *Id.* at 147 ("likability" and "convincingness" appear to be terms of art used by Professor Berk-Seligson).

415. *Id.* at 146.

416. *See supra* note 225.

417. Berk-Seligson, *supra* note 225, at 155-60.

418. *Id.* at 158 (noting that, at a minimum, 17% of the subjects had completed high school or college in a Spanish-speaking country).

419. *Id.* at 155.

420. *Id.*

421. *Id.* at 164-66, 174-76, 182-85.

422. *See* Berk-Seligson, *supra* note 225, at 164-66, 174-76, 182-85. The data were examined using a *t*-test at .05 significance. *Id.*

423. *Id.* at 151.

424. *Id.* at 162-65, 168-69.

425. *Id.* at 162.

426. *Id.* at 161.

427. Berk-Seligson, *supra* note 225, at 161.

428. *Id.* at 163-64.

429. *Id.* at 169. A "register" is a speech variety associated not with any particular group of speakers, but with a "communicative occasion," and "is generally conceived in terms of formality levels." *Id.* (citation omitted). "English has five registers, or levels of formality (1) oratorical, or frozen; (2) deliberative, or formal; (3) consultative; (4) casual; and (5) intimate." *Id.* (citation omitted). The consultative register is usually used to conduct transactions between strangers and is often demonstrated by the speaker providing background information. *Id.* at 170. In the courtroom, judges often use an oratorical style when instructing the jury. *Id.* at 12. Most of the language used by lawyers, however, is in the formal style. *Id.* at 170.

430. *Id.* at 174-75.

431. *Id.* at 169-71.

432. Berk-Seligson, *supra* note 225, at 171.

433. *Id.*

434. *Id.* at 176.

435. *Id.* at 179. A hypercorrection is a form of speech that "reflects the misapplication or overgeneralization of linguistic rules so as to produce nonstandard forms." *Id.* at 170. "Hypercorrection in terms of grammar is exemplified by construction such as 'He gave it to she and I,' which represents the speaker's effort to avoid accusative case pronouns in all contexts, even as objects of prepositions." *Id.*

436. *Id.* at 183-86.

437. William Strunk, Jr. & E.G. White, *The Elements of Style* 18 (3d ed. 1979).

438. *Id.*

439. Berk-Seligson, *supra* note 225, at 179.

440. *Id.*

441. *Id.* at 181.

442. *Id.*

443. *Id.*

444. Berk-Seligson, *supra* note 225, at 181.

445. *Id.* at 180.

446. *Id.*

447. *Id.*

448. *Id.* at 188. The mock jurors were also asked to evaluate the attorney as to intelligence and persuasiveness. *Id.* These results, while consistent with a finding that the jurors found the attorney less intelligent and less persuasive, were not statistically significant. *Id.*

449. Berk-Seligson, *supra* note 225, at 188 (noting that results on the question of persuasiveness were not statistically significant).

450. *Id.* at 190.

451. *Id.* at 190-91.

452. *Id.*

453. *Id.* at 192-93.

454. Berk-Seligson, *supra* note 225, at 195-96.

455. *Id.* at 146-97; *see also infra* part X.A.

456. As we have just demonstrated, very minor speech acts by the interpreter can have an impact on how a factfinder evaluates a witness's testimony. *See* discussion *supra* parts X.A.1-5. Therefore, a judge should permit attorneys to develop a record which includes testimony of competent linguists evaluating the courtroom interpretation not only for misinterpretations but also for verbal cues or acts by the interpreter that may have affected how the factfinder evaluated the relevant testimony. This means that often, in

addition to an audio record, the interpreter should be videotaped. Judges should also be prepared to consider the social science literature in this area. The authors were unable to locate, using very broad queries on WESTLAW[®] or LEXIS,[®] any cases in which courts considered social science evidence in determining whether interpreter action or inaction influenced the factfinder. We conclude, therefore, that either attorneys are not presenting the results of linguistic studies to appellate courts, or appellate courts have not addressed the role of linguistic studies in determining interpreter error in published opinions. In either case, this area of the law needs to be addressed by the courts and legal scholars.

457. González et al., *supra* note 43, at 476, 497.

458. *See generally* Model Code of Professional Responsibility for Interpreters in the Judiciary (1995) (reproduced in Appendix B).

459. For example, of the 13,643 times that the Spanish language federal certification examination was given during the past 10 years, only 558 individuals have been certified as "possessing the required language proficiency to do a *minimally competent job*." Rosann Dueñas González & Victoria F. Vásquez (National Center for Interpretation Testing, Research and Policy), *How to Maximize the Use of the Interpreter: Dos and Don'ts* 3 (1994) (presented at the Hispanic National Bar Association Convention, *La Familia Hispania--A Myriad of Faces: Legal, Practical and Ethical Issues in the Use of Court Interpreters by Attorneys and Judicial Officers*, Sept. 14-18, 1994, Phoenix, Az. [hereinafter HBNA Convention]) (on file with the *New England Law Review*); *see also* González et al., *supra* note 43, at 16.

460. Letter from Robert Joe Lee, Supervisor, Court Interpreting, Legal Translating, and Bilingual Services Section, Administrative Office of the Courts of New Jersey to the authors 2-3 (May 2, 1995) (on file with the *New England Law Review*).

461. *Id.*

462. *Id.*

463. *Id.* at 5.

464. *Id.*

465. Federal Court Interpretation Certification/Examination Statistics, *reprinted in* HBNA Convention, *supra* note 459.

466. *Id.*

467. *Id.*

468. An attorney, however expert, is still just an "aid to a willing defendant--not an organ of the State interposed between an unwilling defendant and his right to defend himself

personally." *Faretta v. California*, 422 U.S. 806, 820 (1975), *quoted in United States v. Mosquera*, 816 F. Supp. 168, 173 (E.D.N.Y. 1993).

469. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984).

470. *Frazer v. United States*, 18 F.3d 778, 782 (9th Cir. 1994) (noting that effective assistance of counsel "contemplates open communication unencumbered by unnecessary impediments to the exchange of information and advice"); *see also supra* part III.A.

471. *Guerin v. Commonwealth*, 339 Mass. 731, 734-35, 161 N.E.2d 38, 40-41 (1959).

472. *See Hewitt, supra* note 13, at 14 (citing studies performed in California, New Jersey, New York, Utah, and Washington); *Eliminating the Barriers, supra* note 10, at 49.

473. State Court Interpreter Certification Consortium, *Guidelines for Consortium Organization and Operation Introduction* (June 23, 1995) (on file with the *New England Law Review*).

474. *Id.*

475. *Id.*

476. *Id.* § 1.1. The Consortium Guidelines provide that Washington will provide: "Two versions of its existing Spanish test; and one version each of its Vietnamese and Korean tests." *Id.* New Jersey will contribute: "Two versions of its Spanish test . . . one version of its existing Haitian Creole French test; one version of its existing Portuguese test; and one version of its new Arabic, French, Italian, Mandarin Chinese, Polish and Russian tests as they are developed." *Id.* Oregon will contribute a Russian language test by January 1, 1996. *Id.* § 1.

477. *Id.* § 2.1.

478. *Samborn, supra* note 26, at 22.

479. State Court Interpreter Certification Consortium, *supra* note 473, § 1.2. "States with estimated populations of non-English speakers greater than one million may be required to pay a higher fee . . ." *Id.* § 1.2.1. The Guidelines provide that this is subject to negotiations with the Consortium's Steering Committee. *Id.*

480. *Id.* § 3.

481. *See Hewitt, supra* note 13, at 185-87. Some state statutes already provide for telephonic court interpretation. *See Kan. Stat. Ann. § 75-4353(c)(B)* (Supp. 1994); *Me. Rev. Stat. Ann. tit. 5, § 51* (West Supp. 1994). At least one state statute provides for televideo interpretation. *See Wis. Stat. Ann. § 807.14* (West 1994) ("On request of any

party, the court may permit an interpreter to act in any civil proceeding other than trial by telephone or live audio-visual means.").

482. There are now software programs and equipment using the internet that offer low cost two-way televideo conferencing. *See infra* part XII.D.

483. *See infra* part XII.C.

484. *See infra* part XII.C.

485. *See infra* part XII.C.

486. *See infra* part XII.C.

487. *See infra* part XII.C.

488. *See infra* part XII.C.

489. *See* discussion *infra* parts XII.C-E.

490. Hewitt, *supra* note 13, at 187.

491. *See infra* part XII.C.

492. Hewitt, *supra* note 13, at 188.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.* at 189.

497. Hewitt, *supra* note 13, at 189

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.*

502. Hewitt, *supra* note 13, at 190-91.

503. *Id.*

504. AT&T Language Line[®] Services is a registered trademark of the AT&T Corp.

505. "Courts in Arizona, Florida, Georgia, Massachusetts, Michigan, Minnesota, Nevada, Oregon, Texas, Virginia and Wyoming use the service." Anne O'Reilly, *On-Call Translators: AT&T's Language Line*, 32 Judges' J., Summer 1993, at 38, 38; Jaret Seiberg, *Telephone Interpreters Ease Court Costs and Delays*, Conn. L. Trib., Mar. 21, 1994, at 6 (discussing Connecticut, Georgia, Oregon, Minnesota, and Maryland); Stewart Ain, *A Drive for Court Interpreters*, N.Y. Times, July 3, 1994, section 13LI, at 8 (discussing New York).

506. *See supra* note 505 and accompanying text. Starting in January 1992, MCI offered interpreters through MCI Forum, a joint project of MCI and Berlitz Translation Services. Customers had to call MCI Forum at least 24 hours in advance to set up a time for the conference call and request an interpreter. Sasha Cavander, *New service on line: Multilingual Phoning*, USA Today, Feb. 1, 1992, at 8A. MCI Forum offered interpreters in 120 languages or dialects through 2,200 Berlitz interpreters in the United States. *Id.* Interpreters charge \$100 for the first hour--one-hour minimum--\$25 for each additional 15 minutes. *Id.* For customers in an area that has an interpreter in the required language, there is no additional charge to have the interpreter physically present. *Id.* Obviously, this service is of little advantage to courts. MCI Forum lacked the convenience and cost savings of AT&T Language Line[®] Services. Recently, however, MCI announced plans to create a new service similar to AT&T Language Line[®] Services. Pam Belluck, *Life, Death on the Language Line Police, Hospitals Use Interpreters via Phone*, Ariz. Republic, Sept. 11, 1995, at C2. The details of MCI's new program were not available at the time this article was written. Courts should evaluate whether the new MCI interpreter service will be superior to existing AT&T Language Line[®] Services when choosing a telecommunications company to provide court interpreter services.

The authors apologize to the reader if this section reads like an AT&T infomercial. However, AT&T Language Line[®] Services is the first and paradigmatic commercial provider of commercial telephonic court interpreter services.

507. Letter from Jeffrey R. Bromley, Marketing Manager, AT&T, to potential AT&T Language Line[®] Services customers 1 (undated) [hereinafter Bromley Letter] (on file with authors).

508. *AT&T Language Line[®] Services Interpreter Services Agreement*, Additional Terms and Conditions, at para. 1 (emphasis added) (on file with the *New England Law Review*).

509. AT&T advertisement for Language Line[®] Services (on file with the *New England Law Review*).

510. *Addendum to AT&T Language Line[®] Services Interpreter Service Agreement for use with Court Systems* [hereinafter *AT&T Addendum*] (on file with the *New England Law*

Review). AT&T requires that a copy of the following notice printed in bold and all capital letters be provided to each judge and presiding officer:

NOTICE TO CUSTOMERS
USING AT&T LANGUAGE LINE SERVICES
FOR COURT INTERPRETATION

AT&T LANGUAGE LINE SERVICES' INTERPRETERS ARE CAREFULLY SCREENED AND TESTED TO ENSURE THATY [sic] HAVE EDUCATED NATIVE FLUENCY IN ENGLISH AND THEIR OWN LANGUAGE(S). HOWEVER, THESE INTERPRETERS ARE NOT CERTIFIED COURT INTERPRETERS AND SHOULD NOT BE USED DURING TRIALS OR OTHER LENGTHY PROCEEDINGS, OR DURING ANY PROCEEDINGS IN WHICH THERE ARE A LARGE NUMBER OF PARTICIPANTS OR A JURY. USE SHOULD BE LIMITED TO PRE OR POST TRIAL PROCEEDINGS, SUCH AS BAIL HEARINGS, ARRAIGNMENTS OR RESTRAINING ORDER HEARINGS.

WHEN USING AT&T LANGUAGE LINE SERVICES INTERPRETERS, THE PRESIDING JUDGE SHOULD ENSURE THAT ADEQUATE TELEPHONE EQUIPMENT IS AVAILABLE AND THAT BACKGROUND NOISE IS MINIMAL. THE JUDGE MUST ALSO CONTROL THE CONVERSATION AT ALL TIMES SO THAT ONLY ONE PERSON SPEAKS AT A TIME AND THE INTERPRETER HAS ADEQUATE TIME TO INTERPRET EACH SEGMENT OF THE CONVERSATION. ALL INTERPRETATION IS CONSECUTIVE INTERPRETATION. *AT&T Addendum, supra*, at Attachment A.

511. Hewitt, *supra* note 13, at 185.

512. *Id.*

513. *Id.*

514. *Id.* at 185.

515. *Id.*

516. Seiberg, *supra* note 505, at 6.

517. Hewitt, *supra* note 13, at 186-90.

Simultaneous interpretation is not possible with ordinary telephone equipment, because ordinary telephone lines do not separate incoming and outgoing signals. For the interpreter to hear over the line from the courtroom, the line must remain open continuously, and the sound of the interpreter's voice is picked up along with the incoming signal from the court room. *Id.* at 187. This may change as the equipment developed by the National Center for State Courts becomes more readily available. *Id.*

518. O'Reilly, *supra* note 505, at 38. For an excellent discussion of the ACTFL Proficiency Guidelines and their interpretation, see Alice Omaggio Hadley, *Teaching Language in Context* 12, 354-55, 456 (2d ed. 1993).

519. *Id.* The test does not evaluate note taking, witness control, knowledge of legal terminology, court interpreter ethics, short-term memory, or ability to switch between languages. The ACTFL Proficiency Guidelines should be compared with the federal Court Interpreter Examination. The Court Interpreter Examination has a 15-minute section testing the interpreter's ability to interpret in a consecutive mode. Berk-Seligson, *supra* note 225, at 38. The section tests the interpreter's ability, both English to Spanish and Spanish to English, and includes registers from technical-expert to low socio-economic. *Id.* The simultaneous mode section is 10 minutes long and tests the interpreter's ability to interpret jury instructions and opening or closing statements. *Id.* at 39. The sight translation section is approximately seven minutes. *Id.* The oral section is approximately 45 minutes long. *Id.* The candidate is permitted 45-50 errors. *Id.* The written component is a two-and-a-half hour, 200 question multiple-choice test. *Id.* at 37. The test is equally divided between English and Spanish, and the interpreter must pass both sections. *Id.* The multiple-choice section tests vocabulary, reading comprehension, and usage. *Id.* Unlike the oral portion, the written section does not emphasize legal vocabulary. *Id.*

520. Telephone Interview with Winnie Heh, Product Manager, AT&T Language Line[®] Services and Shiva Bidar-Sielaff, Operations Manager, Interpreter Support, AT&T Language Line[®] Services (Oct. 25, 1995) [hereinafter Heh & Bidar-Sielaff Interview].

521. *Id.*; *see also* Samborn, *supra* note 26, at 23 ("[However, i]t's a crap shoot in terms of the kind of talent you will get on the end of the line from AT&T'" (quoting William E. Hewitt, National Center for State Courts)).

522. Heh & Bidar-Sielaff Interview, *supra* note 520.

523. *Id.*

524. *Id.*

525. *Id.*

526. ACTFL, Proficiency Guidelines 3 (1989). *Compare id. with* Seltzer v. Foley, 502 F. Supp. 600, 606 & n.4 (S.D.N.Y. 1980). "[T]he Language of the law [is] not common everyday English and . . . it [is] something unto itself." *Foley*, 502 F. Supp. at 606. "[W]ords used in simple hearings never appeared or appeared three times or less in a normal million words of print." *Id.* at 606 n.4. Fred Rodell once quipped: "The Law is carried on in a foreign language. . . . [L]aw deals almost exclusively with the ordinary facts and occurrences of everyday business and government and living. But it deals with them in a jargon which completely baffles and befuzzles the ordinary literate man"

Fred Rodell, *Woe unto You, Lawyers!* 7 (1939), *quoted in* Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations* 237-38 (1993).

527. ACTFL, *Proficiency Guidelines* 3 (1989).

528. *Id.*

529. *Id.*

530. Edwards, *supra* note 23, at 101. In *Santana*, the trial judge complained that Spanish-speaking interpreters could not properly interpret a New York City Puerto Rican dialect called "Spanglish." *Santana v. New York City Transit Auth.*, 505 N.Y.S.2d 775, 777 (Sup. Ct. 1986). The ACTFL Proficiency Guidelines are the minimum standards that an AT&T interpreter must meet. *See* Heh & Bidar-Sielaff Interview, *supra* note 520. Many AT&T Language Line[®] Services Interpreters are full-time professionals; all of whom must meet (and some of whom exceed) the minimum qualifications for ACTFL superior proficiency. *See id.* This reinforces the need for a judge to voir dire the interpreter on the record to ensure that the interpreter is qualified to interpret in the particular proceedings before the court.

531. The aim of court interpretation is to place the non-English speaker in the same linguistic position as a native English speaker. *See supra* notes 38-54 and accompanying text.

532. Paul M. Valentine, *Suspects Get Phone Access to Interpreters; Phone Service Aims Shorten Detentions After Arrest*, *Wash. Post*, Apr. 7, 1994, at M1.

533. This is because AT&T interpreters are located in all 50 states and Canada, so it is unlikely that they have any prior involvement with the parties or the proceeding. Heh & Bidar-Sielaff Interview, *supra* note 520.

534. *See* Seiberg, *supra* note 505, at 6 (stating that AT&T Language Line[®] Services is more cost effective than in-person interpretation when the interpretation lasts less than 15 minutes). AT&T charges between \$2.20 and \$2.60 per minute for interpreters during peak hours Monday through Friday, 5:00 a.m. to 5:00 p.m. Bromley Letter, *supra* note 507, at Attachment A-Customer Charges. The scarcer the language, the more expensive the interpreter (e.g., Farsi, Tagalog, Thai, and Urdu cost \$2.60 per minute). *See id.* Also, AT&T Language Line[®] Services charges more per minute during off-peak time. *Id.* However, AT&T Language Line[®] Services does offer volume usage discounts, and there is no additional toll charge for using AT&T Language Line[®] Services. *Id.* In comparison, federally-certified court interpreters earn \$250 per day, \$135 per half-day, and \$35 per hour in overtime, and non-certified interpreters earn \$120 per day, \$65 per half-day, and \$20 per hour in overtime effective March 1991. Implementing the Court Interpreters Amendments Act, *supra* note 314, at Appendix 2 (effective Mar. 1, 1991).

535. Seiberg, *supra* note 505, at 6.

536. See sources cited *supra* note 505. But see Hewitt, *supra* note 13, at 182-83.

537. This instruction should obviate any jurisdiction or long-arm problems in compelling the interpreter to participate in person in an in-court proceeding at a later date should that be required. For example, if a defendant were to allege ineffective assistance of counsel because of interpreter error, the court may decide to hold a hearing regarding the accuracy of the interpretation. The interpreter's presence would probably be required at the hearing. The court should remember that AT&T Language Line[®] Interpreters are in all 50 states and Canada, and the court will not know where a specific interpreter is located at the time of the interpretation.

538. The court has an independent duty to satisfy itself that the AT&T Language Line[®] Services Interpreter is qualified to interpret the proceedings. Piatt, *supra* note 4, at 11 ("[A]n interpreter ordinarily cannot, upon his or her own blanket assertion of competence, qualify for appointment."). This is a duty that the court may not delegate to AT&T. See *id.*

539. At one time, an AT&T Language Line[®] Services Interpreter would not reveal his or her identity on the telephone other than to provide an AT&T interpreter identification number. See Hewitt, *supra* note 13, at 184. Currently, AT&T policy is to permit its interpreters to identify themselves and be sworn when serving as court interpreters. Heh & Bidar-Sielaff Interview, *supra* note 520.

540. For example, AT&T Language Line[®] Services Interpreter Services Agreement provides that "under applicable law Language Line Services may be obligated to reveal communications which evidence or constitute criminal activity." *AT&T Language Line[®] Services Interpreter Services Agreement*, *supra* note 508, para. 5.

541. See *supra* part III.F.

542. Model Rules of Professional Responsibility for Interpreters in the Judiciary Canon 6 (1995) (reproduced in Appendix B).

543. See Davis & Hewitt, *supra* note 4, at 144 (recommending that AT&T interpreters only be used for misdemeanor cases). Moreover, AT&T itself recommends that AT&T Language Line[®] Services interpreters only be used for "bail hearings, pre-trial arraignments, and hearings for restraining orders." *AT&T Addendum*, *supra* note 510, at 1; see also New Jersey Standards for Court Interpreting, *supra* note 9, § 3B:16(B). The judge always has the option of setting the bail without prejudice when using the AT&T Language Line[®] Services interpreter. The defense attorney can ask for a rehearing on the question of bail when a certified interpreter is available.

544. González et al., *supra* note 43, at 242-43.

545. de Jongh, *supra* note 23, at 290.

546. "Videoconference/The real-time and usually two-way transmission of digitized video images between two or more locations. Videoconferencing has traditionally been done with dedicated video equipment. But increasingly personal computers communicating over switched digital telephone lines are being used for Videoconferencing." John J. Oslund, *Face to Face in Cyberspace*, Star Trib., Aug. 6, 1995, at 1D.

547. *See supra* notes 532-36 and accompanying text.

548. Matt Assad, *Prison to Test Video Arraignments*, Morning Call, July 18, 1995, at B3 ("Court and prison officials have decided to test a new video conferencing system that will enable inmates to appear at their arraignments, bail hearings, bench warrants, guilty pleas and other minor hearings without ever having to leave the prison.").

549. Gary Spencer, *Appeals by Video Planned to Start by End of Year*, N.Y. L. J., Oct. 31, 1995, at 1 ("New York courts will take their first step into the video age by the end of this year, when a two-way television system will be installed to bring attorneys in Brooklyn face to face with the appellate justices in Rochester who will decide their appeals."). Among other appellate courts using videoconferencing are Florida's First District Court of Appeals and the United States Court of Appeals for the Third Circuit. *Id.* Other courts are using videoconferencing for arraignments. V. David Sartin, *Court Set to Join Electronic Age*, Plain Dealer, Oct. 6, 1995, at 4B.

550. Currently, desktop personal computer (PC) video-conferencing units are becoming more popular. Sales of PC video-conferencing units are estimated at 200,000 in 1996 to more than 3.9 million by 1999. Oslund, *supra* note 546, at 1D. The price of videoconferencing equipment is rapidly falling. *Id.* Today, a \$2,500 PC unit can do what took \$25,000 in dedicated video-conferencing equipment a few years ago. *Id.* Experts anticipate that, in a few years, videoconferencing will cost roughly the price of a telephone call. *Id.* Because of the volume of data transmitted in a videoconference call, digital-telephone lines are required. *Id.*

551. *Id.*

552. Dr. Alan K. Melby, ATA Translations & Computers Committee, Brigham Young Translation Research Group, *Should I Use Machine Translation?* (Draft Apr. 13, 1995), available in the World Wide Web at <http://humanities.byu.edu/trg/mt4me.htm> at *13, *25 (hardcopy on file with the *New England Law Review*).

[C]urrent machine translation systems strictly adhere to the principle of "garbage in--garbage out." Therefore, if high quality translation is needed yet the source text is poorly written, forget about machine translation. There is more. Machine translation systems cannot currently produce high-quality translations of general-language texts even when well written. It is well-known within the field of machine translation that current systems can only produce high-quality translations when the source text is restricted to a narrow domain of knowledge and, furthermore, conforms to some sublanguage. A sublanguage is

restricted not just in vocabulary and domain but also in syntax and metaphor. Only certain grammatical constructions are allowed and metaphors must be of the frozen variety rather than dynamic. Naturally occurring sublanguages are rather rare

. . . .

At this point, many requesters of translation will be asking about the future. Won't we soon have machine translation systems that can produce translation that is as good as human translation but faster and cheaper? The answer is that this will not happen in the foreseeable future.

Id. at *12-*13.

553. *Renamed Personal Dictation System to Hit the Stands as IBM's Voicetype Dictation Designed to Suit Everyone*, Computergram International, Dec. 1, 1994, available in WESTLAW, 1994 WL 2789525 (noting that 97% accuracy requires that the machine be trained to an individual's voice).

554. *Executive Update, Computer's Automation Speech Recognition Technology is Advancing, But Faces Big Hurdles*, Inv. Bus. Daily, Sept. 27, 1994, at A4.

555. *Echoes from Silicon Valley*, Agence France-Presse, Sept. 8, 1994, available in WESTLAW, 1994 WL 9593297.

556. *See supra* part VI.

557. *See supra* part II.

558. *See supra* part II.

559. *See supra* part III.E.

560. Learned Hand, "*Thou Shalt Not Ration Justice*," 9 Brief Case 3, 5 (1951).

561. *United States v. Mosquera*, 816 F. Supp. 168, 170-74 (E.D.N.Y. 1993).

562. *See supra* part XII.A.

563. *See supra* part XII.A.

564. Hovland, *supra* note 4, at 477-81.

565. For the text of the Model Court Interpreter Act, see Appendix C.

566. *See* Appendix C.

567. *See* Appendix C.

568. For the text of the Model Code of Professional Responsibility for Interpreters in the Judiciary, see Appendix B.

569. *See supra* parts XII.B-E.

570. *See supra* part XII.E.

571. *See supra* part IX.

Appendices

Appendix A-1

Take Command of the Proceedings!

1. All judges should have a copy of the Model Code of Professional Responsibility for Interpreters in the Judiciary or a copy of their own state's version of ethical guidelines for court interpreters.
2. A judge should advise the non-English speaker not to engage in conversation with the interpreter and to answer only the questions asked, and if the non-English speaker does not understand the question, he or she should simply state, "I do not understand the question."
3. A judge should advise the jury at the beginning of the case that the court has assigned an interpreter who will assist the defendant or a witness who does not speak or understand English. The jury should be instructed that only the English rendition given by the interpreter is evidence in the case.
4. A judge should have the attorneys use short sentences. Do not allow the attorneys to show off their command of the English language. Keep it simple!
5. If there are long periods in which the interpreter is not interpreting, this may signal that a problem is occurring.
6. A judge should not allow a witness, counsel, or the jurors to engage in conversation with the interpreter.
7. If a language problem occurs in a jury trial, a judge should use a side-bar conference with the attorneys and the court interpreter present. If the problem appears to be complex, a judge should call a recess.

8. A judge should allow the court interpreter to use appropriate hand signals with a witness to regulate the speaker when giving a lengthy answer. These interruptions should be kept to a minimum. This is necessary for the interpreter who has to use short-term memory to remember a lengthy response. However, the interpreter should be able to allow the witness to utter a sentence or two before intervening to interpret. The testimony should not be chopped up into such tiny fragments that the witness loses his or her train of thought or the jury cannot follow the testimony.

9. A judge should not dismiss the interpreter while the jury is deliberating. The interpreter should remain "on call."

10. A judge should preserve the record of the interpreter's rendition of the foreign language to preserve any interpretation errors for further review.

11. A judge should allow only one person to speak at a time.

12. Attorneys should use the active voice when questioning a witness.

13. Attorneys should avoid using pronouns. Attorneys should use proper nouns instead of pronouns. Questions or statements should be made to the witness as if the interpreter was not present.

14. A judge should request attorneys to avoid unnecessary jargon, slang, colloquialisms, technical terms, proverbs, metaphors, or allegories.

15. Attorneys should be advised to avoid rhetorical questions and negatives, such as "Did you not . . . ?"

16. A judge should never allow the attorneys to ask compound questions.

17. A judge should discourage questions that begin, "Isn't it true that . . . ?"

18. No one, including a judge, should put fact questions to the interpreter. Questions are put to the witness.

19. A judge and attorneys should not ask the interpreter to do their jobs. It is the obligation of the interpreter to interpret the proceedings, and not to explain them. A judge should not ask or allow the interpreter to perform administrative tasks, such as distributing forms, filing, or escorting non-English-speaking individuals to different areas of the building.

20. A judge should not allow the attorneys to use double negatives when phrasing questions.

21. After a witness has finished testifying through a court interpreter, a judge should ask on the record whether the parties are satisfied with the services of the interpreter.

22. At the pre-trial conference, or early in the proceedings, a judge should establish ground rules for working with the court interpreter and attorneys. For example, a judge should decide whether the attorneys should object to the interpreter's rendition in open court or at a side-bar conference.

23. A judge should order the party offering the translated documents, including audiotapes or videotapes, to make the original and the translation available to the opposing party and his or her language experts. Should the opposing party wish to challenge some or all of the translation, he or she should file a motion in limine not later than forty-eight hours before the trial.

24. A judge should order an attorney representing the party requiring an interpreter to notify the Office of Court Interpreter Services as soon as the attorney becomes aware of the need for such services. The attorney should be prepared to make the party or witness available to the interpreter so that the interpreter can determine whether he or she can interpret for this individual. If the proceedings are cancelled, rescheduled, or, for any other reason, the interpreter is not required, the attorney requesting the interpreter should immediately notify both the Office of Court Interpreter Services and the interpreter.

25. Once a judge has qualified an interpreter, the judge should give all due respect and deference to the court interpreter's dual role as an officer of the court and a language expert. A judge should engage in a rebuttable presumption that the interpretation is correct. Therefore, in close cases, a judge should defer to the court interpreter's rendition of the testimony or interpretation of the Model Code of Professional Responsibility for Interpreters in the Judiciary. An attorney making an objection to the rendition should be asked to make an offer of proof as to an alternative rendition which the attorney considers more accurate or correct.

26. In order to assist the interpreter in preparing for the hearing or trial, a judge should order the attorneys to provide the interpreter with copies of the pleadings and other documents that are likely to be mentioned, used or read during the hearing or trial. For example, transcripts of the grand jury and preliminary hearings; police, chemist's, ballistics and autopsy reports; hospital and medical records; treatises; transcripts of depositions; and the judge's jury instructions should all be made available to the court interpreter prior to the proceedings.

Appendix A-2

Suggested Voir Dire Questions--Defendant or Witness

1. What is your name?
2. Where do you live?

3. Are you married or single? What is your spouse's name?
 4. Do you have any children? How old are they?
 5. Where do they go to school?
 6. What kind of work do you do?
 7. Where did you go to school? Describe your formal education? Did you study English in school?
 8. How far did you go in school?
 9. Can you read and/or write (*native language*)?
 10. How long have you lived in _____?
 11. Do you drive a car?
 12. How did you get to court this morning?
 13. What language do you use when you speak to your attorney?
 14. Have you previously used interpreters?
-

Appendix A-3

Voir Dire Questions to Qualify an Interpreter

Prior to commencing the proceeding, the interpreter should be qualified on the record. If the court interpreter is certified, the judge may want to use a more abbreviated voir dire.

1. What is your name?
2. Do you know or are you related to the defendant, counsel, witnesses, or any party to this case? Have you interpreted in earlier proceedings in this case? If so, for whom?
3. If so, please describe your relationship?
4. Are you aware of any reason that your impartiality may be questioned?
5. Do you speak _____?
6. Is it your native language?

7. How did you learn to speak _____? Do you have any formal education in the _____ language? [Use this to explore countries and places where the interpreter may have had contact with the relevant language.]
8. Do you speak English?
9. How did you learn English? Do you have any formal education in English? [Use this to explore the interpreter's familiarity with English.]
10. Can you read both languages?
11. Have you completed any training to qualify you as an interpreter? If so, please describe your training?
12. Have you had any training or education as a lawyer, paralegal, or legal secretary? If so, please describe your training?
13. If the trial involves extremely technical, legal, scientific, or "street" language, ask the interpreter about his or her ability to interpret the necessary vocabulary?
14. Are you a certified court interpreter in any jurisdiction? If so, which jurisdiction(s)? Which languages?
15. Have you taken a test to qualify as an interpreter? If so, which test(s)? How did you score? What is considered to be a qualifying score on that examination? Did you take the oral and written examination?
16. Have you been qualified by any court as an interpreter?
17. What courts, what type of trials, how many of each, etc.?
18. Have you ever been found unqualified to serve as an interpreter by a court? If so, state the circumstances?
19. Have you ever been disciplined by a court? If so, state the circumstances?
20. Do you have any experience in simultaneous interpreting? If so, please describe?
21. Do you have any experience in consecutive interpreting? If so, please describe?
22. Do you understand that as an interpreter you must interpret everything, and that you may not summarize the testimony or other proceedings?
23. Have you read the Model Code of Professional Responsibility for Interpreters in the Judiciary? If so, please summarize some key ethical obligations for court interpreters?⁽⁵⁷²⁾

24. Are you prepared to conduct yourself according to the Code during the course of these proceedings?

25. Have you had an opportunity to speak with the defendant(s) or witness(es)? If not, and if it is possible, give the interpreter a few minutes to speak with the persons for whom he or she will be interpreting.

26. What language(s) does the defendant(s) or witness(es) speak? Does the defendant(s) or witness(es) speak a dialect of that language? If so, are you prepared to interpret for him or her?

27. Did you experience any difficulty in communicating with the defendant(s) or witness(es)?

28. Is there any other information that the court or the attorney(s) should be aware of in determining your qualifications to serve as a court interpreter?

Provide the attorney(s) with a brief period to ask questions or follow up on the court's voir dire, and then make a finding on the record as to the interpreter's qualifications. If the interpreter is qualified, he or she should be sworn in open court.

Appendix A-4

Colloquy with Witness Before the Beginning of the Hearing or Trial Regarding the Role of a Court Interpreter

The Court has assigned a court interpreter to assist you during this trial/hearing. Before we begin this trial/hearing, you must understand the role of the court interpreter. The interpreter is here only to interpret questions that an attorney or I ask you and to interpret your answers or to assist you in understanding the proceedings. The interpreter will say only what you say or what we say and will not add, omit, or summarize anything.

If you do not understand a question that was asked, do not turn to the interpreter and ask the interpreter for clarification. You should request clarification from the person who asked the question, whether it is an attorney or me.

Please remember that you are giving testimony to this Court or to the jurors, not to the interpreter. Therefore, please face the attorney, not the interpreter, when answering the question. Do not ask the interpreter for advice.

Please speak in a loud, clear voice so that everyone in the courtroom can hear you. If you do not understand a question, simply state that you do not understand the question. If you need something repeated, please tell the person speaking to you. If you do not understand the interpreter, please tell me.

Finally, please wait until the entire question has been interpreted in your language before you answer a question. Do you have any questions about the role of the court interpreter? Do you understand the interpreter?

Appendix A-5

Jury Instruction--Use of a Court Interpreter: Criminal Case

[The purpose of this jury instruction is to introduce the court interpreter to the jurors. This jury instruction is to be given at the commencement of the trial, after the jury is selected and before the opening statements of counsel.]

Ladies and Gentlemen, a qualified/certified court interpreter, Mr./Ms. _____, has been sworn to accurately interpret the proceedings and assist the Court during this trial.

As I have already explained, for the duration of this trial you are going to be the judges of the facts. You will be determining what weight or value to assign to the testimonial and physical evidence. You will also be determining the credibility of the witnesses.

The fact that the defendant or a witness needs an interpreter or that he or she has limited or no proficiency in English should not be considered in any way as a factor for or against the defendant unless you decide that the defendant's or witness's inability to speak, read, or otherwise understand English is at issue. You, as jurors, have taken an oath to be fair and impartial to both the [state] and the defendant. The obligation of this court is to conduct a fair trial for all individuals, regardless of the language they speak or how well they may or may not speak English. Prejudice or bias against or for persons who have little or no proficiency in English, or because they do not speak English, is not permitted under the law.

Also, you may not consider the manner or demeanor of the interpreter in evaluating testimony. Any personal bias that you may have for or against the interpreter must be disregarded in evaluating the testimony of the defendant or witness(es).

While you, the jurors, are the sole judges of the facts, you are limited to considering those facts developed during the course of the trial and admitted into evidence. The court interpreter, Mr./Ms. _____, has been sworn to make a true and impartial interpretation using his or her best abilities and judgment. In addition to literally interpreting the questions, testimony, or other court proceedings, the court interpreter must also maintain the language register of the testimony. Therefore, if the court interpreter uses slang, vulgarities, language demonstrating little formal education or articulate, elegant, and sophisticated language, he or she is merely speaking the words of the individual whose speech he or she is interpreting. As jurors, you may wish to consider

the defendant's or a witness's choice of language, manner, and demeanor in determining his or her credibility.

At times, you may hear a long question or phrase in one language interpreted as a short question or phrase or even a single word in another language. This is normal and should not cause you to doubt the fidelity of the interpretation. For example, the English word for the month of April is interpreted in Navaho as, "the month in which the baby eagles are born." Therefore, the Navaho interpretation would be much longer than the English word "April."

Some of you may speak one or more languages with some proficiency. This language may be the same or similar to the language spoken by the defendant or by the witness(es). Others of you may speak another language of the same family (for example, French, Italian, and Spanish are all romance languages) and may hear words or phrases which you believe that you understand. Even those of you who only speak English, may hear words or phrases spoken by a witness that sound similar to words or phrases in English. Sometimes these words or phrases are false cognates. False cognates are words that sound the same in two languages but have different meanings, or words that may have similar meanings but with important and subtle distinctions.⁽⁵⁷³⁾ Even if you speak the same language as the defendant or a witness, often there are regional differences in the meaning of words.

Moreover, you may only consider evidence provided through the court interpreter in order to insure that all jurors consider the same evidence.⁽⁵⁷⁴⁾ Therefore, "you must disregard any different meanings of non-English words" which you may be aware of, because only the English language interpretation, as provided by the sworn court interpreter, is evidence and may be considered by you in the course of your deliberations.⁽⁵⁷⁵⁾

[In Part VII there are suggested instructions to bilingual jurors on how to address a disputed interpretation.]

Appendix A-6

Waiver of a Court Interpreter

I, _____, hereby waive my right to a qualified/certified court interpreter. I have (have not) spoken with my attorney regarding my decision to waive my right to a court interpreter. My attorney has (has not) informed me of my rights to a court interpreter and how a court interpreter may assist me in preparing a defense or in understanding court proceedings. I understand that an interpreter who speaks my native language will be appointed by the court at no cost to me. The interpreter would assist me in communicating with my attorney and in translating the testimony of witnesses or other court proceedings. Further, I understand that in waiving my right to a

court interpreter, I may experience difficulty in communicating with my attorney, confronting witnesses or in other ways may be hindered in preparing my defense. Despite these warnings, I knowingly and freely waive my right to a court interpreter.

Name of Defendant

Name of Defense Attorney

Dated: _____

Ruling on Defendant's Waiver of a Court Interpreter

After conducting a colloquy with the defendant, I find that he (she) has (has not) knowingly, intelligently, and freely waived his (her) right to a court interpreter. Accordingly, the defendant's waiver of a court interpreter is _____.

Judge

Dated: _____

[The interpreter should perform a sight translation of the waiver and read it to the defendant in open court on the record. In the alternative, the judge may instruct the interpreter to do the sight translation for the defendant in the presence of the defense attorney. Thereafter, the judge should ask, on the record, if the sight translation was performed.]

Appendix A-7⁽⁵⁷⁶⁾

California Standards for Using Court Interpreters

Standards of Judicial Administration Recommended by the Judicial Council § 18.1

Interpreted Proceedings: Instructing Participants on Procedure

[To save time in] interpreted proceedings the court should instruct the participants on the procedure to be followed. These instructions may be given in writing [already translated into languages frequently used in the court] and should normally include:

(a) [Instructions to interpreters] The following instructions should be given to interpreters:

(1) A preappearance interview should be held with the party or witness to enable the interpreter to become familiar with speech patterns and linguistic traits and to determine what technical or special terms may be used. Except when consent is given by counsel, the pending proceedings should not be discussed with the party unless the party's counsel is present or with a witness unless counsel for the party calling the witness is present.

(2) During the preappearance interview with a non-English speaking witness, the interpreter should give the following instructions on procedure:

(i) Speak in a loud, clear voice so that the entire court and not just the interpreter can hear.

(ii) All responses should be directed to the person asking the question, not to the interpreter.

(iii) Any question should be directed to counsel or to the court and not to the interpreter. Do not seek advice from or engage in discussion with the interpreter.

(3) During the preappearance interview with a non-English speaking party, the interpreter should give the following instructions on the procedure to be used when the party is not testifying:

(i) The interpreter will interpret all statements made in open court that are a part of the case.

(ii) Any questions should be directed to counsel. The interpreter will interpret all questions to counsel and the responses. Do not seek advice from or engage in discussion with the interpreter.

(4) Communications between counsel and client are not to be disclosed.

(5) No legal advice should be given to a party or witness. Legal questions should be referred to the attorney or to the court.

(6) All statements made by the witness should be interpreted including statements or questions to the interpreter. No summary of any testimony should be made except on instruction by the court.

(7) The court should be informed if the interpreter is unable to interpret a word, expression, or special terminology.

(8) All words, including slang, vulgarisms, and epithets, should be interpreted to convey the intended meaning.

(9) All statements made in the first person should be interpreted in the first person. For example, a statement or question should not be introduced with the words, "He says . . . "

(10) All inquiries or problems should be directed to the court and not to the witness or counsel. In unusual circumstances, the interpreter may request permission to approach the bench with counsel to discuss the problem.

(11) The interpreter should be positioned near the witness or party but should not block the view of the judge, jury, or counsel.

(12) The court should be informed if the interpreter becomes fatigued during the proceedings.

(13) An interpreter who is to interpret for a party at counsel table should speak loudly enough to be heard by the party or counsel but not so loudly as to interfere with the proceedings.

(b) [Instructions to counsel] The following instructions should be given to counsel:

(1) All questions by counsel examining a non-English speaking witness should be directed to the witness and not to the interpreter. For example, do not say, "Ask him if . . . "

(2) If counsel understands both languages and disagrees with the interpretation, any objection should be directed to the court and not to the interpreter. Counsel should ask permission to approach the bench to discuss the problem.

(3) If counsel believes that a prospective interpreter lacks the qualifications necessary to serve as an interpreter in the matter before the court, counsel may be permitted to conduct a brief supplemental examination before the court decides whether to appoint the interpreter.

Appendix B⁽⁵⁷⁷⁾

Model Code of Professional Responsibility for Interpreters in the Judiciary

Introduction

The following document is a Model Code of Professional Responsibility for Interpreters in the Judiciary. The Model Code presents key concepts and precepts, which over the years have emerged in statutes, rules, case law, and professional experience. Like the Model Court Interpreter Act, it has been prepared in consultation with an advisory group of individuals who have special expertise in court interpretation. The advisory group

included the judges, lawyers, court administrators, and state and federally certified professional interpreters who are named in the acknowledgements for this publication.

Purpose of the Model Code

The purposes of the Model Code are threefold:

- 1) to articulate a core set of principles, which are recommended for incorporation in similar codes that may be adopted in the several states or local jurisdictions;
- 2) to serve as a reference, which may be consulted or cited by interpreters, judges, and court managers where no other authoritative standards have been adopted, and
- 3) to serve as a basis for education and training of interpreters and other legal professionals.

Research has shown that courts must often rely on interpretation services of bilingual individuals who have received no specific training about the requirements, role and responsibilities of a court interpreter. Research has also shown that many judges and attorneys are also unaware of the professional responsibilities of the interpreter and how these translate into highly demanding technical skill requirements. At the very least, anyone serving as a court interpreter should be required to understand and abide by the precepts set out in this Model Code. Judges and attorneys should also become familiar with the code and expect conduct from interpreters that is consistent with it.

Code of Professional Responsibility for Interpreters in the Judiciary

Preamble

Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency or a speech or hearing impairment. It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier.⁽⁵⁷⁸⁾ As officers of the court, interpreters help assure that such persons may enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively. Interpreters are highly skilled professionals who fulfill an essential role in the administration of justice.

Applicability

This code shall guide and be binding upon all persons, agencies and organizations who administer, supervise use, or deliver interpreting services to the judiciary.

Commentary:

The black letter principles of this Model Code are principles of general application that are unlikely to conflict with specific requirements of rule or law in the states, in the opinion of the code's drafters. Therefore, the use of the term "shall" is reserved for the black letter principles. Statements in the commentary use the term "should" to describe behavior that illustrates or elaborates the principles. The commentaries are intended to convey what the drafters of this model code believe are *probable* and *expected* behaviors. Wherever a court policy or routine practice appears to conflict with the commentary in this code, it is recommended that the reasons for the policy as it applies to court interpreters be examined.

Canon 1: Accuracy and Completeness

Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and without explanation.

Commentary:

The interpreter has a twofold duty: 1) to ensure that the proceedings in English reflect precisely what was said by a non-English speaking person, and 2) to place the non-English speaking person on an equal footing with those who understand English. This creates an obligation to conserve every element of information contained in a source language communication when it is rendered in the target language.

Therefore, interpreters are obligated to apply their best skills and judgment to preserve faithfully the meaning of what is said in court, including the style or register of speech. Verbatim, "word for word," or literal oral interpretations are not appropriate when they distort the meaning of the source language, but *every spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted*. This includes apparent misstatements.

Interpreters should never interject their own words, phrases, or expressions. If the need arises to explain an interpreting problem (e.g., a term or phrase with no direct equivalent in the target language or a misunderstanding that only the interpreter can clarify), the interpreter should ask the court's permission to provide an explanation. Interpreters should convey the emotional emphasis of the speaker without reenacting or mimicking the speaker's emotions, or dramatic gestures.

Sign language interpreters, however, *must* employ all of the visual cues that the language they are interpreting for requires -- including facial expressions, body language, and hand gestures. Sign language interpreters, therefore, should ensure that court participants do not confuse these essential elements of the interpreted language with inappropriate interpreter conduct.

The obligation to preserve accuracy includes the interpreter's duty to correct any error of interpretation discovered by the interpreter during the proceeding. Interpreters should

demonstrate their professionalism by objectively analyzing any challenge to their performance.

Canon 2: Representation of Qualifications

Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.

Commentary:

Acceptance of a case by an interpreter conveys linguistic competency in legal settings. Withdrawing or being asked to withdraw from a case after it begins causes a disruption of court proceedings and is wasteful of scarce public resources. It is therefore essential that interpreters present a complete and truthful account of their training, certification and experience prior to appointment so the officers of the court can fairly evaluate their qualifications for delivering interpreting services.

Canon 3: Impartiality and Avoidance of Conflict of Interest

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.

Commentary:

The interpreter serves as an officer of the court and the interpreter's duty in a court proceeding is to serve the court and the public to which the court is a servant. This is true regardless of whether the interpreter is publicly retained at government expense or retained privately at the expense of one of the parties.

The interpreter should avoid any conduct or behavior that presents the appearance of favoritism toward any of the parties. Interpreters should maintain professional relationships with their clients, and should not take an active part in any of the proceedings. The interpreter should discourage a non-English speaking party's personal dependence.

During the course of the proceedings, interpreters should not converse with parties, witnesses, jurors, attorneys, or with friends or relatives of any party, except in the discharge of their official functions. It is especially important that interpreters, who are often familiar with attorneys or other members of the courtroom work group, including law enforcement officers, refrain from casual and personal conversations with anyone in court that may convey an appearance of a special relationship or partiality to any of the court participants.

The interpreter should strive for professional detachment. Verbal and non-verbal displays of personal attitudes, prejudices, emotions, or opinions should be avoided at all times.

Should an interpreter become aware that a proceeding participant views the interpreter as having a bias or being biased, the interpreter should disclose that knowledge to the appropriate judicial authority and counsel.

Any condition that interferes with the objectivity of an interpreter constitutes a conflict of interest. Before providing services in a matter, court interpreters must disclose to all parties and presiding officials any prior involvement, whether personal or professional, that could be reasonably construed as a conflict of interest. This disclosure should not include privileged or confidential information.

The following are circumstances that are presumed to create actual or apparent conflicts of interest for interpreters where interpreters should not serve:

1. The interpreter is a friend, associate, or relative of a party or counsel for a party involved in the proceedings;
2. The interpreter has served in an investigative capacity for any party involved in the case;
3. The interpreter has previously been retained by a law enforcement agency to assist in the preparation of the criminal case at issue;
4. The interpreter or the interpreter's spouse or child has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that would be affected by the outcome of the case;
5. The interpreter has been involved in the choice of counsel or law firm for that case.

Interpreters should disclose to the court and other parties when they have previously been retained for private employment by one of the parties in the case.

Interpreters should not serve in any matter in which payment for their services is contingent upon the outcome of the case.

An interpreter who is also an attorney should not serve in both capacities in the same matter.

Canon 4. Professional Demeanor

Interpreters shall conduct themselves in a manner consistent with the dignity of the court and shall be as unobtrusive as possible.

Commentary:

Interpreters should know and observe the established protocol, rules, and procedures for delivering interpreting services. When speaking in English, interpreters should speak at a

rate and volume that enable them to be heard and understood throughout the courtroom, but the interpreter's presence should otherwise be as unobtrusive as possible. Interpreters should work without drawing undue or inappropriate attention to themselves. Interpreters should dress in a manner that is consistent with the dignity of the proceedings of the court.

Interpreters should avoid obstructing the view of any of the individuals involved in the proceedings. However, interpreters who use sign language or other visual modes of communication must be positioned so that hand gestures, facial expressions, and whole body movement are visible to the person for whom they are interpreting.

Interpreters are encouraged to avoid personal or professional conduct that could discredit the court.

Canon 5: Confidentiality

Interpreters shall protect the confidentiality of all privileged and other confidential information.

Commentary:

The interpreter must protect and uphold the confidentiality of all privileged information obtained during the course of her or his duties. It is especially important that the interpreter understand and uphold the attorney-client privilege, which requires confidentiality with respect to any communication between attorney and client. This rule also applies to other types of privileged communications.

Interpreters must also refrain from repeating or disclosing information obtained by them in the course of their employment that may be relevant to the legal proceeding.

In the event that an interpreter becomes aware of information that suggests imminent harm to someone or relates to a crime being committed during the course of the proceedings, the interpreter should immediately disclose the information to an appropriate authority within the judiciary who is not involved in the proceeding and seek advice in regard to the potential conflict in professional responsibility.

Canon 6: Restriction of Public Comment

Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential.

Canon 7: Scope of Practice

Interpreters 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.

Commentary:

Since interpreters are responsible only for enabling others to communicate, they should limit themselves to the activity of interpreting or translating only. Interpreters should refrain from initiating communications while interpreting unless it is necessary for assuring an accurate and faithful interpretation.

Interpreters may be required to initiate communications during a proceeding when they find it necessary to seek assistance in performing their duties. Examples of such circumstances include seeking direction when unable to understand or express a word or thought, requesting speakers to moderate their rate of communication or repeat or rephrase something, correcting their own interpreting errors, or notifying the court of reservations about their ability to satisfy an assignment competently. In such instances they should make it clear that they are speaking for themselves.

An interpreter may convey legal advice from an attorney to a person only while that attorney is giving it. An interpreter should not explain the purpose of forms, services, or otherwise act as counselors or advisors unless they are interpreting for someone who is acting in that official capacity. The interpreter may translate language on a form for a person who is filling out the form, but may not explain the form or its purpose for such a person.

The interpreter should not personally serve to perform official acts that are the official responsibility of other court officials including, but not limited to, court clerks, pretrial release investigators or interviewers, or probation counselors.

Canon 8: Assessing and Reporting Impediments to Performance

Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the appropriate judicial authority.

Commentary:

If the communication mode or language of the non-English-speaking person cannot be readily interpreted, the interpreter should notify the appropriate judicial authority.

Interpreters should notify the appropriate judicial authority of any environmental or physical limitation that impedes or hinders their ability to deliver interpreting services adequately (e.g., the court room is not quiet enough for the interpreter to hear or be heard by the non-English speaker, more than one person at a time is speaking, or principals or witnesses of the court are speaking at a rate of speed that is too rapid for the interpreter to adequately interpret). Sign language interpreters must ensure that they can both see and

convey the full range of visual language elements that are necessary for communication, including facial expressions and body movement, as well as hand gestures.

Interpreters should notify the presiding officer of the need to take periodic breaks to maintain mental and physical alertness and prevent interpreter fatigue. Interpreters should recommend and encourage the use of team interpreting whenever necessary.

Interpreters are encouraged to make inquiries as to the nature of a case whenever possible before accepting an assignment. This enables interpreters to match more closely their professional qualifications, skills, and experience to potential assignments and more accurately assess their ability to satisfy those assignments competently.

Even competent and experienced interpreters may encounter cases where routine proceedings suddenly involve technical or specialized terminology unfamiliar to the interpreter (e.g., the unscheduled testimony of an expert witness). When such instances occur, interpreters should request a brief recess to familiarize themselves with the subject matter. If familiarity with the terminology requires extensive time or more intensive research, interpreters should inform the presiding officer.

Interpreters should refrain from accepting a case if they feel the language and subject matter of that case is likely to exceed their skills or capacities. Interpreters should feel no compunction about notifying the presiding officer if they feel unable to perform competently, due to lack of familiarity with terminology, preparation, or difficulty in understanding a witness or defendant.

Interpreters should notify the presiding officer of any personal bias they may have involving any aspect of the proceedings. For example, an interpreter who has been the victim of a sexual assault may wish to be excused from interpreting in cases involving similar offenses.

Canon 9: Duty to Report Ethical Violations

Interpreters shall report to the proper judicial authority any effort to impede their compliance with any law, any provision of this code, or any other official policy governing court interpreting and legal translating.

Commentary:

Because the users of interpreting services frequently misunderstand the proper role of the interpreter, they may ask or expect the interpreter to perform duties or engage in activities that run counter to the provisions of this code or other laws, regulations, or policies governing court interpreters. It is incumbent upon the interpreter to inform such persons of his or her professional obligations. If, having been apprised of these obligations, the person persists in demanding that the interpreter violate them, the interpreter should turn to a supervisory interpreter, a judge, or another official with jurisdiction over interpreter matters to resolve the situation.

Canon 10: Professional Development

Interpreters shall continually improve their skills and knowledge and advance the profession through activities such as professional training and education, and interaction with colleagues and specialists in related fields.

Commentary:

Interpreters must continually strive to increase their knowledge of the languages they work in professionally, including past and current trends in technical, vernacular, and regional terminology as well as their application within court proceedings.

Interpreters should keep informed of all statutes, rules of courts and policies of the judiciary that relate to the performance of their professional duties.

An interpreter should seek to elevate the standards of the profession through participation in workshops, professional meetings, interaction with colleagues, and reading current literature in the field.

Appendix C⁽⁵⁷⁹⁾

Model Court Interpreter Act

Background

The Model Court Interpreter Act is based on a review and synthesis of federal law and statutes in states where comprehensive study and reform of practices and laws relating to the use of interpreters has occurred. The Act and its accompanying commentary are also based on analysis of legal and professional issues that have emerged in recent years through practical experience and research in the states. The document was prepared in cooperation with an advisory group of individuals who have special expertise in court interpretation. The advisory group included the judges, court administrators, and state and federally certified professional interpreters who are named in the acknowledgments for this publication.⁽⁵⁸⁰⁾

A Note on the Purposes of the Act and How it May be Used

The following Model Court Interpreter Act and commentary is provided as a guide to assist policy makers who are engaged in any of the following tasks:

Writing or updating court interpreter statutes;

Preparing statewide rules of court for the administration of interpreter services;

Preparing local rules of court or administrative policy to govern interpreter services in the absence of comprehensive state policy in the form of law, rule or administrative procedures.

It is recognized by the drafters of this Model Act that many states will be without the necessary financial, expert, and administrative resources to summarily adopt legislation substantially similar to it in all respects. Implementing a statewide interpreter program involves designating languages for which certification programs will be established, establishing standards and procedures for testing and certifying language interpreters, adopting programs for interpreter recruiting, training, continuing education, and interpreter evaluation. A statewide program must also provide for allocating the cost of interpreter services between government and private individuals and establish mechanisms to provide revenue for the development of the interpreter programs and services.

It is desirable and within the capacity of most states, however, to plan and enact a legislative agenda that sets policy goals consistent with the Model Act and establishes procedures and timetable for implementing them.

Model Court Interpreter Act

§ 1. Policy Declaration

It is hereby declared to be the policy of this state to secure the rights, constitutional and otherwise, of persons who, because of a non-English speaking cultural background, are unable to understand or communicate adequately in the English language when they appear in courts or are involved in justice system proceedings.

It is the intent of this Act to provide for the certification, appointment, and use of interpreters to secure the state and federal constitution-

al rights of non-English speaking persons in all legal and administrative proceedings.⁽⁵⁸¹⁾

Commentary:

A statutory preamble, introduction, or policy declaration should articulate with precision the purpose of the Act and the policy which the Act is designed to implement and support.

§ 2. Definitions

For the purpose of this Act, the following words have the following meaning:

A. "Appointing authority" means a trial judge, administrative hearing officer or other officer authorized by law to conduct judicial or quasi-judicial proceedings.

B. "Non-English speaking person" means any principal party in interest or witness participating in a legal proceeding who has limited ability to speak or understand the English language.

C. "Legal proceeding" means a civil, criminal,⁽⁵⁸²⁾ domestic relations, juvenile, traffic or an administrative proceeding in which a non-English speaking person is a principal party in interest or a witness.

D. "Certified interpreter" means a person who: (1) is readily able to interpret⁽⁵⁸³⁾ simultaneously and consecutively and to sight translate from English to the language of the non-English speaking person or from the language of that person into English; (2) is certified according to procedures approved by the Supreme Court; and (3) satisfies the standards prescribed and promulgated pursuant to this Act and the Code of Professional Responsibility for Interpreters established in this state.⁽⁵⁸⁴⁾

E. "Principal party in interest" means a person involved in a legal proceeding who is a named party, or who will be bound by the decision or action, or who is foreclosed from pursuing his or her rights by the decision or action which may be taken in the proceeding.⁽⁵⁸⁵⁾

F. "Witness" means anyone who testifies in any legal proceeding.

Commentary:

The Act should define with precision the terms used in the policy declaration and throughout the Act. These definitions should identify those individuals for whom an interpreter is required, state clearly the proceedings in which an interpreter should be used, and establish what is meant by a certified interpreter.

Court interpretation is a specialized and highly demanding form of interpreting. It requires skills that few bilingual individuals possess, including language instructors. The knowledge and skills of a court interpreter differ substantially from or exceed those required in other interpretation settings, including social service, medical, diplomatic, and conference interpreting. Interpreters who routinely work non-court settings often cannot perform adequately as a court interpreter.

The term "certified interpreter" is broadly defined to allow flexibility in the certification standards which may vary for particular languages according to the extent of their usage within each state, the availability of bilingual persons to serve as interpreters, and other practical considerations.

This Act establishes criteria *only* for "certified interpreters." There is no use of, reference to, or definition of the term "qualified interpreter." Attempting to define a level of interpreter below that of a "certified interpreter" is problematic and unworkable.

§ 3. Implementing Responsibilities

A. The Supreme Court shall be responsible for ensuring language interpreter certification, continued proficiency, and discipline. The Supreme Court shall prescribe standards and procedures for the recruitment, testing, certification, evaluation, compensation, duties, professional conduct, continuing education, certification renewal, and other matters relating to interpreters as prescribed in this Act.

Commentary:

The establishment of a comprehensive court interpreter program is a significant undertaking requiring specialized experience and expertise. The Supreme Court should understand the size and complexity of the undertaking and be prepared to provide the support and encouragement required to see the establishment of such a program to its conclusion.

Neither the Supreme Court nor the typically configured state administrative office has the expertise or experience in language interpretation to develop, on its own, detailed policies and procedures required to implement a state wide interpreter program. That specialized expertise must be recruited and used to develop and recommend to the Supreme Court the standards for the appointment of interpreters, as well as the criteria for interpreter qualifications, duties, professional conduct, and compensation. Such expertise is available in most states from professionals employed in the fields of languages, interpreting, occupational testing, and from judges and attorneys who have worked extensively with interpreters.

Experience in states with well-developed programs suggests that the advice and services of such individuals can be obtained *pro bono* through the formation of a Court Interpreter Advisory Panel. Expertise and assistance can also be obtained from the administrative offices of the courts in some states (e.g., California, Massachusetts, New Jersey, Washington) and from the National Center for State Courts.

B. Staff and administrative support required by the Supreme Court to implement the interpreter certification program shall be provided by the administrative office of the courts.

Commentary:

The establishment and implementation of a statewide interpreter program is a substantial undertaking. It is recommended that the state Supreme Court initiate such an effort through the establishment of a Court Interpreter Advisory Panel made up of a broad range of trial and appellate judges, court administrative staff, lawyers, court interpreters practicing in the state; and experts in linguistics, interpretation, education, and occupational testing and certification. Such a panel, in conjunction with the administrative office of the courts, should conduct studies of the language interpreter needs of the courts of the state and make recommendations to the Supreme Court and to the administrative office of courts concerning interpreter needs and interpreter program implementation. The recommendations should address such matters as: (1) the

designation of those languages for which there should be certification programs; (2) the establishment and monitoring of a statewide interpreter testing and certification program; (3) the establishment of periodic interpreter certification renewal requirements, (4) the promulgation of guidelines to assist judges in determining when a non-certified interpreter may be permitted to act as an interpreter in the absence of a certified interpreter, and (5) the establishment of statewide standards of practice and appropriate professional conduct for interpreters.

The Court Interpreters Advisory Panel, in conjunction with the administrative office of the courts, should assist in developing policies regarding interpreter training, mandatory continuing education, and recruitment of potential interpreters.

Of primary significance is the initial determination by the Court Interpreters Advisory Panel of those languages which, because of their predominance, require a testing and certification program. These determinations may require surveys of individual court needs for interpreters and the examination of demographic trend data.

It is anticipated that this Advisory Panel would be reimbursed only for travel expenses related to attendance at Advisory Panel meetings. The panel would rely on the state court administrative office for staff and clerical support.

Special note on testing and certification programs. There is growing recognition among the states and the professional community of court interpreters for the need to develop interstate testing and certification programs as a way to make testing and certification in many languages affordable for all states. The standardized tests can be shared among states and incorporated by reference into state laws, rules promulgated by supreme courts, or by administrative regulations of administrative offices of the courts. Prior to drafting legislation or rules, policy makers in the states should explore whether progress has been made toward establishing programs and standards that can be adopted by reference or used as the foundations for state programs.

C. Pursuant to Supreme Court rule, the administrative office of the courts shall administer and manage the operations of the State Court Interpreter Program.

Commentary:

The administrative office of the courts must undertake to develop the structure and the mechanics necessary to administer a court interpreter program. The specific responsibilities of the AOC should be established by Supreme Court rule and may include some or all of the following:

- (1) To establish interpreter proficiency standards;
- (2) To designate languages for certification;

- (3) To establish programs for the recruitment, training, legal orientation, testing, evaluation and certification of interpreters consistent with the proficiency standards;
- (4) To develop resources for interpreter continuing education and recertification;
- (5) To establish, maintain, and publish a current directory of certified interpreters;
- (6) To adopt and disseminate to each court an approved fee schedule for certified and non-certified interpreters;
- (7) To set interpreter certification fees as may be necessary;
- (8) To establish procedural standards and guidelines for in-court interpreted proceedings to address such matters as: modes of interpreting, appropriate procedure for correcting interpretation mistakes, interpreter fatigue and time limits for continuous in-court interpretation, and when the use of multiple interpreters working in shifts or concurrently is indicated;
- (9) To establish, administer or recommend a process to review and respond to allegations of violations the code of professional conduct for interpreters, including decertification or other disciplinary measures.

The certification process encompasses recruitment, training, testing, and evaluation of interpreters. The specialized language proficiency standards, testing criteria, and evaluation processes clearly require detailed language expertise.

Part of the certification process should involve a comprehensive orientation of interpreters to the judicial system to ensure their familiarity with the legal system, including the nature of the various criminal, civil, and other judicial proceedings, legal terminology, and the roles of officials involved in various legal settings.

Furthermore, a court interpreter program should include a component responsible for the continuing education or recertification of existing interpreters. Ideally, this program should include a system for evaluating and monitoring interpreter performance and should have the capacity to evaluate any questions of conflict of interest or ethical violations involving certified court interpreters.

In addition, the administrative office of courts must maintain and disseminate a current list of certified interpreters to the courts throughout the state. This certification list should be updated on a regular basis to be a reliable source for courts in appointing certified interpreters.

The administrative office of courts may also establish and promulgate standards or recommended guidelines and set forth appropriate levels of compensation that should be paid to interpreters, either in the form of salary or fees. Such standards or recommended guidelines may include salary schedules, rates for per diem or contract interpreters, and

minimum compensation standards for an appearance in court. Rules that govern travel expense reimbursement for other court employees, or in exceptional cases for expert witnesses, should also apply to court interpreters. The compensation schedule may be standard for all jurisdictions throughout the state, or it may reflect cost of living differentials or other relevant local conditions. Regardless of the method employed to compensate interpreters, the compensation standards should be adequate to ensure the availability of interpreters.

D. The director of the administrative office of the courts shall collect and analyze statistics pertinent to interpreter utilization. This report may be made a part of the annual report of the judiciary, and contain analyses and recommendations for the improvement of the court interpreter program.

Commentary:

It is important to have an accurate overview of the extent of the need for and use of certified and non-certified interpreters statewide for both management and budgetary reasons. Collecting data regarding the *need* for interpreters is complex, since records are not normally kept of services that can not be provided. Data regarding the actual *use* of interpreters should be more readily available. The interpreter services programs should maintain records regarding the number of salaried interpreter employees, if any, and the number and cost of each interpreter appointment. In any case, the cost of interpreter services for each jurisdiction and statewide, and trends in interpreter requests and use rates, should be monitored for program management and planning purposes.

§ 4. Certified Interpreter Required

A. When an interpreter is requested or when the appointing authority determines that a principal party in interest or witness has a limited ability to understand and communicate in English, a certified interpreter shall be appointed.

Commentary:

The right to an interpreter accrues to the "party in interest." Recognition of the need for an interpreter may arise from a request by a party or counsel for the services of an interpreter, from the court's own *voir dire* of a party or witness, or from disclosures made to the court from parties, counsel, court employees or other persons familiar with the ability of the person to understand and communicate in English. When a judge recognizes that a "party in interest" requires an interpreter, an interpreter *shall* be appointed.

This portion of the Act embodies and implements the policy declaration set out in § 1 of the Act: to provide certified interpreters in all state legal and administrative proceedings where the services of an interpreter are required to secure the rights of non-English speaking persons or for the administration of justice. As a result of that policy declaration, the statute is unequivocal in asserting that an individual who has a limited ability to speak or understand the English language, who is a party in interest or a

witness, is entitled to the assistance of a certified interpreter throughout the legal proceeding, or for the duration of the witness' testimony. Events included in legal proceedings encompass interviews between counsel and client, advisements regarding procedure or rights that are conducted out of the presence of counsel or the judge, and readings or other translations of court documents that are evidence in the case or that are relied on for dispositional decisions by the court.

B. The appointing authority may appoint a non-certified interpreter only upon a finding that diligent, good faith efforts to obtain a certified interpreter have been made and none has been found to be reasonably available. A non-certified interpreter may be appointed only after the appointing authority has evaluated the totality of the circumstances including the gravity of the judicial proceeding and the potential penalty or consequence involved.

Commentary:

Allowance is made for the appointment of a non-certified interpreter, but only after diligent, good faith efforts are made to secure a certified interpreter. A provision for the use of a non-certified interpreter reflects the practical realities of court operations. The exception to the general rule that certified interpreters must be provided acknowledges that jurisdictions may not have access to certified interpreters in all languages for all cases. The uniqueness of the language required, the geographical location of the court, the season of the year, and dozens of other reasons may militate against the availability of a certified interpreter for a particular language on any given date and time. The non-certified interpreter alternative should be used only as a rare exception to the general rule requiring certified interpreters.

A review of the totality of the circumstances is required, because whether a certified interpreter is "reasonably" available depends as much on the gravity of the proceeding and the jeopardy the party is placed in, as on how difficult it is to locate and obtain the services of a certified interpreter. For example, for a felony criminal trial a certified interpreter residing in a distant jurisdiction might be considered "reasonably available"; whereas in a misdemeanor case, or in a procedural hearing required to consider the release of a defendant from jail, "reasonable" availability may extend only to the geographic boundaries of the court.

C. Before appointing a non-certified interpreter, the appointing authority shall make a finding that the proposed non-certified interpreter appears to have adequate language skills, knowledge of interpreting techniques, familiarity with interpreting in a court or administrative hearing setting, and that the proposed non-certified interpreter has read, understands, and will abide by the Code of Professional Responsibility for language interpreters established in this State.

Commentary:

In order for a non-certified interpreter to be appointed, the judge or administrative hearing officer must inquire and be assured that the proposed non-certified interpreter appears to have the requisite knowledge and skills to perform adequately the task for which he or she is appointed. Equally important, the inquiry into the interpreter's skills and experience must include a verification that the interpreter has read, understands, and will abide by the requirements of the Code of Professional Responsibility established for interpreters.

It is recommended that the administrative office of the courts develop and make available a standard voir dire guide for use by the court for the purpose of inquiring into the experience and qualifications of non-certified interpreters. [\(586\)](#)

D. A summary of the efforts made to obtain a certified interpreter and to determine the capabilities of the proposed non-certified interpreter shall be made on the record of the legal proceeding.

Commentary:

The requirement to make these findings on the record not only underscores the importance of using certified interpreters whenever possible, but provides a ready record for review of the circumstances under which a non-certified interpreter was used.

It is recommended that standard language for this voir dire and finding be developed for use by the judge when inquiring into the efforts made by court administrative personnel to secure the services of a certified interpreter.

§ 5. Waiver of Interpreter

A. A non-English speaking person may at any point in the proceeding waive the right to the services of an interpreter, but only when (1) the waiver is approved by the appointing authority after explaining on the record to the non-English speaking person through an interpreter the nature and effect of the waiver; (2) the appointing authority determines on the record that the waiver has been made knowingly, intelligently, and voluntarily; and (3) the non-English speaking person has been afforded the opportunity to consult with his or her attorney.

B. At any point in any proceeding, for good cause shown, a non-English speaking person may retract his or her waiver and request an interpreter.

Commentary:

The intent of this portion of the statute is to ensure that the non-English speaking parties or witnesses are made fully aware of their right to an interpreter. The waiver of the right to an interpreter must be knowing and voluntary, and with the approval of the judge or administrative hearing officer.

States may wish to develop a list of questions, analogous to the questions that are asked when a criminal defendant waives his or her rights to a jury trial and enters a plea of guilty, to demonstrate the knowing and voluntary waiver of the right to an interpreter.

§ 6. Interpreter Oath

All interpreters, before commencing their duties, shall take an oath that they will make a true and impartial interpretation using their best skills and judgment in accordance with the standards and ethics of the interpreter profession.

Commentary:

This is standard statutory language that appears in a variety of current statutes. An interpreter should take an oath for the same reason that any person testifying in court takes an oath--to safeguard against the possibility of knowing and willful falsification of testimony.

The Code of Professional Responsibility addresses the various ethical responsibilities of interpreters for accuracy and completeness, impartiality, confidentiality, and other matters relating to the professional conduct of interpreters. The appointing authority should be alerted to potential conflicts of interest or other violations of the Code of Professional Responsibility that may arise. The sanction of removal is justified for any violations of that Code.

It is common practice for such oaths to be sworn to and maintained on file for all interpreters who are regularly employed by a court. This simplifies the court's inquiries on the record during procedural hearings. It is recommended, however, that an oath be read and sworn to in open court in all proceedings conducted before a jury.

§ 7. Removal of an Interpreter In Individual Cases

Any of the following actions shall be good cause for a judge to remove an interpreter:

Being unable to interpret adequately, including where the interpreter self-reports such inability;

Knowingly and willfully making false interpretation while serving in an official capacity;

Knowingly and willfully disclosing confidential or privileged information obtained while serving in an official capacity;

Failing to follow other standards prescribed by law and the Code of Professional Responsibility for interpreters.

Commentary:

It is important to recognize that interpreters are sometimes called to court to interpret for someone who speaks a different language from that spoken by the interpreter. This section authorizes the appointing authority to remove interpreters who are not competent to interpret for a case for this or any other reason, or who violate the Code of Professional Responsibility which each state should adopt as a companion to legislation. For a more complete discussion of the elements of such a code see the Model Code of Professional Responsibility published by the National Center for State Courts as a companion to this Model Act.

Appointing authorities should guard against appointing interpreters who may have an interest, or the appearance of an interest, in the outcome of the legal proceedings in which the interpreter is serving. A conflict of interest exists when an interpreter acts in a situation where the interpreter may be affected by an interest in the outcome of the case or is otherwise biased. For example, an interpreter should not serve as an interpreter for someone with whom the interpreter has a familial relationship, for someone with whom the interpreter has shared a residence, or for someone with whom the interpreter has a continuing business or professional relationship. The trial court must be assured of interpretations that reflect the precise language of questions and answers of the witness. The interpretation should not be affected by any personal interest of the interpreter in the witness' case.

§ 8. Cost of Interpreter Services

In all legal proceedings, the cost of providing interpreter services shall be borne by the court or administrative agency in which the legal proceeding originates.

Commentary:

A wide variety of funding mechanisms for courts and ancillary court services are used throughout the country. The Model Act takes the position that providing a certified interpreter is a basic and fundamental responsibility of the court, and that the court should bear the burden of the costs associated with providing an interpreter, as a cost of the court proceeding.

This approach does not foreclose subsequent assessments of costs for interpreter services to parties when that is appropriate, according to the same standards or rules that are applied to court costs in other litigation.

Drafters of this statute considered and rejected an approach that attempts to initially allocate the responsibility for acquiring and paying for the cost of the interpreter to the governmental entity which initiates the proceeding, for example, a local prosecutor, state's attorney, public defender, legal services office, or welfare service agency.

§ 9. Appropriation

To achieve the purposes of this Act, \$_____ is appropriated for the administrative office of courts to establish and operate a statewide court interpreter program.

Commentary:

Funding is sure to be a difficult and contentious issue. As with indigent defense, however, the costs of an interpreter program are essential to the administration of a fundamentally fair justice system.

A realistic assessment of the start-up costs of an interpreter program should be made by the administrative office of the courts. Efforts should be made to enlist the voluntary service of available experts to serve on the Court Interpreters Advisory Panel. Courts should also look to other states for program models and for the formation of interstate or other interjurisdictional service agreements. Nevertheless, AOC staff and administrative support will require state funding during the implementation stage. As with all court appropriations, this expenditure will require detailed and specific justification and substantiation.

To defray some of the costs of administering the interpreter certification program, the administrative office of courts should be authorized to assess a court interpreter certification fee or fees if necessary. Such fees may be designed to operate the court interpreter testing program on a self-sustaining basis once the start-up costs secured through a state appropriation are expended. Certification fees may cover administrative costs of testing, certification, and recertification.

572. Examples of the key ethical principles are reproduced as the ten "musts" for ethical court interpretation. *See supra* part IX.B.

573. An example of a false cognate is the English word "embarrassed" and the Spanish word "*embarazada*." The words sound the same but mean different things. In English, "embarrassed" means to feel ashamed, but in Spanish, the word "*embarazada*" means to be pregnant. Another example is the word "fabric" in English, which means cloth, and the Spanish word "*fábrica*," which means factory. *See generally* Diccionario de términos equívocos (Miguel Cuenca ed. 1987)

574. 9th Cir. Crim. Jury Instr. 3.18 (West 1995).

575. *Id.*

576. This appendix is taken directly from division one of the appendix to the California Rules of Court, Standards of Judicial Administration Recommended by the Judicial Council § 18.1 (1995) (third and fourth alterations in original).

577. This appendix appears in original form as chapter nine of William H. Hewitt, *Court Interpretation: Model Guides for Policy and Practice in the State Courts* (1995). Copyright © 1995 National Center for State Courts, Williamsburg, Virginia 23187-8798, all rights reserved, reprinted by permission. The list of references has been deleted, and the layout of the Model Code has been changed slightly; however, the text and citations appear without alteration and may not conform to *New England Law Review* format.

578. A non-English speaker should be able to understand just as much as an English speaker with the same level of education and intelligence.

579. This appendix appears in original form as chapter ten of William H. Hewitt, *Court Interpretation: Model Guides for Policy and Practice in the State Courts* (1995). Copyright © 1995 National Center for State Courts, Williamsburg, Virginia 23187-8798, all rights reserved, reprinted by permission. The *Model Court Interpreter Act* is reprinted with slight modifications in format; however, the text and citations appear without alteration and may not conform to *New England Law Review* format.

580. NCSC staff prepared for the work by compiling and summarizing statutes from all of the states. Statutes from states where laws have been enacted to develop statewide standards for interpreter services in the courts were then identified (e.g., Arkansas, California, New Mexico, Massachusetts, Washington), and their key concepts were extracted and summarized to provide a foundation for a discussion document. The discussion document drafted by NCSC staff was presented on July 14-16, 1993 in Williamsburg VA at a workshop attended by representatives of state and local courts and the interpreter profession throughout the country. The discussion draft was studied, critiqued, and redrafted by the conferees and NCSC staff to create a second draft document which was then submitted to the project Advisory Committee for additional review and comment. The resulting Model Act, therefore, is based both on existing state laws and the professional opinion of a broadly representative group of experienced judges, court administrative professionals, and interpreters. The individuals who contributed to the work are listed in the acknowledgments pages of this publication. [The acknowledgment pages are not reproduced as part of this appendix.]

581. Administrative hearings, although executive branch functions, are regularly appealed to the state court system where the reviewing court's decision is based on the administrative hearing record, including interpreted testimony. In addition, courts may require that administrative hearing litigants be accorded the same rights, constitutional and otherwise, as are accorded to criminal and civil litigants. This is a sensitive separation of powers matter, and some states may choose not to include administrative hearings within the ambit of their interpreter statutes.

582. Criminal proceedings are intended to encompass grand jury proceedings and judicial inquests.

583. Although the term "translate" is frequently used interchangeably with or instead of "interpret," the activities are distinct and require different skills. Interpreting is oral

rendering of one spoken language into another, while translation is the rendering of a written document from one language into a written document in another language. The Model Act recognizes that court interpreters will be required to perform *sight translations*, which involves reading and orally translating a written document.

584. See the Model Code of Professional Responsibility for Interpreters, which is a companion publication to this Model Court Interpreter Act.

585. It is the intent of this act to include parents of juveniles involved in court proceedings among principal parties in interest.

586. A model voir dire for this purpose has been developed by the California Judicial Council.