

ACCESS TO JUSTICE FOR PEOPLE WHO DO NOT SPEAK ENGLISH

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For the first time since German faded from American public discourse in the wake of World War I, the nation finds itself engaged with substantial language issues. While the debate often focuses on problems associated with education and employment, there are also many other public institutions and services that confront equally important communication challenges. For lawyers and judges, this is a story about protecting access to justice.

As the number of non-English speaking individuals in the United States continues to rise,¹ courts struggle to ensure these individuals can maneuver the system of justice.² Encountering the judicial system is difficult enough for native English speakers. Non-English speakers struggle merely to understand the words of court staff, lawyers, and judges, let alone the corresponding processes. Without a translator, a non-English speaker is left deaf without the aid of sign language.

In certain settings, state and federal statutes, common law, and constitutions require appointment of interpreters. This is not an easy task for a trial judge, who must first identify the non-English speaker's language and dialect—a challenge considering the judge may have little or no prior experience with the language. Second, the judge must locate an interpreter and determine whether the interpreter is qualified—not only to interpret generally, but to participate actively in the special nature of judicial proceedings. Judges were traditionally left to their own devices to make these determinations on a case-by-case basis. Sometimes this worked, and sometimes it did not.

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1. The National Center for State Courts (“NCSC”) reported that, [r]ecent [2000] census figures indicate that about 10 percent of people living in the United States are foreign born. Eighteen percent—almost 45 million people—report that they speak a language other than English at home and almost 5 percent “do not speak English well,” or “do not speak English at all.”

NATIONAL CENTER FOR STATE COURTS, CONSORTIUM FOR STATE COURT INTERPRETER CERTIFICATION, FREQUENTLY ASKED QUESTIONS NO. 7 (2006), http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortCertFAQ.pdf. Similarly, the NCSC reported that “[w]hile the total population of the United States increased by 10 percent between 1980 and 1990, the nation’s Asian and Pacific Islander minority populations increased by 108 percent; the nation’s Hispanic population increased by 53 percent; other language minority populations increased by 45 percent.” NATIONAL CENTER FOR STATE COURTS, COURT INTERPRETING, PUBLICATIONS & RESOURCE MATERIAL 11 (2002), http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf [hereinafter NCSC, RESOURCE MATERIAL].

2. Franklyn P. Salimbene, *Court Interpreters: Standards of Practice and Standards for Training*, 6 CORNELL J.L. & PUB. POL’Y 645, 647 n.14 (1997) (noting state court bias reports from Florida, Georgia, Massachusetts, Minnesota, and Oregon recommended the appointment of language interpreters to protect non-English speakers’ rights).

In recent years, both the federal government and individual states have undertaken to locate, train, test, and certify interpreters. These efforts gave meaning to the otherwise hollow statutory and constitutional rights of non-English speakers in the judicial system.

I. THE SOMETIME RIGHT TO AN INTERPRETER

Because individual state and federal courts have not tackled the language barrier uniformly, the “right” to an interpreter varies. As a practical matter, the need for an interpreter may not be recognized until a judge is face-to-face with a party or witness whom the judge cannot understand. Perhaps the individual speaks Spanish, American Sign Language, Vietnamese, Chinese, or Russian. In these process-halting moments, people universally recognize the need for interpreters, but what happens when an individual understands enough English to communicate with the court but only at the most basic level? Who or what controls whether an interpreter must be appointed?

A variety of statutes, common law, or constitutions may supply the answer. The federal Court Interpreters Act of 1978 governs interpreter issues in federal proceedings and requires interpreters “for the hearing impaired . . . and persons who speak only or primarily a language other than the English language.”³ As a practical matter, however, courts possess broad discretion,⁴ guided largely by common law and constitutional concerns.⁵

Indiana’s statutes take an approach similar to the federal Court Interpreters Act in delineating those situations where an interpreter must be appointed:

Every person who cannot speak or understand the English language or who because of hearing, speaking, or other impairment has difficulty in communicating with other persons, and who is a party to or a witness in

3. Court Interpreters Act of 1978, 28 U.S.C.A. § 1827 (West 2007).

4. Neither civil nor criminal procedural rules identify those situations where an interpreter must be appointed. *See* FED. R. CIV. P. 43(f) (stating “court *may* appoint an interpreter of its own selection and may fix . . . reasonable compensation”) (emphasis added); FED. R. CRIM. P. 28 (stating “court *may* select, appoint, and set the reasonable compensation for an interpreter”) (emphasis added).

5. Defendant’s Fifth Amendment, Sixth Amendment, and Due Process rights may be violated where an interpreter is improperly denied or an interpretation is inadequate. *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) (stating defendant’s Fifth Amendment right violated where interpreter withdrawn despite defendant’s refusal to testify without an interpreter, claiming he still needed one, where no evidence proved otherwise); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986) (“[S]everal circuits have held that a defendant whose fluency in English is so impaired that it interferes with his right to confrontation or his capacity, as a witness, to understand or respond to questions has a constitutional right to an interpreter.”) (citing cases from the First, Second, and Fifth Circuits); *United States v. New York*, 434 F.2d 386, 388 (2d Cir. 1970) (finding defendant’s due process and confrontation rights violated where translator merely summarized English-speaking witness’ testimony for Spanish-speaking defendant twice during four-day trial leaving defendant to hear nothing more than “a babble of voices”).

a civil proceeding is entitled to an interpreter to assist the person throughout the proceeding.⁶

Equivalent entitlement is generally afforded in criminal proceedings, and the statutory right to an interpreter is buttressed by the Indiana Constitution and by common law.⁷

Until quite recently, this right to an interpreter existed without any statement of minimum qualifications or any plan to train, test, or certify interpreters. This left trial judges on the front lines with little guidance. Where should the judge find the interpreter? What minimum qualifications should the interpreter possess? How should the judge test the interpreter's performance? Who can properly serve as an interpreter while maintaining the integrity of the court (family member of party, court personnel, juror, police officer, prison inmate)? What should the judge do if an interpreter cannot be located? And how should the judge ensure that the interpretation is accurate if the interpretation is not somehow recorded?

All of these questions initially went unanswered and related problems went unnoticed. As the number of non-English speaking individuals in the United States increased, however, interpreter problems in courts grew as well.

II. MANY REASONS INTERPRETATION CAN GO BADLY

When an interpreter is engaged to translate testimony, the court reporter typically only records the English translation, and the original words of the non-English speaker are forever lost. This phenomenon makes it difficult to identify interpreter problems, and even if the problem is identified, it may be impossible to challenge the interpretation on appeal.⁸ Malfunctions of interpretation largely fall into three categories: (1) the interpreter speaks a different language or dialect than the non-English speaking party or witness; (2) the interpreter is biased; or (3) the interpreter inaccurately translates the testimony.

A. *Interpreter Speaks Different Language or Dialect*

It is difficult even for someone familiar with a given language to distinguish

6. IND. CODE § 34-45-1-3 (2004) (entitlement to interpreter in civil proceeding); *see also id.* § 4-21.5-3-16 (entitlement to interpreter in administrative proceeding). In addition, where no procedure is outlined in Indiana's criminal procedure statutes, the court may proceed "consistent with applicable statutes or court rules." *Id.* § 35-35-2-2. As a result, because Indiana's criminal procedure statutes do not delineate interpreter requirements, courts may apply the civil or administrative requirements.

7. *See* IND. CONST. art. 1, § 13 (rights of accused in criminal prosecutions); *Chavez v. State*, 534 N.E.2d 731, 735-38 (Ind. 1989) ("The interpreter is necessary to implement fundamental notions of due process such as the right to be present at trial, the right to confront one's accusers, and the right to counsel.").

8. NCSC recommends making an audiotape of interpreted testimony to preserve the original words. NCSC, RESOURCE MATERIAL, *supra* note 1, at 134-36.

the language's many dialects, and even more difficult for judges to distinguish between dialects or recognize the need for a different translation. Moreover, a shortage of qualified interpreters can lead judges, lawyers, and parties to accept the varied interpretation as "close enough." In *State v. Lopes*, for example, the defendant spoke Portuguese, and the judge and lead counsel agreed that defendant's co-counsel who was fluent in Spanish, not Portuguese, could translate after concluding "that defendant had sufficient fluency in Spanish to at least be apprized [sic] of the *gist* of the hearing."⁹

In another instance reported by the National Center for State Courts, "[a] defendant was convicted and served years of a lengthy prison term [before his sentence was ultimately commuted] following a trial when the court interpreter spoke a *different language* than that of the defendant (interpreter spoke Spanish while the defendant's language was Mixtec)."¹⁰

Similarly, in *Ememe v. Ashcroft*, an immigration judge found Ememe's testimony not credible because Ememe's responses were short and lacking detail during an interview about credible fear, and then much more verbose when Ememe later appeared in person before the immigration judge.¹¹ Ememe testified before the immigration judge, however, in her native language, Amharic, but had testified at the credible fear interview in Italian.¹² The Seventh Circuit reversed the credibility finding after concluding that the immigration judge failed to assess Ememe's Italian language proficiency and noting that the variance in testimony could be the simple result of Ememe's increased ability to express herself in her native language.¹³

B. Interpreter Is Biased

The shortage of qualified interpreters also necessitates that judges use whatever resources may be available. Documented instances reflect use of "bailiffs, secretaries, building janitors, courthouse personnel, jurors, arresting officers, probation officers, prison guards, civil plaintiffs, district attorneys and other counsel, prosecution witnesses, young children, friends and relatives of victims or witnesses, prison inmates, [] defendants and co-defendants."¹⁴

9. *State v. Lopes*, 805 So. 2d 124, 125 (La. 2001) (emphasis added).

10. NCSC, RESOURCE MATERIAL, *supra* note 1, at 12.

11. *Ememe v. Ashcroft*, 358 F.3d 446, 450, 452 (7th Cir. 2004).

12. *Id.* at 452.

13. *Id.*

14. Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. TOL. L. REV. 593, 603-04 (1999) (citing reports from New Jersey, New York, the Second Circuit and Third Circuit); *see also* Salimbene, *supra* note 2, at 658 (citing *Commonwealth v. Delrio*, 497 N.E.2d 1097 (Mass. App. Ct. 1986) (conviction reversed where one defendant was allowed to interpret his co-defendant's pre-Miranda admission)); NCSC, RESOURCE MATERIAL, *supra* note 1, at 13 (quoting Ken Kolker, GRAND RAPIDS PRESS, Feb. 21, 1993) ("[Jail inmate] Christopher Sanchez, who speaks Spanish, interpreted for the courts and the jail more than 20 times during his six months jail term . . . Once he even translated for a Laotian robbery suspect, just a

At least a few of the individuals in these categories might have predilections that foster misinterpretation. In addition, judges making these case-by-case interpreter appointments are likely left without any way to evaluate whether the translation is accurate. These problems can easily compound and threaten the integrity of the judicial process.

C. *Inaccurate Translation*

The combination of a shortage of qualified interpreters, a lack of means to test and certify interpreters, translation in the wrong dialect or language, and biased interpreters creates the predictable result. Sadly, an inaccurate translation can end a person's liberty or defeat an otherwise meritorious claim.

Four examples are instructive. One particularly disturbing example involved a deaf woman who was raped.¹⁵ The interpreter misinterpreted the victim's testimony by telling the court that the victim said "made love" instead of "forced intercourse" and "short blouse" instead of "blouse."¹⁶ Even simple mistakes of this scale can easily end a valid rape claim.¹⁷

Similarly, a plaintiff's worker compensation claim ended due in large part to a misinterpretation.¹⁸ When questioned by the judge, a Mexican-dialect employee testified that only his lower back was injured.¹⁹ The interpreter, however, interpreted "cintura" as "waist" rather than "lower back," and the judge found the employee's "statements to be inconsistent and evasive."²⁰

Yet another likely interpretation error resulted in a Cuban man's temporary loss of liberty.²¹ The Cuban defendant was convicted on drug charges for uttering the words, "¡Hombre, ni tengo diez kilos!"²² The defendant used these words in response to a request for a loan, and the words can be properly

month after Sanchez says he picked up some of that language from a fellow inmate.").

15. SY DUBOW, *LEGAL RIGHTS: THE GUIDE FOR DEAF AND HARD OF HEARING PEOPLE* 182 (1992) (citing the unreported decision of *Commonwealth v. Edmonds*, Cir. Ct. Staunton, Va. (1975)).

16. *Id.*

17. Mr. Dubow noted that "[t]he legal effect of the interpreter's mistake [in *Edmonds*] was devastating because, in rape, force is the essential element." *Id.*

18. Debra L. Hovland, *Errors in Interpretation: Why Plain Error Is Not Plain*, 11 *LAW & INEQ.* 473, 473 (1993) (citing the State of Washington's Court Interpreter Task Force Initial Report and Recommendations published in 1986).

19. *Id.*

20. *Id.*

21. Michael B. Shulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 *VAND. L. REV.* 175, 176 (1993) (citations omitted).

22. Quote taken from wire tape of telephone conversation, thereby preserving the defendant's original words for later review. *Id.* at 176 n.1 (citing Alain L. Sanders, *Libertad and Justicia for All*, *TIME*, May 29, 1989, at 65).

translated as “man, I don’t even have ten cents.”²³ The interpreter, however, mistakenly translated the words as “man, I don’t even have ten kilos.”²⁴ Fortunately for this defendant, this translation error was caught and the conviction overturned, but these errors often go unnoticed and unpreserved.²⁵

Finally, an accurate interpretation requires that the interpreter translate everything that is said, even “apparent misstatements.”²⁶ The following example from the mental health setting illustrates the related dangers of an incomplete interpretation:

Clinician to Spanish-speaking patient: “What about worries, do you have many worries?”

Interpreter to patient: “Is there anything that bothers you?”

Patient’s response: “I know, I know that God is with me, I’m not afraid, they cannot get me [pause] I’m wearing these new pants and I feel protected, I feel good, I don’t get headaches anymore.”

Interpreter to clinician: “He says that he is not afraid, he feels good, he doesn’t have headaches anymore.”²⁷

As a result of the interpreter’s incomplete translation, the clinician was left without the most diagnostically valuable information.²⁸

III. STATE AND FEDERAL GOVERNMENTS TAKE NOTICE

Courts at all levels struggled to find a way to ensure qualified interpreters were available to make accurate translations—thereby avoiding the problems cited above and giving meaning to the “right to an interpreter.”

23. *Id.* at 176 n.3. “The Spanish word ‘kilo’ can be translated into English as either ‘kilogram’ or ‘cent.’ Which word is the better translation depends on the dialect of the speaker and the context of the statement.” *Id.* Cuban speakers commonly use the word “kilo” to mean “cent,” and drug dealers usually do not use the word “kilo” to refer to cocaine, but instead use code words. *Id.* at 176 nn.3-4 (citing telephone interviews with federally certified interpreters).

24. *Id.* at 176.

25. *Id.* at 176 n.5. Since this defendant’s original words resided on a recorded telephone conversation, another more qualified interpreter was able to later review the accuracy of the translation, resulting in the conviction being overturned. If the translation error had instead occurred while the defendant was testifying, the error may have never been caught, because the defendant’s original Spanish words would not have been recorded and only the improperly translated English record would remain. *Id.*

26. Salimbene, *supra* note 2, at 651 (citing Minnesota and Oregon statutes as examples).

27. *Id.* at 651-52 (quoting ROSEANN DUENAS GONZÁLEZ ET AL., *FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY & PRACTICE* 479-80 (1991)).

28. *See id.* at 652.

A. *The Court Interpreters Act of 1978*

The federal government was the first to move beyond the right to an interpreter and focus on the “quality of the interpretation.”²⁹ The Court Interpreters Act required the Director of the Administrative Office of the United States Courts to “establish a program to facilitate the use of certified and otherwise qualified interpreters” in federal proceedings.³⁰ This certification task itself turned out to be intricate and costly.³¹

In creating certification requirements, the Administrative Office recognized the need for a “highly complex” interpreter skill set.³² Specifically, a qualified interpreter must be skilled in three forms of interpretation: simultaneous, consecutive, and sight.³³ Simultaneous translation is required for parties and

29. Mollie M. Pawlosky, Case Note, *When Justice is Lost in the “Translation”*: Gonzalez v. United States, an “Interpretation” of the Court Interpreters Act of 1978, 45 DEPAUL L. REV. 435, 468 (1996).

30. 28 U.S.C.A. § 1827(a) (West 2007).

31. The federal certification “program is maintained at a cost of approximately \$400,000 annually.” NCSC, RESOURCE MATERIAL, *supra* note 1, at 90.

32. Administrative Office of the United States Courts, *Federal Court Interpreter Information Sheet*, <http://www.uscourts.gov/interpretprog/infosheet.html> [hereinafter Administrative Office, *Federal Court Interpreter Information Sheet*].

33. The Administrative Office defined the three forms of interpretation:

“Simultaneous Interpretation” means the instantaneous oral reproduction of speech from one language to another. This requires the interpreter to listen, comprehend, convert into the target language, and reproduce a speaker’s or signer’s message in the target language while the speaker or signer continues to speak or sign, typically lagging a matter of seconds behind the speaker’s or signer’s communication. The simultaneous mode is used by interpreters when interpreting all that is said in courtroom proceedings for non-English speaking defendants.

“Consecutive Interpretation” means interpretation that requires the interpreter to listen, comprehend, render into the target language, and reproduce the original message in the target language after the speaker or signer pauses, such as in the “question and answer” mode in which the speaker completes a statement and the interpreter begins to interpret after the statement is completed. The consecutive mode is used with non-English speaking parties on the stand or at the lectern.

“Sight Translation” is the oral rendition of the text of a written document. The interpreter first reviews the original text, then renders it orally into the other language. Sight translation is distinguished from the general meaning of translation, which is rendering a written source language document into a written target language document, in that sight translation is done on sight (upon reading): the parallel text is spoken verbally, and not prepared in writing.

Administrative Office of the United States Courts, *Contract Court Interpreter Services Terms and Conditions*, http://www.uscourts.gov/interpretprog/Terms_Conditions.pdf.

consecutive translation for witnesses, although judges have discretion to authorize additional interpretation where necessary.³⁴

In each form of interpretation, the interpreter must be able to render precise translation “without any additions, omissions or other misleading factors that in any way alter the intended meaning of the message from the source language speaker.”³⁵ She must also be able to understand and negotiate herself through the unique nature of judicial proceedings, including the use of “specialized and legal terminology, formal and informal registers, dialect and jargon, varieties in language and nuances of meaning.”³⁶ All of this must be done without bias and while maintaining certain professional standards.³⁷ To ensure interpreters understand and abide by their professional and ethical responsibilities, the Administrative Office created a Code of Conduct³⁸ and requires interpreters to take an oath.³⁹ The Administrative Office further classified three categories of interpreters for potential use in federal courts: certified interpreters, professionally qualified interpreters, and language-skilled interpreters.⁴⁰

Federal certification programs currently exist for Spanish, Navajo and Haitian-Creole.⁴¹ The Administrative Office continues to develop procedures for the other languages most represented in federal courts.⁴² To become a federally certified court interpreter, an applicant must first pass a written examination, successful completion of which allows the applicant to register for an oral test.⁴³

34. 28 U.S.C.A. § 1827(k).

35. Administrative Office, *Federal Court Interpreter Information Sheet*, *supra* note 32.

36. *Id.*

37. *Id.*

38. Court interpreters are “officers of the court,” and “are expected to follow the Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts.” The Canons address nine topics: (1) Accuracy and Completeness; (2) Representation of Qualifications; (3) Impartiality, Conflicts of Interest, and Remuneration and Gifts; (4) Professional Demeanor; (5) Confidentiality; (6) Restriction of Public Comment; (7) Scope of Practice; (8) Assessing and Reporting Impediments to Performance; and (9) Duty to Report Ethical Violations. Administrative Office of the United States Courts, *Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts*, http://www.uscourts.gov/interpretprog/Standards_for_Performance.pdf [hereinafter Administrative Office, *Standards for Professional Responsibility*].

39. Federal Rule of Evidence 604 requires interpreters to be administered an oath. FED. R. EVID. 604. “The oath or affirmation of the interpreter is to make a ‘true translation’ which requires that the interpreter communicate exactly what the witness is expressing in his testimony. An interpreter for a criminal defendant is also required to interpret everything said in the courtroom.” 2 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 604:1 (6th ed. 2007).

40. Administrative Office, *Federal Court Interpreter Information Sheet*, *supra* note 32.

41. *Id.*

42. Federal courts primarily require Spanish interpreters, but they also need interpreters in other languages, including Chinese (Mandarin, Cantonese, and Foochow), Vietnamese, Korean, Russian, and Arabic. *Id.*

43. Administrative Office of the United States Courts, *Federal Court Interpreter Certification*

An applicant must successfully pass both the oral and written portions to become certified.⁴⁴ Achieving certification takes a minimum of two years because the written examination is administered one year, and the oral examination is administered the following year.⁴⁵

The two examinations are difficult and comprehensive. The written test, for example, typically requires “college level proficiency,” and the oral examination usually requires training in the three forms of interpreting (simultaneous, consecutive, and sight).⁴⁶ To ensure the interpreter can function accurately in a live courtroom setting,

[T]he oral portion is conducted in a simulated courtroom and tests the candidate’s use of formal language, slang, and colloquialisms. A jury charge and defense opening statement taken from actual trial transcripts have been used in past examinations. Candidates also have been required to interpret direct testimony and direct and cross examination questions, as well as translate probation reports and power of attorney forms. During the oral examination, each candidate is reviewed by a panel consisting of an active court interpreter, a specialist in the [target] language, and an international conference interpreter.⁴⁷

The lack of readily available training and the complexity of the oral and written examinations have made building a substantial corps of interpreters a slow proposition. The first certification examination was held in 1980, and today there are only 940 federally certified Spanish interpreters, 12 federally certified Haitian-Creole interpreters, and 8 federally certified Navajo interpreters.⁴⁸

When there is need to interpret one of the languages for which a certification regimen has been established (Spanish, Navajo, and Haitian-Creole),⁴⁹ federal courts may use only certified interpreters unless the judge, with the assistance of the Director of the Administrative Office, determines that a certified interpreter is not reasonably available.⁵⁰ In those situations, the court may use only professionally qualified interpreters or language-skilled interpreters.⁵¹

Examination Information, Frequently Asked Questions, http://www.ncsconline.org/D_Research/Consort-interp/fcice_exam/faq.htm.

44. *Id.*

45. *Id.*

46. Pawlosky, *supra* note 29, at 470.

47. *Id.* at 469-70.

48. E-mail from Carolyn J. Kinney, Ph.D., Federal Court Interpreting Program, District Court Administration Division, Administrative Office of the U.S. Courts (Feb. 27, 2007, 09:07 EST) (on file with author).

49. Currently Cantonese and Mandarin language tests are being developed, and federal courts have proposed creating “otherwise qualified” procedures for Arabic, Hebrew, Italian, Mien, Polish, and Russian. NCSC, RESOURCE MATERIAL, *supra* note 1, at 93.

50. See 28 U.S.C.A. § 1827(b)(2), (d)(1) (West 2007); see also Administrative Office, *Federal Court Interpreter Information Sheet*, *supra* note 32.

51. The Administrative Office’s definitions follow:

This structure seeks to avoid the sort of interpretation problems cited earlier. The federal government's unified approach towards remedying these problems has proven to be a suitable model for the states.

B. Indiana's Initiatives on Interpreter Needs

Indiana recognized the need for a coordinated approach to language interpretation due largely to the findings and recommendations of the Indiana Supreme Court Commission on Race and Gender Fairness.⁵² The Commission's subcommittee on language and cultural barriers surveyed Indiana judges, attorneys, court employees, and court users concerning issues of language and cultural barriers in the legal system.⁵³ This survey documented the many interpreter problems Indiana courts faced on a daily basis,⁵⁴ and plainly indicated the growing need for interpreters in Indiana courts.⁵⁵

“Professionally qualified” interpreters. . . . An individual with previous employment as a conference or seminar interpreter with any United States agency or with the United Nations or a similar entity may be deemed “professionally qualified” if the condition for employment includes successfully passing an interpreter examination. Another way to be deemed “professionally qualified” is to be a member in good standing in a professional interpreter association that requires a minimum of 50 hours of conference interpreting experience in the language(s) of expertise and the sponsorship of three active members of the same association who have been members for at least two years and whose language(s) are the same as the applicant's, and who will attest to having witnessed the applicant's performance and to the accuracy of the statements on the application. . . .

Language-skilled interpreters. Interpreters . . . who can demonstrate to the satisfaction of the court their ability to effectively interpret from the foreign language into English and vice versa in court proceedings, can be classified as “language skilled” interpreters.

Administrative Office, *Federal Court Interpreter Information Sheet*, *supra* note 32.

52. Indiana State Court Administration, *Court Interpreter Certification Program, About the Program*, <http://www.in.gov/judiciary/interpreter/about.html> [hereinafter *State Court Administration, About the Court Interpreter Program*].

53. RACE AND GENDER FAIRNESS COMMISSION, INDIANA SUPREME COURT COMMISSION ON RACE AND GENDER FAIRNESS EXECUTIVE REPORT AND RECOMMENDATIONS 14 (Dec. 20, 2002), available at <http://www.in.gov/judiciary/fairness/pubs/fairness-final-report.pdf> [hereinafter *RACE AND GENDER FAIRNESS COMM., EXECUTIVE REPORT*].

54. The research indicated “that Indiana [was] ill-prepared to deal with persons who do not speak English or have limited understanding of English, whether these persons appear[ed] in court as victims of crime, witnesses, civil litigants, or criminal defendants.” *State Court Administration, About the Court Interpreter Program*, *supra* note 52.

55. Population data alone demonstrated the obvious reality that non-English speakers were commonly entering Indiana courts to face English-speaking judges and court staff:

The 2000 U.S. Census reported that more than 362,000 persons over age 5 in Indiana or 6.4 percent of the population spoke languages other than English in their homes and 40 percent of them reported that they speak English less than well. . . . More than

“Of the 247 judges who responded” to the 2001 survey, “90.3 percent reported having used translators for non-English speakers in their courtrooms [within the] past five years and 89.5 percent had used an interpreter in the past six months.”⁵⁶ Of these judges, “54.7 percent had used interpreters between one and 10 times during that period, [and astoundingly] 4.9 percent had used interpreters more than 100 times.”⁵⁷

Judges most commonly reported using Spanish interpreters in Indiana courts (84.6%), followed by Vietnamese (10.1%), Chinese (9.7%), and Russian (6.1%).⁵⁸ However, “[s]urveys of attorneys and court personnel revealed that courtroom interpreters also had been used for Polish, German, Japanese, Korean, Arabic, French, Greek, Ethiopian, Punjabi, Croatian, Serbian, Lithuanian, Macedonian, Czech, Thai, Burmese, Tongan and Rumanian.”⁵⁹

Unsurprisingly, Indiana judges were not always able to fulfill such needs. Of the judges surveyed, 30% were unable to find an interpreter when one was needed for a judicial proceeding.⁶⁰ These judges reported that “due to the unavailability of interpreters *qualified* to translate the required language,” they were forced to develop alternative strategies.⁶¹ Such strategies included postponements, and allowing family members, friends, bilingual counsel, or other court personnel to interpret.⁶²

Even when judges were able to locate a potential interpreter, they were often unable to determine whether she was properly qualified.⁶³ Judges were left on their own to assess what level of proficiency might be adequate and to measure whether a possible interpreter possessed these capabilities.⁶⁴ The lack of formal process and shortage of interpreters sometimes led judges to rely on interpretation by untrained, uneducated, and sometimes obviously biased individuals.⁶⁵

186,000 residents of Indiana over age 5 or 3.1 percent of the population were born outside the U.S. and more than half entered the country after 1990. Moreover, while the total population of Indiana was projected to increase by about 8.2 percent between 2000 and 2025, the Hispanic population is expected to increase at a rate of approximately 73.6 percent.

RACE AND GENDER FAIRNESS COMM., EXECUTIVE REPORT, *supra* note 53, at 14.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at app. A7.

61. *Id.* (emphasis added).

62. *Id.* at app. A5.

63. *Id.* at app. A7.

64. The judges' survey results revealed that 66.4% of judges “had no minimum standards against which interpreters' credentials were checked,” and 18.2% of judges had “no process in place for checking interpreter credentials.” *Id.*

65. The “Commission heard reports of fraudulent conduct by persons acting as interpreters, reliance upon friends and family members untrained in the law and not well educated in either

Based on these findings, the Commission recommended to the Indiana Supreme Court that Indiana develop a statewide court interpreter system.⁶⁶ Indiana subsequently joined a collaborative enterprise established by the National Center for State Courts, the Court Interpreter Certification Consortium, and implemented an Indiana court interpreter testing and certification system for Spanish, closely modeled after the Consortium procedures.⁶⁷

Indiana gained a wealth of knowledge and resources simply by joining the Consortium. The National Center for State Courts launched this collaborative effort in 1995, after states individually assessed their interpreter needs and “concluded that interpreter certification is the best method to protect the constitutional rights of court participants with limited English proficiency.”⁶⁸ Because the cost of implementing reliable certification procedures for the many necessary languages could not be shouldered by any individual state, the Consortium was developed “to facilitate court interpretation test development and administration standards, to provide testing materials, to develop educational programs and standards, and to facilitate communication among the member states and entities.”⁶⁹ This collective approach allows member states to pool their resources with a goal of ensuring qualified interpretation in the country’s courtrooms.

By mid-2006, thirty-six states had joined the Consortium, and tests have now been developed for Arabic, Cantonese, French, Haitian-Creole, Hmong, Korean, Laotian, Mandarin, Portuguese, Russian, Serbian, Somali, Spanish, and Vietnamese.⁷⁰ Aside from developing and sharing tests and testing procedures, the National Center’s Consortium also developed a “Model Interpreters Act.”⁷¹

language Of even greater concern were reports of police officers serving as interpreters in criminal court proceedings . . . despite their obvious conflict of interest.” State Court Administration, *About the Court Interpreter Program*, *supra* note 52.

66. *Id.*

67. *See id.*

68. State Court Administration, *About the Court Interpreter Program*, *supra* note 52; *see also* National Center for State Courts, *Consortium for State Court Interpreter Certification, Frequently Asked Questions, Research Services*, http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortCertFAQ.pdf.

69. State Court Administration, *About the Court Interpreter Program*, *supra* note 52.

70. National Center for State Courts, *Consortium for State Court Interpreter Certification, Member States*, http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortMemberStatesPubJune2006.pdf; *see also* National Center for State Courts, *Consortium for State Court Interpreter Certification, Tests*, http://www.ncsconline.org/wc/publications/Res_CtInte_ConsortCertTestsPub.pdf.

71. The “Model Interpreters Act” requires an interpreter oath and contains a “Model Code of Professional Responsibility for Interpreters in the Judiciary.” NCSC, RESOURCE MATERIAL, *supra* note 1, at 199-210, 217-33. Specifically, the Act requires all interpreters to “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.” *Id.* at 230. In addition, the Code of Professional Responsibility contains ten Canons that are nearly identical to those adopted by federal

With the assistance of resources from the Consortium, Indiana devised a Spanish interpreter certification program.⁷² Unlike the federal effort, Indiana's certification program incorporates both training and testing, in the hope that a dual approach will build a larger corps of certified individuals more quickly.⁷³ To become certified in Indiana, a candidate must complete five steps:

- First: Attend the two-day court interpreter orientation that covers interpreter ethics, protocol, basic criminal procedure, and the three modes of interpretation used in the courtroom;
- Second: Pass a written exam covering vocabulary, criminal procedure, and court interpreter ethics with a score of 80% or better;
- Third: Pass all three portions of the National Consortium-approved interpreter certification oral exam with a score of 70% or better on each of three sections: sight translation, consecutive interpretation and simultaneous interpretation;
- Fourth: Submit to [and pass] a criminal background check;
- Fifth: Sign an oath promising to comply with the Indiana Supreme Court Interpreter Code of Conduct and Procedure.⁷⁴

The written examination tests three skill sets: (1) the English language, (2) court-related terms and usage, and (3) ethics and professional conduct.⁷⁵ In the oral examination, two certified interpreters who are trained as raters individually test the applicant in the three modes of interpretation (simultaneous, consecutive, and sight).⁷⁶ To date, Indiana has thirty-five certified Spanish court interpreters.⁷⁷ The hope is that incorporating training into the five-step testing procedure will allow more bilingual individuals to become certified, while ensuring court interpreters possess the necessary skill set.

Although Indiana only has certification procedures established for Spanish

courts: (1) Accuracy and Completeness; (2) Representation of Qualifications; (3) Impartiality and Avoidance of Conflict of Interest; (4) Professional Demeanor; (5) Confidentiality; (6) Restriction of Public Comment; (7) Scope of Practice; (8) Assessing and Reporting Impediments to Performance; (9) Duty to Report Ethical Violations; and (10) Professional Development. *Compare id.* at 199-210, with Administrative Office, *Standards for Professional Responsibility*, *supra* note 38.

72. State Court Administration, *Court Interpreter Certification Program Administrative Policies*, <http://www.in.gov/judiciary/interpreter/policies.html>.

73. State Court Administration, *Court Interpreter Certification Program, Get Certified*, <http://www.in.gov/judiciary/interpreter/getcertified.html> [hereinafter State Court Administration, *Get Certified*].

74. *Id.*

75. *Id.*

76. *Id.*

77. State Court Administration, *Court Interpreter Certification Program, Registry*, <http://www.in.gov/judiciary/interpreter/registry.html> [hereinafter State Court Administration, *Registry*].

interpreters, Indiana does permit certification by reciprocity.⁷⁸ “Reciprocity is available to out-of-state certified interpreters with Federal Certification or State Certification from National Center for State Courts Interpreter Consortium member states.”⁷⁹ This further allows Indiana to benefit from the Consortium membership by certifying interpreters in more languages than Spanish.⁸⁰

We encourage Indiana courts to use certified interpreters, partly through distribution of cash grants made possible by the Indiana General Assembly. Before any formal requirement for use of certified personnel could ever be considered, there must be a sufficient number of certified interpreters, and the process is slow. Still, the process exists, and it is through these recently adopted testing and certification procedures that Indiana can guarantee non-English speaking parties and witnesses the right to a qualified interpreter, at least for Spanish.

Still, what about the *immediate* problem when a judge is faced for the first time in her courtroom with a party or witness who speaks some other language? How should the judge timely locate an interpreter? Indiana recognized this need in 2005 and opened an account with “Language Line Services” for telephone interpretation.⁸¹ Language Line is “an over-the-phone interpretation service based in Monterey, California, which provides interpretation services in more than 140 languages,” every day of the year, around the clock.⁸²

Language-Line is only a temporary fix where *immediate* interpretation is necessary to allow the most basic communication. It is not meant to replace available certification programs, and Language-Line interpreters do not possess the full skill set that is necessary to ensure “quality” interpretations. For example, Language-Line interpreters may not be trained in the three forms of interpretation and may not be intimately familiar with courtroom language or processes.⁸³ But, the simple fact is that individuals present themselves in Indiana courts speaking everything from Mandarin to Urdu,⁸⁴ and we must find a way to communicate with these individuals while we locate more permanent

78. State Court Administration, *Court Interpreter Certification Program, Certification by Reciprocity*, <http://www.in.gov/judiciary/interpreter/reciprocity.html>.

79. *Id.* The applicant still must pass a criminal history background check with the Indiana State Police and must take a sworn oath to uphold the Indiana Court Interpreter Code of Ethics. *Id.*

80. Indiana has one certified Arabic interpreter. State Court Administration, *Registry*, *supra* note 77.

81. Press Release, Ind. Supreme Court, Supreme Court Arranges for \$25,000 in Translation Services (Oct. 5, 2005), *available at* <http://www.ai.org/judiciary/press/2005/1005.html>.

82. *Id.*; *see also* Adrienne Meiring, *New Program to Provide Limited Telephonic Foreign Language Interpretation for Indiana Courts*, INDIANA COURT TIMES, Summer/Fall 2005, at 2.

83. However, Language-Line interpreters do “have hundreds of hours of interpreting experience” and “are required to be familiar with police and 911 procedures.” Press Release, Ind. Supreme Court, *supra* note 81.

84. Chief Justice Randall T. Shepard, State of the Judiciary Address: Indiana’s Place in American Court Reform: Rarely First, Occasionally Last, Frequently Early (Jan. 12, 2006).

interpretation services. Illustrating its usefulness, Indiana has already used Language-Line interpreters to assist people who spoke French, Somalian, Russian, Mongolian, Yeman, Korean, and Mextaco (a Mexican regional dialect).⁸⁵

Beyond the right to an interpreter for parties and witnesses, however, Indiana hopes to serve people of all backgrounds, litigants, witnesses, relatives, and anyone else who enters the courthouse hoping for justice.⁸⁶ Indiana takes a serious view of how confusing and unmanageable the judicial system must be for non-English speaking individuals. Even the most seemingly simple questions, such as “What court do I go to?, When is my next court date?,” and “Where is the Clerk’s office?” can remain unanswered if court staff and personnel cannot communicate with those individuals that come through the doors.⁸⁷ In light of these concerns, just last year, hundreds of court employees, court clerks, and judges alike,⁸⁸ took it upon themselves to do more to tackle the language barrier by trooping off to Spanish class.⁸⁹

CONCLUSION

These initiatives are but a down payment on what remains to be done. They nevertheless represent a respectable effort to make Indiana a better home to people of all backgrounds—through ensuring that statutory and constitutional rights and access to justice are not lost in translation.

85. *Id.*

86. Chief Justice Randall T. Shepard, State of the Judiciary Address: Most Justice Happens in the County Courthouse (Jan. 17, 2007).

87. *Id.*

88. “Since the program started last summer, almost 500 people from local court offices and clerks’ offices have enrolled in this course from 34 different counties.” *Id.*

89. The Indiana Supreme Court partnered with Ivy Tech Community College to develop a WorkPlace Spanish® Training Program for Indiana’s courts, featuring twenty-four hours of classroom instruction and a textbook with companion CD. *Id.*

