

CHAPTER 15

LANGUAGE ACCESS

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About The Authors

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1. INTRODUCTION

National and local demographic trends point to a growing immigrant population in the United States.¹ Louisiana is no exception.² With such growth comes the inevitable challenge of providing a variety of government services,³ including court interpreters, to a population which may not be able to fully understand the English language.⁴ According to a report compiled by the Southern Poverty Law Center, Latinos indicated that among schools, hospitals, and courtrooms—a courtroom was the place where they were least likely to encounter an interpreter.⁵

The issue of court interpreters is particularly challenging for Louisiana Courts, due to little legislative guidance or judicial consensus concerning interpreter qualifications, appointments, and appropriation of costs. These Limited English Proficient (LEP) persons can face grave consequences when they are drawn into judicial proceedings, civil or criminal, where they are unable to meaningfully participate or defend themselves because they lack English proficiency. However, the presence of a qualified interpreter can give a LEP individual the opportunity to participate in a meaningful way in the legal process and to contribute rich detail and essential information because effective communication has been established.

2. THE RIGHT TO AN INTERPRETER IN LOUISIANA COURTS

2.1 HOW TO APPLY FOR AN INTERPRETER

Articles 192.2 and 25.1, of the codes of civil and criminal procedure mandate that a judge appoint a foreign language interpreter when requested by a “principal party in interest” or a “witness.”⁶ An adequate showing of a party’s inability to understand the proceedings in English or be understood in English should establish the right to an interpreter.⁷ The right to an interpreter applies to the entire proceeding, not just to the non-English speaking person’s own testimony.⁸

¹ Between 1990 and 2010, “the number of LEP [Limited English Proficient] individuals in the United States grew by 80 percent” and “[i]n 2010, LEP individuals accounted for 25.2 million, or 9 percent, of the US population over age 5.” Pandya Chhandais et al., *Limited English Proficient Individuals in the United States: Number, Share, Growth, and Linguistic Diversity*, MIGRATION POLICY INST. (Dec. 2011), available at <http://www.migrationinformation.org/integration/LEPdata-brief.pdf>.

² According to the 2010 census conducted by the U.S. Census Bureau, Louisiana had 4,533,372 inhabitants, with 8.7% of the inhabitants over the age of five speaking a language other than English at home. This would mean that approximately 394,403 individuals in Louisiana speak a language other than English at home. *State & Country QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/22000.html> (last visited Apr. 2, 2011).

³ Agencies that receive federal money must comply with Title VI of the Civil Rights Act of 1964 and President Clinton’s Executive Order 13166 dealing with LEP individuals, which is titled, “Improving Access to Services for Persons with Limited English Proficiency.” *Language Portal: A Translation and Interpretation Digital Library*, MIGRATION POLICY INST., http://www.migrationinformation.org/integration/language_portal/ (last visited June 25, 2012) & *Overview of Executive Order 13166*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/cor/13166.php> (last visited June 25, 2012) [hereinafter *Overview of Executive Order*]. Executive Order 13166 directs federal agencies “to examine the services they provide, identify any need for services to those with limited English proficiency (LEP), and develop and implement a system to provide those services so LEP persons can have meaningful access to them.” *Overview of Executive Order*. In addition, the order “requires that the Federal agencies work to ensure that recipients of Federal financial assistance provide meaningful access to their LEP applicants and beneficiaries.” *Id.*

⁴ A term that has gained currency to describe non-English speaking individuals is “Limited English Proficient” (LEP) person. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1001 n.5 (2007). A good description of LEP persons defines them as “those who ‘cannot speak, read, write or understand the English language at a level that permits them to interact effectively with’ service providers.” *Id.* (quoting Policy Guidance on the Prohibition Against National Origin Discrimination as It Affects Persons With Limited English Proficiency, 67 Fed. Reg. 4968, 4969 (Feb. 1, 2002)).

⁵ *Under Siege: Life for Low-Income Latinos in the South*, S. POVERTY LAW CTR. 38 (Apr. 2009) [hereinafter *Under Siege*]. Forty-six percent of Latinos who had prior court experience reported there was no court interpreter. *Id.*

⁶ LA. CODE CIV. PROC. ANN. art. 192.2 (2008); LA. CODE CRIM. PROC. ANN. art. 25.1 (2008).

⁷ *State v. Mondragon*, 01-35,178 (La. App. 2 Cir. 04/19/01); 804 So. 2d 657.

⁸ LA. CODE CIV. PROC. ANN. art. 192.2 (2008).

In 2002, the Louisiana Supreme Court mandated that, in accordance with the Americans with Disabilities Act, in all criminal and civil proceedings a court-provided foreign language interpreter should be made accessible through simply filling out the form found in its Appendix 5.1B.⁹ Thus, it is the responsibility of the person or his/her attorney to request an interpreter by completing this Interpreter Request and Order Form.¹⁰ This applies to all proceedings, both criminal and civil.

2.2 WHO BEARS THE COST OF AN INTERPRETER?

Louisiana Code of Civil Procedure Article 192.2 clearly states that the cost of an interpreter for a court proceeding is taxed as a court cost.¹¹ However, the costs may not be taxed to a prevailing pauper.¹² Also, in many domestic violence cases, the costs must be paid by the abuser.¹³ Note that art. 192.2 deals strictly with those who are not deaf or severely hearing-impaired.

Louisiana law imparts more rights to persons who are deaf and severely hearing-impaired than to LEP individuals. The right to an interpreter applies to the taking of depositions and the court proceedings.¹⁴ For the deaf and hearing-impaired, the Louisiana Code of Civil Procedure specifically states that “[t]he costs of such interpreters shall be borne by the court.”¹⁵ These individuals not only have a right to have an interpreter appointed for the proceeding itself, but in cases where it is the practice or policy of the courts to appoint counsel for indigent parties, they also have a right to have a “qualified interpreter/transliterator”

⁹ LA. SUP. CT. R. 5.1. “Rules for Proceedings in District Courts, Family and Domestic Relations Courts, and Juvenile Courts, Title I, Rule 5.1 ‘Accessibility to Judicial Proceedings’ (a) The facilities, services, and programs of the court shall be readily accessible to persons with disabilities. Attached as Appendix 5A is a form that may be used to request reasonable accommodations extended under the ADA. Attached as Appendix 5B is a form that may be used to request an interpreter.” *Id.* See Appendix B for a copy of this form.

¹⁰ LA. SUP. CT. R. 5.1.

¹¹ LA. CODE CIV. PROC. ANN. art. 192.2 (2008) states in full “A. If a non-English-speaking person who is a principal party in interest or a witness in a proceeding before the court has requested an interpreter, a judge shall appoint, after consultation with the non-English-speaking person or his attorney, a competent interpreter to interpret or to translate the proceedings to him and to interpret or translate his testimony. B. The court shall order reimbursement to the interpreter for his services at a fixed reasonable amount, and that amount shall be taxed by the court as costs of court.” *Id.* Louisiana Code Criminal Procedure Article 25.1 has the same language in Part A as Article 192.2 of the civil code. However, Part B of Article 25.1 states “[t]he court shall order reimbursement to the interpreter for his services at a fixed reasonable amount.” LA. CODE CRIM. PROC. ANN. art. 25.1 (2008). Note there is no mention in Article 25.1 of the cost of an interpreter being taxed as a court cost. Thus, a criminal defendant could ultimately be responsible for the cost under Louisiana Code Criminal Procedure Article 887(A). Article 887(A) states in full “[a] defendant who is convicted of an offense or is the person owing a duty of support in a support proceeding shall be liable for all costs of the prosecution or proceeding, whether or not costs are assessed by the court, and such costs are recoverable by the party or parties who incurred the expense. However, such defendant or person shall not be liable for costs if acquitted or if the prosecution or proceeding is dismissed. In addition, any judge of a district court, parish court, city court, traffic court, juvenile court, family court, or magistrate of a mayor’s court within the state shall be authorized to suspend court costs.” LA. CODE CRIM. PROC. ANN. art. 887(A) (2008). See also *State v. Lopes*, 01-1383 (La. 12/07/01); 805 So. 2d 124, 128 (the court recognized a need for an interpreter as a function of due process, but did not hold that the obligation to provide an interpreter at the State’s cost was unconditional) and discussion *infra* p. 9. See also Judge William J. Burris, *The Impact of Language Barriers to Access to Justice*, 56 La. B.J. 416, 417 (2009) (“if the criminal defendant is convicted and is not indigent, the cost of an interpreter is assessable to him under La. C.C.P. art. 887”).

¹² LA. CODE CIV. PROC. ANN. art. 5186 (1997); *Snowton v. Snowton*, 09-0600 (La. App. 4 Cir. 1/27/10), 22 So.3d 1111.

¹³ LA. REV. STAT. ANN. § 46: 2136.1 (2011)(protective order proceedings); LA. REV. STAT. ANN. § 9:367 (2011)(custody and protective order proceedings under Post-Separation Family Violence Relief Act).

¹⁴ LA. CODE CIV. PROC. ANN. art. 192.1(C)(2) (2008).

¹⁵ LA. CODE CIV. PROC. ANN. art. 192.1(C)(2) (2008). Discussed *supra* p. 3, the costs for an interpreter under Article 192.2 is to be taxed as court costs. LA. CODE CIV. PROC. ANN. art. 192.2 (2008).

appointed and paid for “to assist in communication with counsel in all phases of the preparation and presentation of the case.”¹⁶

2.3 WHAT QUALIFICATIONS MUST AN INTERPRETER HAVE?

The qualifications of court interpreters are governed by the Louisiana Code of Evidence Article 604, which states “[a]n interpreter is subject to the provisions of this Code relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.”¹⁷ Thus, Louisiana, like many other states, designates interpreters as “expert witnesses.”¹⁸ Yet nothing in the law sets forth any interpreter standards, nor is there any guidance for judges or lawyers to follow when considering the use and evaluation of an interpreter other than Code of Civil Procedure art. 192.2 which requires the interpreter to be competent.¹⁹

A recent civil case, *Thongsavanh v. Schexnayder*,²⁰ did set forth general standards regarding the qualification of interpreters. The court stated “[a]n interpreter of foreign-language testimony must be competent and qualified by virtue of knowledge, skill, experience, training, or education, have no substantial interest in the proceedings, and be sworn to give a true bilateral translation of the questions and answers during testimony.”²¹

3. HOW TO COMMUNICATE WITH LEP CLIENTS²²

Another issue, which ties into legal ethics, is the importance of clear communication between an attorney and his/her client. For representation of a client to comport with ethical requirements of competence, it is imperative that counsel be able to communicate fully with his/her client.²³ Thus, before interviewing a client, an attorney should determine what particular and special needs the future

¹⁶LA. REV. STAT. ANN. § 46:2364(A)(F) (2008). This statute is broadly titled “Louisiana Interpreter’s Law.” *Id.* See also *State v. Mondragon*, 01-35,178 (La. App. 2 Cir. 04/19/01); 804 So. 2d 657 and discussion *infra* p. 9. The pertinent parts of Louisiana Revised Statute § 46:2364 are: “A. Whenever a hearing-impaired person is a party or witness at any stage involving direct communication with hearing-impaired persons or his legal representative or custodian during any judicial or quasi-judicial proceeding in this state or in its political subdivisions, including but not limited to proceedings of civil and criminal court, grand jury, before a magistrate, juvenile, adoption, mental health commitment, and any proceeding in which a hearing-impaired person may be subjected to confinement or criminal sanction, the appointing authority shall appoint and pay for a qualified interpreter/transliterater to interpret or transliterate the proceedings to the hearing-impaired person and to interpret or transliterate the hearing-impaired person’s testimony. E. (1) Whenever a hearing-impaired person is arrested for an alleged violation of a criminal law, including a local ordinance, the arresting officer shall procure and the court with jurisdiction over the alleged violation shall pay for a qualified interpreter/transliterater for any interrogation, warning, notification of rights, or taking of a statement. F. Where it is the policy and practice of a court of this state or of its political subdivisions to appoint counsel for indigent persons, the appointing authority shall appoint and pay for a qualified interpreter/transliterater for hearing-impaired indigent people to assist in communication with counsel in all phases of the preparation and presentation of the case.” LA. REV. STAT. ANN. § 46:2364 (2008).

¹⁷LA. CODE EVID. ANN. art. 604 (2006). See also LA. DIST. CTS. R. 5.1, Interpreter’s Oath, available at <http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX5.1C.PDF>. See Appendix C for a copy of this oath.

¹⁸See LA. CODE EVID. ANN. art. 604 (2006). However, a witness who cannot speak English will be provided an interpreter before a grand jury. LA. CODE CRIM. PROC. ANN. art. 433(A)(1)(e) (2008).

¹⁹The Louisiana Language Access Coalition is working towards creating legislation to regulate “standards and monitoring of interpreter services within the state court system.” *LLAC Mission and Goals*, LA. LANGUAGE ACCESS COAL. 2, available at http://loisianalac.org/Docs/LLAC%202-Pager_2012.pdf.

²⁰*Thongsavanh v. Schexnayder*, 09-1462 (La. App. 1 Cir. 05/7/10); 40 So. 3d 989.

²¹*Id.* at 997. See also discussion *infra* p. 11.

²²The authors would like to thank Rebecca E. Zuniga-Hamlin, Outreach Assistant to the Workplace Justice Project, for her insight and contribution to this section of the chapter.

²³See LA. RULES OF PROF’L CONDUCT R. 1.1. The pertinent section of this rule governing attorney competence states “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *Id.*

client might have; and this determination ought to include language access and cultural awareness. A lawyer must be able to understand the story the client is telling. All clients present with a story—that is the basis for his/her problem and why he/she is seeking the advice of a lawyer. Therefore, the lawyer must be able to ask questions and elicit responses from his/her client. If an attorney is unable to fully comprehend the underlying issues surrounding a client's problem, then representation of the client may not be competent.

Thus, be aware that if a LEP person comes to your office you must be able to communicate fully with them. If language access is a problem you may be required, under the Rules of Professional Conduct, to use an interpreter.²⁴ A lawyer should always strive to use a qualified interpreter, and in the event a trained and qualified interpreter is not available, the attorney may request that the client bring an interpreter with him or her. Attorneys should never use a family member or a child to interpret. This would violate confidentiality and there is a clear conflict of interest. Additionally, using family members, especially children, is unadvisable and dangerous due to the trauma it may cause to the family member or child. In many cases lawyers do not have a trained qualified interpreter they know or can reach. In some cases it may be possible for counsel to use a staff member in his/her office who is bilingual, but that staff member should be trained to at least a minimal level. As mentioned previously, being bilingual does not qualify a person as an interpreter; interpretation is a profession that requires skill and training.²⁵

Another tool which lawyers may use is language lines. Although these services do not guarantee full meaningful communication, they can be helpful. For example, at Language Line Services, which offers interpretation services for over 170 languages, an attorney simply calls the 800 number and requests over-the-phone interpretation.²⁶ The interpreters at this service must sign a confidentiality agreement and are bound by a code of ethics.²⁷ The call to the number is free and usage is billed in one-minute increments when the interpreter comes on the line.²⁸ Thus, this may be an option for counsel if a qualified interpreter is not available.

Additionally, lawyers should take into consideration the location of the interview. In many cases, the client is a person that is held in detention or is serving a sentence of some sort. Therefore, it is important for counsel to determine what language access facilities are available at the location. If the attorney has to bring an interpreter, the attorney should make inquiries about the facility's requirements for the use of interpreters and their access to the facility. Nevertheless, lawyers should be prepared for the contingency that the interpreter is not allowed into the facility, even after counsel has comported with all requirements.

²⁴ See *id.*

²⁵ See discussion *supra* pp. 4-6.

²⁶ *Immediate Access to Interpreters in Over 170 Languages*, LANGUAGE LINE SERVS., http://www.language-line.com/page/our_company/ (last visited June 25, 2012).

²⁷ *Frequently Asked Questions About Telephone Interpreting*, LANGUAGE LINE SERVS., <http://www.language-line.com/page/qanda/> (last visited June 25, 2012).

²⁸ *Id.* The service may be used by either a pay-as-you go option or by establishing an account. If a lawyer uses the service on a pay-as-you go basis, the rate is \$3.95 per minute. If an account is established, the rate varies between two and six dollars, depending on the languages used and how many calls per month the account handles. Interview with a Language Line Service representative (June 25, 2012).

4. HOW DO I DECIDE WHETHER A CLIENT NEEDS AN INTERPRETER?

The issue is whether your client can adequately understand English and be understood in English. A LEP client's lack of sufficient English proficiency should be clear in many cases. However, there may be close cases where you need to carefully decide whether an interpreter is needed or not. A LEP client's testimony may not be as strong in a translation as in his English. Also, if the judge perceives that a LEP witness is "hiding" behind an interpreter when his English is good enough for him to understand and be understood, this may affect your client's credibility.

5. USE OF INTERPRETERS AT DEPOSITIONS

Depositions of LEP clients may be even more challenging than courtroom testimony. First, there is no right for a LEP client to have a free interpreter in a deposition in a civil case. Generally, in most legal services cases, the opposing counsel takes the deposition and the legal services attorneys defends the deposition. Thus, the qualifications and costs of the interpreter will always present as an issue since legal services clients lack the funds to pay interpreters. You should argue that the party seeking the deposition must pay for the cost of interpretation for your LEP client.²⁹ As a practical matter, if you don't speak the client's language, you will also need another interpreter to speak confidentially with your client at the deposition and to check the official interpreter's translations.

One challenge of interpreted depositions (if you don't speak the client's language), is that the client's testimony will be recorded before you have an opportunity to object or intervene. Thus, there is an enhanced risk that a witness may reveal confidential information before the attorney can intervene.

Never waive the reading and signing of the deposition of a LEP client. If mistakes were made due to inaccurate translations, this will be your opportunity to correct them. Given the difficulties of interpreted testimony, the deposition presents the danger of setting a LEP client up for inconsistent testimony which will undercut his credibility at the ultimate trial.

If your client can afford it, real time depositions of LEP witnesses' testimony will facilitate easier and more accurate translations by the interpreter. An audio or video recording would also allow you to check the accuracy of translations after the fact.

6. HOW TO WORK WITH AN INTERPRETER

You should help the interpreter understand the case. Provide the interpreter with a copy of the complaint and a summary of the case and issues. For a deposition interpreter or an interpreter appointed by the court for the trial, you should seek the opposing counsel's approval of any case summary that you want to provide to the interpreter. If opposing counsel will not approve your case summary, seek authorization from the court for the proposed communication with the interpreter. A better interpretation should result if the interpreter is provided in advance with the names of witnesses and any technical terms that may be used

²⁹See e.g., *Dahn World Co., Ltd. v. Chung*, 2009 WL 277603 (D. Md. 2009); *East Boston Ecumenical Comm. Council, Inc. v. Mastorillo*, 124 F.R.D. 14, 15 (D. Mass. 1989).

in the witnesses' testimony. But remember that the interpreter is an officer of the court and communications with the interpreter outside the court should not be conducted without the court's authorization.

Ideally, the interpreter should be able to meet and briefly speak with the non-English speaking party or witness prior to his testimony. This will help the interpreter and witness understand differences in accents, dialects, pronunciation and speaking styles. Remember to warn your client that communications with the interpreter are not confidential and that they should talk about things other than the case to get used to each other's speech.

To make the interpreter's translation more accurate, examining attorneys should use short and simple questions. Pause between sentences or segments to allow the interpreter to interpret. Don't use complex legal terms, acronyms or refer to people by their titles, rather than their names. Remember that you should always direct your questions to the witness in the first person, not to the interpreter. For example, say "did you see the car accident?" rather than "ask him whether he saw the car accident." Generally, it is not wise to have an interpreter translate a document on the spot or through a witness. If important documents need to be translated into English or another language, this should be done by a qualified translator before the trial or deposition.

Translations are tiring to interpreters and require focus. Thus, it is important for the court or deposing attorneys to allow an interpreter to take frequent breaks from translating testimony. This will promote greater accuracy in the translations. If possible, it is better to work with one interpreter for consistency. But, if a trial is long, it may be necessary to employ more than one interpreter given the need for interpreters to rest and remain fresh.

If you don't speak the language of your client or a witness, you should bring an interpreter to check on the accuracy of the court appointed interpreter's translations. As a practical matter, you need an interpreter with you to communicate confidentially with your client during the trial. This interpreter can also advise you if the court interpreter has inaccurately translated the examiner's question or the witness' answer. Use tact in challenging the official interpreter's translations.

A serial interpretation is easier and more accurate than simultaneous interpretation. In serial interpretations, the interpretation is given after the entire question or answer. In simultaneous interpretations, the interpreter translates as the witness, lawyer or judge is speaking. Some courts may require simultaneous interpretations.

7. PREPARATION OF YOUR LEP CLIENT FOR TESTIMONY

You should prepare your LEP client on how to work more effectively with an interpreter. Advise your client to speak slowly and clearly, and not to speak when another person is speaking. Clients should be counseled to use short sentences and avoid slang.

If your client does not understand a question or the words used by the interpreter, he should say so and wait for the attorneys or court to resolve the matter before answering.

Advise your client that anything he says to the court interpreter will be translated word for word and that the interpreter is required to tell the court everything he says. Tell your client that the interpreter is not allowed to explain the client's answers. Your client should avoid asking the interpreter how to answer a question or revealing any confidential information to the interpreter. Such mistakes can seriously prejudice your client's case.

8. INTERPRETER ETHICS

Interpretation requires knowledge, skill, and ethics. The fact of being bilingual does not qualify an individual for court interpreting, even if the person is fluent. For example, officials in Arkansas

[D]iscovered that the Spanish-language rights waiver signed by a man pleading guilty to driving while intoxicated stated that he was charged with 'a murder' and that his penalty was '1 anus in jail and a \$1,000 fine.' A court clerk who spoke Spanish but wasn't certified by the state had translated the waiver form into Spanish several years earlier.³⁰

An interpreter's competence can be "defined as the congruence between task demands (performance standards) and qualifications;"³¹ thus, interpreters should be considered professionals within the judicial system.³² The conceptualization of interpreters as "professionals," which incidentally, is also supported by their designation in the Louisiana Code of Evidence as "experts,"³³ is essential to the understanding that "interpreters," like experts, require specialized knowledge and training.

Thus, since interpreters are professionals, they have established professional responsibilities and must ascribe to a code of ethics. Codes of ethics for interpreters may vary from jurisdiction to jurisdiction, but generally accepted canons exhort interpreters to uphold the standards of the profession by understanding the need for "accuracy," "impartiality and conflicts of interest," "confidentiality," "limitations of practice," "protocol and demeanor," "maintenance and improvement of skills and knowledge," "accurate representation of credentials" and "impediments to compliance" in particular instances.³⁴

³⁰ *Under Siege*, *supra* note 5, at 39.

³¹ FRANZ PÖCHHACKER, *INTRODUCING INTERPRETING STUDIES* 166 (Routledge 2004).

³² *Id.* ("For a practice or occupation to be acknowledged as a profession, it must be perceived to rest on a complex body of knowledge and skills, mastery of which can only be acquired by specialized training.")

³³ See LA. CODE EVID. ANN. art. 604 (2006).

³⁴ *Code of Ethics and Professional Responsibilities*, NAT'L ASS'N OF JUDICIARY INTERPRETERS AND TRANSLATORS, <http://www.najit.org/about/NAJITCodeofEthicsFINAL.pdf> (last visited Apr. 2, 2012). The Administrative Office for the United States Courts establishes the standards and guidelines for selecting and using interpreters in federal court proceedings. The "Federal Standards of Performance" are more stringent than the ones published by NAJIT. See *Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts*, U.S. CTS., http://www.uscourts.gov/uscourts/FederalCourts/InterpreterStandards_for_Performance.pdf (last visited Apr. 2, 2012). For a copy of the NAJIT and Federal Standards of Performance ethics codes refer to Appendix D. See also *Court Interpreter Knowledge, Skills, and Abilities*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/Court-Interpreters/InterpreterSkills.aspx> (last visited Apr. 2, 2012). Even more telling of interpreter's professional status is the fact that they may be sued for "malpractice" and can obtain professional interpreter liability insurance. See *The National Association of Judiciary Interpreters and Translators Professional Liability Insurance Program*, PROF. PROGRAM INS. BROKERAGE, <http://www.najit-ins.com/> (last visited Apr. 2, 2012). The NAJIT provides professional liability insurance which covers "errors, omissions or negligent acts arising out of . . . professional interpreting or translating services." *Id.*

Although Louisiana does not have a code of ethics for interpreters, interpreters must take an oath.³⁵ This oath embodies many of the important ethical considerations found in the accepted canons—accuracy, competency, and impartiality.³⁶ Moreover, the oath requires interpreters to make a true interpretation.³⁷

9. LOUISIANA LEGAL ISSUES RELATIVE TO INTERPRETERS

9.1 OVERVIEW

Legal problems faced by LEP individuals in Louisiana as a result of the failure of the courts to understand, apply, and uphold interpreter standards impinge on the right to full access to the courts and the fairness of the proceeding. The courts have themselves expressed frustration with the lack of legislative guidance on the matter, leading at least one court to opine that the “issue concerning an interpreter should be addressed by the Legislature and not this Court.”³⁸ Yet another court specifically referred to the lack of statutory interpreter qualifications in its attempt to otherwise craft a juridical answer to the question of interpreter bias on appellate review.³⁹ Further, Louisiana courts, in the absence of statutory standards, have not otherwise developed a greater understanding of the issue through jurisprudence, and at least one court has bemoaned the “dearth of case-law on the issue of foreign-language interpreters” and the fact that as late as the year 2002, the main case on the issue of interpreter bias remained one decided in 1912.⁴⁰

Specific problems may be gleaned from a review of the sporadic Louisiana jurisprudence relating to interpreters.⁴¹ Although there are not an overwhelming number of interpreter cases, especially civil cases, the nature of the problems are not surprising given the absence of clear interpreter standards, and in fact, are typical of problems found in other jurisdictions facing similar legal circumstances. A scrutiny of Louisiana decisions reveals that appellate review of interpreter issues has centered mostly on:

1. the refusal or failure to appoint an interpreter;
2. interpreter error—accuracy;
3. interpreter qualifications—competency;
4. interpreter bias—impartiality;
5. timeliness of the objection to interpreter errors (accuracy) and qualifications (competency); and
6. the standard of review under which these issues will be considered.

³⁵ See LA. CODE EVID. ANN. art. 604 (2006). As previously noted, Article 604 states “[a]n interpreter is subject to the provisions of this Code relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.” *Id.*

³⁶ LA. DIST. CTS. R. 5.1, Interpreter’s Oath, available at <http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX.1C.PDF>. The oath reads in part “accurately, completely and impartially make a true interpretation.” Thus, competency is implied by the requirements that the interpretation be complete and the interpreter make a true interpretation. For a copy of the oath see Appendix C.

³⁷ LA. DIST. CTS. R. 5.1.

³⁸ *Segui v. Anthony*, 86- 4770 (La. App. 4 Cir. 06/06/ 86); 487 So. 2d 616, 618.

³⁹ *State v. Tamez*, 506 So. 2d 531, 533 (La. Ct. App. 1987).

⁴⁰ *State v. Nguyen*, 02-0410 (La. App. 3 Cir. 10/02/02); 827 So. 2d 1248, 1252 (referring to *State v. Lazarone*, 57 So. 532 (La. 1912)).

⁴¹ This review dates back to 1871. See *State v. Lemodelio*, 23 La. Ann. 16 (La. 1871).

9.2 THE REFUSAL OR FAILURE TO APPOINT AN INTERPRETER

Courts may be reticent or unwilling to appoint an interpreter. However, the general exception to the courts' hesitance to provide interpreters has been the criminal proceeding, where courts almost always conclude that regardless of who is responsible for payment of the interpreter's fees, the appointment of an interpreter is mandated as a matter of constitutional due process for a criminal defendant who is obviously unable to understand and meaningfully participate in a process which may result in loss of liberty.

The right to an interpreter in civil proceedings has not been articulated in Louisiana, although at least one civil case held "[i]f a litigant cannot fully understand or read and write the English language, he is entitled to an interpreter."⁴² Although the case does not discuss the basis for such entitlement, it is noteworthy because it was made in the context of a civil matter, and seems to imply a constitutional basis.⁴³ However, a review of other cases does not reveal any further discussion of this notion, nor whether it would be supported constitutionally. Moreover, there is no discussion as to who would be responsible for the cost of the interpreter, an issue which is not well settled given the lack of specific legislative mandate or clearly articulated and supported jurisprudence.

Note the following case law in this section is all derived from criminal cases. Thus, counsel may be able to find a criminal argument that is analogous to his/her civil one. More importantly, if a problem arises in a civil case where the judge refuses to appoint an interpreter counsel must rely on Article 192.2.⁴⁴ Under 192.2(A) if the LEP person is a "principal party in interest" or a "witness," it is mandatory that a judge appoints an interpreter if so requested.⁴⁵ There may be several approaches available if a judge refuses to appoint an interpreter. The approaches mentioned are not exclusive; the practitioner may have other ideas or may be able to ascertain what needs to be done in that particular situation.

Counsel may proceed to hire an interpreter and pay for the use of that interpreter. Or, if appropriate, counsel may wish to file a motion seeking appointment of an interpreter. If this motion is denied, then counsel may determine that the issue is qualified for an interlocutory appeal. However, interlocutory judgments are generally not appealable unless expressly provided by law.⁴⁶ Thus, a court might deem an appeal regarding the refusal of a court to appoint an interpreter a nonappealable interlocutory judgment.⁴⁷ Therefore, counsel may determine that seeking supervisory writ of the matter is the proper course of action.⁴⁸ Nevertheless, if counsel feels that none of the preceding suggestions have merit, he/she may decide the wisest course of action is to preserve an objection on the record for an appeal at a later date.

⁴² *Kim v. Kim*, 563 So. 2d 529, 530 (La. App. 5 Cir. 1990).

⁴³ *See id.*

⁴⁴ LA. CODE CIV. PROC. ANN. art. 192.2 (2008).

⁴⁵ *Id.*

⁴⁶ LA. CODE CIV. PROC. ANN. art. 2083(c) (1984). Interlocutory judgments are types of judgments that do not determine the merits of the case, but rather address preliminary matters, and are appealable only if irreparable injury can result from granting the judgment. *See* LA. CODE CIV. PROC. ANN. art. 1841 (2011) & LA. CIV. CODE PROC. ANN. art. 2083 cmt. a (1984).

⁴⁷ In the past, courts have found that judgment's maintaining exceptions of nonjoinder and no cause of action are nonappealable interlocutory judgments. *See* LA. CODE CIV. PROC. ANN. art. 2083 cmt. a (1984).

⁴⁸ Interlocutory orders are reviewable under an appellate courts' supervisory writ procedure, "which is a review mechanism separate and distinct from an appeal." BLAINE LECESNE, LOUISIANA CIVIL PROCEDURE: CASES AND MATERIALS 422 n. 1 (2010). According to Article 2201, "[s]upervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction." LA. CODE CIV. PROC. ANN. art. 2201 (2011).

Courts, when considering the refusal or failure to appoint an interpreter, have found that there is no error in failing to appoint an interpreter when the interpreter and the accused spoke English at the same level,⁴⁹ or when the interpreter was not requested prior to or during the trial.⁵⁰ Also, no error has been found when there is evidence of the defendant's ability to speak and understand the English language.⁵¹ For example, in *State v. Castro* the defendant was not entitled to a court appointed interpreter because there were numerous examples of his ability to speak, write, and understand the English language; as evidenced by his many written pro se filings made in the trial court.⁵² However, in *State v. Tamez* the court found an interpreter should have been appointed when the lower court was on notice that the defendant had difficulties with English "severe enough to require the services of an interpreter."⁵³ In that case, the trial court had a co-defendant translate the proceedings into Spanish for the defendant.⁵⁴

In *State v. Lopes* the Louisiana Supreme Court addressed the issue of whether a LEP individual had a right to an interpreter in a criminal case at the expense of the court.⁵⁵ The Court found the "need for a foreign (non-English) language translator should not be conditioned upon a defendant's financial status," and recognized the need of a LEP defendant

[T]o understand the charges leveled against him and the criminal proceedings in which he is involved, the importance of a defendant's ability to communicate with counsel, the ability of a defendant to effectively confront and cross-examine witnesses, and the defendant's understanding needed to exercise his constitutional right to testify in his own behalf in a meaningful manner.⁵⁶

In short, the Court recognized the need for an interpreter as a function of due process. However, it shied away from holding that the obligation to provide an interpreter at the State's cost was unconditional, suggesting instead that the costs of the interpreter could be later charged to a convicted defendant as costs pursuant to the Louisiana Code of Criminal Procedure.⁵⁷

Interestingly, the appellate court in *State v. Mondragon* reasoned that it saw "no distinction between those persons, whose need for assistance arises from physical limitations [the deaf or severely hearing-impaired], and the needs of those which arise from linguistic limitations [LEP persons]."⁵⁸ A full extension of the statutory rights of the deaf and severely hearing-impaired to LEP individuals by virtue of *Mondragon*, would require not only the appointment of a court paid interpreter for LEP persons, but in those instances where the individual is indigent, an interpreter to assist with the attorney-client communication as necessary.⁵⁹ However, this is not yet the law in Louisiana.

⁴⁹State v. Danna, 129 So. 154, 155 (La. 1930).

⁵⁰State v. Thucos, 390 So. 2d 1281, 1287 (La. 1980).

⁵¹*Id.* "[D]efendant's testimony at trial reflects his unquestionable ability to speak and understand the English language."

⁵²*Id.*

⁵³State v. Castro, 09-887 (La. App. 5 Cir. 5/25/10); 40 So. 3d 1036, 1049.

⁵⁴State v. Tamez, 506 So. 2d 531, 534 (La. App. 1 Cir. 1987).

⁵⁵*Id.* at 533.

⁵⁶State v. Lopes, 01-1383 (La. 12/07/01); 805 So. 2d 124.

⁵⁷*Id.* at 128.

⁵⁸*Id.* at 128-29; see also LA. CODE CRIM. PROC. ANN. art. 887(A) (2008) and *supra* note 9.

⁵⁹State v. Mondragon, 01-35,178 (La. App. 2 Cir. 04/19/01); 804 So. 2d 657, 658.

⁶⁰In Colorado, a defendant made the argument that an interpreter should have been appointed to facilitate communication with his own lawyer. *State v. Cardenas*, 62 P.3d 621, 622-23 (Colo. 2002). The court disagreed and rejected this argument. *Id.*

9.3 INTERPRETER ERROR—ACCURACY

Again, the majority of the case law in this section is derived from criminal cases. Thus, counsel may be able to find a criminal argument that is analogous to his/her civil one. More importantly, if a problem arises in a civil case dealing with the accuracy of an interpretation, counsel must rely on Article 192.2, which states that an interpreter must be competent.⁶⁰ If counsel has doubts as to the interpreter's competency, there are several tactics that may be available. The approaches mentioned are not exclusive, and counsel may intuitively know what to do in a particular situation or may have other ideas. Counsel may proceed to hire an interpreter and pay of the use of that interpreter. Or, if appropriate, counsel may wish to file a motion challenging the competency of the interpreter, stating that the interpretation lacks accuracy. If the motion is denied, counsel may then object to the interpreter's competency, thereby preserving the objection on record for an appeal at a later date. An objection can be made under Article 192.2, stating that the interpreter is not competent; or by citing that the interpreter is not fulfilling his/her oath because he/she is failing to make a complete and true interpretation under Louisiana District Court Rule 5.1.

Parties complain of interpreter error, complaints which manifest themselves in a variety of ways given the complexities involved in interpreting. *Segui v. Anthony* is a civil case where the plaintiff complained that some quality of the testimony was lost in translation.⁶¹ "The essence of plaintiff's argument is that 'something was loss [sic] in the translation' of plaintiff's testimony and therefore the trial judge could not properly assess her credibility."⁶² The court found "very few errors" in the translation and held unless the errors were prejudicial it believed "the issue concerning an interpreter should be addressed by the Legislature and not this Court."⁶³

The remaining cases discussed in this section are all criminal cases. Regarding the issue of interpreter error, courts have held that the comment of a "bystander" to the effect that the interpretation was not accurate was harmless⁶⁴ and that the failure of the interpreter to offer a literal translation instead of one which "paraphrased" the testimony made no difference.⁶⁵ In this latter instance, the court also found since "[t]here was no contemporaneous objection during or after this alleged irregularity and defendant's right to complain on appellate review is therefore waived."⁶⁶

Also, parties complain of the quality of the interpretation, asserting, for example, that the interpretation was inept because it failed to adequately communicate the defendant's "emotions and passions."⁶⁷ In this particular case, the court noted the interpreter "was stipulated to by both State and Defense and recognized by the Court as a qualified interpreter in the Spanish language," and the

⁶⁰LA. CODE CIV. PROC. ANN. art. 192.2 (2008).

⁶¹*Segui v. Anthony*, 487 So. 2d 616, 618 (La. App. 4 Cir. 1986).

⁶²*Id.*

⁶³*Id.*

⁶⁴*State v. Constanza*, 102 So. 507, 508-09 (La. 1925).

⁶⁵*State v. Cushenberry*, 407 So. 2d 700, 702 (La. 1981). See also *State v. Gonzalez*, 07-0532 (La. App. 4 Cir. 11/28/07); 973 So. 2d 115, 117 (appellant complained of not being provided the specifics of the communications between the State and the judge).

⁶⁶*Cushenberry*, 407 So. 2d at 702.

⁶⁷*State v. Rodriguez*, No. 93-0461 (La. App. 4 Cir. 3/29/94); 635 So 2d 391, 396.

defendant failed to show that the translation was inaccurate; thus, the assignment of error had no merit.⁶⁸ As the above cases indicate, Louisiana courts have not found much merit in arguments dealing with the accuracy of the interpretation.

9.4 INTERPRETER QUALIFICATIONS—COMPETENCY

Courts considering interpreter qualifications generally find that interpreters are competent. A recent civil case sheds some light on interpreter qualifications. In *Thongsavanh v. Schexnayder* the court noted “[n]either the legislature nor the judiciary has yet adopted objective standards for certification and qualification of foreign language interpreters for legal proceedings.”⁶⁹ It then set forth general standards for qualification of interpreters: “[a]n interpreter of foreign-language testimony must be competent and qualified by virtue of knowledge, skill, experience, training, or education, have no substantial interest in the proceedings, and be sworn to give a true bilateral translation of the questions and answers during testimony.”⁷⁰ The court went on to conclude that the trial court did not commit manifest error or abuse its discretion when it accepted the interpreter’s qualifications.⁷¹

In *Thongsavanh v. Schexnayder* counsel was able “to conduct an extensive voir dire examination” of the interpreter.⁷² Although the voir dire examination was to establish potential interpreter bias,⁷³ this gives a practitioner an opportunity to extend a voir dire examination to interpreter qualifications. If a judge objects to a voir dire to determine the competency of an interpreter, counsel has several options. Again, these options are not exclusive, and the practitioner may have other ideas or may be able to ascertain what needs to be done in that particular situation. If counsel has serious doubts concerning the interpreter’s qualifications, he/she may proceed to hire and interpreter and pay for the use of that interpreter. Another option is to object to the competency of the interpreter, stating that the interpreter is not qualified. It might also be suggested that counsel take the additional action of requesting to file a motion and memorandum explaining the objection. This action ensures the objection is fully set out for a later appeal.

The majority of the remaining cases in this section are criminal. Thus, counsel may be able to find a criminal argument that is analogous to his/her civil one. As mentioned above, most courts find interpreters to be competent. For example, in *State v. Nguyen* the defendant argued he had suffered prejudice because he was unable to confront the victim due to the non-qualified interpreter; the interpreter had only been working for two months prior to his trial in traffic court.⁷⁴ The court stated this issue had not been properly preserved for review.⁷⁵ It went on to note the defendant had “not claimed any specific prejudice arising out of the interpreter’s translations” and “there is nothing in the record to suggest that any of the testimony at trial was improperly translated.”⁷⁶ Thus, the defendant failed to show any substantial rights were violated.⁷⁷

⁶⁸ *Id.*

⁶⁹ *Thongsavanh v. Schexnayder*, 09-1462 (La. App. 1 Cir. 05/7/10); 40 So. 3d 989, 997.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *State v. Nguyen*, 11- 229 (La. App. 5 Cir. 12/28/11); 2011 WL 6821500, 9-10.

⁷⁵ *Id.* at 10.

⁷⁶ *Id.* The court also noted that the defendant spoke both Vietnamese and English; therefore, the defendant did not seem to be unable “to confront his accuser at trial because of some language barrier.” *Id.*

⁷⁷ *Id.*

There are some instances where courts will find that interpreters were qualified, even in the absence of any record to that effect.⁷⁸ In *State v. Gonzalez* the appellate court noted it seemed as if the interpreter's qualifications would have been reviewed at the preliminary hearing, which was the first time the interpreter was utilized.⁷⁹ "However, whether this was done is unknown because the transcript from the hearing is not part of the record on appeal. The minute entry from that day does not show that his qualifications were addressed, nor does it reflect an objection regarding his qualifications."⁸⁰ The appellate court ultimately found no merit in the defendant's argument that the interpreter was unqualified.⁸¹ Furthermore, in another case, *Segui v. Anthony*, the court stated "[a]lthough the record is unclear as to what were the credentials of the interpreter utilized by the Court, the trial judge was satisfied with her abilities."⁸² In this case, the court found there was "very few errors pointed out by her [plaintiff's] attorney," and held that the interpreter was qualified.⁸³

However, there are some instances where courts do not find interpreters to be competent. For example, "the use of an unqualified, unsworn interpreter who was the co-defendant with the accused and also has a substantial interest in the outcome of the proceedings, renders the plea itself questionable" and was enough to vacate the accused's guilty plea.⁸⁴

9.5 INTERPRETER BIAS—IMPARTIALITY

By far, the most complaints associated with interpreters relate to interpreter bias. Courts, however, are reticent to find bias. Recently, in *Thongsavanh v. Schexnayder*, the Louisiana First Circuit Court of Appeals upheld the trial court's ruling allowing a social acquaintance of the plaintiff passenger to serve as interpreter.⁸⁵ The court quoted Professor Luz Molina's article, noting that "being bilingual does not qualify an individual for court interpreting, even if the person is fluent" and "even '[t]he appearance of bias' on the part of an interpreter 'should be of concern to the courts of the administration of justice.'"⁸⁶ However, the court went on to note that although the interpreter may not have been:

'[A]bsolutely disinterested' according to the strict standard of the Lazarone case . . . there was no showing of clear bias or prejudice, and defendant's counsel had a full opportunity to conduct an extensive voir dire examination of Ms. Sourkidhdy [the interpreter] on the issue of potential bias. On this point, we note that a witness is not disqualified from qualification as an expert witness simply because he is a party or the employee of a party to the lawsuit. In such a case, the party opposing qualification may cross-examine the expert regard-

⁷⁸ See *State v. Gonzalez*, 07-0532 (La. App. 4 Cir. 11/28/07); 973 So.2d 115, 117; *Segui v. Anthony*, 487 So.2d 616, 618 (La. App. 4 Cir. 1986).

⁷⁹ *Gonzalez*, 973 So. 2d at 117.

⁸⁰ *Id.*

⁸¹ *Id.* at 117-18.

⁸² *Segui*, 487 So. 2d at 618. The court also commented on the fact that plaintiff's attorney was "fluent in both Spanish and English." *Id.* Note that this is a civil case.

⁸³ *Id.*

⁸⁴ *State v. Tamez*, 506 So. 2d 531, 533 (La. App. 1 Cir. 1987).

⁸⁵ *Thongsavanh v. Schexnayder*, 09-1462 (La. App. 1 Cir. 05/7/10); 40 So.3d 989.

⁸⁶ *Id.* at 997 (quoting Luz M. Molina, *Language Access to Louisiana Courts: A Failure to Provide Fundamental Access to Justice*, 10 *LOV. J. PUB. INT. L.* 1, 11, 21 (2008)).

ing potential bias and argue that point to the trier of fact. Because La. C.E. art. 604 equates the qualification of an interpreter with the qualification of an expert, the same general rule should apply by analogy.⁸⁷

The following cases in this section are criminal. Thus, counsel may be able to find a criminal argument that is analogous to his/her civil one. A few approaches may be possible if counsel has doubts as to the interpreter's impartiality. Yet again, these suggestions are not exclusive, and the practitioner may have other ideas on how to proceed. Counsel could hire an interpreter and pay for the use of that interpreter. Or counsel could file a motion challenging the competency of the interpreter. If the motion is denied, counsel may then object to the interpreter's competency, stating that the interpreter is not impartial. This objection would preserve the record for an appeal at a later date.

In 1908, the Louisiana Supreme Court took an extreme position and found the fact that the interpreter "was a witness did not disqualify him from acting as interpreter [in a grand jury hearing], though his alleged activity as a deputy sheriff might suggest a doubt as to the propriety of his selection, were it not for the fact that he acted as interpreter satisfactorily. . . ."⁸⁸ The court noted the defendant had made no complaint to the interpreter at the time and "there is no proof whatever in support of the allegations" the interpreter had a bias against the defendant or the interpreter had made any suggestions to witnesses to prejudice the defendant.⁸⁹

In *State v. Nguyen* the court found that a law enforcement official is not per se biased when acting as an interpreter, placing the onus entirely on the opposing party to prove bias.⁹⁰ Note however, the court determined it "need not resolve the issue of bias of the translator because" if there was an error, it would be harmless. In this case, "the defendant spoke enough English that the interpreter was not needed."⁹¹

Claims asserting the appearance of impropriety have gone nowhere. In this regard, courts have found that the appearance of impropriety is not enough, especially in the absence of any proof of any mistranslation or incompetence.⁹² For example, in *State v. Davis* the trial court's use of court appointed, state-paid translators did not warrant a mistrial.⁹³ Here, the defendant did not claim any specific prejudice arising out of the interpreter's translations.⁹⁴ Rather, he alleged there could "appear some impropriety" as to whether the translations or interpretations were colored to favor the State's case because the interpreter was employed by the State.⁹⁵ The appellate court observed that there was nothing in the record to suggest the testimony was improperly translated, the defendant did not request any assistance from the interpreter, and the interpreter was not a party or witness.⁹⁶ Furthermore, the court noted that the interpreter was sworn by the trial court.⁹⁷

⁸⁷ *Id.* (citations omitted).

⁸⁸ *State v. Firmatura*, 46 So. 691, 693 (La. 1908).

⁸⁹ *Id.*

⁹⁰ *State v. Nguyen*, 02-0410 (La. App. 3 Cir. 10/02/02); 827 So. 2d 1248, 1252.

⁹¹ *Id.*

⁹² *State v. Davis*, No. 07-544, 975 (La. App. 5 Cir. 12/27/07); 975 So. 2d 60, 69.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

Another case that dealt with impropriety of the interpreter was *State v. Lai*.⁹⁸ Here, the defendant complained that the court failed to appoint an impartial and neutral “translator” because the “translator” was paid by the State and was used by the State to talk to State witnesses.⁹⁹ The court found defendant had made no use of the interpreter whatsoever; and thus, his substantive rights were not violated.¹⁰⁰ In *State v. Gonzalez* the defendant observed the interpreter speaking to a police officer.¹⁰¹ The appellate court noted the trial court had “resolved this matter by questioning” the interpreter and presumably accepting the interpreter’s explanation that he was not “derelict in his duty to the defendant, and . . . any conversation that he may have had with a police officer was strictly on a friendly basis and did not deal with the case.”¹⁰² Because the defendant did not assign any “specific prejudice arising out of” the interpreter’s “translations, he has not shown that his substantial rights were violated.”¹⁰³

Although it is difficult to win an argument regarding interpreter bias; the defendant in *State v. Lazarone* was successful.¹⁰⁴ Here, the Louisiana Supreme Court reversed the defendant’s conviction because the trial court erred in choosing as an interpreter a prosecution witness who “had contributed to a fund for the prosecution of the” defendant.¹⁰⁵ The Court stated “[t]he person chosen to interpret into English testimony given in a tongue not understood by jury, court, or counsel must be absolutely disinterested, unprejudiced, and unbiased[.]”¹⁰⁶ Note, this case was decided in 1912; thus, it has been many, many years since a Louisiana court has found merit in the argument that an interpreter was biased.

9.6 TIMELINESS OF THE OBJECTION TO INTERPRETER ERRORS (ACCURACY) AND QUALIFICATIONS (COMPETENCY)

Generally, appellate review of the lower courts’ failure or refusal to appoint interpreters, as well as interpreter qualifications and performance, will only occur when there is a contemporaneous objection. In fact, courts have refused to review many of the interpreter cases previously discussed on the basis that the attorney failed to timely object.¹⁰⁷ Note that again, these cases are criminal. However, a practitioner in a civil case must be sure to object timely, meaning contemporaneously, to any issue dealing with interpreter appointment, error or qualifications of the interpreter.

In *State v. Lemodelio* the court held the appellant’s challenge to the competency of a “translator,” to use the Court’s words, was too late when raised in a motion for new trial.¹⁰⁸ In another case, the court noted that the defendant failed to complain or object at the time of the use of the interpreter.¹⁰⁹ In *State v. Thucos* the complaint was not timely because “no motion requesting the appointment of an

⁹⁸ *State v. Lai*, No. 04-1053 (La. App. 5 Cir. 4/26/05), 902 So. 2d 550.

⁹⁹ *Id.* at 557.

¹⁰⁰ *Id.*

¹⁰¹ *State v. Gonzalez*, 07-0532 (La. App. 4 Cir. 11/28/07); 973 So. 2d 115, 117.

¹⁰² *Id.*

¹⁰³ *Id.* at 118.

¹⁰⁴ See *State v. Lazarone*, 57 So. 532 (La. 1912).

¹⁰⁵ *Id.* at 534.

¹⁰⁶ *Id.*

¹⁰⁷ See *State v. Lemodelio*, 23 La. Ann. 16 (1871); *State v. Firmatura*, 46 So. 691 (1908); *State v. Thucos*, 390 So. 2d 1281 (La. 1980); *State v. Cushenberry*, 407 So. 2d 700 (La. 1981); *State v. Nguyen*, 11- 229 (La. App. 5 Cir. 12/28/11); 2011 WL 6821500.

¹⁰⁸ *Lemodelio*, 23 La. Ann. at 16.

¹⁰⁹ *Firmatura*, 46 So. at 692-93.

interpreter was filed by the defense prior to or during the trial.”¹¹⁰ The court in *State v. Cushenberry* noted that an objection must be timely and contemporaneous.¹¹¹ In that case “[t]here was no contemporaneous objection . . . and defendant’s right to complain on appellate review . . . [was] therefore waived.”¹¹² In *State v. Nguyen* the defendant failed to raise the issue of confrontation at trial and “defense counsel did not question the interpreter about his qualifications and mentioned a perceived lack of experience only once during the testimony of the victim.”¹¹³

This issue remains unexplored by the courts, especially since this is likely to occur because the attorney does not possess the knowledge necessary to even make the objection. It stands to reason that if the attorney is not bilingual, and does not retain an independent interpreter to manage his/her communications with the client (a very expensive proposition), the lawyer is in the dark regarding the English proficiency of his/her client and cannot evaluate whether the client is in fact actively participating in the court proceeding. Moreover, the attorney may be in no position to evaluate the court interpretation absent some access to means by which to judge it.

9.7 THE STANDARD OF REVIEW USED FOR INTERPRETER ISSUES

Louisiana appellate courts’ have reviewed interpreter issues under various standards; namely, “abuse of discretion,”¹¹⁴ “manifest error,”¹¹⁵ and “patent error.”¹¹⁶ These standards place a high burden on a party to prove any of the interpreter issues discussed above, absent some statutory or judicial guidelines which can clearly point attorneys and judges to the complexities of interpreting as a means of judging the trial error or abuse of discretion. Further, a common thread in many of these decisions is the fact that the appellate courts allude to records which are incomplete and unclear as to the particulars relating to the interpreter in a given case, and rely on conclusions in the record without benefit of the court’s own judgment.¹¹⁷ In the absence of an understanding of the legal implications of the use of interpreters, appellate courts will continue to make decisions regarding interpreter issues based on records where the facts attendant the appointment, accuracy, competency, and impartiality of the interpreter have not been properly developed in the lower court.

10. FEDERAL LAW REGARDING INTERPRETERS

Unlike in Louisiana, federal courts have recognized the juridical problem posed by the LEP individual in civil and criminal matters, and have mandated the appointment of interpreters for LEP persons through the Federal Court Interpreters Act, which also sets forth specific criteria for interpreter training, selection, and payment.¹¹⁸ Though the Act mandates appointment of interpreters for those indi-

¹¹⁰ *Thucos*, 390 So. 2d at 1287.

¹¹¹ *Cushenberry*, 407 So. 2d at 702.

¹¹² *Id.*

¹¹³ *State v. Nguyen*, 11- 229 (La. App. 5 Cir. 12/28/11); 2011 WL 6821500, 10.

¹¹⁴ *State v. Gonzalez*, 07-0532 (La. App. 4 Cir. 11/28/07); 973 So. 2d 115, 118; *State v. Davis*, No. 07-544, 975 (La. App. 5 Cir. 12/27/07); 975 So. 2d 60, 69; *Thongsavanh v. Schexnayder*, 09- 1462 (La. App. 1 Cir. 05/7/10); 40 So. 3d 989, 997; *State v. Castro*, 09- 887 (La. App. 5 Cir. 5/25/10); 40 So. 3d 1036, 1049.

¹¹⁵ *Segui v. Anthony*, 487 So. 2d 616, 618 (La. App. 4 Cir. 1986); *Thongsavanh*, 40 So. 3d at 997; *Nguyen*, 2011 WL at 10.

¹¹⁶ *State v. Tamez*, 506 So. 2d 531, 532 (La. App. 1 Cir. 1987).

¹¹⁷ See *Gonzalez*, 973 So. 2d at 117; *Segui*, 487 So. 2d at 618.

¹¹⁸ 28 U.S.C.A. § 1827 (2008).

viduals solely “in judicial proceedings instituted by the United States,”¹¹⁹ the Act can be instructive to states developing appropriate statutory guidelines which would guide local courts in the selection, appointment, and payment of interpreters.

The federal interpreter program clearly acknowledges the complexity inherent in language interpretation. However, it also leaves open the possibility that non-certified interpreters are qualified to interpret and thus could be appointed. Understanding those complexities is essential to assessing the qualifications of potential interpreters who may not be certified. It states

The professional knowledge, skills, and abilities required of a federal court interpreter are highly complex. Communication in courtroom proceedings may be more complex than that in other settings or in everyday life. For example, the parties involved may use specialized and legal terminology, formal and informal registers, dialect and jargon, varieties in language and nuances of meaning.¹²⁰

It notes that interpreter skills include:

Highly proficient in both English and the other language. Impartiality. Able to accurately and idiomatically turn the message from the source language into the receptor language without any additions, omissions or other misleading factors that alter the intended meaning of the message from the speaker. Adept at simultaneous interpretation, which is the most frequent form of interpretation used in the courtroom, and in consecutive interpretation and sight translation. Able to communicate orally including appropriate delivery and poise. Demonstrates high professional standards for courtroom demeanor and professional conduct.¹²¹

11. FURTHER DISCUSSION OF INTERPRETATION AND INTERPRETERS

At its most basic function, interpretation¹²² is simply the oral translation of the words of a person speaking a different language.¹²³ This definition, however, belies the complexity of that function as performed by the interpreter and as understood by those dependent on the interpreter for communication in a courtroom. As stated previously, under the section dealing with interpreter ethics, the fact of being bilingual does not qualify an individual for court interpreting, even if the person is fluent. Thus, for example, professional interpreters understand and are able to appropriately use the various forms of interpretation; namely, simultaneous, consecutive, or summary.

¹¹⁹ 28 U.S.C.A. § 1827(d)(1)(A) (2008).

¹²⁰ *Federal Court Interpreters*, U.S. Cts., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/District-Courts/CourtInterpreters.aspx> (last visited Apr. 2, 2012).

¹²¹ *Court Interpreter Knowledge, Skills, and Abilities*, U.S. Cts., <http://www.uscourts.gov/federalcourts/understandingthefederalcourts/districtcourts/CourtInterpreters/InterpreterSkills.aspx> (last visited Apr. 2, 2012).

¹²² Many lawyers use the words “interpretation” and “translation” interchangeably. However, “[w]ithin the conceptual structure of Translation, interpreting can be distinguished from other types of translational activity most succinctly by its immediacy: in principle, interpreting is performed ‘here and now’ for the benefit of people who want to engage in communication across barriers of language and culture.” PÖCHHACKER, *supra* note 22, at 11. Thus, interpreting can be defined as “a form of Translation in which a first and final rendition in another language is produced on the basis of a one-time presentation of an utterance in a source language.” *Id.* at 10.

¹²³ This definition is widely accepted and generally used by courts and agencies.

Simultaneous interpretation “involves the interpreter’s rendering into the foreign language whatever is being said in English, involving no pauses on the part of the English speaker.”¹²⁴ This mode is mandated in federal courts for use with the parties to the litigation.¹²⁵ Consecutive interpretation, on the other hand

[I]nvolves a speaker’s pausing at regular intervals to allow the interpreter to render his or her speech into the target language, aloud for everyone in the courtroom to hear. Thus, the speaker and the interpreter take turns, and no overlapping speech should be heard. This mode of interpreting is typically used for foreign language witness testimony, the interpreter rendering the testimony in English for the court, and then interpreting the attorney’s and judge’s questions into the foreign language for the benefit of the witness. Everything rendered in English by the interpreter is recorded for the court, whereas none of the foreign language testimony or questions rendered by the interpreter in the foreign language is recorded by the court reporter.¹²⁶

This mode of interpreting is mandated in federal court for use with witnesses.¹²⁷ Summary interpretation, the third mode of interpreting

[I]nvolves distilling or condensing what has been said in the source language into the target language. This mode of interpreting is to be kept to a minimum in court interpreting, and is restricted to interpreting highly technical legal language, language that would be difficult to follow even for a native speaker of English.¹²⁸

An additional mode of interpreting “sight translation,” refers to the oral translation of a document for the benefit of the court or the parties.¹²⁹

Additionally, interpreters must have a high level of skill in using English and the foreign language. Thus, the interpreter must understand, for example, the four varieties of spoken legal language generally found in court. These four varieties include: formal legal language; standard English; colloquial English; and other sub-cultural varieties.¹³⁰ The significance of the methodology used by the

¹²⁴ SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM*, 38 (Univ. of Chicago Press 2002) (1990). “This is the mode used at the counsel table, whereby the interpreter interprets for the defendant or litigant what the attorneys, judge, and English-speaking witnesses are saying.” *Id.*

¹²⁵ 28 U.S.C.A. § 1827(k) (2008).

¹²⁶ BERK-SELIGSON, *supra* note 122, at 38.

¹²⁷ 28 U.S.C.A. § 1827(k) (2008).

¹²⁸ BERK-SELIGSON, *supra* note 122, at 39.

¹²⁹ *Id.* “Typical of the types of texts that require sight translation in court are police reports or the reports of other expert witnesses (e.g., physicians, psychologists, and so on), formal documents such as birth certificates, wills, and contracts, and transcriptions of oral statements, such as depositions.” *Id.*

¹³⁰ BERK-SELIGSON, *supra* note 122, at 19. Formal Legal Language is “[t]he variety of spoken language used in the courtroom that most closely parallels written legal language; used by the judge in instructing the jury, passing judgment, and ‘speaking to the record;’ used by lawyers when addressing the court, making motions and requests, etc.; linguistically characterized by lengthy sentences containing much professional jargon and employing a complex syntax.” *Id.* Standard English is “[t]he variety of spoken language typically used in the courtroom by lawyers and most witnesses; generally labeled CORRECT English and closely paralleling that taught as the standard in American classrooms; characterized by a somewhat more formal lexicon than that used in everyday speech.” *Id.* (emphasis in original). Colloquial English is “a variety of language spoken by some witnesses and a few lawyers in lieu of standard English; closer to everyday, ordinary English in lexicon and syntax; tends to lack many attributes of formality that characterize standard English; used by a few lawyers as their particular style or brand of courtroom demeanor.” *Id.* Subcultural Varieties include the “language spoken by segments of the society who differ in speech style and mannerisms from the larger community” *Id.*

interpreter and skill level displayed is, of course, the accuracy of the interpretation, which gives new “ears” to the LEP individual and in turn also shapes and informs the most fundamental and basic function of the courts—ascertaining facts and making credibility determinations based on those facts.

12. CONCLUSION

The real import of the dearth of Louisiana case law on foreign-language interpreters, and lack of clear statutory law on interpreters themselves, not just experts in general, is that the absence of standards makes it difficult for counsel to know how to proceed generally, since there are no set rules. However, the discussion above will hopefully set forth several guidelines if any problems arise in the areas of interpreter appointment, error (accuracy), qualifications (competence), and bias (impartiality).

APPENDIX A

Quick Reference

How to request an interpreter:

- Fill out form 5.1B (see Appendix B for a copy of this form)
- Client is a Limited English Proficient (LEP) individual
 - Mandated judge appointment if requested by a “party in interest” or a “witness” under Article 192.2¹³¹

Costs:

- Client is a LEP individual
 - Assessed as court costs under Article 192.2¹³²

Potential Problems:

- Court fails to appoint an interpreter
 - Possible solutions:
 - Hire own interpreter
 - File motion to seek an appointment of an interpreter
 - If appropriate, file an interlocutory appeal or seek supervisory writ
 - Object timely to preserve the record for a later appeal
- Issue with interpreter error (accuracy), qualifications (competence) or bias (impartiality)
 - Possible solutions:
 - Hire own interpreter
 - File motion challenging the competence of the interpreter (e.g. the interpreter is not accurate, not competent or is biased)
 - Object timely to preserve the record for a later appeal

Case law dealing with interpreters in the civil context:

- *Thongsavanh v. Schexnayder*, 09- 1462 (La. App. 1 Cir. 05/7/10); 40 So. 3d 989

¹³¹ LA. CODE CIV. PROC. ANN. art. 192.2 (2008) states in full “A. If a non-English-speaking person who is a principal party in interest or a witness in a proceeding before the court has requested an interpreter, a judge shall appoint, after consultation with the non-English-speaking person or his attorney, a competent interpreter to interpret or to translate the proceedings to him and to interpret or translate his testimony. B. The court shall order reimbursement to the interpreter for his services at a fixed reasonable amount, and that amount shall be taxed by the court as costs of court.” *Id.*

¹³² *Id.*

APPENDIX B

APPENDIX 5.1B
REQUEST FOR INTERPRETER AND ORDER

_____ JUDICIAL DISTRICT COURT

DOCKET NO. _____

_____ VERSUS _____

PARISH OF _____

STATE OF LOUISIANA

REQUEST FOR INTERPRETER AND ORDER

Name of Individual Needing Interpreter: _____

This person is: _____ Witness _____ Party Other: _____

Name of person submitting request: _____

Telephone number of person submitting request: _____

Address of person submitting request: _____

If the person submitting request is not the individual in need of an interpreter, please state your relationship (i.e., attorney, party, etc.) _____

Address and telephone number of individual needing interpreter (if different from person submitting request) _____

Judge presiding in case: _____

1. Type of proceeding: ___ Criminal ___ Civil
2. Proceedings to be covered (e.g. bail hearing, sentencing hearing, trial, etc.): _____

3. Dates interpreter needed (specify): _____

4. Reason for requesting interpreter: _____

LANGUAGE ACCESS

APPENDIX B, *continued*

APPENDIX 5.1B

5. Type of interpreter needed:

___ Language

___ French

___ Spanish

___ Vietnamese

___ Other: _____

___ Deaf/Hearing Impaired

___ Sign Language

___ Other: _____

6. Special requests or anticipated problems (specify): _____

I declare under penalty of perjury under the laws of the State of Louisiana that the foregoing is true and correct.

(Date)

(Signature of Person Submitting Application)

(Type or Print Name)

(Signature of Individual Needing Interpreter)

(Type or Print)

(Date)

(Signature of Judge)

<http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX5.1B.PDF>

APPENDIX C

Appendix 5.1C (RULE 5.1) INTERPRETER'S OATH

Do you solemnly swear or affirm that you will accurately, completely and impartially make a true interpretation to the person needing interpretation services of all the proceedings of this case in the language understood by said person, and that you will repeat, in as literal and exact manner as possible, said person's answers and statements to the court, counsel or jury, to the best of your skill and judgment?

<http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX5.1C.PDF>

APPENDIX D

National Association of Judiciary Interpreters & Translators

Code of Ethics and Professional Responsibilities

Preamble

Many persons who come before the courts are non- or limited-English speakers. The function of court interpreters and translators is to remove the language barrier to the extent possible, so that such persons' access to justice is the same as that of similarly-situated English speakers for whom no such barrier exists. The degree of trust that is placed in court interpreters and the magnitude of their responsibility necessitate high, uniform ethical standards that will both guide and protect court

Applicability

All NAJIT members are bound to comply with this Code.

Canon 1. Accuracy

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

Guessing should be avoided. Court interpreters who do not hear or understand what a speaker has said should seek clarification. Interpreter errors should be corrected for the record as soon as possible.

Canon 2. Impartiality and Conflicts of Interest

Court interpreters and translators are to remain impartial and neutral in proceedings where they serve, and must maintain the appearance of impartiality and neutrality, avoiding unnecessary contact with the parties. Court interpreters and translators shall abstain from comment on matters in which they serve. Any real or potential conflict of interest shall be immediately disclosed to the Court and all parties as soon as the interpreter or translator becomes aware of such conflict of interest.

Canon 3. Confidentiality

Privileged or confidential information acquired in the course of interpreting or preparing a translation shall not be disclosed by the interpreter without authorization.

Canon 4. Limitations of Practice

Court interpreters and translators shall limit their participation in those matters in which they serve to interpreting and translating, and shall not give advice to the parties or otherwise engage in activities that can be construed as the practice of law.

Canon 5. Protocol and Demeanor

Court interpreters shall conduct themselves in a manner consistent with the standards and protocol of the Court, and shall perform their duties as unobtrusively as possible. Court interpreters are to use the same grammatical person as the speaker. When it becomes necessary to assume a primary role in the communication, they must make it clear that they are speaking for themselves.

Canon 6. Maintenance and Improvement of Skills and Knowledge

Court interpreters and translators shall strive to maintain and improve their interpreting and translation skills and knowledge.

Canon 7. Accurate Representation of Credentials

Court interpreters and translators shall accurately represent their certifications, accreditations, training and pertinent experience.

Canon 8. Impediments to Compliance

Court interpreters and translators shall bring to the Court's attention any circumstance or condition that impedes full compliance with any Canon of this Code, including interpreter fatigue, inability to hear, or inadequate knowledge of specialized terminology, and must decline assignments under conditions that make such compliance patently impossible.

Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts

Preamble

Federally certified court interpreters are highly skilled professionals who bring to the judicial process specialized language skills, impartiality, and propriety in dealing with parties, counsel, the court, and the jury. All contract court interpreters, regardless of certification, are appointed to serve the court pursuant to 28 U.S.C. § 1827. When interpreters are sworn in they become, for the duration of the assignment, officers of the court with the specific duty and responsibility of interpreting between English and the language specified. In their capacity as officers of the court, contract court interpreters are expected to follow the Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts.

1: Accuracy and Completeness

Interpreters shall render a complete and accurate interpretation or sight translation that preserves the level of language used without altering, omitting, or adding anything to what is stated or written, and without explanation. The obligation to preserve accuracy includes the interpreter's duty to correct any error of interpretation discovered by the interpreter during the proceeding.

2: Representation of Qualifications

Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.

3: Impartiality, Conflicts of Interest, and Remuneration and Gifts

Impartiality. Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. During the course of the proceedings, interpreters shall not converse with parties, witnesses, jurors, attorneys, or with friends or relatives of any party, except in the discharge of their official functions.

Conflicts of Interest. Interpreters shall disclose any real or perceived conflict of interest, including any prior involvement with the case, parties, witnesses or attorneys, and shall not serve in any matter in which they have a conflict of interest.

Remuneration and Gifts. Court interpreters shall accept remuneration for their service to the court only from the court. Court interpreters shall not accept any gifts, gratuities, or valuable consideration from any litigant, witness, or attorney in a case in which the interpreter is serving the court, provided, however, that when no other court interpreters are available, the court may authorize court interpreters working for the court to provide interpreting services to, and receive compensation for such services from, an attorney in the case.

4: Professional Demeanor

In the course of their service to the court, interpreters shall conduct themselves in a manner consistent with the dignity of the court and shall be as unobtrusive as possible.

5: Confidentiality

Interpreters shall protect the confidentiality of all privileged and other confidential information.

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.

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.

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.

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 these Standards, or any other official policy governing court interpreting and legal translating.

