

# **INTERPRETERS IN FEDERAL AND NEW YORK STATE COURTS: RECOMMENDED BEST PRACTICES**

## **ADVISORY GROUP TO THE NEW YORK STATE-FEDERAL JUDICIAL COUNCIL<sup>1</sup>**

### **Introduction**

The United States has a diverse population with people speaking a great variety of languages. Such linguistic diversity has increased the need for interpreters in our court systems, both federal and state.<sup>2</sup> Interpretation deals with oral speech and interpreters convey meaning orally from one language to another. Interpreters are required for all stages of a criminal case, including bail hearings, probation interviews, plea negotiations, proffer sessions, meetings with counsel, and any court proceedings. Qualified interpreters also play an important role in civil proceedings.

Legal interpreting is very different from every day interpreting and requires familiarity with legal concepts and specialized terminology. An untrained interpreter who is not familiar with legal terms is not able necessarily to render precisely, accurately, and completely what is occurring during the proceeding. Accordingly, a party/witness may not accurately understand what is occurring during the proceeding. The inability to ensure that the translation is accurate and understood is of particular concern when the foreign language is less common or the person in need of the interpretation service speaks a colloquial dialect. The party/witness's attorney (or staff from that attorney's office), family member, or friend should not act as an interpreter for the party/witness, particularly in criminal cases, not only for the reasons already stated, but also to preserve the attorney-client privilege and prevent the possibility of unduly influencing the party/witness.

### **New York Federal Courts**

In 1978, in order "to provide more effectively for the use of interpreters in courts of the United States," Congress passed the Court Interpreter's Act. 28 U.S.C. § 1827. Pursuant to the Court Interpreter's Act, each federal court is required to provide, at the judiciary's expense, a certified or otherwise qualified interpreter in judicial proceedings instituted by the United States for a party who speaks only or primarily a language other than English. In civil cases where the United States is a defendant and the plaintiff seeks the services of an interpreter, it is the

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<sup>1</sup> This report is an updated and revised version of the report that was approved by the New York State-Federal Judicial Council on May 18, 2015.

<sup>2</sup> This report focuses on oral linguistic translations and does not include a discussion of document translation or address sign language interpretation for the deaf and hearing impaired. We note, however, that in criminal and civil cases in federal court, sign language interpreters are required by law to be provided by the court.

responsibility of the plaintiff to hire and pay for the interpreter unless the plaintiff is indigent in which situation the court may appoint an interpreter who often provides interpretation services on a pro bono basis.

In compliance with the Court Interpreter’s Act, the Administrative Office of the United States Courts (the “Administrative Office”) instituted and administers a certification program for interpreters. This program includes taking a rigorous two-part exam (written and oral), which, at present, is offered only to interpreters for the Spanish language.<sup>3</sup> An interpreter who successfully passes both the written and oral certification exams is deemed competent by the Administrative Office to interpret between English and Spanish in court proceedings. In order to be deemed professionally qualified by the Administrative Office, an interpreter must have passed the U.S. Department of State’s seminar or conference level exam, passed the United Nation’s interpreter test, passed the full version of an oral certification developed by the National Center for State Courts, or be a current member in good standing of the European Association Internationale of Conference Interpreters and its American equivalent, or the American Association of Language Specialists. Interpreters working in the federal courts are bound by the Code of Professional Responsibility. (See, e.g., <https://www.uscourts.gov/services-forms/federal-court-interpreters/interpreter-categories#a1>). Other than staff interpreters, federal guidance requires that all interpreters in federal courts be sworn in on the record by the district judge or magistrate judge (or courtroom deputy or clerk) before the court proceeding begins, which reinforces the importance of accurate and truthful interpretation.<sup>4</sup> (See Guide to Judiciary Policy, Vol. 5, Ch. 3, § 350 [https://www.uscourts.gov/sites/default/files/guide\\_vol05.pdf](https://www.uscourts.gov/sites/default/files/guide_vol05.pdf); Federal Court Interpreter Orientation Manual and Glossary, Ch. 4 [https://www.uscourts.gov/sites/default/files/federal-court-interpreter-orientation-manual\\_0.pdf](https://www.uscourts.gov/sites/default/files/federal-court-interpreter-orientation-manual_0.pdf)). After being sworn, all interpreters are considered officers of the court with the specific duty and responsibility to interpret accurately between English and the language specified. (See Standards for Performance and Professional Responsibility for Contract Court Interpreters for the Federal Courts, Admin. Office of the U.S. Courts, <https://www.uscourts.gov/services-forms/federal-court-interpreters/interpreter-categories#a1>).

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<sup>3</sup> Certified programs exist for Spanish, Navajo, and Haitian Creole. For other languages, an interpreter must be otherwise qualified or court-approved. Certified and professionally qualified interpreters are paid a higher rate than language skilled/ad hoc interpreters, although the court may request a higher rate for language skilled/ad hoc interpreters when certified or otherwise qualified interpreters are unavailable. See, e.g., <https://www.uscourts.gov/services-forms/federal-court-interpreters>.

<sup>4</sup> As an example of how oaths are administered in one of New York’s federal districts, all freelance interpreters in the Southern District of New York are sworn in by the Clerk’s Office before appearing in court. The oath that is utilized by the Southern District of New York, which includes Attachment 10.2, Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts is attached to this Report as **Exhibit 1** (the “S.D.N.Y. Federal Court Oath”). The judge then may rely on that oath or choose to swear the interpreter in on the record at the start of the proceeding. Federal court guidance states that the presiding judge should ensure that interpreters take an oath, and thus federal courts should ensure they are complying with this practice. (See Guide to Judiciary Policy, Vol. 5, Ch. 3, § 350 [https://www.uscourts.gov/sites/default/files/guide\\_vol05.pdf](https://www.uscourts.gov/sites/default/files/guide_vol05.pdf)). State courts should consider adopting this practice that has been adopted by the federal courts for swearing in interpreters.

In criminal cases where the defendant requires an interpreter, the need for an interpreter should be brought to the attention of the district judge or magistrate judge (or courtroom deputy) by either the prosecutor or the defense counsel and then the court contacts the interpreter's office in that district to request an interpreter for the specified court proceeding. The United States Attorney's Office is responsible for securing the services of interpreters for government witnesses. In any civil or criminal proceeding, retained counsel may hire interpreters to facilitate out-of-court communication with a client or witness who speaks a language other than English.<sup>5</sup> In civil cases, the party needing the interpreter typically supplies the interpreter, although, for out-of-court depositions, the party taking the deposition supplies the interpreter upon request from the individual being deposed.

### New York State Courts

Pursuant to the New York State Unified Court System Court Interpreter's Manual and Code of Ethics, interpreters are either employed by the court on a full-time, part-time or hourly basis after passing certain examinations and being hired as court employees or hired under contract on a per diem basis after completing a written screening examination and oral assessment. In all civil and criminal cases, when a court determines that a party or witness, or an interested parent or guardian of a minor party in a family court proceeding (particularly in a custody or removal proceeding), is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings, the court shall appoint an interpreter. A person with limited English proficiency, other than a person testifying as a witness, may waive a court-appointed interpreter, with the consent of the court, if the person provides his or her own interpreter. State Court interpreters are bound by the New York State Unified Court System Court Interpreter's Manual and Code of Ethics and an "Ethics hotline" is available for interpreters to call when they have an ethics question. (See [www.nycourts.gov/COURTINTERPRETER/pdfs/CourtInterpreterManual.pdf](http://www.nycourts.gov/COURTINTERPRETER/pdfs/CourtInterpreterManual.pdf)). There is no uniformity with respect to the swearing-in of interpreters in State Courts for a particular proceeding, although interpreters are required to execute an oath of office, which is filed with the Clerk of Court and applies to the provision of interpretation services for all court engagements.

### Methodology

In updating and preparing this best practices document, we convened a committee composed of the lead interpreters from the federal districts in New York, the interpreter coordinator from the Office of Court Administration of the New York State Unified Court System, practitioners from the federal districts in New York, the Honorable Loretta Preska, United States District Court Judge for the Southern District of New York, the Honorable James Wicks, United

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<sup>5</sup> In criminal proceedings, attorneys appointed to represent a defendant pursuant to the Criminal Justice Act ("CJA") should apply to the court for leave to use an interpreter to facilitate out-of-court communications with the client or witnesses who speak a language other than English. After approval by the court, the interpreter is paid out of CJA funds.

States District Magistrate Judge for the Eastern District of New York, and the Honorable Ramón Rivera, Judge for the New York State Court of Claims. We also reviewed various publications and publicly available documents.

### **Best Practices/Hot Topics**

#### 1. Proper Role of Interpreter

- Interpreters must translate the actual words as they are spoken by the party/witness.
- Interpreters must translate everything that is said during court or other proceedings without omission or additions.
- Interpreters never should explain or simplify or add words in an attempt to explain the actual words spoken by the party/witness.
- Interpreters should not give legal advice or act as an advisor to the party/witness.
- The court should instruct the jury regarding the function of interpreters, *i.e.*, that they work for the court and not for a particular party to the case. The court also should instruct the jury that they must rely on the interpretation provided by the interpreter and not on their own understanding of the language spoken by the party/witness.

#### 2. Tips for Working With Interpreters

As an interpreter is required to translate only the words spoken by the witness/attorney/judge, it is helpful if the interpreter is provided in advance with the general context or subject matter of a case. The attorney should summarize the matter for the interpreter and allow the interpreter to speak briefly with the party/witness about country of origin and education so that the interpreter has a sense of the dialect the person speaks and level of understanding. Relatedly, it is preferable, although sometimes impractical, to work with the same interpreter for all stages of a matter so that, if the party/witness testifies in court, the interpreter will be alert to and familiar with the party/witness's speech patterns, accent, and any idiosyncratic speech patterns.

Set forth below is a list of means through which an attorney working with an interpreter can provide the interpreter with an appropriate amount of information about the case that requires the services of the interpreter:

- Inform the interpreter about the subject matter of the case, including names and roles of the individuals involved in the case, places that frequently will be mentioned, and relevant time frames.<sup>6</sup>
- Supply the interpreter with a copy of the civil complaint or charging document in a criminal case.
- Educate the interpreter about the party/witness, including national origin, how many years the party/witness has lived in the United States in order to, among other things, help the interpreter anticipate Anglicisms or mixed-language responses, educational level, speech defects, or emotional or mental health issues.
- Alert the interpreter to possible use of code or slang words or industry terminology so that the interpreter can ask the party/witness to clarify the meanings of certain words.

In addition, the attorney should prepare the party/witness regarding working with an interpreter. Set forth below is a list of means through which an attorney with a party/witness who requires an interpreter properly can prepare that party/witness:

- Instruct the party/witness to wait for the question to be translated fully before answering it and to answer the question in his/her native language.
- Advise the party/witness to listen to the translation of the question, even if the party/witness understands the original question posed in English. Tell the party/witness to answer briefly, slowly, and to pause regularly so that the interpreter has sufficient time to repeat the answer in English.
- Instruct the party/witness that if he/she hears the word “objection,” the party/witness should wait for the judge to rule before speaking again, and then answer the question (or continue answering the question) only if the objection is overruled.
- Explain that the party/witness should not direct any comments or questions to the interpreter, but should pretend that the interpreter is not present. In the courtroom, it is improper for the interpreter and party/witness to have any private conversation. In addition, the party/witness should be told not

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<sup>6</sup> As noted below, this information would also allow the interpreter to evaluate whether they may have a conflict that would not allow them to act as an interpreter in that matter.

to fraternize with the interpreter or ask the interpreter for advice about the case.

- Advise the party/witness to direct answers to the examiner (or the jury or judge) and not to the interpreter. Explain that testimony is judged not only by words but by the party/witness's demeanor, manner, and body language. (Bear in mind that body language varies from culture to culture: in some cultures it is considered polite to answer questions with the eyes downcast, so a party/witness may have to be instructed to look up when answering questions.)

Lastly, the attorney him/herself should remember that working with an interpreter requires patience and skill. Set forth below are some general tips for attorneys:

- Construct questions with extra care. If possible, refrain from questions with double negatives or ambiguous references. When using the word "you," clarify if you intend the singular or plural ("you yourself" or "yourself and others"). Questions should be simple and not convoluted. Speak clearly, concisely, and slowly, and pause where necessary to allow the interpreter to translate contemporaneously.
- Remember to wait for the translation of the question and of the answer: even if you yourself can understand the foreign language response; the judge and jury need to hear it from the interpreter.
- Some legal concepts do not exist in certain countries, such as orders of protection, custody orders, constructive possession of drugs, and conspiracy, or the party/witness may not understand a concept that is familiar to a native English speaker. Accordingly, provide clear explanations of various legal terms for the interpreter to translate to the party/witness.
- Proper planning is key. Advise the court if your case requires an interpreter who speaks an uncommon language. The court may need time to locate a qualified interpreter and, therefore, advance notice is critical to ensure that the proceeding can go forward.

### 3. Tips for Proceedings with Interpreters

- Remind parties and witnesses to speak slowly and clearly into the microphones.

- Assure interpreters that, if they cannot understand something the party/witness says, they should ask the court to instruct the party/witness to repeat exactly what he/she said.
- Ask the Government/plaintiff or defense counsel to provide the interpreter with a copy of the charging instrument or complaint and/or other relevant documents at the beginning of the proceeding. In federal court and some state courts, interpreters can review relevant documents on the electronic case filing system.
- Inform the parties that, if they have a challenge to an interpretation, they should bring it to the court's attention immediately and that such challenges will be heard at sidebar outside the presence of the witness (and the jury, if during a jury trial). The court should decide in advance, and inform the parties, whether the interpreter shall be present during any challenge to the interpretation, but the interpreter shall be given the opportunity to be heard prior to the court's decision regarding the challenge to the interpretation. The party challenging the interpretation has the burden to show it was mistaken or in error.

#### 4. Conflict of Interest Issues

In general, interpreters should disclose any real or perceived conflict of interest, including any prior involvement with the case, parties, witnesses, attorneys, or judges and shall not serve in any matter in which they have a conflict of interest. Such disclosure is required for interpreters working in federal courts, and is recommended as a best practice for interpreters working in state courts. (See Standards for Performance and Professional Responsibility at 1-2).

Additionally, the Preamble for the S.D.N.Y. Federal Court Oath provides that “[i]nterpreters shall disclose any real or perceived conflict of interest, including prior involvement with the case, parties, witnesses, or attorneys, and shall not serve in any matter in which they have a conflict of interest.” For interpreters working in other federal districts or in state courts, it is best practice to have the interpret sign an oath similar to the S.D.N.Y. Federal Court Oath. Regardless of the oath that is utilized, interpreters should be advised that information that is learned when performing their official function should not be shared or utilized in any other capacity, including, if applicable or necessary, when interpreting for another party in the same case.

- Interpreting for Co-Defendants in Criminal Cases

There is no federal rule against the same interpreter interpreting for co-defendants. Caution must be exercised where there is a possibility that a co-defendant will cooperate in the case or the case possibly will be severed. Defense counsel should examine whether the use of an interpreter

will create a potential conflict or the potential appearance of a conflict, and should take precautionary steps to avoid these potential conflicts.

- Interpreting for the Government and the Defense in the Same Criminal Case

While it might be perceived to be a conflict of interest for an interpreter to interpret for both defense and prosecution witnesses, there are circumstances in which it does happen, either by inadvertence or because there are no other qualified interpreters in a particular language. It also typically can occur during a trial when multiple witnesses speak the same foreign language. Interpreters are sworn to interpret accurately, fairly and impartially, no matter for whom they are interpreting. Thus, once under oath, an interpreter may work for either or for both sides at the direction of the court.<sup>7</sup>

The lack of any rule prohibiting shared interpreters may cause confidential information to be shared inadvertently. Interpreters should be trained specifically to safeguard against inadvertent disclosure. The interpreters should be instructed not to divulge to the adverse party the content of the matter translated.

Additionally, attorneys who are aware that an interpreter may be utilized, specifically in a criminal context, should work to assist in identifying any potential conflicts as early as possible. As noted above, when providing interpreters with background information in advance of the interpretation, counsel may consider asking the interpreter to review information about the related entities, witnesses, defendants, or the matter more generally. This information may allow the interpreter to identify a conflict if one exists. The Government should also consider adding language to its initial discovery letter, or otherwise communicating with the other side as soon as the issue is identified, that there may be interpreters utilized in the matter and that parties would like to confer in advance about conflict issues before they arise.

If an issue arises, the court should speak to the interpreter *ex parte* to determine if confidential information in fact has been disclosed and, if so, then proceed on a case-by-case basis, with notice and disclosure to all parties, to determine how to remedy such disclosure.

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<sup>7</sup> If an interpreter is needed in a matter that may proceed to trial, there is a strong preference for the interpreter to interpret for the court rather than for the individual parties. This preference is because if an individual's role in the matter changes, any potential appearance of conflict for the interpreter is avoided. One example of this would be where a cooperator, who initially may not have been cooperating with the Government ultimately does appear as a Government witness at trial. In that circumstance, an interpreter would not have the same potential conflict issues with the cooperator appearing as a Government witness at trial if the interpreter was interpreting for the court rather than the defendant and the Government.

## 5. Errors in Interpretation

The interpreter who discovers that he/she made an error in interpretation during a court proceeding, should immediately inform the judge, even if the error is perceived after the proceeding has been completed. The judge then should decide if a correction is necessary on a case-by-case basis after disclosure to both parties with an opportunity to be heard on how to proceed. If the interpreter discovers an error after a witness meeting or a deposition in a civil case, the interpreter should inform the attorney who was present at that meeting or deposition of the error.

It is not unusual for a bilingual attorney who believes an interpreter has made an error to inform the court of perceived interpretation errors and they may have an ethical obligation to do so.

The court should make interpreters aware that they should bring these matters to the court's attention in open court, on the record, and before the parties.

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