



Supreme Court of Louisiana

Office of Language Access

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CHIEF JUSTICE

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JUDICIAL ADMINISTRATOR

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MEMORANDUM

TO: Judge Guy Holdridge, Director, LSLI
Josef Ventulan, Attorney, LSLI

FROM: Brian Wiggins on behalf of the Language Access Stakeholder Committee (LASC)¹

DATE: November 30, 2022

RE: HCR 71 of the 2022 Regular Session

HCR 71 of the 2022 Regular Session by Rep. Malinda White urges and requests the Louisiana State Law Institute (LSLI) to “study the Office of Language Access Stakeholder Committee’s proposed changes” to the Code of Evidence relative to qualification of court interpreters as well as avenues to challenge the accuracy of the interpretation. Please allow this memorandum and attachment to serve as the Stakeholder Committee’s report to the Louisiana State Law Institute (LSLI).

Introduction

In 2020, the Louisiana Supreme Court approved the state judiciary’s first-ever Language Access Plan in state courts (LAP). The purpose of the LAP is to “create a framework to provide meaningful access for limited English proficient (LEP) individuals who would otherwise be unable to understand or fully participate in judicial proceedings, programs and services....”² The quality and competence of court interpreters is an integral part of meaningful access for LEP individuals in court proceedings. Yet, Louisiana law, including the Code of Evidence, does not currently reflect the procedures used to train and qualify interpreters nor the

¹ This Memorandum is the product of the Louisiana Supreme Court’s Language Access Stakeholder Committee and does not necessarily reflect the opinion, views, or recommendations of the Judicial Administrator’s Office or the Louisiana Supreme Court.

²See Louisiana Access Plan in Louisiana Courts, Page 7.

guidance given to judges in appointing interpreters. Given the importance of court interpreters to the fundamental rights of LEP individuals, current law should reflect the procedures, guidance, and best practices currently used in courts or, in the very least, reflect the changing landscape associated with language access for LEP individuals.³ Furthermore, as the use of court interpreters continues to increase statewide, judges, attorneys, and parties (whether LEP or not) would be greatly benefit from a system of law that clearly defines when interpreted testimony may be challenged and how the parties may do so.

Current Law

La. Code Evid. art. 604, “An 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.”

La. Code Evid. art. 702(A):

A. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (2) The testimony is based on sufficient facts or data;
- (3) The testimony is the product of reliable principles and methods; and
- (4) The expert has reliably applied the principles and methods to the facts of the case.

Interpreters must be qualified in order to interpret in a court proceeding. As noted above, interpreter qualifications are governed by the La. Code Evid. art. 604. Nevertheless, nothing in Louisiana law sets forth any interpreter standards including the competence of an interpreter for purposes of qualification. Other than La. Code Civ. Proc. art. 192.2, and La. Code Crim. Proc. art. 25.1, which simply require the interpreter to be competent (without defining it), and La. Code Evid. art. 702, which addresses general expert qualifications not necessarily related to interpreters, there is little other law.⁴

³ For a full recitation of the issues involved, see *Attachment A, Memorandum of Professor Luz M. Molina*, Loyola University of New Orleans College of Law.

⁴ See also *Thongsavanh v. Schexnayder*, 40 So.3d 989, 997 (La. App. 1 Cir. 5/7/10). In *Thongsavanh*, the Court, citing the lack of legislative or judicial guidance on court interpreters, found that a court interpreter should “give a true bilateral translation of the questions and answers given during testimony.”

Interpreter Qualifications in Louisiana Courts

The Louisiana Supreme Court's [Office of Language Access](#) (OLA) recognizes three types of court interpreters: uncredentialed, registered, and certified interpreters. An uncredentialed interpreter (also referred to as a qualified interpreter) does not have any documented qualifications with the OLA.⁵ A [registered interpreter](#) is an intermediate level of court interpreter; he or she has passed a background check, a standard written English examination as provided by the National Center for State Courts (NCSC), and a written translation examination. A [certified interpreter](#) completed all steps to become a registered interpreter and, in addition, passed an oral examination in the three primary modes of interpreting as developed by the NCSC.⁶ Furthermore, both registered and certified interpreters agree to be bound by the Louisiana Supreme Court's Interpreter [Code of Professional Responsibility](#). The OLA maintains a list of current registered and certified interpreters and requires all interpreters to complete [continuing education](#) courses on an annual basis. The OLA advises courts to avoid using "uncredentialed" interpreters barring exigent circumstances. Despite this qualification process and advice, Louisiana courts are *not* obligated to choose a certified or registered interpreter, nor is there a preference for such interpreters.⁷

Guidance to Judges

In addition to the interpreter qualification process, the OLA, in consultation with language access advocacy groups, the U.S. Department of Justice, and the [Council of Language Access Coordinators](#), issued guidance relative to interpreter qualification to judges via the [Louisiana Language Access Judicial Bench Card](#). The Bench Card does not reference the La. Code of Evidence at all. Rather, it instructs judges to verify interpreter qualifications based on the three types of interpreters recognized by the OLA. For uncredentialed interpreters, the Bench Card instructs judges to conduct a full *voir dire* and provides sample questions.⁸ For registered interpreters, qualifications may be verified through the OLA website, but a *voir dire* must still be conducted. For certified interpreters, the interpreter's qualifications should be verified through the OLA, but a full *voir dire* is not required.

⁵It is important to note that an uncredentialed interpreter does not necessarily mean the interpreter is unqualified. It simply means that the OLA has not verified the interpreter's qualifications in accordance with its written policies and procedures.

⁶Because of the lack of an oral examination, ASL interpreters may currently only become registered interpreter.

⁷The Language Access Plan recommends that the Supreme Court create a preference for certified, registered, and uncredentialed interpreters (in that order). However, the Court has not adopted such a policy. See [Louisiana Access Plan in Louisiana Courts](#), page 13.

⁸For example, "How many times have you interpreter in court? How did you learn both language skills? How you worked in a legal proceeding before? If yes, please describe it."

Language Access Stakeholder Committee Recommendations

In drafting this recommendation, the Stakeholder Committee examined the following issues: (a) the availability of qualified interpreters in Louisiana, (b) the experience, competence, and qualifications of interpreters, (c) and the accuracy of the interpretation itself. Furthermore, the Stakeholder Committee considered the existing practices of the OLA including the aforementioned interpreter qualification process and guidance to judges.

Proposal 1: Interpreters, oral and sign, should not be governed by the provisions in the Code of Evidence (including La. Code of Evidence art. 604) pertaining to experts. Suggested additions:

- (a) An interpreter must be qualified in a manner deemed by the Supreme Court.⁹
- (b) If no such qualified interpreter is reasonably available, the court must appoint an interpreter who meets the following qualifications. The interpreter is:
 - (i) an uninterested party;
 - (ii) able to accurately communicate with and convey information to and from the source language;
 - (iii) able to conduct consecutive, simultaneous, and sight translation; and
 - (iv) familiar with legal terminology and concepts in both English and the source language.
- (c) All interpreters must take an oath or affirmation that they will make a true interpretation.

Proposal 2: Parties should have the opportunity to challenge inaccurate interpretations. However, the benefit of the doubt should be granted to interpreters with the highest level of credentials in accordance with accepted national standards. Suggested additions:

Lawyers shall have the opportunity to *voir dire* an interpreter except that there is a rebuttable presumption for interpreters who have passed the national oral examination.¹⁰

⁹ Note: The proposal allows the Supreme Court to update its interpreter qualifications based on best practices and national trends. For instance, Louisiana is one of the last states that qualifies states utilizing a written translation exam. The OLA is currently studying ways to update the registered interpreter category to add an oral examination component.

¹⁰ The national oral examination is administered by the OLA and acquired through the National Center for State Courts. It is the final step to becoming a “certified” interpreter. ASL interpreters currently may not become a certified interpreter because there is no oral component to that language. However, the Louisiana Commission for the Deaf is currently working to update interpreter standards consistent with [Act No. 128 of the 2022 Regular Session](#).

Proposal 3: In order to challenge inaccurate interpretations, parties should have access to the record. Suggested additions:

In all proceedings where a party or witness communicates with the court through an interpreter, such interpreted communications shall be recorded, in both an audio and visual format, in a manner determined by the Supreme Court, and all objections that might otherwise be waived during the course of this testimony shall be preserved for a period of 14 days, exclusive of the day the testimony was given, and legal holidays.

Proposal 4: Nothing in the aforementioned proposals should limit existing rights of the parties. Suggested additions:

Nothing in this article shall be construed as limiting any party to a proceeding from using their own interpreter present.

Nothing in this article shall be construed as limiting any party from objecting to any interpreter issue arising during a proceeding.

Other Issues for Consideration

1. How does a lawyer who is monolingual challenge an interpretation?
2. What is the standard of review on appeal for a challenged interpretation?¹¹
3. What happens when interpreter is otherwise unable to interpret after he or she has been qualified by the court—i.e. information is too technical? Or the dialect proves to be difficult to interpret?
4. What does the attorney need to consider in making/preserving objections, and what kind of corresponding instruction, if any, should the court offer in such instances (where there is an objection)?
5. In an effort to facilitate the best interpretation possible, the parties should be required to provide pleadings and necessary documents to interpreters ahead of a scheduled interpretation.

Conclusion

The Stakeholder Committee appreciates the complexity of the issues presented and is open to further study and discussions. Louisiana law should reflect current guidance and procedures in Louisiana courts. Regardless of the solution crafted or recommendation of the LSLI, courts should endeavor to appoint a court interpreter with the requisite experience, competence, and qualifications that reflects

¹¹ See *U.S. v. Joshi*, 896 F2d 1303 (11 Cir. 1990).

the level of complexity of the court proceeding in effort to produce the most accurate and reliable court record possible under the circumstances.

Attachment

**STUART H. SMITH LAW CLINIC AND CENTER FOR SOCIAL JUSTICE
LOYOLA COLLEGE OF LAW, LOYOLA UNIVERSITY-NEW ORLEANS
MEMORANDUM**

To: Language Access Committee/Access to Justice Commission

From: Luz M. Molina¹

Re: La. Code Evid. art. 604 – Discussion and Recommendation for Statutory Amendments in Furtherance of the Louisiana's Language Access Plan

Date: January 31, 2022; Further edited, February 2, 2022

Purpose of Memorandum

As detailed in the Language Access Plan in Louisiana Courts (hereinafter "LAP"), a product of the Memorandum of Agreement Between the U. S. Department of Justice and the Louisiana Supreme Court, one of the crucial Phase 2 initiatives of the LAP is the promulgation of state laws and court rules that will "fully embrace language access." The LAP's mandate demands an exploration of the need for the promulgation, or amendment, of particular state laws and court rules which may impact the full "embrace" of language access due LEP individuals in Louisiana.

At the outset, it is useful to note that any desired changes to state laws and/or court rules that affect the appointment, qualifications, and competence of interpreters, in effect, speak to the ability of an attorney to monitor those three areas. Thus, the discussion here is framed in terms of the opportunities the attorneys should have to challenge court interpreter issues. Generally, these occur at least during one, or all three phases of the court proceedings: at the time the appointment of an interpreter is requested, or needed (but not appointed), at their qualification through *voir dire*, or some other process, and during the interpretation itself, to the extent that the interpretation is not accurate, or the interpreter's performance presents other issues which are serious enough to prejudice the LEP client. Further, although it is not the intent of this memorandum to deal with issues of appointment, as explained below,

¹ Student-practitioner, William Ercole, Workplace Justice Project, Stuart H. Smith Law Clinic and Center for Social Justice helped with this memorandum.

because the court must now appoint one upon request,² nevertheless, it bears mentioning that a procedural issue does arise in those cases when the interpreter is not requested, but the judge determines that it is likely that one may be necessary. In such instances, although the Judicial Bench Card suggests that the judge should resolve any doubt in favor of the LEP individual, still, it would appear that the appointment is discretionary. This Committee should consider recommending statutory changes which make clear the type of process that should be followed in those instances when a challenge to the judge's decision is necessary. This process might include a right to a *voir dire* of the client by the attorney if the judge denies the appointment, and/or the introduction of extrinsic evidence regarding the LEP individual's inability to fully understand English.³

This memorandum then, is limited to a discussion of the evidentiary standards applicable to the qualification of the interpreter as governed by the La. Code Evid. art 604 and the provisions of La. Code Evid. 702 and 706, as cross-referenced by La. Code Evid. art. 604. This is a pre-requisite to any effort to determine whether the current juridical structure best addresses any legal issues related to interpreter qualifications. As a quick reminder, issues of appointment should not be conflated with issues of interpreter qualification, or once qualified, issues of competence and performance. For purposes of comparison, and general information, the discussion includes a short summary of applicable evidentiary standards under federal law.

Federal Statutory Solution Not Yet Adopted in Louisiana

Rule 604 of the Federal Rules of Evidence provides: "An interpreter must be qualified and must give an oath or affirmation to make a true translation." Fed. R. Evid. 604.⁴ Article 604⁵ of the Louisiana Code of Evidence provides: "An 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." The original federal rule was identical to the Louisiana rule, however, it was amended for stylistic purposes only. Notes to the amendment make it clear that there is no substantive change. Accordingly, it is presumed that the federal rule continues to designate interpreters as experts. Unlike Louisiana, however, federal law, since 1978, has developed a robust statutory and regulatory structure for interpreters, to wit, 28 U.S.C. § 1827,⁶ which provides a measure of guidance in the appointment and qualification of

² See La. Code Civ. Proc. art. 192.2 at <http://www.legis.la.gov/Legis/Law.aspx?d=506661> and La. Code Crim. Proc. art. 25.1 <http://www.legis.la.gov/Legis/Law.aspx?d=507411>

³ Of course, the LEP individual now also has a right to complain to the Office of Language Access that they "... had a problem getting court services because [they did] not speak English or ... not proficient in English."

⁴ <https://www.rulesofevidence.org/article-vi/rule-604/>

⁵ <http://www.legis.la.gov/Legis/Law.aspx?d=72492>

⁶ <https://www.law.cornell.edu/uscode/text/28/1827>

interpreters. Moreover, over the years, the federal system has developed a very complete internal manual addressing many aspects relating to the qualification and appointment of interpreters.⁷ The applicability of 28 U.S.C. § 1827, together with Rule 604 of the Federal Rules of Evidence, and the availability of other federal materials regarding the qualification and competence of interpreters, makes that federal code provision on interpreters (as experts) different than the one in Louisiana. Louisiana refers only to the general provisions on experts, but provides no other statutory framework as with 28 U.S.C. § 1827.

Qualification of Interpreters

Stating the obvious, interpreters must be qualified in order to interpret in a court proceeding. As noted *supra*, interpreter qualifications are governed by the La. Code Evid. art. 604. Yet nothing in Louisiana law sets forth any interpreter standards, nor is there any guidance for judges, or lawyers, to follow when considering the competence of an interpreter for purposes of qualification. Other than La. Code Civ. Proc. art. 192.2,⁸ and La. Code Crim. Proc. art. 25.1,⁹ which simply require the interpreter to be *competent* (without defining it), and La. Code Evid. art. 702¹⁰ which addresses general expert qualifications not necessarily related to interpreters, there is little other guidance. To the extent that now the Office of Language Access maintains a list of certified, and registered interpreters, subject to a code of professional responsibility, a legitimate question arises as to whether the certified, and registered interpreters, could be presumptively qualified as competent by virtue of having been previously vetted by the Supreme Court (through training and testing). However, there are no rules that address this issue, and thus, the attorney is left to consult what is available, namely, La. Code Evid. art. 702.

In addressing the idea of interpreters as experts pursuant to Louisiana Code Evid. art. 702, it is not difficult to see the awkward fit of expert standards to interpreters, sort of a round peg in a square hole. A close analysis examining applicability, highlights the problem: “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify *in the form of an opinion* or otherwise . . .” (Emphasis added) However, it is an accepted ethics rule that interpreters do not give opinions (unless called to testify pursuant to La. Code Evid. art. 706, noted more fully *infra*.) Further, the evidence code article sets forth expert requirements that seem to be satisfied by the interpreter, but which fit only in a rather contrived manner. Thus, so long as the interpreter is “qualified,” (again, a concept not defined in that article), the interpreter may also satisfy the following: “(1) The expert's scientific, technical, or other

⁷ https://www.uscourts.gov/sites/default/files/federal-court-interpreter-orientation-manual_0.pdf

⁸ La. Code Civ. Proc. art. 192.2, *supra* note 2.

⁹ *Id.*

¹⁰ <http://www.legis.la.gov/Legis/Law.aspx?d=72506>

specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue" (clearly, in its most literal sense, interpreting/translating to English will help the trier of fact understand the testimony); "(2) The testimony is based on sufficient facts or data" (this is either not applicable, or taken in the most literal sense, easily satisfied, as the "facts" are those being spoken in the language other than English); "(3) The testimony is the product of reliable principles and methods" (it seems that if an interpreter is qualified their methods would be reliable – but again, what does it mean to be qualified); and "(4) The expert has reliably applied the principles and methods to the facts of the case." (If the interpreter is qualified, and thus presumably competent, the application of the principles and methods to the facts would be simply the act of interpreting accurately.) Nevertheless, despite the ill-fitting applicability of general expert requirements to the role of the interpreter, the court's discretion to qualify the interpreter is derived from its application of La. Code Evid. art. 702 pursuant to the cross-reference set out in La. Code Evid. art. 604. A trial court's refusal to qualify an interpreter-expert is reviewable under the manifest error standard of review,¹¹ a high bar to establish that an error occurred; this is so even though there are no appropriate interpreter standards.

The other code article implicated here, La. Code Evid. art. 706, relates to the appointment of an interpreter by the court, and allows the court, on its own, or on motion of any party, to enter an order to show cause why an expert should not be appointed. This provision would seem to be irrelevant for those instances when the appointment is mandatory, as noted *supra*. Further, if applied to interpreters as experts, it allows any court appointed expert to be called to testify and to be deposed. As with La. Code Evid. art 702, the language of art. 706 is inappropriate. Interpreters must be impartial and disinterested parties, and would have no reason to testify or be deposed. The only exception to this, would be in those cases where the interpreter is in fact qualified as a language expert, for example, a linguist. In such cases, the interpreter-expert is not likely to serve the function of a court interpreter, instead, they might give an opinion as to whether a written contractual arrangement was accurately translated, or whether previous court interpretations were accurate.

In summary, regardless of the fact that you could seemingly refer to La. Code Evid. art. 702 and La. Code Evid. art. 706, and glean some kind of interpreter standards, the fact is that there is no mention of concepts particularly applicable to the role of court interpreter. Thus, La. Code Evid. art. 702 allows an individual who is qualified, *inter alia*, by virtue of education and training, *to give an opinion*; La. Code Evid. art. 706 asks whether *an expert should be appointed*, and if so, allows the expert to be *deposed*, and

¹¹ *Thongsavanh v. Schexnayder*, 40 So.3d 989, 996-97 (La. App. 1 Cir. 5/7/10)

to testify – neither address interpreter qualifications; both would violate the interpreter's ethical standards.

The *Sui Generis* Nature of Interpreters

As discussed above, there are issues with classifying an interpreter as an expert. The inapplicability of certain language in La. Code Evid. art. 702, the uncertainty and further inapplicability of La. Code Evid. art. 706, and possible issues of presumptive qualification under La. Code Civ. Proc. art. 192.2 and its Criminal Code analogue are relevant examples. It seems appropriate that at the very least, La. Code Evid. art. 604 should be amended to remove the cross-reference to experts, and thus, further reference to La. Code Evid. arts. 702 and 706. However, removal of the reference to experts, should also trigger a comprehensive amendment including appropriate language which addresses some of the concerns here, or any others which may be raised in further discussions. Below, is an attempt to envision some possibilities.

A proposed version might be:

"An interpreter must: (1) be qualified either by way of registration or certification with the Louisiana Supreme Court; and (2) take an oath or affirmation that he will make a true translation."

Alternatively, the more applicable language from art. 702 could be repurposed: "An interpreter must: (1) be qualified either by way of registration or certification with the Louisiana Supreme Court, or by *demonstrating scientific, technical, or other specialized knowledge of the source language*. . ." (emphasis added).

Or, borrowing from the provisions on interpreters for deaf individuals, the rule might read: "An interpreter must: (1) be qualified either by way of registration or certification with the Louisiana Supreme Court, or be an uninterested party *able to accurately communicate with and convey information to and from the source language*. . ." See La. Stat. Ann. § 46:2362 (emphasis added).

Further, the article could clarify whether an appointment from the certified and registered list elicits a presumption of being qualified. and provide a unique mechanism for challenging an interpretation.

The full article might look something like this:

"Interpreters are not governed by any of the provisions herein pertaining to experts. An interpreter must be qualified: (a) either by way of certification or registration with the Office of Language Access of the Louisiana Supreme Court; or (b) if no certified or registered interpreter is reasonably available, by demonstrating that the interpreter is (1) an uninterested party; (2) able to accurately communicate with and convey information to and from the source language; (3) able to conduct consecutive, simultaneous, and sight translation; and (4) be familiar with legal terminology and concepts in both English and the source language; (c) Take an oath or affirmation that he will make a true

interpretation; (d) An interpreter appointed by the court pursuant to (a) is presumed to be qualified. The presumption is rebuttable; (alternately, "There is a rebuttable presumption that the interpreter appointed by the court pursuant to (a) is qualified.).

One more issue which should be discussed, beyond qualifications, is that of challenges to the interpretation itself. These challenges implicate competence in the performance of the interpretation. It would be helpful to recommend an additional section or a new statutory provision that provides for permitted challenges to the accuracy of the interpretation.

Such a provision may have wording similar to this:

"In all cases where the testimony of any party or witness is facilitated through a language interpreter, such interpreted testimony shall be recorded, in both audio and video format, and all objections that might otherwise be waived during the course of this testimony shall be preserved for a period of _____, exclusive of the day the testimony was given, and legal holidays."

Another idea in this regard would be to have a provision that gives the attorney the option of giving pre-trial notice to the court that they want the proceedings audio/video recorded. There would be issues of cost, and rules would have to be developed around that process. Admittedly, it may be a tough sell to mandate audio/video, but the fact remains that there has to be a mechanism, perhaps at the very least, an audio recording, which will allow an attorney the opportunity to review accuracy (and perhaps other matters related to the interpreter) in order to protect the rights of the LEP individual. The reality is that without some recordation of the source language, an attorney, under certain circumstances, would be required to retain an expert throughout any portion of a court proceeding where an LEP individual is assisted by a court interpreter. This may impose an onerous burden best borne by the court system.

Disqualification or Removal

There is an additional issue as to whether an attorney may challenge the qualification of the interpreter *after* they have been properly qualified by a court. It has not been addressed here. Nevertheless, by way of short discussion in order bring awareness about other the possible issues regarding interpreters, it should be noted that there is no statutory guidance in Louisiana as to how that might occur, and neither of the evidence articles seem applicable. One might envision a situation where an interpreter, previously qualified, turns out to be unqualified given their actual performance, for example, by consistently delivering subpar interpretations, clear language mismatch between witness and interpreter, or serious ethical lapses, among others, which belie the initial qualification, and that a mere objection to competence will not remediate. In those cases, disqualification or removal should be an option. It stands to reason that the court would likely entertain a motion to remove or disqualify the interpreter when fairness and meaningful participation of the LEP individual in the proceedings is grossly

compromised; nonetheless, notwithstanding the likelihood that a court will do the right thing, there should be a procedure in place.¹²

A Concluding Thought

The right to assert challenges, and the standards controlling them, are not suitably available under the current procedural and evidence code, nor another statutory framework. These rights should be outlined in a way that protect the rights of the LEP individual to participate meaningfully in court proceedings, by offering clarity and guidance to the attorneys who represent those individuals.

¹² For a good example of a court rule which provides for the removal of an interpreter, see [Tenn. R. App. P. 42 § 6.](#)