



LOST

IN

TRANSLATION

**Challenges for Non-English Speakers
in the American Justice System**

By Gina L. Signorelli and Ivan A. Orihuela

Non-English speakers face challenges in the American justice system that can place them at a disadvantage. Interpreters play a crucial role when non-English speakers turn to the legal system to resolve a dispute or are thrust into the system by instances like being sued or charged with a crime. The non-English speakers are dependent on interpreters.

A lot is lost in translation. There must be competent interpretation in legal matters. The outcome of a case can turn on whether a witness establishes critical facts through testimony with the assistance of an interpreter. Yet, interpretation is commonly inadequate in legal proceedings. For instance, one of the authors has witnessed interpreters who lack sufficient command of legal terminology to properly translate that terminology. This author also has witnessed interpreters simply paraphrase to keep up with the proceedings, instead of giving a literal word-for-word translation. In Virginia, a man shouted in Spanish from the back of a courtroom, "I didn't rape anybody!" The outburst was the result of bad translation from his interpreter. Though the man was accused of running a red traffic light, his interpreter told him he was accused of a "violación," which in Spanish does not mean "violation" but "rape." The proper translation was "infracción." Such misunderstandings are surprisingly common in courts.¹

When deciding the admissibility of a deposition transcript during a trial, some judges may not fully consider the qualifications of the interpreter. When calling "balls and strikes" during a trial, it is important that judges consider the transcript consists of only the interpreter's translation of the deponent's answers to the questions posed by an interpreter translating the examiner's questions. Only the interpreter's words are reflected in the transcript.

Should requirements for interpretation be different whether rendered during a deposition or a trial? Should family and friends be permitted to interpret despite potential bias? Should interpreter qualifications be examined? Should interpreters be admitted as experts? These questions are not often asked or answered.

Family or friends should not be permitted to interpret. Although such relationships do not per se make an interpretation lacking, such an interpreter is unlikely to be neutral and detached. Likewise, attorneys should not be permitted to interpret proceedings for their clients.

What if the deponent is deaf and only understands Vietnamese, is not proficient in sign language and communicates through reading lips? Individuals who are not native Vietnamese speakers, but became proficient in Vietnamese as a second language, may not mouth the words as a native speaker would, making it inappropriate for that individual to serve as an interpreter. Imagine yourself being accused of a crime in a country whose first language you do not speak, read, write or understand. Imagine yourself being dependent on an interpreter and there being few rules to ensure adequate interpretation in your criminal proceeding. Imagine the tumult you would feel of being thrown into criminal judicial proceedings in a foreign language. The issue is significant.

When it comes to interpretation, no standard rules or requirements exist from court to court or judge to judge within the same court. The translator's qualifications and who has to arrange and pay for the translation services are viable questions to which the answers are unclear or unknown.

The number of non-English speakers in the United States has grown rapidly. Between the 1990 and 2000 U.S. Census, the foreign-born population grew by 57%.² The number of diverse parties participating in the legal system has substantially increased. The growth of the immigrant population creates language barrier concerns and a shortage of qualified interpreters. "[T]he demand for court interpreters remains much greater than the current supply of certified interpreters."³ This shortage has forced many courts to use "skilled non-certified interpreters on a regular basis."⁴ Worse, this shortage has led to "the widespread use of unqualified and incompetent individuals as interpreters."⁵

The proliferation in the need for translation services has led to improvements in the field of interpretation. The Louisiana Supreme Court, through its Office of

Language Access, lists interpreters on its interpreter roster. These interpreters can become registered by completing a training course and passing a written English examination, agreeing to be bound by the Code of Professional Responsibility for Language Interpreters⁶ and passing a criminal background check. Registered interpreters are required to complete 12 hours of continuing education every three years.

Advancement is necessary considering the stakes at issue. Interpretation is a factor that cannot be ignored or minimized. It can be the most essential factor in some instances, like when a credibility determination is required. Credibility determinations can become more of a conundrum when the witness's testimony is being relayed through an interpreter as opposed to coming directly from the witness.

A single word can have crucial meaning. An inaccurate translation or omission of one word can result in a terrible injustice. Despite the critical nature interpretation plays, few safeguards exist for ensuring accurate interpretation. Precautions are needed to protect non-English speakers' rights.

There is a need for uniformity in interpretation. The constitutional right to access to the courts is dependent on needed developments. Uniformity in this area will improve the public's confidence in the legal system. Lack of uniformity undermines confidence.

With non-English speakers, courts rely on the work of a court interpreter. The non-English speaker is almost entirely dependent on an interpreter to navigate the judicial proceeding. This illustrates the importance of developing standard rules to control these proceedings and ensuring compliance with same, especially when the record represents only the work of the interpreter because the untranslated testimony went unrecorded for later review. The record is a transcript of a second-hand rendition of a witness's actual unrecorded testimony in a language other than English. Solutions are needed to prevent inadequate interpretations to avoid the daunting circumstances that arise when an individual is in an unfamiliar judicial system that uses an unfamiliar language.

Constitutional Rights

Louisiana Constitution Article 1, § 22, titled “Access to Courts,” provides as follows:

All courts shall be open and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.⁷

In *Graham v. Richardson*, the Supreme Court held that “an alien as well as a citizen is a ‘person’ for equal protection purposes.”⁸ Courts have traditionally recognized the right of court access for undocumented workers “to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries.”⁹

The law establishes a constitutional right to access to courts. Without adequate interpretation in legal proceedings, the ability for non-English speakers to participate in the judicial system is compromised in violation of their constitutional rights to access to courts and equal protection. Allowing non-English speakers to exercise their constitutional rights in court requires adequate interpretation. Anything short of that denies a class of persons access to courts.

In *State v. Lopes*,¹⁰ the Louisiana Supreme Court recognized the constitutional right to an interpreter by explaining that a “defendant’s constitutional right . . . to testify in his own behalf may be meaningless if a language barrier causes him to be misunderstood or he misconstrues questions posed to him because he simply does not understand the language.” In *United States v. Carrion*,¹¹ the court indicated “the right to an interpreter rests most fundamentally on the notion that no defendant should face the kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.” If an individual’s understanding of the English language is not adequate to render him or her capable of understanding the nature of the proceedings and his or her rights, that individual has a right to an interpreter.¹² “If a litigant cannot fully understand or read and write the English language, he is



entitled to an interpreter.”¹³

Louisiana Code of Criminal Procedure article 25.1 states in part, “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.” An interpreter “should be a neutral and detached individual whose abilities are first screened by the court and who is sworn to make a true, literal, and complete bilateral translation.”¹⁴ “[A]n interpreter is subject to the provisions of [the Louisiana Code of Evidence] relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.”¹⁵ A trial judge must qualify an interpreter as an expert “by knowledge, skill, experience, training, or education . . .”¹⁶ A trial court must abide by this mandate. If not, the interpreter utilized fails to meet the required standard, making the entire proceeding unreliable.

The U.S. Constitution guarantees non-English speakers standing equal to fluent English speakers in the judicial system. Yet, the present judicial system provides few safeguards to ensure the quality of the interpretation. Inadequate court interpretation violates the non-English speaker’s constitutional rights and undermines confidence in the judicial system. A non-English speaker’s right under the Equal Protection Clause of the 14th Amendment and the Effective Assistance of Counsel

Clause of the 6th Amendment are the rights most likely to be violated when inadequate court interpretation occurs. As the Equal Protection Clause guarantees the equal protection of United States laws to any person within its jurisdiction, non-English speakers should not be harmed in the judicial system because they cannot fully comprehend the law’s significance and consequences. If the Equal Protection Clause is read according to its plain language, an individual’s immigration status or language ability should not be a detriment while within the jurisdiction of the United States. “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁷

Remedies

Precautions can be instituted to protect non-English speakers. The Louisiana Legislature could consider passing laws to ensure the ability of non-English speakers to communicate with counsel and the court. Like Congress did with the Court Interpreters Act,¹⁸ Louisiana laws could form an administrative office to establish a certification program for interpreters, prescribe the qualifications necessary for certification, determine who meets the certification standards and certify those who complete the program.

Since court reporters record only what the interpreter says, there is no true record of what the non-English speaker states during the courtroom proceedings. Due to the lack of a true record, any appeal based upon the issue of inadequate court

interpretation is complicated for a non-English speaker. In instances where interpretation is used, a recording could be required for purposes of later review should an issue arise concerning adequacy.

Because of the increased need for interpretation, the personnel devoted to court interpretation could be increased. Courts can expand the number of certified interpreters to ensure availability of qualified interpreters. To create checks and balances designed to prevent inadequate court interpretation, the court can provide non-English speakers with multiple interpreters, meaning a second interpreter being present during the interpretation to act as a check on the first interpreter's work or to relieve the interpreter when fatigued. Although these suggestions lead to increased costs, the risk to an individual's rights justifies this increase. Adopting added checks in court despite the resultant increased costs is justified because it would protect the individual constitutional rights of non-English speakers and promote the integrity of the judicial system.

Should increasing the number of interpreters not be economically feasible, courts can use already existing, or implement new, low-cost video and audio recording of the proceedings. A recording of the interpreted event will include the utterances of the non-English speaker. This is not available from a court reporter's transcript. The recording of the interpreted exchange would be available for later review by other reviewing court interpreters if there are concerns about the accuracy of the original interpretation.

As the non-English speaker's statements and demeanor would be captured on film, the reviewing court interpreters can directly and more accurately interpret the individual's firsthand statements from the recording. With advancements in technology, the cost and inconvenience of requiring audio or video monitoring for all court proceedings requiring interpreters would be, at worst, negligible. Courts could be required to audio or video monitor the exchanges that take place during proceedings requiring interpretation. Audio or video recordings of criminal suspect interrogations are utilized in courts routinely. If police are capable of recording suspect interrogations for legal reasons, courts can

implement the suggested improvement of audio or video recordings of interpreted exchanges to safeguard individual constitutional rights, as well as the integrity of the judicial system.

With recordings of interpreted exchanges, the reviewing court has a more complete record when determining the adequacy of the relevant interpretation. This advancement would protect a non-English speaker's ability to attack the sufficiency of the interpretation and hold interpreters accountable for the adequacy of their interpretations.

Conclusion

Implementing the listed suggestions can decrease the possibility that inadequate interpretations would harm a non-English speaker's constitutional rights. Implementation of any of the above suggestions would be a light burden when balanced against the possible violation of a non-English speaker's rights. Even though there are more cases involving non-English speakers, very little checks exist to guarantee court interpreters are adequately conveying the non-English speaker's words to the court or the court's message to the party. Without precautions to ensure adequate interpretation, the validity of a proceeding can always be questioned. Currently, a high risk exists in the judicial system that a non-English speaker's constitutional rights will be violated by inadequate interpretation. For example, court interpreters play a particularly crucial role in the criminal plea bargains when a non-English-speaking defendant is asked to waive substantial constitutional rights. Flawed or inadequate court interpretation during the plea-bargain process can lead to an accused not recognizing the charge against him or having difficulty comprehending elements of the charge.¹⁹ Steps need to be taken to reduce this risk by adopting safeguards like those proposed above.

FOOTNOTES

1. Rebecca Beitsch, *In Many Courtrooms, Bad Interpreters Can Mean Justice Denied* (2016), www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/17/in-many-courtrooms-bad-interpreters

can-mean-justice-denied.

2. Nolan Malone, et al., *The Foreign Born Population: 2000* (2003), www2.census.gov/library/publications/decennial/2000/briefs/c2kbr-34.pdf.

3. Lynn W. Davis, et al., "The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation," 7 *Harv. Latino L. Rev.* 1, 14-15 n. 62 (2004).

4. *Id.* at 15.

5. Beth Gottesman Lindie, "Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations," 48 *U. Miami L. Rev.* 399, 410 (1993).

6. *La. S.Ct. R.* 14.

7. *La. Const. art. 1*, § 22.

8. *Graham v. Richardson*, 403 U.S. 365 (1971); *see also*, *Plyer v. Doe*, 457 U.S. 202 (1982).

9. *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 997 (N.H., 2005) (*citing* *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 225 (N.J. Super. 1996)).

10. *State v. Lopes*, 01-1383 (La. 12/7/01), 805 So.2d 124, 126.

11. *United States v. Carrion* (1 Cir. 1973), 488 F.2d 12, *cert. denied*, 94 S.Ct. 1613 (1974).

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

13. *Id.*

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

15. *La. C.E. art.* 604.

16. *La. C.E. art.* 702.

17. *U.S. Const. amend. XIV*, § 1.

18. 28 U.S.C. § 1827(a)-(b) (2000).

19. *Valencia v. United States*, 923 F.2d 917, 921 (1 Cir. 1991).

Gina L. Signorelli earned a master of social work degree from Tulane University and her JD degree, magna cum laude, from Southern University Law Center. She was a member of the Law Review. She is a former law professor at Southern and author of an article providing solutions for the psychological and social effects of legal immigration waivers on families. She is a licensed clinical social worker, an attorney and a consultant for the Louisiana State Board of Social Work Examiners. (signorelligina@gmail.com; 711 Royal St., C, New Orleans, LA 70116)



Ivan A. Orihuela (Boston University, 1994) is a partner in the Kenner office of Riguer Silva, LLC. His practice areas include criminal litigation, personal injury and appellate practice. He is bilingual (English/Spanish) and he primarily represents clients from the Hispanic community. (ivanaorihuela@hotmail.com; Ste. C, 3213 Florida Blvd., Kenner, LA, 70065)

