INJUSTICE IN ANY LANGUAGE: THE NEED FOR IMPROVED STANDARDS GOVERNING COURTROOM INTERPRETATION IN WISCONSIN

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I. INTRODUCTION

Court interpretation in the United States is the oral translation of one language into English (or vice-versa) for a defendant or a witness.[1] Court interpreting is done in many different languages in the United States;[2] however, a majority of interpretations are between Spanish and English. The federal court system requires certification of interpreters in the Spanish language, as well as Navajo and Haitian Creole.[3] Most state court systems, however, lack any certification program for interpreters. Thus, interpretation in state courts is essentially unregulated.[4]

The lack of regulation is significant because courtroom misinterpretations can have dire consequences. In the case of Quang Nguyen in California, it was clearly established that the defendant sneaked into the home of a woman with whom he was obsessed, waited for her and her

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1. This article primarily addresses foreign language interpreters in the criminal court context, although in Milwaukee County participants have a right to an interpreter in family, juvenile, and civil court in some cases. *See* WIS. STAT. § 885.37 (1997-98). Nevertheless, the constitutional implications are greater at the adult criminal court level because of the possible outcome of a case.

2. For example, in 1988, eighty different languages were used in the United States District Courts. *See* ELENA M. DE JONGH, AN INTRODUCTION TO COURT INTERPRETING 19 tbl.1.3 (1992). As immigration from different parts of the world increases, so too will the number of interpretations and the variety of languages used in courts across the country.

3. *See* Court Interpreters Amendment Act of 1988, 28 U.S.C. § 1827 (1994).

4. The majority of states do not require certification of interpreters with the exceptions of Arkansas, California, Massachusetts, Nevada, New Jersey, New Mexico, Oregon, and Washington. *See infra* notes 208-15.

husband to come home, and killed the husband.[5] The prosecution in the case sought a murder charge, requesting life in prison for the defendant. The jury convicted Nguyen of the lesser charge of manslaughter, which did not carry a life sentence.[6] Crucial to the jury's decision of the lesser charge was the testimony of the victim's wife, who the jury felt was evasive on the stand.[7] The testimony that the jury heard was in fact evasive—but it was not what the witness said. The wife testified in her native Vietnamese, which was translated by a court interpreter. An interpreter hired by the San Jose Mercury News to monitor the trial found that the court interpreter completely changed the meaning of the wife's testimony.[8] Words were omitted, while phrases and whole sentences were frequently changed from the original, resulting in an examination by the prosecution that was confusing and difficult to follow.[9] One expert said of the case: "The witnesses and the interpreter were at one trial, and the judge, the prosecutor, the defense attorney and the jury were all at another trial."[10]

A similar instance of misinterpretation occurred in Grand Rapids, Michigan in the case of Truan Truong.[11] The eighteen–year old defen-

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5. *See* Miranda Ewell, *What Jury Heard Was Not What Was Said*, SAN JOSE MERCURY NEWS, Dec. 17, 1989, at 16A. A description of the type of mistakes the interpreter made reads:

> [The interpreter] . . . spoke in pidgin English. Sometimes, the question was interpreted incorrectly, leading to a confusing exchange that forced the deputy district attorney to ask [the witness] the same question repeatedly. The effect was to batter the credibility of his own star witness, as in this exchange:
> Deputy district attorney: "Did you, your husband or anybody to your knowledge keep a gun in the house?"
> Interpreter asks in Vietnamese: "Did you or your husband keep a gun in the house?"
> [Witness]: "No."
> Deputy district attorney, again: "Although, didn't your son Long have a BB gun?"
> [Witness]: "Yes."

Id. The faulty translation which omitted the language of "anybody to your knowledge," caused it to appear that the witness contradicted herself by saying that neither she nor her husband kept a gun in the house. *See id.* As far as the witness knew, she was not asked whether anyone besides her and her husband kept a gun; thus, she answered "no" when in fact, her son kept a gun in the house. *See id.*

6. *See* Ewell, *supra* note 5, at 16A.
7. *See id.*
8. *See id.*
9. *See id.*
10. *Id.*
11. *See* People v. Truong, 553 N.W.2d 692 (Mich. 1996).

dant was convicted of first degree murder and sentenced to life in prison without parole despite his claim of self-defense.[12] As chronicled in the *Grand Rapids Press*, his testimony in support of this claim was never heard.[13] A court-appointed interpreter made serious errors by completely changing testimony of the defendant by including phrases that were never said, and by changing words like "shoot" to "kill."[14] While judges,[15] attorneys,[16] and interpreters[17] alike may view these stories as the inevitable result of the interpretation process, the result of cases would not be affected by an interpreter if the court system ensured the use of qualified interpreters. In fact, the court interpreter's role is pivotal in a criminal courtroom because the loss of freedom may turn on a single phrase.[18]

In cases across the country, unqualified interpreters are appointed regularly. In some cases, in addition to the interpreters being grossly unqualified, they may not even speak the language of the defendant. For example, during his six months in jail in Ottowa County, Michigan, Christopher Sanchez was allowed to serve as a court interpreter more than twenty times. Although Sanchez spoke Spanish, he was not a trained interpreter and perhaps not bilingual.[19] In one instance he translated for a Laotian defendant, claiming that he (Sanchez) had "picked up some of that language from a fellow inmate."[20] Similarly, two Albanian defendants were on trial in the Kentwood District Court

12. *See id.* at 695.

13. *See* Ken Kolker, *I Couldn't Make a Miracle—Additions, Omissions Undetected*, GRAND RAPIDS PRESS, Feb. 21, 1993, at A22.

14. *See id.*

15. Judge Johnston in the circuit court case said he did not believe Truong needed to hear everything at the trial. "That . . . would take too long." *Id.* This exhibits a preference for judicial economy over constitutional rights of a defendant.

16. Even when attorneys are aware of possible errors in translation, they appear reluctant to object. "You want to proceed in the case. . . . I don't see the percentage in going around stirring up trouble." Miranda Ewell & David Schrieberg, *How Court Interpreters Distort Justice*, SAN JOSE MERCURY NEWS, Dec. 17, 1989, at 17A. If attorneys allow errors of which they are aware to go without objection because they do not want to be perceived as troublemakers, they not only jeopardize the case, but open themselves up for a malpractice claim.

17. In the *Grand Rapids Press* account, the interpreter was questioned about his mistakes and responded "I'm not God . . . I couldn't make a miracle." Kolker, *supra* note 13, at A22. A professionally trained interpreter would accept that mistakes occur.

18. *See* Ewell & Schrieberg, *supra* note 16, at 17A.

19. *See* Ken Kolker, *Few Rules, No Standards*, GRAND RAPIDS PRESS, Feb. 21, 1993, at 1A.

20. *Id.*

in Michigan and an Albanian interpreter could not be found for them.[21] Rather than delay trial, the judge appointed an Italian interpreter for one defendant on the basis that the defendant had spent a little over a year in Italy after escaping Albania.[22] The other defendant followed the testimony at trial through his attorney.[23] The attorney spoke Greek, a language in which the defendant had some proficiency.[24] Neither of these translations was into the defendants' native language. It is likely that the defendants had an insufficient understanding of these languages to understand the testimony or even to grasp what was happening in the courtroom.

There are similar accounts in state courts across the country, where poor court interpretation has led to miscarriages of justice. The increase of racial and ethnic minority populations in the United States,[25] even in mid-western states like Wisconsin,[26] has increased the demand for interpreters' services in the criminal justice system. The number of cases requiring court interpretation will become even greater as these minority populations grow.[27] For example, in Milwaukee County, Wisconsin, the total number of interpretations performed each year has increased rapidly since 1994.[28] In 1994, the verifiable number of interpretations in criminal, family, and juvenile court approximated 375.[29] In 1995, the to-

21. *See* Kolker, *supra* note 19 at 1A.

22. *See id.*

23. *See id.*

24. *See id.*

25. For example, in 1980, Asian/Pacific Islanders comprised 3,500,439 of the United States population. In 1990, Asian/Pacific Islanders comprised 7,273,662 of the population, an increase of over one hundred percent. *See* D. WAGGONER, TESOL MATTERS 12-13 (1991); WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 11 (1995). Likewise, Hispanics comprised 14,608,673 of the United States population in 1980, and 22,354,059 in 1990, an increase of over fifty percent. *See. id.*

26. Among all fifty states, Wisconsin ranked twentieth in the number of estimated non-English speaking persons at 264,000 in 1990. *See* HEWITT, *supra* note 25, at 25 tbl.1.2.

27. It is estimated that by the year 2050, thirty-six percent (estimated at 139 million people) of the United States population will be recent (post-1970) immigrants, a great number of whom will be non-English speakers. *See* Peter Brimelow & Joseph Fallon, *Controlling our Demographic Destiny*, NAT'L REV., Feb. 21, 1994, at 42.

28. Letter from Karen Surges, Administrative Assistant, *Milwaukee County Clerk of Circuit Court, Administrative Division*, to author (Dec. 30, 1996) (on file with author). *See infra* note 29 and accompanying text.

29. This data was compiled by the author in the Clerk of Circuit Court Office, Administrative Division, which maintains files of interpreter bills for Milwaukee County. Records obtained began in 1994. The records consist of single sheets of paper that are completed by individual interpreters. These sheets are used to record pay to interpreters and then used as a guide for billing the state for interpreter services. Milwaukee County bills the State of Wis-

tal number court interpretations approximated 1,417.[30] In 1996, the number of interpretations approximated 1,943, over five times the number from two years earlier.[31] While a slight decrease in interpretations in 1997 took place, with still over 1,500 interpretations, statistics compiled at the time of this writing indicate that 1998 was on pace to exceed that total.[32]

It is well established that non-English speaking criminal defendants have a right to an interpreter if the court determines that one is needed.[33] Quality interpretation requires an interpreter to have extensive training as well as knowledge of the judicial process. In order to interpret in federal court, interpreters must first complete a testing and

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consin each quarter (January-March; April-June; July-September; and October-December) for interpreter services paid out by Milwaukee County. Thus, this system of interpreter records is a mechanism for Milwaukee County to get reimbursed by the State for interpreter services.

On each sheet, the interpreter includes a case number, the judge and the client's name (defendant), and the amount charged. One sheet is not necessarily indicative of how many times, or how many different proceedings an interpreter worked each day. For example, an interpreter who covered an entire trial lasting over 30 hours may have used one sheet with only one case number, thus it was counted as one interpretation proceeding for these purposes. Likewise an interpreter may have used one sheet with four case numbers on it; this would constitute four proceedings and was counted as such. Many cases involved multiple charges, with several case numbers but one defendant. In such cases, one proceeding was counted.

Aside from the general lack of uniformity of these records, they are not indicative of the total number of interpretations that took place at the courthouse. These records only reflect the work done by contracted interpreters. There is, however, a county employee who conducts courtroom interpretations regularly, perhaps daily, in an unofficial capacity, and there is no record of these interpretations on file. Thus, the actual number of interpretations performed could be much higher.

Clearly, a new record keeping system needs to be implemented just to keep a record of court interpretations, not only for billing purposes. Once a record keeping system is established, the need for uniform standards will be clearer. Also, the demand for court interpretations, which is rapidly growing, would be identifiable. The numbers cited, though imprecise, do reflect a need increasing at a rather rapid rate. *See infra* Part V.B.3 Problem #5.

30. *See id.*

31. *See id.*

32. *See id.* The first three quarters of 1998 show that approximately 1,331 interpretations took place.

33. *See* Court Interpreters Act of 1978, 28 U.S.C. §§ 1827, 1828 (1994); United States *ex rel.* Negron v. New York, 434 F.2d 386 (2d Cir. 1970); State v. Neave, 344 N.W.2d 181 (Wis. 1984), *overruled on other grounds by* State v. Koch, 499 N.W.2d 152 (Wis. 1993); *see also* State v. Besso, 240 N.W.2d 895 (Wis. 1976).(holding that selection of an interpreter is within the trial court's discretion and it is the defendant's burden to show that this selection prejudiced the defendant). The law is unsettled as to the right to an interpreter in civil court, although most courts provide for one. *See supra* note 222 and accompanying text for a definition of "court interpreting."

certification process.[34] The qualifications of interpreters at the state level are not so strictly regulated.[35] In most states, including Wisconsin, the judge determines both whether a court interpreter is needed and whether the appointed interpreter is qualified.[36] However, few of the state judges are aware of the court interpreter's responsibilities and the complexities involved in interpreting. Moreover, many judges are often unaware of the impact that poor courtroom interpretation has on the defendant's constitutional rights.[37] Judges in the federal system may be similarly unaware of the consequences of poor interpretation. However, federal judges have limited discretion in deciding whether to appoint interpreters, and they receive the benefit of specific standards that dictate whether potential interpreters are qualified.[38]

Wisconsin is similar to most other states in that it has no such standards for the appointment of interpreters. Other states, like Minnesota and Oregon have recognized the potential for miscarriage of justice due to inadequate courtroom interpretation.[39] These states have formed an interstate collaboration to share the costs of formulating standards for court interpreting, including training and testing, as well as sharing information to develop a set of rules of professional conduct.[40] Wisconsin must follow the lead of Minnesota and Oregon in developing a program that trains and requires certification of court interpreters. By mandating strict compliance with certification and training standards, the state will also educate the judiciary regarding the difference that high quality interpretation makes in the administration of justice. Still, in order for states to adopt such standards, the states must recognize the right to an

34. *See* 28 U.S.C. §§ 1827, 1828. *See infra* note 35 for an explanation of this process.

35. The Court Interpreters Act only applies to interpretation in federal court. To become certified as a federal court interpreter, one must pass a rigorous written and oral examination. *See* SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM (1990). "As of February 1986, only [four] percent of those who had initially taken the exam passed it in its entirety (292 out of 7,000 persons), and many of those who ultimately passed the exam had to take a portion of it repeatedly before being able to pass the entire exam." *Id.* at 36-37 (citing J. Leeth, Speech given at the meeting of the Pittsburgh chapter of the American Translators Association (1986)). While some states have followed the federal court example, many have not and are not required to follow that example.

36. *See infra* Part II.

37. *See* Honorable Lynn W. Davis & William Hewitt, *Lessons in Administering Justice: What Judges Need to Know About the Requirements, Role, and Professional Responsibilities of the Court Interpreter*, 1 HARV. LATINO L. REV. 121, 145 (1994) (providing a detailed description of common problems and dilemmas of judges, and suggestions for those problems).

38. *See infra* Part II.

39. *See infra* Part II.B.

40. *See* HEWITT, *supra* note 25, at 245.

interpreter.

Past and present language attitudes in the United States play an integral part in the history of the right to a court interpreter. The immigration patterns of the United States are unique and there is a history of bilingualism in this country that is often forgotten. Recently and in the past, attempts have been made to make English this country's official language.[41] Despite these attempts, English has never been the official language of the United States.[42] Moreover, it can be argued that the framers of the Constitution purposefully avoided declaring English the official language by not including such a provision in the Constitution.[43] English was certainly not the first language spoken in what is now the United States, nor was it even the first European language brought to the United States.[44]

The United States has always been multilingual, and for one hundred years after the United States was founded, the American people had a tolerant attitude towards languages other than English.[45] In fact, many schools were conducted bilingually, and some state constitutions were written in more than one language.[46]

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41. *See, e.g.*, English Language Empowerment Act, H.R. 123, 104th Cong. (1995). Many states have declared English to be the official language of the state, but the federal constitutional rights of non-English speakers are not superseded by these laws. *See* Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481 (1994). Most notable is the recent case of *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). *See also* Antonio Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989); Juan Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

42. *See* BILL PIATT, ONLY ENGLISH?: LAW AND LANGUAGE POLICY IN THE UNITED STATES 3 (1990). "The United States has never had any official language and has never been monolingual." *Id.*

43. In fact, framers such as Benjamin Franklin, John Jay, and Thomas Jefferson were fearful of a multilingual and diverse society, but still left the Constitution free of declaring an official language. *See* Juan Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 974 (1995).

44. *See* PIATT, *supra* note 42, at 3. It is estimated that "[p]rior to the beginning of the European exploration of these territories . . . one million natives inhabited the region north of present-day Mexico and south of the polar regions . . . . These peoples . . . spoke up to a thousand distinct dialects and languages." *Id.* at 4. Spanish was the first European language to be heard by the native peoples of North America. *See id.* at 5.

45. *See* ROSEANN DUEÑAS GONZÁLEZ ET AL., FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY AND PRACTICE 38 (1991).

46. *See* KENJI HAKUTA, MIRROR OF LANGUAGE: THE DEBATE OF BILINGUALISM 167-68 (1986). German-English bilingual education flourished in Milwaukee public schools in the 1800s. *See id.* at 211. In 1890, eighty-six percent of the city of Milwaukee was immigrant, one of the largest percentages in the country. *See* DIEGO CASTELLANOS, THE BEST OF TWO WORLDS: BILINGUAL-BICULTURAL EDUCATION IN THE U.S. 33 (2d ed. 1985). For a more

In the late eighteenth century, American revolutionaries realized the importance of multilingualism by using other languages to promote their independence from Britain.[47] This tactic of using a number of languages to promote loyalty in the new nation was a successful one.[48]

In the eighteenth and nineteenth centuries, intolerance of languages other than English increased as immigration increased. The conquest of Mexican territory (forcing thousands of Mexicans to become United States citizens), along with the increase of non-English speaking Irish immigrants,[49] and the enlistment of thousands of Asians for work on the railroads were all great factors contributing to the English-only sentiment that escalated in the twentieth century.[50]

In the twentieth century, educational policies lead the way for language usage. For example, "[b]y 1923, thirty-four states had legislation mandating English as the language of school instruction to the exclusion of other languages."[51] Nonetheless, in 1923, a controversial ruling was made by the Supreme Court in *Meyer v. Nebraska*.[52] In *Meyer*, the Supreme Court held that a Nebraska law requiring English as the sole medium of instruction violated the liberty guaranteed by the Fourteenth Amendment.[53] This ruling voided the legislation in a number of states that had the same such requirement.[54] Despite this important ruling for "language rights,"[55] after World War II English-only sentiments increased due to the Cold War and McCarthyism.[56] Xenophobia by English speakers escalated even more when lack of manpower in the United States due to World War II brought a large number of Mexicans to the United States to conduct farm labor under the Bracero program.[57]

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complete history of early immigration, see generally CASTELLANOS, *supra*.

47. *See* PIATT, *supra* note 42, at 8.

48. *See id.* at 9. "Soldiers speaking German, French, Swedish, and other languages stood with English-speaking revolutionaries in the creation of a nation committed to the liberty and independence of its peoples." *Id.*

49. At the time, some Irish spoke Gaelic.

50. *See* GONZÁLEZ ET AL., *supra* note 45, at 38.

51. G. SAN MIGUEL, ONE COUNTRY, ONE LANGUAGE: A HISTORICAL SKETCH OF ENGLISH LANGUAGE MOVEMENTS IN THE UNITED STATES 10 (1986).

52. 262 U.S. 390 (1923).

53. *See id.* at 390.

54. *See* HAKUTA, *supra* note 46, at 167-68.

55. "Language rights," according to authors Gonzalez, Vasquez and Mikkelson, are really "access rights" and are laws which include language as a remedy to insure access rights. *See* GONZÁLEZ ET AL., *supra* note 45, at 39.

56. *See id.* at 39.

57. *See* Kitty Calavita, *The Immigration Policy Debate: Critical Analysis and Future Options, in* IMMIGR. PROCESS AND POL'Y 276, 277 (Thomas Alexander et al., eds., 3d ed. 1991).

These events brought about one of the most visible manifestations of anti-Spanish sentiments in the schools, where corporal punishment was used against children caught speaking Spanish, and administrators and teachers were in danger of losing their jobs if they allowed children to speak Spanish.[58]

Our history of bilingualism illustrates that many languages have existed in our country since its inception, and although many people believe that English is the "official" language of the United States, it is not. While our courts are conducted in English, non-English speakers still must be afforded due process of law. After all, there was a time in our history when English was not the predominant language in what is now the United States.[59] It was with this understanding of the history of diversity in the United States that the issue of rights for the linguistic minority emerged.

Part II of this article explains the constitutional and statutory right to an interpreter on the federal level and in Wisconsin. Part III discusses why translation for legal purposes requires more than a working knowledge of a second language. Part IV includes a discussion of linguistics and legal language. Part V discusses interpreter training, certification, and practices. Finally, Part VI addresses the perceived problems of court interpretation in Wisconsin. This Part also proposes a model to be used by the Wisconsin legislature when developing standards for court interpreters and the judiciary.

This article asserts that in order to administer fair justice, Wisconsin must establish standards for appointment, training, and certification of court interpreters. Recent case law in Wisconsin does not sufficiently recognize the issues involved in court interpretation. While the Wisconsin Supreme Court recognizes a right to an interpreter, it does not explicitly recognize the right as a *constitutional* right. Also, Wisconsin courts oversimplify the linguistic issues involved in courtroom interpretation.[60]

Further, the current statutory structure that forces a judge to determine whether someone requires an interpreter and whether an inter-

58. *See* GONZÁLEZ ET AL., *supra* note 45, at 39.

59. Prior to the arrival of the Europeans to North America more than five hundred languages were spoken here. *See* CASTELLANOS, *supra* note 46, at 1. Even in the eighteenth century, when English was predominant, it shared its status with German. German schools and newspapers were prevalent although quite feared by white Englishmen. *See* Perea, *supra* note 41, at 972.

60. *See infra* notes 161-83 and accompanying text. *See also infra* notes 78-98 and accompanying text.

preter is qualified is glaringly inadequate considering the linguistic complexities necessary to make such a determination, and the possible ramifications of the appointment of an incompetent interpreter. Judges are not trained or educated to make determinations of language proficiency and should not be expected to do so without such training. The fact that judges, rather than expert linguists, are required to make such determinations, shows that the Wisconsin legislature does not understand the constitutional implications of the appointment of an interpreter for a defendant, nor the linguistic issues involved in deciding whether to appoint an interpreter.

While drastic changes may be necessary to assure quality interpretation and constitutional protections in Wisconsin, there are immediate smaller adjustments that Wisconsin may make that will begin to correct the shortcomings of the system. Overall, the state needs to educate the judiciary, so that if judges are required to make a determination regarding language proficiency, they will have some guidance. The state court system also needs to maintain a central administration of court interpreter services, as is done for interpreters for the deaf. This will allow court interpretations to be monitored and will maintain a standard of professionalism for the interpreters. The state must establish standards for the qualification of interpreters to insure high quality interpretation, and to allow the system to run more efficiently.

II. RIGHT TO AN INTERPRETER

The right to an interpreter stems from the Constitution and from federal statutes that originated in the 1960s and 1970s.[61] The civil rights legislated in these federal statutes involved equal access to education, employment, the voting booth, and the courts for all persons (this extended to linguistic minorities).[62] However, attitudes still persist that

61. *See* GONZÁLEZ ET AL., *supra* note 45, at 39 (discussing the "language rights" movement and increased awareness in the 1960s and 1970s of denial of access and its ramifications on minorities).

62. *See* Bilingual Education Act of 1968, 20 U.S.C. § 3281 (recognizing educational needs of limited-English speaking children); Court Interpreters Act of 1978, 28 U.S.C. §§ 1827, 1828 (establishing a right to an interpreter in federal court); Voting Rights Act of 1975, 42 U.S.C. § 1973(b) (mandating use of bilingual or multilingual ballots where there were large concentrations of non-English speaking people); Civil Rights Act of 1964, 42 U.S.C § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ."); Equal Employment Opportunity Act of 1972, 42 U.S.C. § 1981(a) (prohibiting employment discrimination on the basis of sex, race, color, religion or national origin). "These acts helped to bridge the linguistic gap be-

people who speak languages other than English are unable to assimilate in American culture and are too lazy to try. There are also overwhelming societal disagreements about bilingualism, such as the debate over bilingual education, which permeate the criminal justice system[63] and distort the real issues involved in the right to a competent interpreter.[64]

A. Case Law on the Right to an Interpreter

For limited and non-English speakers, equal access to justice includes the right to an interpreter. There is no explicit constitutional right to an interpreter, but the United States Constitution mandates the right to an interpreter as a necessary component to the Sixth Amendment right to counsel and right to confrontation.[65]

A defendant's Sixth Amendment right to counsel requires more than being provided with counsel. A defendant's attorney must be able to communicate effectively with the defendant. When the defendant and counsel speak different languages, in court the defendant must have an interpreter in order to "hear" all of counsel's objections and dialogue with the court. These exchanges constitute communication with the client to which the client is, arguably, entitled under the Sixth Amendment.

The right of the accused to confront witnesses, also guaranteed by the Sixth Amendment, is almost certainly violated if the defendant is unable to comprehend the testimony of those witnesses. Furthermore, due process guaranteed by the Fifth and Fourteenth Amendments is

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tween language handicapped people and government agencies, thereby affording access to services to persons who had previously been denied them." GONZÁLEZ ET AL., *supra* note 45, at 40.

63. *See* Carlos A. Astiz, *But They Don't Speak the Language*, 1986 JUDGES' J. 32, 33 (Spring 1986).

64. *See infra* Parts II.A-B.

65. The Sixth Amendment reads in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI; *see also* Davis & Hewitt, *supra* note 37 at, 126-28; Michael B. Schulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants,* Note, 46 VAND. L. REV. 175, 183-84 (1993); Joan Bainbridge Safford, *No Comprendo: The Non-English-Speaking Defendant and the Criminal Process*, 68 J. CRIM. L. & CRIMINOLOGY 15, 23-24 (1977); Alan J. Cronheim & Andrew H. Schwartz, *Non-English Speaking Persons in the Criminal Justice System: Current State of the Law*, 61 CORNELL L. REV. 289, 290-95 (1976); Williamson B.C. Chang & Manuel U. Araujo, *Interpreters for the Defense: Due Process for the Non-English Speaking Defendant*, 63 CAL. L. REV. 801, 813-20 (1975). *See also supra* note 33 and accompanying text.

violated if the defendant is unable to participate in his own defense.[66]

There are a few landmark cases in the federal courts establishing the constitutional right to an interpreter.[67] These cases all predate the Court Interpreters Act of 1978.[68] In the years since the Court Interpreters Act was passed, the existence of a statutory right to an interpreter has obviated the need to rely on a constitutional right to interpretation in the federal courts. At the same time, state courts have relied on pre-1978 federal precedent to support the right to an interpreter in state proceedings.[69]

1. Court Discretion in Appointing an Interpreter

The United States Supreme Court has never recognized the right to an interpreter as a constitutional right and has dealt with the issue only once. In *Perovich v. United States*,[70] the Court considered no constitutional arguments and held that the decision whether to appoint an interpreter for a non-English speaking defendant is within the trial court's discretion.[71]

The *Perovich* court added that it did not appear from the answers given by the defendant that there was any abuse of that discretion.[72] It is unlikely that a judge, questioning a defendant for a brief period of time, would be able to determine the level of proficiency a defendant has in the English language.[73] Determining language proficiency involves training in linguistics, which most judges do not have. Without such training the determination is little more than guesswork.

The *Perovich* ruling continues to be the leading case on the issue of a judge's discretion in appointing an interpreter, and judges around the country, particularly in state courts, have great discretion to decide when to appoint an interpreter.[74] By lodging discretion with the trial

66. *See* United States *ex rel.* Negron v. New York, 434 F.2d 386, 389 (2d. Cir. 1970).

67. *See id.;* United States v. Carrion, 488 F.2d 12 (1st Cir. 1973); Perovich v. United States, 205 U.S. 86 (1907).

68. 28 U.S.C. § 1827 (1978). *See also infra* Part III.B.

69. *See infra* notes 81, 125.

70. 205 U.S. 86 (1907).

71. *See id.* at 91.

72. *See id.* Presumably the court is referring to the "answers" given by the defendant while he was on the stand during trial. *See id.*

73. *See* Schulman, *supra* note 65 at 185 ("Perhaps the biggest problem in the present system of allowing a judge to choose the interpreter is the assumption that a judge can accurately determine the competency of a given interpreter.").

74. *See, e.g.,* State v. Yang, 549 N.W.2d 769 (Wis. 1996); State v. Neave, 344 N.W.2d 181 (Wis. 1984), *overruled on other grounds by* State v. Koch, 499 N.W.2d 152 (Wis. 1993); State

judge, the *Perovich* ruling makes it unlikely that an appellate court will second guess the decision to deny a request for an interpreter. It is also quite difficult to challenge an interpretation because trial transcripts are inadequate to detect instances where a defendant lacks English proficiency. The reason for this is partly due to the nature of questioning in legal setting. Judges may ask questions such as "Do you understand the nature of the proceedings today?"[75] or "Are you able to read and understand the form in front of you?" Leading questions simply require a yes or no answer, and limited English speakers can answer these questions without detection of their limited skills. Thus, the presence of leading questions in such a setting is insufficient to determine language skills.[76]

Another difficulty in discovering language deficiency from within the trial transcripts is that most language deficient defendants are unlikely to admit a language deficiency. The reasons for this include individual pride and the tendency for non-native speakers of a language to claim greater proficiency in that language than they actually possess.[77]

In Wisconsin, the right to an interpreter has been established by *State v. Neave*.[78] The Wisconsin Supreme Court held that as a matter of "judicial administration," and *not* as a federal constitutional right, fairness requires that a defendant be given the assistance of an interpreter when needed.[79] The Wisconsin Supreme Court found that the assistance of an interpreter promotes judicial economy by reducing the risk of appeal premised upon faulty interpretation or the failure to appoint an interpreter, rather than holding it is required as a constitutional right.[80]

Wisconsin treats the issue of appointment of an interpreter in the same way as the United States Supreme Court and other states. In Wisconsin the appointment of an interpreter is within the discretion of the trial court.[81] It is the burden of the court to make certain that the defen-

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v. Besso, 240 N.W.2d 895 (Wis. 1976).

75. This was observed in a plea colloquy in Milwaukee County Circuit Court with a limited English-speaking defendant. *See infra* Part V.B.2 Problem 1.

76. *See* Miguel A. Mendez, *Lawyers, Linguists, Story-Tellers, and Limited English-Speaking Witnesses*, 27 N.M. L. REV. 77, 93-94 (1997).

77. *See infra* note 94-95, 106, and accompanying text.

78. 344 N.W.2d 181 (Wis. 1984), *overruled on other grounds by* State v. Koch, 499 N.W.2d 152 (Wis. 1993).

79. *Neave*, 344 N.W.2d at 184. The *Neave* court relied on *United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973), and *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970).

80. *See Neave*, 344 N.W.2d at 184.

81. *See id.* at 183. The earlier case of *State v. Besso*, 240 N.W.2d 895 (Wis. 1976), established this discretionary function of the court.

dant is aware of his right to an interpreter and that one will be provided to him if he cannot afford one.[82]

The determination of whether the defendant requires an interpreter is in the hands of the trial court. The most recent Wisconsin case to deal with whether an interpreter was required is the 1996 court of appeals case, *State v. Yang*.[83] In *Yang*, the defendant appealed his conviction contending that the trial court erred in its failure to make a determination that the defendant had a language difficulty sufficient to prevent him from communicating with his attorney and from reasonably understanding the English court proceedings.[84]

The court of appeals engaged in a discussion of what constitutes "notice" of a language difficulty sufficient to trigger a determination of whether the defendant needed an interpreter, and it determined:

> [A] court has notice of a language difficulty within the meaning of §885.37(1)(b), Stats., when it becomes aware that a criminal defendant's difficulty with English may impair his or her ability to communicate with counsel, to understand testimony in English, or to make himself or herself understood in English. At that point, the court has an obligation to make a factual determination on the need for an interpreter required under § 885.37(1)(b).[85]

The court relied on *Neave* in discussing the nature of the hearing to take place once a court is on notice of a language difficulty: "A hearing to determine the defendant's language ability to understand English need not be elaborate. Normally the court should be able to decide whether an interpreter is necessary by simply asking a few questions."[86] While the appellate court found that the trial court should have made a pre-trial factual determination as to Yang's language ability, it nonetheless affirmed, finding that the trial court's post-conviction determination that he did not need an interpreter was not clearly erroneous.[87]

The trial court implicitly found that Yang reasonably understood the

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82. *See Neave*, 344 N.W.2d at 189.

83. 549 N.W.2d 769 (Wis. 1996).

84. *See id.* at 770; *see also* WIS. STAT. § 885.37(1)(b) (1997-98) (requiring a court that is on notice of a language difficulty to determine whether that language difficulty will impair the individual from "communicating with his attorney, reasonably understanding the English testimony or reasonably being understood in English.").

85. *Yang*, 549 N.W.2d at 772.

86. *Id.*

87. *See id.* at 772, 775.

English testimony and was able to make himself reasonably understood in English.[88] The trial court relied on the defendant's testimony at trial and on post-conviction testimony by the defendant's former girlfriend that the defendant communicated with her exclusively in English.[89] The trial court also disbelieved the testimony of the psychologist who had tested the defendant for purposes of the post-conviction motion.[90] The results of the test indicated that defendant did not have sufficient comprehension of English to adequately communicate with his attorney or understand English testimony.[91] The court found that the defendant had faked the test to gain a certain result.[92] However, the trial court placed emphasis on witness testimony and on the trial transcripts of Yang's testimony.[93]

Yang was clearly a borderline case, in terms of whether the defendant was capable of understanding his trial without an interpreter.[94] While the determination of lack of proficiency is clear in some cases, "[w]here the difficulties arise are in cases of persons who know English to a certain extent. It is here that the judge must use his discretion in arriving at a linguistic evaluation that only a trained linguist could properly make."[95]

While *Yang* asserts that the standard in a hearing to determine language capability is not as high as that required in a competency hearing, it arguably should be.[96] The results can be just as egregious whether a defendant sits in a trial in misapprehension due to a language deficiency or due to incompetence. A competency hearing, among other requirements, involves a mandatory examination by one or more specialists and a detailed written report.[97] This is done to ensure that the defendant re-

88. *See id.* at 773. The appellate opinion reads: "Implicit in the trial court's determination are also findings that Yang reasonably understood the English testimony at trial and that he was able to make himself reasonably understood in English." *Id.* (citing Schneller v. St. Mary's Hosp. Med. Ctr., 470 N.W.2d 873, 879 (Wis. 1991) (a trial court's finding may be implicit from its ruling)).

89. *See Yang*, 549 N.W.2d at 773.

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* at 741-42.

94. By "borderline," I mean that on its face, it seems equally likely that the defendant needed an interpreter as it is that he did not. *See infra* note 98 and accompanying text.

95. BERK-SELIGSON, *supra* note 35, at 35.

96. *See Yang*, 549 N.W.2d at 772; *see also* WIS. STAT. § 971.14(1)(a) (1997-98) (stating specific competency hearing requirements).

97. *See* WIS. STAT. § 941.14 (2), (3).

ceives a fair trial by being "present" in the courtroom. The defendant who cannot understand the trial due to a language deficiency is being violated in the same way that an incompetent defendant would be if the trial would go on. Thus rather than a "few simple questions," further examination by a linguist should take place when it is unclear whether a defendant lacks the language skills to proceed without an interpreter. A linguist is better able to efficiently determine the extent of an individual's language difficulty.[98]

Other federal and state courts have faced similar issues and have reached similar results in determining whether to appoint an interpreter. The United States Court of Appeals for the First Circuit, in *United States v. Carrion*,[99] relied on *Perovich* in determining that the trial court must be granted wide discretion in determining whether an interpreter is necessary.[100] The question raised was how severe the language barrier must be before the right to an interpreter is implicated. The court noted that uncertainty arises when the defendant has *some* ability to communicate in English but has incomplete comprehension,[101] like in the *Yang* case. The court determined that there is a right to an interpreter in a criminal case when the defendant is indigent and has obvious difficulty with English.[102] Still, in the original case no formal hearing was held to determine whether the defendant required an interpreter. The court noted that there was procedure available to the defendant to show language difficulty *before* trial, which he did not follow.[103] The First Circuit Court of Appeals observed that the trial court had told the defendant that if at any point during the trial there was anything he did not understand, he only had to raise his hand and the testimony would be repeated.[104] The court was unwilling to find the defendant had any consti-

98. Courts will be concerned about defendants faking a proficiency exam, as is a concern with competency tests. However, the defendant actually has a stake in the outcome of a competency exam because the result may have implications in the outcome of the case. This is not really the case with an English language deficient defendant. What would a defendant gain from faking a proficiency exam? At the most, the defendant would be provided an interpreter, but would still be required to appear in court and proceed. Further, a trained linguist is able to spot a "real" faker more easily than a judge with no linguistic training.

99. 488 F.2d 12 (1st Cir. 1973).

100. *See id.* at 14 (relying on Perovich v. United States, 205 U.S. 86 (1907)); *see supra* notes 70-76 and accompanying text.

101. *See Carrion*, 488 F.2d at 14.

102. *See id.*

103. *See id.*

104. *See id.*

tutional right above this.[105]

The court in *Carrion* failed to examine the efficacy of their determinations. For example, it does not necessarily do any good for a limited-English speaking defendant to have English testimony or proceedings repeated in English if what he is not understanding is the English language. Further, most defendants are unlikely to admit to a language deficiency.[106] The defects of *Carrion* are indicative of the unrealistic expectations placed upon limited-English speaking defendants in courts today.[107] Courts expect a defendant to make it clear to the court that he does not understand the proceedings. Courts even go so far as to determine that if the defendant does not show his limited English skills to the court, then he has no language difficulty. This is a heavy burden when defendants, whose native language is clearly not English, often mask their limited English skills by answering leading questions by the court with a yes or no.

In *Arizona v. Natividad*,[108] the Arizona Supreme Court asserted that a court must establish the extent of the language difficulty, and if it is found, must inform the defendant of his right to have an interpreter.[109] Therefore, it is within the court's discretion to determine whether a language difficulty exists sufficiently to inform the defendant of his right to an interpreter. Thus, in Arizona, a judge must determine first, without any training in linguistics or language, that a defendant has a language difficulty before a defendant is even informed that he has a right to an interpreter.[110] This places a heavy burden on the defendant to make it obvious to the court that he is deficient in the English language. As noted, it is unlikely that a defendant will admit language deficiency on his own; that is, without the request for an interpreter by an attorney. Further, a defendant in Arizona who attempts to communicate in English or even to use simple English words in the courtroom risks leading the judge to believe there is no deficiency and to conclude that no inter-

105. *See id.*; Safford, *supra* note 65, at 23.

106. It is typical of people learning a second language to indicate greater understanding of that language than they actually have. *See* Linda Friedman Ramirez, et al., *When Language is a Barrier to Justice: The Non-English Speaking Suspect's Waiver of Rights*, CRIM. JUST., Summer 1994, at 6. Further, there is a level of pride involved that may keep a defendant from raising his hand to show he does not understand.

107. *See infra* Part III for a discussion of the linguistic complexities involved in interpretation. It is necessary to understand these complexities to appreciate the difficulty a limited-English speaker faces in comprehending courtroom procedures.

108. 526 P.2d 730 (Ariz. 1974).

109. *See id.* at 733-34.

110. *See id.*

preter is necessary.

The main problem with granting the court wide discretion in determining whether a defendant requires an interpreter is that most judges are not sufficiently trained or educated in linguistics to make such a determination. Judges are legal experts but rarely language experts. For a judge who is not educated or trained in linguistics to determine whether a non-native speaker is proficient in English is akin to a lawyer deciphering an x-ray in a medical malpractice action. Such an examination has serious consequences, as it may effect the outcome of a case, and should be left to the experts.[111]

2. Sixth Amendment Right to an Interpreter

Beyond *Perovich*, lower federal courts and some state courts, though not Wisconsin, have found that a constitutional right to an interpreter exists if the defendant is deficient in the English language and is either denied an interpreter, or the interpretation itself is faulty.

The leading case establishing a federal constitutional right to an interpreter is *United States ex rel. Negron v. New York.*[112] This constitutional right is mainly set in the framework of the Sixth Amendment. In *Negron* the United States Court of Appeals for the Second Circuit found that lack of an interpreter for a non-English speaking defendant violates the Sixth Amendment guarantee of a right to be confronted with adverse witnesses.[113] The court observed:

> Negron's incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination. Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negron deserved more then to sit in total incomprehension as the trial proceeded.[114]

Negron was not provided an interpreter for a majority of the English portions of the trial. He received only two summaries, in his native language, of the testimony of witnesses and his own testimony was simultaneously interpreted for the court and the jury.[115]

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111. *See* Schulman, *supra* note 65, at 185. *See generally* Davis & Hewitt, *supra* note 37, at 121.

112. 434 F.2d 386 (2d Cir. 1970).

113. *See id.* at 389.

114. *Id.* at 390.

115. *See id.* at 388. See *infra* Part IV.B.3, 4 for an explanation of simultaneous interpre-

Denial of an interpreter when it is required not only denies the defendant the Sixth Amendment right to confront witnesses, but also denies the defendant the right to participate in his own defense, as noted in *Negron*.[116] Essentially, if a trial lacks fundamental fairness as in *Negron*, it violates due process of law mandated by the Fifth and Fourteenth Amendments.[117]

Although Wisconsin courts routinely rely on *Negron* in interpretation cases, this state does not recognize the right to an interpreter as a federal or state constitutional right.[118] For example, in *State v. Neave*, the supreme court acknowledged that *Negron* held that the right to an interpreter is a constitutional one but went on to state that "[w]e do not hold that there is a federal constitutional right to an interpreter."[119] That is the extent to which the court discussed the right to an interpreter as constitutional. Wisconsin recognizes that the appointment of an interpreter advances judicial economy, reduces the likelihood of appeal, and "removes the feeling of having been dealt with unfairly."[120]

Some states have followed the reasoning in *Negron* in deciding issues of "linguistic presence." "Linguistic presence" means being able to comprehend the proceedings enough to constitute presence by a due process standard.[121] That is, in order for a defendant to be afforded due process, he must be present at all stages of the trial.[122] If the defendant is incompetent, for example, he is not considered legally "present."[123] Likewise, if a defendant is deficient in the language of the court he cannot be said to be legally present because, just as the incompetent, he cannot understand the nature of the proceedings.[124] This legal presence in a language context is "linguistic presence."

For example, in *Arizona v. Natividad*,[125] the defendant was an indigent Spanish speaker with limited English skills.[126] An interpreter was

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tation and summary interpretation.

116. *See Negron*, 434 F.2d at 389.

117. *See id.*

118. *See* State v. Neave, 344 N.W.2d 181, 184 (Wis. 1984), *overruled on other grounds by* State v. Koch, 499 N.W.2d 152 (Wis. 1993).

119. *Neave*, 344 N.W.2d at 184.

120. *Id.*

121. *See* GONZAEZ ET AL., *supra* note 45, at 49-50.

122. *See* Arizona v. Natividad, 526 P.2d 730, 733 (Ariz. 1974) (citing Negron v. New York, 434 F.2d 386 (2d Cir. 1970)).

123. *See* GONZÁLEZ ET AL., *supra* note 45, at 49-50.

124. *See id.*

125. 526 P.2d 730 (Ariz. 1974).

126. *See id.* at 732. The court noted: "The record is barren of a reliable indication as to

supplied only during the defendant's testimony.[127] The Arizona Supreme Court observed, as the court did in *Negron*, that a defendant's inability to understand testimony in his own trial violates his Sixth Amendment constitutional right to be present in the courtroom during every stage of the trial.[128]

3. Waiver

In Wisconsin, when the Supreme Court in *State v. Neave*[129] upheld the *State v. Besso*[130] ruling that the determination to appoint an interpreter is that of the court's, it also held that when that determination is made in the affirmative, the defendant must waive that right in order for an interpreter to not be appointed.[131] In *Besso*, the court felt that the defendant's "acquiescence in the acceptance of the interpreter and her failure to object[] to either his competence or bias evidences a waiver . . . ."[132]

In dealing with waiver of the right to an interpreter, the *Neave* court concluded that the defendant does not necessarily lose his right to an interpreter because of his silence. Instead, it depends on the circumstances of the case, and whether the trial court had notice of the need for an interpreter.[133] While the court recognized the established standard of waiver, it failed to hold firmly that silence never equals waiver. Although the decision does require that the defendant waive his right to an interpreter in open court, this only applies when the court is on notice of a defendant's language deficiency. Thus, if a court is not on notice, a defendant may in effect waive his right to an interpreter by silence. In Wisconsin, it is still unclear what is sufficient "notice" of a language deficiency.

In Wisconsin, the issue of what constitutes waiver in this context is now governed by statute, which mandates that waiver be made in open

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the defendant's ability to comprehend the English language." *Id.*

127. *See Natividad*, 526 P.2d at 732. This presumably was done for the jury, the judge and the attorneys but in no way assists the defendant. See *infra* Part IV for appropriate methods of interpretation.

128. *See Natividad*, 526 P.2d at 733 (citing Lewis v. United States, 146 U.S. 370 (1892); United States *ex rel* Negron v. New York, 434 F.2d 386 (2d Cir. 1970)).

129. State v. Neave, 344 N.W.2d 181, 184 (Wis. 1984), *overruled on other grounds by* State v. Koch, 499 N.W.2d 152 (Wis. 1993).

130. 240 N.W.2d 895 (Wis. 1976).

131. *See Neave*, 344 N.W.2d at 184.

132. *Besso*, 240 N.W.2d at 899.

133. *See Neave*, 344 N.W.2d at 185.

court and on the record.[134] It is relevant to point out that it was not until 1985 that the Wisconsin legislature resolved the issue of waiver, fifteen years after *United States ex rel. Negron v. New York* established what was required to constitute waiver in this context.[135]

Negron held that as a matter of due process, when a court is put on notice of a defendant's language deficiency, it is required to make it clear to the defendant that he has the right to a competent interpreter at the cost of the state.[136] In order to waive that right, the court held that it must be by *conduct* or an "intentional relinquishment or abandonment of a known right."[137] Further, the court found that Negron's failure to request an interpreter did not constitute waiver.[138]

As in *Negron,* the court in *Arizona v. Natividad* found passivity does not constitute waiver and stated: "A defendant who passively observes in a state of complete incomprehension the complex wheels of justice grind on before him can be hardly said to have satisfied the classic definition of a waiver as 'the voluntary and intentional relinquishment of a known right.'"[139] As it stands in federal court, silence does not equal waiver of the right to an interpreter. Much more is required in federal court to constitute waiver, as spelled out in federal legislation.[140] Since waiver has been resolved by state and federal legislation, more recent state case law focuses on the qualifications of the interpreter and the quality of the interpretations in court.

4. Interpreter Qualification

The issue of the trial court's choice of interpreter in Wisconsin was considered in *State v. Besso.*[141] In *Besso* the defendant appealed her conviction, which was secured through a guilty plea, claiming that the trial court erred in failing to inquire as to the competency of the interpreter for the defendant.[142] The Supreme Court of Wisconsin held that

134. *See* WIS. STAT. § 885.37(4)(b) (1997-98).

135. *See Negron,* 434 F.2d at 389-90.

136. *See id.* at 390-91.

137. *Id.* at 390 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

138. *See Negron,* 434 F.2d at 390.

139. *Natividad,* 526 P.2d at 733.

140. *See* Court Interpreters Act of 1978, 28 U.S.C. § 1827, 1828 (1994).

141. 240 N.W.2d 895 (Wis. 1976).

142. *See id.* at 896. The case is unclear about what language the defendant spoke. At one point the case says the defendant spoke "Gypsy." *See id.* Through a hearing, the trial court discerned that the defendant spoke some Polish. *See id.* There were also witnesses, who were alleged victims of the defendant, who testified that the defendant knew and understood English. *See id.* The trial court concluded based upon this testimony that the defen-

the selection of a suitable person as an interpreter is within the discretion of the trial court.[143]

The *Besso* court noted that the record failed to show that the interpreter made any error and there was no criticism of his function.[144] The court's statement reflects a common ignorance that can be crucial in many decisions made regarding interpretations. In *Besso*, as in the majority of interpretations across the country (and *all* as observed in Milwaukee County) the record cannot show error in translation because the record is entirely in English. It is an impossibility to show error in translation with only one language available for review unless a bilingual attorney is present who objects each and every time a perceived error is made.[145] It is also unlikely that any criticism of the interpreter's function will occur. Most players in the courtroom are unaware of the proper role of the interpreter, as well as how to detect error. Furthermore, it is difficult to prove any error has occurred because there is no record in the foreign language to show error. Even if the defendant has a bilingual attorney, the attorney must perform his function as an attorney, not that of the interpreter. Attorneys cannot perform to the best of their ability if they must monitor translations while thinking about the next question they must ask as attorneys.[146]

In 1997, the District of Columbia Court of Appeals, in *Gonzalez v. United States*,[147] held that failure to verify the qualifications of an interpreter was error.[148] The court relied on the District of Columbia Interpreter Act,[149] which requires the authority appointing the interpreter to make a "preliminary determination that the interpreter is able to accu-

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dant had a working command of the English language. *See id.* The judge allowed two men, apparent friends of the defendant to interpret "Gypsy" for the defendant and in the case they were unavailable, the court would bring in the Polish interpreter. *See id.* at 897. This confusion is an example of what a judge must decide when faced with a non-English speaking defendant, who "appears" to understand the English language. See generally *infra* Parts IV, V for a discussion of potential problems and common misconceptions about translation and interpretation in the courtroom.

143. *See Besso*, 240 N.W.2d at 898.

144. *See id.*

145. *See* BERK-SELIGSON, *supra* note 35, at 26 ("Ultimately, what is said aloud for the court record is in English, and since the record is what ultimately 'counts' in terms of admissible evidence and material utilizable in future appeals, what is said in the foreign language is perceived as 'not counting.' Officially that is in fact the case.").

146. *See* Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1 (1990).

147. 697 A.2d 819 (D.C. 1997).

148. *See id.* at 822.

149. D.C. CODE ANN. §§ 31-2701 to -2712 (1998).

rately communicate with and translate information to and from [the defendant]."[150] This did not effect the additional ruling that the determination of the competence of an interpreter is within the discretion of the court.[151] Further, the court noted that this determination will not be disturbed on appeal unless the discretion was abused.[152]

The premise underlying the court of appeal's ruling is that because the court is in direct contact with the defendant and because the decision of appointing a competent interpreter relies on factors complex to the legal system, the judge is the best determiner of competency in interpretation.[153] The factors complex to the legal proceedings included the "complexity of the proceeding, issues and testimony."[154] In fact, these factors should not play a part in whether an interpreter is appointed or in whether an interpreter is competent. The standards of appointment and of the competency of an interpreter should be the same whether the judge feels the proceedings are simple or complex. So-called "simple" proceedings will be complex to someone who is deficient in the language of the proceedings. Wisconsin uses this same standard of complexity of the proceedings, issues, and testimony when appointing interpreters.[155]

On the issue of competency, the *Gonzalez* court relied on its decision in *Redman v. United States*.[156] In *Redman*, the court discussed the qualifications of interpreters and stated: "Although the government presented no formalized evidence of the interpreter's competence, such as language degrees or certifications, *the fact that the interpreter continued in that role . . . suggests that the translation must have been competent enough to allow communications between parties.*"[157]

There are several problems underlying the reasoning in this case. First, just as a court is not trained to determine language proficiency of a defendant, it is not trained to determine the competency of interpreters

150. *Gonzalez*, 697 A.2d at 825.

151. *See id.*

152. *See id.*

153. *See id.* (quoting United States v. Coronel-Quintana, 752 F.2d 1284, 1291 (8th Cir. 1985) the court stated: "Because the decision to appoint an interpreter will likely hinge upon a variety of factors, including the defendant's understanding of the English language, and the complexity of the proceedings issues, and testimony, the trial court, being in direct contact with the defendant, should be given wide discretion." *Gonzalez*, 697 A.2d at 825.

154. *Id.*

155. *See* Francisco Araiza, *Se Habla Everything*, WIS. LAW., Sept. 1997, at 17.

156. 616 A.2d 336 (D.C. 1992); *see Gonzalez*, 697 A.2d at 823.

157. *Redman*, 616 A.2d at 337-38 (quoting United States v. Nazemian, 948 F.2d 522, 528 (9th Cir. 1991)) (emphasis added).

when there is no objective standard for doing so.

Second, the fact that an interpreter continues to "interpret" says nothing about that interpreter's own competency. Without certification requirements, people can hold themselves out to be interpreters by virtue of their knowledge of another language. But it takes much more than this to interpret.[158] Also, without a trained interpreter to review the interpreter in question, no one would know whether the interpreter is functioning in a competent manner. The defendant would not know because, presumably, his English language skills are deficient so he would not be able to determine if the translations were accurate. The attorney would not know because, presumably, he is not a trained linguist or even bilingual (if he is, he would object to faulty interpretations if he heard them). The court also would not know for the same reasons.

Third, as discussed above, anecdotal information shows that faulty and even horrendous interpretations do occur *unnoticed* by the judge and parties in court.[159]

It is simplistic to say that if someone continues to do something, he or she must be competent at it. The risk of incompetence is greatest in states like Wisconsin that do not require pre-certification for court interpreters. In such states, there is no system available to screen would-be interpreters.

5. Quality of Interpretation

The Supreme Court of Wisconsin dealt with the issue of faulty interpretation in the 1996 case of *State v. Santiago*.[160] The case primarily dealt with the issue of insufficiency of foreign language *Miranda* warnings[161] because of poor translation.[162]

In *Santiago*, the defendant asserted that during custodial interrogation, he was not properly given his *Miranda* warnings and did not waive his *Miranda* rights.[163] The defendant based this assertion on the claim that the police officer that "read" him his rights inadequately translated the *Miranda* warnings from English to Spanish.[164] During a pre-trial

158. *See infra* Parts III-IV.

159. See *infra* Part I (describing situations where mistranslations resulted in miscarriages of justice).

160. 556 N.W.2d 687 (Wis. 1996).

161. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

162. *See Santiago*, 556 N.W.2d at 689.

163. *See id.* While *Santiago* deals with an out-of-court interpretation, the reasoning of the court in Santiago and its holding arguably impact in-court interpreting.

164. *See id.*

hearing, the defendant moved to suppress statements made after the warnings were given on those grounds.[165] However, the defendant was precluded from eliciting for the record the Spanish language warnings given by the police officer.[166] The trial court only heard the testimony of the police officer that the warnings he gave were correct.[167] The trial court found the testimony of the officer to be more credible than that of the defendant, and thus determined that the defendant was adequately advised of his *Miranda* rights and that he knowingly and voluntarily waived those rights.[168]

The court of appeals reversed the conviction on the grounds that, absent the Spanish words of the officer's *Miranda* warnings on the record, there was insufficient evidence to determine whether the warnings complied with *Miranda*.[169] The Supreme Court of Wisconsin affirmed, but held that the State is not required to give evidence of the foreign language words and their translation.[170] Further, it held that the State must present evidence of the sufficiency of the foreign language warnings only in cases where the accused puts the State on notice that he was not properly advised of his *Miranda* rights, or did not voluntarily and intelligently waive those rights because of the foreign language translation given.[171]

As to the burden of proving sufficiency of the *Miranda* warnings given in a foreign language, the State argued that when a defendant questions the sufficiency of the warnings or claims that waiver was not knowingly and voluntarily made because of the foreign language warnings, the initial burden should be on the defendant to present the evidence that the spoken words did not articulate the *Miranda* warnings adequately.[172] The supreme court agreed with the State that generally the state does not need to present foreign language *Miranda* warnings with translation to make a *prima facie* case of sufficiency and waiver.[173] The court also noted that while all parties at the circuit court level attempted to put the Spanish translation into record and failed, the record might have been obtained by an audio or video tape of the Spanish

165. *See id.* at 691.
166. *See id.* at 689.
167. *See id.*
168. *See id.*
169. *See id.*
170. *See id.*
171. *See id.* at 689-90.
172. *See id.* at 693.
173. *See id.*

translation.[174]

Another issue that the supreme court addressed was under what circumstances two court interpreters should be appointed rather than only one. The court determined that the "better practice in *some* cases *may be* to have two interpreters . . . ."[175] This was not a declaration on the constitutional merits of having two interpreters. The court listed three factors to consider that may support the need for two interpreters:

> First, while an interpreter is translating a witness's testimony he or she cannot assist an accused in communicating with counsel and cannot interpret for the defendant any colloquy between the court and counsel. Second, when a jury is the factfinder it may associate an interpreter who is translating for the accused with the accused and thus either discount the translation or give it more credibility. Third, an interpreter, through association with the accused, may become biased.[176]

While the Wisconsin Supreme Court takes a more realistic and enlightened approach than that of the courts in the cases previously discussed, there are still some defects in the determinations made regarding interpreting.

The determination that the state need only produce evidence of sufficiency of the foreign language *Miranda* warnings or sufficient waiver after the defendant puts the state on notice—of either an improper advisement of *Miranda* warnings or of an insufficient waiver due to faulty interpretation—fails to consider the unlikelihood that a non-English speaking defendant will know the warnings were insufficient. The accused would have to know first what the *Miranda* warnings *should* be and second, that the translation was poor. Unless the accused has a bilingual attorney, it is not likely any error would be discovered.[177] The Wisconsin Court of Appeals was correct when it reversed the conviction due to the lack of a record with regard to the Spanish *Miranda* warnings. If there is only one language for review, it is impossible to show either

174. *See Santiago*, 556 N.W.2d at 693. See *infra* Part V.B.2 Problem 3 for a discussion of such recordings.

175. *See Santiago*, 556 N.W.2d at 695 (emphasis added).

176. *Id.* (citing Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretations*, 30 NEW ENG. L. REV. 227, 265-66 (1996)).

177. *See generally* Piatt, *supra* note 146.

error or no error in translation.[178]

The supreme court sufficiently stated the problem involved in appointing a single interpreter when there is a non-English speaking witness as well as a non-English speaking defendant, but it failed to view the problem as a constitutional issue. The Sixth Amendment affords the defendant the right to hear all of the proceedings in order for counsel to effectively assist him. In order to "hear" all of the proceedings or be "linguistically present," the defendant must be able to communicate with counsel while also hearing testimony.[179] Thus, for *constitutional* reasons an interpreter should be at the defendant's table, interpreting the entire proceedings for the defendant, including conference with counsel at the table. In essence, this makes an interpreter available to the defendant and another interpreter available for any non-English speaking witnesses.

The concern that a jury could associate the interpreter with the accused and thus form their opinion of witness testimony is valid. But, this concern can be easily rectified by the judge educating the jury as to the interpreter's role. While instructions may not be as effective as simply allowing two interpreters, both should be done for the different reasons stated.[180]

The idea that an interpreter may become biased through association is also valid, but can be remedied by interpreter training and certification. Impartiality is a strict rule of professional conduct for court interpreters,[181] and they should be expected to adhere to it, not assumed to break it. Such concerns should not be used as a pretext for limiting the rights of defendants.

While the Wisconsin Supreme Court is leaning towards the proper procedure, this procedure cannot be effective without significant fundamental changes, particularly judicial education, awareness of interpretations, and the complexities involved in court interpreting.[182]

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178. See the discussion of *State v. Besso infra* Part II.A.4.

179. *See* GONZÁLEZ ET AL., *supra* note 45, at 49.

180. *See* HEWITT, *supra* note 25, at 131.

181. *See id.* at 202-04; PROFESSIONAL ETHICS OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, PROFESSIONAL ETHICS & THE ROLE OF THE COURT INTERPRETER 17 (1992) [hereinafter PROFESSIONAL ETHICS].

182. *See* Davis & Hewitt, *supra* note 37, at 145; *see also* DIRECTOR OF STATE COURTS, WISCONSIN COURT INTERPRETERS HANDBOOK: A GUIDE FOR JUDGES, LAWYERS, INTERPRETERS AND CITIZENS; HEWITT, *supra* note 25, at 125-153; Grabau & Gibbons, *supra* note 176, at 308-310.

B. Statutory Right to an Interpreter

1. Federal

In 1978, the Court Interpreters Act (the Act)[183] was passed, mandating the use of qualified interpreters in civil and criminal cases in federal court for those who do not speak or understand English, and for those who are hearing or speech impaired.[184] The Act "prescribes the availability of *certified* interpreters to populations that are unable to comprehend the language of the proceedings . . . ."[185]

In federal court, an interpreter is appointed when the presiding judicial officer determines that a defendant or a witness "speaks only or primarily a language other than the English language."[186] Thus, the judge still has some discretion as to when an interpreter will be appointed, but the discretion will be exercised only after motion of the court or a party, including a defendant. Moreover, an individual is entitled to waive interpretation, but must do so expressly, on the record, and after the individual has had the opportunity to consult with counsel, and the presiding judge has explained the nature and effect of the waiver.[187]

The discretionary function as to the qualifications of an interpreter is significantly lessened in federal court. Certified interpreters must be used in federal court, unless waived by the defendant.[188] Interpreters are certified through a two-part examination process designed so that those who pass are beyond mere bilingualism and can handle the rigors of court interpreting.[189] When a certified court interpreter is not reasonably available, perhaps because there is no certification for that party's language, an "otherwise qualified" interpreter may be used.[190]

The director of the Administrative Office of the United States Courts (AO) maintains a list of certified and otherwise qualified inter-

183. Court Interpreters Act of 1978, 28 U.S.C. 1827, 1828 (1994).

184. *See* 28 U.S.C. § 1827(d)(1)-(2) (1996). While the Act deals with both civil and criminal courts, the law is unsettled as to use of interpreters in state civil matters.

185. GONZÁLEZ ET AL., *supra* note 45, at 57.

186. 28 U.S.C. § 1827(d)(1) (1996).

187. *See id.* at § 1827(f)(1).

188. *See id.* at § 1827(f)(2).

189. *See* GONZÁLEZ ET AL., *supra* note 45, at 57. The test is currently administered by the University of Arizona Federal Court Interpreter Project, under the auspices of the Administrative Office of the Courts. For more details on what it takes to be a court interpreter see *infra* Part IV. *See also* ALICIA B. EDWARDS, THE PRACTICE OF COURT INTERPRETING (1995).

190. *See* Court Interpreter Amendments Act of 1988, 28 U.S.C. § 1827(b)(2) (1994).

preters.[191] An otherwise qualified interpreter is defined in the Act under two categories: "professionally qualified interpreters" and "language skilled interpreters."[192] Professionally qualified interpreters must demonstrate:

> i. Prior existing employment as a conference or seminar interpreter . . . for the Office of Language Services of the United States Department of State, for the United Nations, or for related agencies for which examinations are a condition of employment; *or*
> ii. Membership in good standing in a professional interpreters association whose by-laws and practices at a minimum require as follows:
>
> A. An application specifying a minimum of 50 hours of conference experience in the native language(s) of expertise; and
>
> B. The sponsorship of three active members in good standing who have been members of the same association for at least two years, whose language(s) of expertise are the same as the applicant's, and who attest to having witnessed the performance of the applicant, as well as to the accuracy of the statements on the application.[193]

Interpreters who wish to be professionally qualified may not do so in languages for which there is no certification.[194] The current languages for certification are Spanish, Haitian Creole, and Navajo.[195]

"Language skilled interpreters" are interpreters who fall outside of the qualifications of "professionally qualified" but who demonstrate ability to interpret court proceedings as determined by the court.[196] The director of the AO maintains a list of "language skilled interpreters" as well.[197] It would be difficult for a federal court to apply its own discretion even when relying on the "language skilled interpreters" provision. All other processes must be adhered to before a language skilled interpreter is appointed, and only a language skilled interpreter on the mas-

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191. *See* 28 U.S.C. § 1827(a).

192. *Interim Regulations of the Director of the Administrative Office of the United States Courts, in* GONZÁLEZ ET AL., *supra* note 45, at 580.

193. *Id.*

194. *See id.*

195. *See* GONZÁLEZ ET AL., *supra* note 45, at 532.

196. *See id.*

197. *See id.*

ter list at the AO may be appointed.[198]

As a matter of policy, this federal legislation recognizes the need for a defendant to understand the proceedings and to understand his or her attorney.[199] The Act also recognizes the need for quality by mandating the use of "certified" interpreters, which in turn advances the fair administration of justice.[200]

2. Wisconsin State Courts

Wisconsin also establishes the right to an interpreter through statute.[201] Section 885.37 of the Wisconsin Statutes requires a court that is on notice of a language difficulty to make a factual determination as to whether this impairment "is sufficient to prevent the individual from communicating with his or her attorney, reasonably understanding the English testimony or reasonably being understood in English."[202] If the court finds that an interpreter is necessary, the defendant is entitled to a "qualified" interpreter. However, unlike the federal statute, the Wisconsin statute fails to define "qualified."

If a determination is made that the defendant requires an interpreter, any waiver of that right to an interpreter must be made in open court, and on the record.[203] This requirement came in 1985, after *State v. Neave*,[204] solidifying the issue of waiver.

As is obvious, there is no objective standard established in Wisconsin as to the qualifications of interpreters, nor is there a standard to guide the court in choosing an interpreter, as there is in federal court. The consequences of a lack of standard in this area can have dramatic results. When left to the discretion of the trial judge, "the frequent result is the appointment of an incompetent interpreter or no interpreter at all."[205] The appointment of an incompetent interpreter is all too likely in Wisconsin, where there are absolutely no standards for "qualified" interpreters.

The federal act brought about some significant changes in the fields

198. *See* GONZÁLEZ ET AL., *supra* note 45, at 532.

199. *See generally* Chang & Araujo, *supra* note 65; Davis & Hewitt, *supra* note 37, at 121.

200. *See* 28 U.S.C. § 1827(d).

201. *See* WIS. STAT. § 885.37 (1997-98). *See also* State v. Neave, 344 N.W.2d 181 (Wis. 1984), *overruled on other grounds by* State v. Koch, 499 N.W.2d 152 (Wis. 1993).

202. WIS. STAT. § 885.37(1)(b) (1997-98).

203. *See id.* at § 885.37(4)(b).

204. 344 N.W.2d 181 (Wis. 1984).

205. Schulman, *supra* note 65, at 179.

of interpretation. The Federal Court Interpreters Act has significantly improved the quality of interpretation in the federal court system by standardizing pay scales, advancing the professional status of court interpreters, and recognizing their importance in the court proceedings.[206]

The Act has also had a great effect on some state courts, serving as the model for court interpreting.[207] The states of Arkansas,[208] California,[209] Massachusetts,[210] Nevada,[211] New Jersey,[212] New Mexico,[213] Oregon,[214] and Washington[215] all require the use of certified interpreters through statute and have established administrative procedures to implement the use of such interpreters. The states of California, New Mexico and Washington have implemented certification programs and New Jersey has a testing, certification and training program.[216] Many more states are considering certification programs, Wisconsin not being among them.[217]

C. Impact of Wisconsin Case Law & Statutory Scheme

The Wisconsin cases and statutes do not just leave the decision of whether to appoint an interpreter to the discretion of the court. Rather, they have the court play the role of expert in terms of language comprehension, acquisition, and ability. Unfortunately, "some judges are not sensitive to the needs of linguistic minorities and trial judges are rarely reversed for failing to appoint [an] interpreter."[218]

In *State v. Neave*,[219] the supreme court stated "[i]f the court suspects fraud, other testimony may be necessary to establish the extent of defendant's ability to speak English."[220] Such testimony in this scenario

206. *See* GONZÁLEZ ET AL., *supra* note 45, at 59.

207. *See id.* at 60.

208. ARK. CODE ANN. § 16-10-127 (Michie 1995).

209. CAL. GOV'T CODE §§ 685.60-685.66 (West 1997).

210. MASS. GEN. LAWS ANN. ch. 221C, §§ 1-7 (West 1996).

211. NEV. REV. STAT. §§ 1.510, 1.530 (1995).

212. N.J. STAT. ANN. § 34:9A-7.2 (West 1996).

213. N.M. STAT. ANN. §§ 38-10-3 to -7 (Michie 1996).

214. OR. REV. STAT. §§ 45.288, 45.291 (1995).

215. WASH. REV. CODE ANN. §§ 2.43.030, 2.43.070 (West 1996).

216. *See* GONZÁLEZ ET AL., *supra* note 45, at 539-554.

217. *See id.* at 60. As of the date of this article, Wisconsin has taken no steps in establishing a certification program for interpreters.

218. Grabau & Gibbons, *supra* note 176, at 265-66.

219. 344 N.W.2d 181 (Wis. 1984), *overruled on other grounds by* State v. Koch, 499 N.W.2d 152 (Wis. 1993).

220. *Id.* at 189 n.6 (quoting Chang & Araujo, *supra* note 65, at 819).

should include that of an expert in linguistics.

It appears that Wisconsin's legislature and courts believe that a judge is capable of making determinations about language ability that make these types of cases very difficult to overturn, unfair to the State, unfair to the defendant, and unconstitutional. At least the federal statute has specific criteria for the appointment, and particularly the qualification of interpreters. Without such criteria, Wisconsin will continue to experience miscarriages of justice due to faulty interpretation.[221]

III. LINGUISTICS & LEGAL LANGUAGE: THEIR IMPACT ON COURT INTERPRETING

"Court interpreting" can generally be defined as "oral interpretation of speech from one language to another in a legal setting."[222] To be a court interpreter, one must not only be bilingual,[223] but must possess the skill to decode a message in an original language (source language) and simultaneously re-encode that message in the language of the intended listener (target language).[224] Interpreting is a highly complex skill, thus the court interpreter must possess:

> superior, unquestionable command of two languages and must be able to manipulate registers[225] from the most formal varieties to the most casual forms, including slang. The interpreter's vocabulary must be of considerable depth and breadth to support the wide variety of subjects that typically arise in the judicial process. At the same time, the interpreter must have the ability to orchestrate all of these linguistic tasks while interpreting . . . for persons speaking at rates of 200 words or more per minute . . . .
>
> Court interpreters must possess a wide general knowledge of the world and a graduate-level educational background or com-

221. *See, e.g.*, Araiza, *supra* note 155, at 15.

222. EDWARDS, *supra* note 189, at 1.

223. Definitions of "bilingualism" vary. Some definitions rely exclusively on linguistic competence while others include non-linguistic factors such as culture. *See* EDWARDS, *supra* note 189, at 64; HAKUTA, *supra* note 46, at 4; AMERICAN HERITAGE DICTIONARY 178 (2d ed. 1985) (defining "bilingual" as "[a]ble to speak two languages with equal skill" and defines "bilingualism" as "[h]abitual use of two languages, esp[ecially] in speaking."); *see also* Christopher Thiéry, *True Bilingualism and Second Language Learning, in* LANGUAGE INTERPRETATION AND COMMUNICATION 146 (David Gerver & H. Sinaiko eds., 1978).

224. EDWARDS, *supra* note 189, at 26; *see also* GONZÁLEZ ET AL., *supra* note 45, at 19.

225. "Register" refers to a variation in language style according to the context in which language is being used. *See* DAVID CRYSTAL, A DICTIONARY OF LINGUISTICS AND PHONETICS 260-61 (2d ed. 1985).

mensurate life and reading experiences.[226]

Further, the central goal of court interpreting (as distinguished from other forms of interpretation) is to provide "legal equivalence."[227] "Legal equivalence" can be characterized as interpreting the "original source material without editing, summarizing, deleting, or adding while conserving the language level, style, tone, and intent of the speaker."[228]

In order to be an effective interpreter, to understand the degree to which a court relies on the interpreter and to recognize the seriousness of interpreter error, one must understand the linguistic complexities underlying court interpreting.

A. Fundamental Linguistic Concepts

On a rudimentary level, "linguistics" is "[t]he study of the nature and structure of human speech."[229] All languages can be separated into different systems which make up the entire structure of the language: (1) phonology, (2) morphology, (3) syntax, (4) semantics, and (5) pragmatics.[230] An understanding of these systems provides a general understanding of linguistics that is necessary for a successful court interpreter.

Phonology is the sound system of language and "how the particular sounds used in each language form an integrated system for encoding information . . . ."[231] Thus phonology differs among languages and within languages as well. Understanding variation is an essential element of interpretation. For example, Spanish spoken in the Caribbean, such as Puerto Rico, may drop an /s/[232] in the final position of syllables

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226. GONZÁLEZ ET AL., *supra* note 45, at 19.

227. *Id.* at 16.

228. *Id.* (citing R.D. González, Test Specifications for the federal court interpreter certification examination ((Confidential internal document) University of Arizona, Federal Court Interpreter Certification Project (1989)).

229. AMERICAN HERITAGE DICTIONARY, *supra* note 223, at 734. *See generally* SUZETTE HADEN ELGIN, WHAT IS LINGUISTICS? (1973).

230. *See* DEPARTMENT OF LINGUISTICS, OHIO STATE UNIVERSITY, LANGUAGE FILES: MATERIALS FOR AN INTRODUCTION TO LANGUAGE 9-12 (Monica Crabtree & Joyce Powers eds., 5th ed. 1991) [hereinafter LANGUAGE FILES]. *See generally* ELGIN, *supra* note 229.

231. LANGUAGE FILES, *supra* note 230, at 5.

232. The symbol /s/ is being used to refer to the sound symbolized in linguistics (phonetics) as [s], which is the sound used in the following words: *s*oap, p*s*ychology, pack*s*, de*s*cent, peace. The sound is technically referred to as a voiceless alveolar fricative which means it is a sound made without a vibration of the vocal cords, with the tip of the tongue at the ridge behind the upper front teeth, and by forming a near stoppage of the air stream through the vocal tract. *See* LANGUAGE FILES, *supra* note 230, at 54. For more on the articulation of sounds see *id.*, at 49-57.

and words.[233] This is the most important phonological feature of the Spanish of that region.[234] The significance of this variation in the same language is that the

> syllable and word final /s/ makes it difficult at times for the unaccustomed ear to determine whether a noun or adjective is singular or plural, and consequently, the listener must rely more heavily on contextual cues. For the interpreter, such a situation represents an additional burden; therefore every attempt should be made to train the ear to become more attuned to such phonological variation.[235]

Phonological units make up larger units called morphological units, which are studied in morphology. Morphology refers to "ways in which words are constructed out of smaller units [morphemes] which have a meaning or grammatical function."[236] Thus morphemes can be referred to as either *content* morphemes or *function* morphemes.[237] Additionally, morphemes are either *free*, they can stand alone and have meaning (*i.e.*, words), or *bound*, they cannot stand alone (*i.e.*, affixes).[238]

The significance of these distinctions for the interpreter is that morphemes alone contain a great amount of information crucial to variation in meaning. For example, in Spanish the verb system relies heavily on bound morphemes which indicate *tense* as well the *aspect*, or relation of action to the passage of time.[239] Therefore any changed morpheme at the end of a verb in Spanish can significantly affect its meaning.[240] For the interpreter then, "[a] knowledge of morphology in the source lan-

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233. An example of final position in a syllable is *lástima* and final position in a word is *los zapatos*. *See* GONZÁLEZ ET AL., *supra* note 45, at 229.

234. *See id.* (citing T.D. TERRELL & M. SALGUÉS DE CARGILL, LINGÜÍSTICA APLICADA A LA ENSEÑANZA DEL ESPAÑOL A ANGLOHABLANTES [LINGUISTICS APPLIED TO THE TEACHING OF SPANISH TO ENGLISH SPEAKERS] (1979)).

235. GONZÁLEZ ET AL., *supra* note 45, at 230.

236. LANGUAGE FILES, *supra* note 230, at 5. For a detailed discussion of morphology see THE LINGUISTICS ENCYCLOPEDIA 314-317 (Kirsten Malmkjaer & James Anderson eds., 1991).

237. *See* LANGUAGE FILES, *supra* note 230, at 129.

238. *See id.* at 127.

239. *See* GONZÁLEZ ET AL., *supra* note 45, at 231.

240. *See id.* The meaning in Spanish can be affected with regard to point of reference as well as who and how many are performing the action. *See id. See generally* CHRISTOPHER KENDRIS, 501 SPANISH VERBS: FULLY CONJUGATED IN ALL TENSES IN A NEW EASY TO LEARN FORMAT ALPHABETICALLY ARRANGED (5th ed. 1995); EMILY SPINELLI, ENGLISH GRAMMAR FOR STUDENTS OF SPANISH: THE STUDY GUIDE FOR THOSE LEARNING SPANISH (2d ed. 1990).

guage and the target language is essential . . . because morphology is the tool of lexical expansion. New words are created by combining pre-existing morphemes into combinations with new meanings to meet new needs."[241] Morphemes placed together in a logical order create a syntactical structure.

Syntax relates to the way in which phrases and sentences are constructed.[242] A basic feature of syntax is word order, and word order is language specific which means that languages vary, among other ways, by the order in which the words are placed in a coherent sentence.[243] The theory of linguistic competence asserts that fluent speakers of a language have an intuitive knowledge of the rules of the language, or the structure.[244] For example, fluent speakers can understand sentences in their language that they have never before heard, which is not always the case with individual words.[245] This linguistic competence results in what is termed "linguistic performance," or the production of an infinite number of sentences.[246] It is therefore essential that interpreters possess linguistic competence in order to interpret languages competently. An example of syntactic differences is illustrated by the fact that in English, the word *became* is used to indicate subtly different meanings of the verb *to be* (*e.g.*, he became angry; he became president; he became a Catholic), whereas in Spanish, there are several different verbs themselves, not just different forms of the same verb, to express the above examples.[247] A native speaker knows which combinations are appropri-

241. GONZÁLEZ ET AL., *supra* note 45, at 231 (parentheticals omitted). An example of this is: *alunizar* (to land on the moon (luna)). *See id.* This can be distinguished from the phenomenon known as "language integration," which occurs when two languages come in contact with each other, borrowing words or phrases which become incorporated into the base language phonologically, morphologically, syntactically or of a lexical nature. *See* DE JONGH, *supra* note 2, at 71-73. With Spanish and English, language integration is sometimes referred to as "Spanglish." Language integration, in this case "Spanglish," is commonly confused with what is termed "code-switching" or alternation of two languages in the middle of or between sentences. *See id.* at 73-74. "Code-switching" involves a complete shift from one language to another and there is no integration. An example would be: "She was, like, *muy antipática* [very unfriendly]." *Id.* at 74 (translation added).

242. *See* LANGUAGE FILES, *supra* note 230, at 5. For further discussion on language construction see DAVID CRYSTAL, THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE 88-99 (1987).

243. *See* LANGUAGE FILES, *supra* note 230, at 163.

244. *See* NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (1965).

245. *See id.* at 57-58.

246. *See* CHOMSKY, *supra* note 244, at 3-15; GONZÁLEZ ET AL., *supra* note 45, at 231.

247. *See* GONZÁLEZ ET AL., *supra* note 45, at 232. The notion that what takes few words in one language to express may take several in another is a clear syntactic feature. *See* BERK-SELIGSON, *supra* note 35, at 120.

ate for each context, and this is what an interpreter needs to know, in both languages, in order to interpret the closest equivalent.[248] A native speaker also uses this knowledge to also grasp the meaning that is being conveyed.

Semantics is related to meaning and how "words and sentences are related to the (real or imaginary) objects they refer to and the situations they describe."[249] The meaning of an expression is not as simple as looking to a dictionary. While dictionaries provide a definition, generally dictionary definitions are based on how the speakers *use* the word.[250] Speakers obviously can use words in different ways to convey different meanings. Therefore, deciphering meaning requires more than a mental picture of what is being referred to, it requires knowing under what conditions the sentence would be true and whether the speaker is using literal or non-literal language.[251]

While regional and even individual differences in meaning occur within languages, there are sets of words called semantic fields.[252] Some semantic fields are comprised of words that reflect the same general experience such as color or kinship.[253]

The notion of semantic field can be extended to any set of terms that are relevant to a concept or set of concepts. The court interpreter must develop both depth and breadth of vocabulary in order to cope with the infinite number of semantic fields that may comprise courtroom language. Therefore, the interpreter needs to develop as many areas of interest as possible, and build through reading and other life experiences a wide and profound lexicon for guidance through the many linguistically and conceptually difficult areas to be encountered.[254]

Semantic fields are used in different contexts, which may vary the pragmatic meaning. Pragmatics is similar to semantics in that it relates to meaning, but pragmatics deals with how meaning is conveyed, that is, how aspects of the context convey meaning.[255] These aspects of context can include "time, place, social relationship between speaker and

248. *See* GONZÁLEZ ET AL., *supra* note 45, at 232.

249. LANGUAGE FILES, *supra* note 230, at 5 (parenthetical omitted); *see also* CRYSTAL, *supra* note 225, at 100-08.

250. *See* LANGUAGE FILES, *supra* note 230, at 211.

251. *See* GONZÁLEZ ET AL., *supra* note 45, at 232-33; LANGUAGE FILES, *supra* note 230, at 212-14.

252. *See* GONZÁLEZ ET AL., *supra* note 45, at 233.

253. *See id.*

254. *See id.* at 233-34. For a list of semantic fields useful to an interpreter see *id.* at 234.

255. *See* LANGUAGE FILES, *supra* note 230, at 5.

hearer, and the speaker's assumptions about the hearer's beliefs."[256] An important aspect of context includes illocutionary force, or the speaker's intention, which may include commands, questions or assertions.[257]

For the interpreter, it is necessary to be able to "communicate the pragmatic aspects of SL [the source language] discourse into TL [the target language]. In order to do so, a high degree of communicative competence in both languages is essential."[258]

To be effective, the interpreter must understand these basic linguistic concepts and their impact on court interpreting. This suggests how truly complex court interpreting is and that training is a condition precedent to competent interpreting. To further complicate the issues, there are features of legal language itself which the interpreter must be cognizant in order to render accurate translations.

B. Legal Language

Lay people—and sometimes even lawyers—complain about what is commonly termed "legalese."[259] Spoken legal language is not necessarily the same as written legal language and carries a variety of registers.[260] These registers of courtroom language can be broken down into four categories:

> Formal Legal Language: The 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.
>
> Standard English: The variety of spoken language typically used in the courtroom by most lawyers and most witnesses . . .

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256. *Id.*

257. *See* J.S. FALK, LINGUISTICS AND LANGUAGE: A SURVEY OF BASIC CONCEPTS AND IMPLICATIONS 10 (2d ed. 1978).

258. GONZÁLEZ ET AL., *supra* note 45, at 234.

259. "Legalese" or "legal English" is often used to refer to both written and spoken legal language. *See* BERK-SELIGSON, *supra* note 35, at 18-19. This section will refer only to spoken legal language since that is what court interpreting involves. For an in-depth discussion of legal language, see Veda R. Charrow, *Linguistic Theory and the Study of Legal and Bureaucratic Language, in* EXCEPTIONAL LANGUAGE AND LINGUISTICS 81 (Loraine Obler & Lise Menn eds., 1982); William O'Barr, *Professional Varieties: The Case of Language and the Law, in* AMERICAN DIALECT RESEARCH 320 (Dennis R. Preston ed., 1993).

260. See *supra* note 225 for a definition of "register."

> closely paralleling that taught as the standard in American classrooms; characterized by a somewhat more formal lexicon than that used in everyday speech.
>
> Colloquial English: A variety of language spoken by some witnesses and a few lawyers in lieu of standard English; closer to everyday English in lexicon and syntax; tends to lack many ordinary attributes of formality that characterize standard English; used by a few lawyers as their particular style . . . .
>
> Subcultural Varieties: Varieties of language spoken by segments of the society who differ in speech style and mannerisms from the larger community . . . these varieties include Black English[261] and the dialect of English spoken by poorly educated whites.[262]

It is common for speakers to switch from one form to another and back in the courtroom, depending on the situation. As many legal tacticians observe, using one style over another with a jury or even different witnesses, for example, will advantage the speaker's party.[263]

For the court interpreter, this variety clearly shows a necessity to not only be familiar with legal terminology, but also to be able to translate a language in many different registers because "[m]odifying, by lowering or raising the register, can alter the global impression the jury or judge has of the witness."[264] An example of how enormous the impact of altered register can be is the Florida case where an elderly woman testified for the prosecution using casual language, slang and profanities, while the interpreter delivered the testimony in a way that made the woman sound like a gentle grandmother.[265] The defendant was con-

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261. "Black English" is considered a dialect of English whose speakers have historically been African Americans. *See* Guy Bailey, *A Perspective on African American English, in* AMERICAN DIALECT RESEARCH 287 (Dennis R. Preston ed., 1993). In some cases, other races and people of other ethnic background use this dialect. *See id.* The quote should not be read to interpret Black English as the dialect of the poorly educated. *See id.* Most English speakers using the Black English dialect also use Standard American English, and many are well educated. *See id.* The field of linguistics considers Black English to be a dialect because it has specific rules and patterns that deviate from Standard American English but is mutually intelligible to standard English speakers. *See id.*

262. WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 25 (1982).

263. *See id.* at 35 (citing F. LEE BAILEY & HENRY B. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS (1971)).

264. GONZÁLEZ ET AL., *supra* note 45, at 265.

265. *See* H. Silva, *Interpreters Can Make a Difference*, MIAMI HERALD, June 21, 1981, at 2B.

victed, and the case was later overturned because of poor translation.[266] The significance is that "hedging," or masking testimony with more polite terminology, on the part of the interpreter changes the demeanor of the witness which the jury considers as evidence.[267] Obviously, the impact of hedging can be great.[268] Cognizance of the appropriate register to use, regardless of the interpreter's personal use of a particular style, is crucial to the outcome of the translation, and in the above case "by not conserving the register, the interpreter [is] unwittingly cloaking the 'true' character of the witness as manifested by language."[269]

Aside from all the various registers of spoken legal language, formal legal language, such as that found in jury instructions, is highly complex in its syntactical structure, which makes it difficult for an English speaking jury to understand.[270]

It is because of the complexity and variety of legal language as well as the interpreter's duty to render the exact register and tone of the speaker, that court interpreters must receive a high level of training which makes them aware of all the variations that contribute to their already burdensome tasks.[271]

IV. INTERPRETER TRAINING, CERTIFICATION, AND PRACTICE

A. Training & Certification

Training is essential for court interpreters. Unfortunately, many state-certified interpreters never receive training. Moreover, continuing

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266. *See id.*

267. Grabau & Gibbons, *supra* note 176, at 315.

268. See *infra* section IV.B.5-6 for a discussion on court interpreters masking testimony.

269. GONZÁLEZ ET AL., *supra* note 45, at 265.

270. *See* O'BARR, *supra* note 262, at 27. O'Barr explains:

> Most English sentences, for example, tend to be right-branching (*i.e.*, the verb comes early in the sentence and complex constructions follow it). An example of uniform jury instructions as used in many jurisdictions reveals a high frequency of left-branching sentences (*i.e.*, ones in which complex constructions precede the verb). Such sentences are more difficult for English speakers to process. The combination of abstruse vocabulary and complex syntactic forms makes the language of jury instructions especially difficult to understand.

Id.

271. *See* GONZÁLEZ ET AL., *supra* note 45, at 272; *see also* BERK-SELIGSON, *supra* note 35, at 25 (discussing the impact of the interpreter on courtroom speech); DE JONGH, *supra* note 2, at 26-30 (discussing extra linguistic knowledge necessary for court interpreting).

education is important for all interpreters to keep their skills in tact.

1. Federal Level

Under the Federal Court Interpreters Act of 1978,[272] when a judge determines that an interpreter is needed, he or she must "utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter . . . ."[273] A "certified" interpreter is one who has passed the federal court interpreters examination,[274] which is a test administered by the Director of the Administrative Office of the U.S. Courts. Each district court must maintain a list of certified interpreters in its district.[275]

While the federal courts require certification, they do not require training and there are no formal education requirements for federal certification.[276] However, the examination is at a "college degree level of proficiency, and successful completion of the oral skills portion would normally require prior training or experience in simultaneous and consecutive interpretation and sight translation."[277] There are a few training programs available for court interpreters in the United States.[278] The

272. 28 U.S.C. § 1827 (1994).

273. 28 U.S.C. § 1827(d) (1994).

274. The test was developed by a panel which included court interpreters, international conference interpreters, language experts, and test-construction experts. *See* DE JONGH, *supra* note 2, at 122-23. The test is currently conducted by the University of Arizona and certification is available for Spanish, Haitian Creole and Navajo. *See id.* at 123-24. For a detailed description of the examination see GONZÁLEZ ET AL., *supra* note 45, at 523-538. The examination is a rigorous two-part exam with an oral and written portion. The written portion is used as a screening device to show that the test-taker can perform at the level necessary for the courts. If the written portion is passed, the test-taker may take the second portion which is the oral part. *See* DE JONGH, *supra* note 2, at 123.

The passing rate of the examination shows how truly rigorous it is. "As of February 1986, only [four] percent of those who had initially taken the exam passed it in its entirety (292 out of 7,000 persons), and many of those who ultimately passed the exam had had to take a portion of it repeatedly before being able to pass the entire exam." BERK-SELIGSON, *supra* note 35, at 36-37 (citing J. Leeth, Speech given at the meeting of the Pittsburgh chapter of the American Translators Association (1986)). According to the most recent data, in 1989, twenty-four percent of those taking the exam became certified. *See* DE JONGH, *supra* note 2, at 124. This number does not necessarily reflect a higher first time passing rate, as the test may be taken as many times as one wishes. It does indicate a rise in the number of people certified. *See id.* at 124 ("[i]n 1980 . . . 7.7 percent of the 1,370 persons who took the two-part test were certified . . . . In 1980/81, 13.2 percent were certified.").

275. 28 U.S.C. § 1827 (b) (1994).

276. *See* DE JONGH, *supra* note 2, at 123.

277. *Id.*

278. Programs include: University of Arizona Summer Institute for Court Interpreta-

purpose of these programs is not only for training for the federal certification examination but to maintain and improve the specialized skills of professionals that must be relied on in the courts.[279]

2. State Level

Currently, there are eight states that require interpreter certification by statute.[280] There are also several states that have administrative or judicial provisions for the appointment of interpreters.[281] In the remaining states, the determination that an interpreter is needed, and the selection of the interpreter are decisions left to the court.[282]

Wisconsin provides for the right to an interpreter through statute[283] and leaves the selection of the interpreter entirely up to the presiding judge.[284] While the department of health and family services is required to "maintain a list of qualified interpreters for use with persons who have hearing impairments,"[285] there is no such requirement for those with limited English language skills.[286] The implications are the same whether a defendant is hearing impaired or has limited or no English speaking skills. In both cases, the defendant is not "present" in the courtroom because he cannot understand the proceedings. Why is the standard different? There is no justification for the difference. In terms

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tion; University of Delaware, Interpretation Seminar, Department of Linguistics; Florida International University (year round general translation and legal interpreting program); Georgetown University, Division of Interpretation & Translation, Department of Languages & Linguistics; University of Hawaii, Center for Interpretation and Translation Studies; Monterey Institute of International Studies, summer sessions; New Jersey Project on Legal Interpretation (led by the Center for Legal Studies of Montclair State College under the New Jersey Consortium of Educators in Legal Interpretation and Translation). *See* BERK-SELIGSON, *supra* note 35, at 41; NATIONAL CENTER FOR INTERPRETATION TESTING, RESEARCH, AND POLICY AT UNIV. OF ARIZ., LEAFLET, PROGRAMS FOR INTERPRETING & TRANSLATION (1997) (on file with the author).

279. *See* BERK-SELIGSON, *supra* note 35, at 41.

280. *See supra* notes 209-16 and accompanying text.

281. *See* DE JONGH, *supra* note 2, at 122.

282. *See id.* at 122; *see also* WIS. STAT. § 885.37 (1997-98).

283. *See* WIS. STAT. § 885.37. The statute mandates the use of an interpreter, when needed, for persons with language difficulties or hearing or speaking impairments. *See id.*

284. The conclusion that the selection of an interpreter is within the hands of the judge is supported through case law in Wisconsin. *See* State v. Neave, 344 N.W.2d 181 (Wis. 1984), *overruled on other grounds by* State v. Koch, 499 N.W.2d 152 (Wis. 1993); State v. Besso, 240 N.W.2d 895 (Wis. 1976).

285. WIS. STAT. § 885.37(5)(b) (1997-98).

286. There is no such list for language interpreters and what is meant by "qualified" is unclear and not defined. *See id.* at § 885.37. The judges themselves "hire" the interpreters and there is no central list or resource. Interview with Karen Surges, Administrative Assistant in Milwaukee County Circuit Courts, Administrative Division (Dec. 30, 1996).

of administrative procedure, the list provided for sign language interpreters can be used as a model for oral language interpreters. Implementing such a list of qualified court interpreters would ease burdens on courts and would effectuate a necessary standard.

B. Court Interpreting Practice

The court interpreter's role is to put the limited or non-English speaker in the same situation as that of the English speaker in a legal setting.[287] In performing his or her job, the court interpreter "does not give any advantage or disadvantage to the non-English speaking witness or defendant."[288] The interpreter allows the court to communicate with a defendant or witness by acting as the linguistic liaison, but the interpreter does not possess specialized legal training that would qualify him or her to offer legal services to non-English speaking persons. Still, in the past interpreters have been expected to explain the legal process and terminology to non-English speakers. Such requests have the interpreter act as advocate, which is not the interpreter's role.[289]

Interpreters are used throughout the criminal justice process and ideally should be used at every stage of the process, including arrest.[290] The following descriptions of court practices are either established practices in federal court and states with certification or reflect the recommendations made by experts in the field of court interpreting. Beyond technical skills, interpreters must be aware of their professional role and what is and is not acceptable within their role as a court interpreter and within the courtroom itself.

There are four types of interpretation modes which are available for use in a courtroom setting: (1) sight translation, (2) consecutive interpretation, (3) simultaneous interpretation, and (4) summary interpretation. Which mode the interpreter utilizes is dependent on the situation.

1. Sight Translation

"Translation" itself refers to the process of converting meaning from one language to another in the written form.[291] Sight translation is a

287. *See* GONZÁLEZ ET AL., *supra* note 45, at 155.

288. *Id.* at 155-56.

289. *See id.* at 156; PROFESSIONAL ETHICS, *supra* note 181, at 19 ("As an interpreter you are not an advocate for non-English speakers.").

290. *See* GONZÁLEZ ET AL., *supra* note 45, at 166. Because this is unrealistic, González suggests that at least the *Miranda* warnings should be interpreted. *See id.* at 167.

291. *See* CRYSTAL, *supra* note 225, at 344-351.

mixture of translation and interpretation; it is the "oral rendition into a target language of written material in the source language."[292] Sight translation is used in court proceedings when a foreign language document is used as evidence without an English translation.[293] It is also used when the non-English speaking witness or defendant must read an English document.[294] Documents that must be sight translated in court may range from the very simple, such as a personal note, to the hypertechnical or formal and interpreters must be able to quickly render equally accurate translations of both categories of documents.[295]

2. Consecutive Mode

In consecutive mode interpretation, the interpreter conveys a message in the target language after the speaker of the source language has finished.[296] Consecutive mode is used primarily for witness testimony, depositions or questioning of a witness by the judge.[297]

In the consecutive mode, interpreters are faced with variations in length of passages as well as rates of speed.[298] An interpreter may comfortably interpret at a rate of 100 to 120 words per minute, and any deviation from that speed will stress and fatigue for the interpreter.[299] Meanwhile, the interpreter must deliver the message most near that of the original in terms of meaning, style, tone, and register.[300] Interpreters must not deviate from the speaker's original message and must provide what is termed "faithful echo."[301] For example, if the attorney asks "What is your name," the interpreter must not say "The lawyer wants to know your name," but rather repeat the question as "What is your name?" Likewise, if the interpreter must address the court, he or she must do so in the third person: "Your honor, the interpreter did not hear the question."[302]

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292. DE JONGH, *supra* note 2, at 37.

293. *See id.*

294. *See id.*

295. *See id*; *see also* HEWITT, *supra* note 25, at 39-40.

296. *See* GONZÁLEZ ET AL., *supra* note 45, at 379.

297. *See* DE JONGH, *supra* note 2, at 37; GONZÁLEZ ET AL., *supra* note 45, at 379.

298. *See* GONZÁLEZ ET AL., *supra* note 45, at 379.

299. *See* David Gerver, *Empirical Studies of Simultaneous Interpretation: A Review and a Model, in* TRANSLATION: APPLICATIONS & RESEARCH 172 (Richard W. Brislin ed., 1976).

300. *See* DE JONGH, *supra* note 2, at 41; GONZÁLEZ ET AL., *supra* note 45, at 380.

301. *See* DE JONGH, *supra* note 2, at 39 (describing faithful echo); PROFESSIONAL ETHICS, *supra* note 181, at 15; HEWITT, *supra* note 25, at 133.

302. Examples parallel those in DE JONGH, *supra* note 2, at 39. *See also* HEWITT, *supra* note 25, at 133.

Consecutive interpreting requires excellent listening skills, the ability to predict what will come next in the message, and supreme memory skills.[303]

It is recommended that interpreters engage in "attending" as distinguished from hearing. "Attending" is the "most alert, deliberate form of listening" and requires a voluntary effort to process the incoming message.[304] Listening involves identifying the meaning, determining the speaker's intent, or illocutionary force, and attaching real world knowledge to the message.[305] Court interpreters must use those skills at their most acute level plus transfer the message to another language, which is especially difficult if the source language is not the interpreters' dominant or native language.[306]

The ability to guess what will come next in a message, or prediction, is a major part of interpretation. An example of prediction would be the following: "[I]f you hear someone say, 'I'm going to run out to the *smghf* to get some groceries,' the message you will get is 'I'm going to run out to the store to get some groceries,' because that is what you expect to hear, based on prior experience."[307] While prediction is a natural and efficient way of listening, it may also cause problems for the interpreter. An interpreter may distort a message based on bias and personal knowledge along with what the interpreter expects to hear and should therefore be aware of any tendency to predict and make sure to interpret what is actually heard.[308] Beyond prediction, the interpreter must have excellent retention skills.

Memory plays a vital role in consecutive interpretation and any methods of retention available to an interpreter should be utilized.[309] On a fundamental level, interpreters should listen to the meaning of the message rather than the individual words that comprise it—this will

303. *See* GONZÁLEZ ET AL., *supra* note 45, at 380-86.

304. *Id.* at 380.

305. *See* Jack C. Richards, *Listening Comprehension: Approach, Design, Procedure*, 17 TESOL Q., Spring 1983, at 219-240.

306. *See* GONZÁLEZ ET AL., *supra* note 45, at 381 (citing P.G. Dunkel, The Immediate Recall of English Lecture Information by Native and Non-Native Speakers of English as a Function of Note Taking (1985) (unpublished doctoral dissertation, University of Arizona (Tucson) (on file with GONZÁLEZ ET AL.)) (noting that subjects listening to messages in their second language have a shorter memory span and this hinders their processing of the original message)).

307. *Id.* at 382.

308. *See id.*

309. *See* DE JONGH, *supra* note 2, at 41-45; GONZÁLEZ ET AL., *supra* note 45, at 382-83.

maximize memory capacity.[310] The most widespread technique for increasing retention is note-taking.[311] Some experts suggest specific note taking techniques, but all emphasize that while note-taking may be highly personal and individual, it is essential.[312]

Most often consecutive mode interpreting is done from the witness stand.[313] Consecutive mode interpreting is only used in the case where a non-English speaking witness is testifying, otherwise simultaneous mode is used.[314]

When a witness testifies, the jury needs to hear the witness in order to judge his demeanor and manner in determining his credibility.[315] In many situations, courtrooms are not equipped to accommodate an interpreter, thus court interpreters typically stand outside the witness box, without obstructing the view of the jury.[316] Some witness boxes are large enough to fit two chairs, but precautions should be taken that both the witness and interpreter are heard by the court and the jury. Some courtrooms are equipped with two microphones for the witness box.[317] In this author's experience, the established practice in federal court is for the interpreter to stand next to the witness box, without blocking the jury's view and speak in a loud, clear voice. The problem with standing is the fatigue factor that contributes to interpreter error.[318]

In cases where an interpreter for consecutive interpretation is unavailable, telephone interpretation can also be utilized. Telephone interpretation is the use of various Language Lines to provide interpretations for the court.[319] A speaker phone is all that is required. This method is only useful for consecutive interpretation.[320] Everything said in the courtroom is heard by the interpreter. The interpreter then

310. *See* GONZÁLEZ ET AL., *supra* note 45, at 383. For a discussion on memory recall see Justine Owens et al., *The "Soap-Opera" Effect, in Story Recall*, in MEMORY & COGNITION 185 (1979). *See also* Endel Tulving, *How Many Memory Systems Are There?* AM. PSYCHOLOGIST (Apr. 1985) at 385.

311. *See* DE JONGH, *supra* note 2, at 42 ("A notation system will enormously improve the quality of the end product and it is essential for remarks running to more than a few sentences.").

312. *See* DE JONGH, *supra* note 2, at 42; GONZÁLEZ ET AL., *supra* note 45, at 388.

313. *See* DE JONGH, *supra* note 2, at 99.

314. *See id.*

315. *See* GONZÁLEZ ET AL., *supra* note 45, at 421.

316. *See id.*

317. *See id.*

318. *See* GONZÁLEZ ET AL., *supra* note 45, at 421.

319. *See* HEWITT, *supra* note 25, at 180 (describing the AT&T Language Line service which provides access to interpreting services).

320. *See id.*

broadcasts the interpretation over the phone and it is heard by the entire courtroom.[321]

3. Simultaneous Mode

Simultaneous interpretation is when the interpreter speaks at the same time as the source language speaker.[322] Thus, the interpreter is speaking and comprehending at the same time, which is a difficult and demanding task. Simultaneous mode is used for most of the court proceedings to deliver the proceedings to the defendant, thus it is most frequently performed from English to the foreign language.[323]

Simultaneous mode requires skills above and beyond those required in consecutive mode. Timing, rate of speech, and the interpreter's placement in the courtroom are essential factors to successful simultaneous interpreting.

The interpreter's prediction tendency in simultaneous mode differs from that in consecutive mode. In consecutive mode, prediction is used for retention purposes. In simultaneous mode, prediction plays a part in memory but the interpreter must also predict the structure of the sentences as well as the illocutionary force.[324] The interpreter cannot wait for the speaker to develop his entire idea. Prediction becomes easier in this context if the interpreter has a knowledge and understanding of the subject area, which helps to provide a more reliable interpretation.[325]

When an interpreter works in the simultaneous mode, the interpreter lags behind the speaker by at least one unit of thought while interpreting, thus concentration is crucial in simultaneous mode.[326] This lag is referred to as "decalage."[327] Decalage may play a large part of the simultaneous interpretation if the interpreter is relying heavily on prediction, which may be necessary for certain languages. For example, in German-English interpretation, decalage and prediction are crucial because the verb in German comes at the end of the sentence, whereas in English it comes at the beginning (the lag is longer and the prediction

321. *See* HEWITT, *supra* note 25, at 180. Hewitt's book provides a detailed discussion of the benefits and drawbacks of telephone interpreting, as well as the logistics. *See id.* at 179-194. One of the major drawbacks is the potential use of unqualified interpreters, which is the root of interpreter error. *See id.* at 179.

322. *See* DE JONGH, *supra* note 2, at 45; GONZÁLEZ ET AL., *supra* note 45, at 359.

323. *See* GONZÁLEZ ET AL., *supra* note 45, at 360.

324. *See id.* at 365.

325. *See* DE JONGH, *supra* note 2, at 48.

326. *See* GONZÁLEZ ET AL., *supra* note 45, at 360.

327. *See id.* at 366.

more necessary).[328] This results in postponement of the interpretation, which places extreme stress on the short-term memory of the interpreter, which in turn contributes to fatigue.[329] The rate of speech being used by speakers in the courtroom may also contribute to fatigue.[330] An interpreter may comfortably interpret at a rate of 100 to 120 words per minute.[331] Any deviation from that speed causes stress for the interpreter and may result in less accurate interpretations.[332]

During simultaneous interpreting, or "proceedings" interpreting, the interpreter is usually seated next to the defendant, but out of the way of other courtroom actors. The interpreter interprets the proceedings by whispering in the defendant's ear everything that is being said in the courtroom that an English speaking defendant would normally hear.[333] The result of this set-up is often that the interpreter will be a distraction to other parties and the fatigue may be greater due to uncomfortable seating or positioning of the interpreter.[334] In cases with multiple defendants, the scenario becomes more complicated. One interpreter can be used for all the defendants, which may require the interpreter to speak in a louder voice. Or one interpreter may be assigned to each non-English speaking defendant. Another option is to use specialized equipment that will accommodate all non-English speaking defendants, with one interpreter speaking and one interpreter on standby.[335]

The most popular specialized equipment is electronic equipment that may be either in the form of a closed circuit headset for the defendant and a microphone for the interpreter, or the more recently developed wireless system. Either of these systems allows the interpreter to speak into a microphone at low volume and the defendant to wear a headset in order to hear the messages. The wireless system allows the interpreter to be positioned anywhere in the courtroom to maximize hearing for the interpreter. Both of these systems are used in federal court with the wireless system increasing in popularity. Both systems require a second interpreter to be available for client-attorney confer-

328. *See* Wolfram Wilss, *Syntactic Anticipation in German-English Simultaneous Interpretation, in* LANGUAGE INTERPRETATION AND COMMUNICATION 343, 347 (David Gerver & H. Wallace Sinaiko eds., 1977).

329. *See id.* at 347.

330. *See supra* note 299 and accompanying text.

331. *See* Gerver, *supra* note 299, at 172.

332. *See* GONZÁLEZ ET AL., *supra* note 45, at 367.

333. *See id.* at 465.

334. *See id.* at 416, 465.

335. *See* HEWITT, *supra* note 25, at 142.

ences.[336] Such client-attorney spontaneous conferences are often necessary during the course of a trial. In order for a defendant to have full representation, he must be able to communicate with his attorney. This communication involves the defendant's constitutional right to counsel.[337] These conferences can take place while the first interpreter continues, which is a virtual impossibility without electronic equipment.

4. Summary Mode

Summary mode is paraphrasing the speaker's statements and does not provide a precise rendering into the target language, which is absolutely necessary in court interpreting.[338] Thus, summary mode is not used in court interpreting and is specifically prohibited in federal court through the 1988 amendments to the Federal Court Interpreters Act.[339]

5. Interpreter Error

Interpreter error occurs for a variety of reasons but most often with fatigue.[340] Just as court reporters are allowed to take breaks, so too should court interpreters. The United Nations standards for simultaneous interpreting[341] require replacement of interpreters every forty-five minutes.[342] The court interpreter should request breaks when she is fatigued, but the judge can help by being aware that fatigue contributes to inaccuracies and allowing for periodic recesses or substitutions after forty-five minutes.[343]

A language deficient interpreter will make frequent errors, one being literal translation rather than focusing on the concepts being conveyed. Inadequate language proficiency is the most frequent cause of error. These errors are either grammatical in nature or due to lack of vocabulary.[344] Illustrative of how serious lack of proficiency is to the process are the results of the 1989 Federal Court Interpreter Oral Examination. On that exam "84 of the 222 failing performances . . . could be attributed to an underdeveloped vocabulary or poor command of the

336. GONZÁLEZ ET AL., *supra* note 45, at 466.

337. *See* U.S. CONST. amend. VI. *See also supra* note 63 and accompanying text.

338. *See* DE JONGH, *supra* note 2, at 49; HEWITT, *supra* note 25, at 32, 138.

339. 28 U.S.C. § 1827(k) (1994).

340. *See* GONZÁLEZ ET AL., *supra* note 25, at 281.

341. This is called "conference interpreting" which is simultaneous interpreting in a conference setting.

342. *See* HEWITT, *supra* note 25, at 139.

343. *See* Davis & Hewitt, *supra* note 37, at 135.

344. *See* GONZÁLEZ ET AL., *supra* note 45, at 282-83.

language-either Spanish or English."[345] Since most state courts, including Wisconsin, do not have certification, there is very little way of determining proficiency unless a defined standard is adopted.

Other errors include distortion, omissions, or added information. A common example of distortion is an interpreter masking slang or vulgarity with more socially acceptable language. The interpreter must interpret what a witness says and by masking any testimony, the interpreter may greatly affect how the jury views the witness, in terms of credibility.[346] Omissions also occur with fatigue and omitting is often a strategy of the language-deficient interpreter for managing ambiguities, information overload, or unfamiliar terms.[347] Added information usually occurs when the interpreter is unsure of the message, or the interpreter is unable to retain the ideas from the source message.[348]

Interpreter error may also occur because of lack of professionalism and ignorance of the ethical code required of interpreters.[349] An example of this would be adding proper names to a witness's testimony when the witness did not identify people by name.[350] This is highly inappropriate but the interpreter may believe it is clarification and thus helpful. Professional standards strictly prohibit additions.[351] Omissions and added information alike may grossly change the posture of the witness and distort the illocutionary force.

Body language of the interpreter can also have this effect. One example is an interpreter who would interpret testimony, then shrug his shoulders and roll his eyes at the judge as if in disbelief of the testimony. This is an example of unprofessionalism that could be easily remedied by training.

6. Professional Ethics

At the very least, an interpreter should be aware of the professional and ethical standards that are expected of her and know the appropriate conduct for a courtroom. Lack of professionalism contributes to interpreter error and errors of this type can be just as egregious as those stemming from linguistic issues.[352] A professional code should be used

345. *Id.* at 284.
346. *See id.* at 281.
347. *Id.* at 288.
348. *See id.* at 289.
349. *See generally* Grabau & Gibbons, *supra* note 176, at 308-310.
350. This has been observed by the author in Milwaukee County.
351. *See* PROFESSIONAL ETHICS, *supra* note 181, at 2-3.
352. *See* GONZÁLEZ ET AL., *supra* note 45, at 290. Understanding professional roles can

as a training tool for interpreters. Likewise, judges and attorneys can make themselves familiar with the code and expect interpreters to follow it.[353] Areas of professional conduct or ethical standards that should be included in a model code are listed below.

Accuracy and Completeness—Interpreters should render a complete and accurate interpretation without paraphrasing, omitting or adding information, and without explanation.[354] The interpreter's duty has two parts: (1) to ensure that the record of the proceedings accurately and precisely reflects what was said by the non-English speaking person, and (2) to place the non-English speaking person on "equal footing" with those who understand and speak English.[355] The interpreter is obligated to conserve all information in the source language and communicate this in the target language in as close a form as possible. Verbatim interpretation is inappropriate if it will distort the meaning. The duty of accuracy and completeness is crucial because the judge and jury rely on the interpreter's version as evidence.[356] This duty includes the interpreter's obligation to correct any error in interpretation as soon as it becomes apparent to the interpreter.[357]

Representation of Qualifications—Interpreters should completely and accurately represent their experience, training and certification. This allows the court to fairly evaluate interpreter qualifications. It is a waste of resources for a court to hire an unqualified interpreter only to have to replace him after the proceedings have begun.[358]

Impartiality/Conflict of Interest—Interpreters should remain unbiased and impartial and refrain from conduct that may have a tendency to show bias. Interpreters must also disclose any conflict of interest, real or perceived.[359] The interpreter is there to serve the court and should therefore avoid conduct that presents an appearance of favoritism.[360] For example, the interpreter should maintain professionalism with clients and discourage any dependence an individual party may have on

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be gained with training. *See id.*

353. *See* HEWITT, *supra* note 25, at 198.

354. *See* PROFESSIONAL ETHICS, *supra* note 181, at 2; HEWITT, *supra* note 25, at 200.

355. *See* PROFESSIONAL ETHICS, *supra* note 181, at 2; HEWITT, *supra* note 25, at 200.

356. *See* PROFESSIONAL ETHICS, *supra* note 181, at 2; HEWITT, *supra* note 25, at 200.

357. *See* PROFESSIONAL ETHICS, *supra* note 181, at 13; HEWITT, *supra* note 25, at 201.

358. *See* HEWITT, *supra* note 25, at 201-02.

359. *See* PROFESSIONAL ETHICS, *supra* note 181, at 17; HEWITT, *supra* note 25, at 201-02.

360. *See* PROFESSIONAL ETHICS, *supra* note 181, at 17-18; HEWITT, *supra* note 25, at 202.

the interpreter.[361]

Professional Demeanor—Interpreters should conduct themselves according to the rules of the court and remain as unobtrusive as possible.[362] Interpreters should remain detached and follow the protocol of the court. Interpreters must always remember not to obstruct the view of any individuals involved in the proceedings.[363]

Confidentiality—Interpreters must protect all privileged and confidential information. This rule applies to all types of privileged information, particularly that of the attorney-client privilege.[364]

Scope of Practice—Interpreters must limit themselves to interpreting and translating and must not give legal advice or offer personal opinions.[365] The interpreter should not engage in any activity that may be construed to be a service other than interpreting.[366] For example, in a plea bargain context, the defendant might ask the interpreter, "should I take the deal?" The interpreter should not answer with his opinion but rather should interpret for the attorney.

Duty to Report Ethical Violations—The interpreter must inform the court or authority if effort is being made to impede compliance with law, professional standards, or policies. Many people often misunderstand the role of the court interpreter and may ask the interpreter to do something that either violates their duties or causes the interpreter to engage in activity other than interpreting. It is the interpreter's duty to inform any persons making such a request of his or her professional obligations.[367] A common example of this is a request not to interpret. It is the duty of the interpreter to interpret all proceedings for the court. Any request contrary to this duty should be directed to the court, so that the request and explanation by the interpreter are on the record.[368]

Professional Development—Interpreters should maintain and improve their skills and knowledge. Interpreters should also seek to ad-

361. *See* HEWITT, *supra* note 25, at 202.

362. *See* PROFESSIONAL ETHICS, *supra* note 181, at 27-28; HEWITT, *supra* note 25, at 204.

363. *See* PROFESSIONAL ETHICS, *supra* note 182, at 27-28; HEWITT, *supra* note 21, at 204.

364. *See* PROFESSIONAL ETHICS, *supra* note 181, at 21; HEWITT, *supra* note 25, at 205. For a detailed discussion of various situations that would require confidentiality see PROFESSIONAL ETHICS, *supra* note 181, at 21-24.

365. *See* PROFESSIONAL ETHICS, *supra* note 181, at 25; HEWITT, *supra* note 25, at 206.

366. *See* HEWITT, *supra* note 25, at 206. For examples of how to deal with specific situations see PROFESSIONAL ETHICS, *supra* note 181, at 25-26.

367. *See* HEWITT, *supra* note 25, at 209.

368. *See* PROFESSIONAL ETHICS, *supra* note 181, at 30.

vance the profession through continuing education and training.[369]

V. WISCONSIN PRACTICES—PROBLEMS & SOLUTIONS

Milwaukee County Circuit Court practices regarding court interpretations are essentially ad hoc. While there are some consistencies within courtrooms, this is likely the preference of the judge rather than an established standard.[370] Some fundamental observations and findings are that: (1) there is no central office that keeps any record of daily interpretations within the county; (2) there is no central management that monitors interpreters, which could be accomplished by training and testing of interpreters; and (3) there is a general lack of understanding of the legal issues involved in court interpreting and the ramifications of using unqualified interpreters.

A. Methods of Research

Interviews were conducted with court personnel, interpreters, and area interpretation and translation services. Empirical research was conducted to establish general patterns that are inappropriate and likely to lead to interpreter error. The difficulty with observing courtroom interpretations surfaced immediately. Due to lack of central management, interpreters had to be located individually. Four interpreters[371] were interviewed, three of whom do the majority of the Spanish[372] inter-

369. *See* PROFESSIONAL ETHICS, *supra* note 181, at 32; HEWITT, *supra* note 25, at 210.

370. Some Milwaukee County courts may have the false notion that once an interpreter has been assigned to a defendant, that the same interpreter must be provided throughout trial. While it is necessary for interpreters to familiarize themselves with the case, this notion contradicts the purpose of court interpreting and the professional responsibility of the court interpreter. First, interpreters that are used should be equally qualified so as to render equally accurate renderings of proceedings. There should not be a dramatic amount of variation among interpreters. Second, the court interpreter is not an advocate for any party and should not develop such a relationship, this would violate professional standards. *See* PROFESSIONAL ETHICS, *supra* note 181, at 27. Thus, switching interpreters should not have an effect on any party. Third, interpreters' performance decreases with fatigue, and therefore interpreters conducting simultaneous interpretation should alternate at least every forty-five minutes to increase accuracy. *See supra* notes 345-48 and accompanying text.

371. To respect the privacy of individuals, interpreter's names will not be used. All dates, case names, court, and interpreter names are on file with the author.

372. Although many other languages are present in the courtrooms, Spanish is the predominant language and is also one of the languages that is available for certification in the federal courts. This should not overshadow how many languages come into the courtrooms. In 1990, the ten most frequently interpreted languages in United States District Courts were Spanish; Cantonese; Korean; Haitian Creole; Armenian; Arabic; Mandarin; Tagalog; Navajo; and Turkish (in order of most frequently used to less frequently used). *See* DE JONGH, *supra* note 2, at 19 tbl. 1.3, at 21 tbl. 1.5. Still some eighty languages were interpreted in that same

pretations in Milwaukee County. Most interpreters do not know their assignments until a day or two before they are needed and sometimes with less notice. Thus, it was difficult to obtain information about where interpretations would be occurring, and difficult to arrange to view the interpretations. Some problems were evident from observation and courthouse research, and these patterns are supported by interviews conducted with interpreters and interpreter services, case law, and existing statutes.

Another problem associated with observation was positioning in the courtroom. In most courtrooms, observers are not allowed past the bar to view interpretations, and therefore it is more difficult to hear and see everything occurring in the courtroom. The only time that an observer can hear interpretations is during witness testimony and as there is no record of the interpretation (only the English version), reading a transcript is useless. It is impossible to judge interpreter error without hearing interpretations. The result, as mentioned above, is that general observations were recorded and used to show patterns.

During each interpretation observed the following was noted: physical positioning of the interpreter in relation to defendant/witness; whether the attorney spoke or appeared to speak Spanish; the audibility of witnesses/interpreters; and all other information such as court, interpreter, and case name. The observation was not designed specifically to expose error in translation. While some obvious errors were recorded,[373] the focus was on the *potential* for error based on prevailing courtroom practices. The results are patterns that contribute to higher potential for error. While individual cases were recorded, these observations fell into general categories rather than specific instances of error with specific results.

B. Findings

1. Interpreter Qualifications

Of the four interpreters whom were interviewed directly, three are freelance interpreters. Interpreter *A* is a federally certified interpreter and also works in the federal court system in Milwaukee. Interpreter *A*

year. *See id.*

373. The author is not trained to interpret (as emphasized, the training is highly specialized and goes beyond the equivalent of having a bachelor's degree in linguistics), therefore not qualified to comment on the quality of interpreting observed in terms of meaning. However, there were some errors so obvious that they presented themselves quite easily and were used as examples throughout this article, particularly in Part IV.

has a master's degree in an unrelated field. *A* is a native Spanish speaker, and training in interpretation is unknown. However, as indicated above, the federal certification examination for court interpreting is quite rigorous and one who has passed is considered "qualified." *A* has been interpreting for eight years, mostly in Wisconsin.[374]

Interpreter *B* is certified in another state that requires certification. Interpreter *B* has a master's degree in an unrelated field. *B* is a native speaker of Spanish and training is unknown. *B* has been interpreting for six years, the past three in Wisconsin.[375]

Interpreter *C* is employed by the county as a bilingual typist and also serves as a court interpreter. Interpreter *C* holds a General Equivalency Diploma (G.E.D., equivalent to a high school diploma). *C* has had no training in interpretation. *C* has been interpreting for fifteen years in this capacity.[376]

Interpreter *D* is not a native speaker of Spanish. Interpreter *D* has a high school diploma and has had Spanish instruction in high school and some college level courses. *D* has had no formal training in interpretation and has conference interpretation[377] experience as well as courtroom experience. Interpreter *D* has been interpreting for eight years, all in Wisconsin.[378]

While interpreters *A* and *B* have some level of training or experience sufficient to allow them to gain federal and state certification, this is not a prerequisite in Wisconsin. The certification of interpreters *A* and *B* attests to their knowledge of the subject language, but not to their training in the professional responsibilities of the courtroom interpreter. Continuing education or training in the subject of professional responsibility is essential to successful and competent interpretation. None of this is offered in Wisconsin.

While training and certification should be required for individuals, so too should businesses that provide interpretations be required to

374. Interview with Interpreter A, federally certified interpreter for Milwaukee County Circuit Courts, in Milwaukee, Wis. (Nov. 6, 1996).

375. Interview with Interpreter B, interpreter for Milwaukee County Circuit Courts, in Milwaukee, Wis. (Nov. 26, 1996).

376. Interview with Interpreter C, Milwaukee County Court Clerk, in Milwaukee, Wis. (Nov. 26, 1996).

377. Conference interpreting is interpreting in a conference (or similar) setting. This is the type of interpreting used in some educational settings and international settings such as the United Nations.

378. Telephone Interview with Interpreter D, interpreter in counties outside of Milwaukee but in Wisconsin, in Milwaukee, Wis. (Aug. 26, 1997).

meet certain standards in hiring their interpreters. Milwaukee County also hires interpreters through local translation/interpretation services. Telephone interviews were conducted with three of these businesses that provide the bulk of non-Spanish interpretations in Milwaukee County—in such languages as Arabic, French, Hmong, Laotian, Polish, Russian, and Thai. All three businesses require their interpreters to be "bilingual."[379]

Businesses *X* and *Y* both indicated intangible standards for hiring court interpreters, such as whether they were comfortable with the candidate, whether the candidate says he or she can interpret, and if the interpreter seems honest.[380] Business *X* indicated that background checks are conducted if the candidate is not a native speaker of the foreign language. Business *X* also indicated there was a preference for some university level education.[381] Business *Y* found whether the candidate honestly represents his or her nationality to be a major factor in hiring. Business *Y* uses an application for employment as their main hiring tool. Business *Y* presently possesses no guidelines for court interpreting, but added that the interpreters are told to interpret everything that is said verbatim. Business *Y* has no educational requirements for their interpreters.[382]

No interpreters from business *Z* are known to be certified but all of its court interpreters must pass an examination in consecutive interpreting given by the business headquarters. It is unknown what makes up this test and what is required to pass it, but it at least establishes a standard for hiring which is related to what it takes to be a competent interpreter.[383] Business *Z* requires that interpreters have a college education.

It is uncertain how any of the businesses define "bilingual," and the interviews indicated that businesses *X* and *Y* do not test for bilingualism. Moreover, the training of interpreters from businesses *X* and *Y* is nonexistent, at least on the part of the businesses themselves, as it is not a

379. Definitions of bilingual vary and can even be subjective. See *supra* note 223 for definitions of "bilingual."

380. Interview with Mark Inglin, Owner of Hess-Inglin Translation Service, in Milwaukee, Wis. (Feb. 5, 1997); Interview with Lorraine Pozayt, Court Interpreters Department, International Institute of Wisconsin, in Milwaukee, Wis. (Feb. 9, 1997).

381. Interview with Mark Inglin, Owner of Hess-Inglin translation service, in Milwaukee, Wis. (Feb. 5, 1997).

382. Interview with Lorraine Pozayt, Court interpreters department, International Institute of Wisconsin in Milwaukee, Wis. (Feb. 9, 1997).

383. Interview with Elizabeth Baran, Coordinator of interpreters at Berlitz Translation Centers, in Milwaukee, Wis. (Feb. 12, 1997).

prerequisite to being hired. As discussed, lack of proficiency and training often results in incompetent interpreting.[384]

Interviews with the businesses indicated a level of understanding of court interpreting below that which is necessary to provide competent interpreters. For example, the belief that a native speaker of a language other than English who posses adequate English skills can provide competent court interpreting based on those skills alone is false, though prevalent.[385] The businesses are legitimately able to set their own standards for competency because there are no legal requirements in Wisconsin for the businesses to meet.

The county, in hiring the businesses to provide interpreters, is either assuming that the businesses perform adequate screening for competent interpreters, or the county is unconcerned with interpreter qualifications.

2. Patterns & Problems in Milwaukee County Courts with Solutions

The patterns that emerged as problems in Milwaukee County can be attributed to general lack of statewide standards for interpreter qualification, lack of training for interpreters, and perhaps ignorance of the proper role of interpreters on the part of the judiciary. The results are either inadequate interpreting or increased potential for error. Fundamental changes are necessary in order to advance the fair administration of justice and to remedy the sporadic quality of court interpretation.

Some individual cases showed signs of interpreter error or lack of professionalism but all showed that challenging an interpretation would be extremely difficult because there is no record of the foreign language. All observations also revealed an ad hoc approach by the courts because of lack of standards.

For example, on one occasion a court was unsure whether one interpreter could provide witness interpretation without an additional interpreter present to conduct simultaneous interpretation for the defendant. In effect, this set-up would keep one interpreter in the courtroom for the testimony, but the defendant would not have had simultaneous interpretation provided for him. Thus, any proceedings that occurred outside of testimony would not be translated for the defendant, and the defendant would have no opportunity to consult with counsel at the table without an interpreter. This suggestion came from the defense attorney. In this case, the judge determined that both interpreters must be pres-

384. *See supra* Part IV.

385. *See supra* notes 223-29 and accompanying text.

ent. This decision was proper and also an example of the kinds of questions that courts must answer without any guidance or education about court interpreting. The judge likely made this decision in the name of consistency but not necessarily out of any knowledge of court interpreting and its implications on a defendant. It is also an example of the lack of knowledge attorneys possess regarding court interpreting, as in this instance, the defense attorney with even a small knowledge of court interpreting would be objecting to such a request, not suggesting it.

3. Problems & Solutions

Most of the present problems in Milwaukee County are fundamental structural problems. Solutions can entail severe changes to the system, but can also involve rather minor changes that will make enormous differences in the fair administration of justice in Wisconsin.

a. Problem #1 & Solution

Allowing or expecting judges to determine (1) if an interpreter is necessary and (2) whether an interpreter is competent without judicial training as to what is necessary to interpret in court.[386] The Wisconsin and Federal case law has made it clear that the determination of when to appoint an interpreter is for the trial judge. However, the statute allowing for appointment of an interpreter does not adequately define "qualified interpreter" for language deficient defendants.[387] Thus the statute provides little guidance towards selection of a qualified interpreter.

Observation has shown that judges rely on their experiences and expertise in the law to make determinations about language capability. For example, on one occasion a limited English-speaking defendant appeared in court without an attorney. The judge wanted to make sure that the defendant did not want an attorney, but there was a language barrier. The judge proceeded to question the defendant about his language ability, providing time for the defendant to read the complaint issued against him. The judge asked him several times if he understood English, to which the defendant responded "I'm not mental." While he may have been offended, the defendant appeared unable to say that he

386. This problem is evidenced by case law, see supra Part II.A; statutory law, see WIS. STAT. § 885.37 (1997-98); and observation.

387. *See* WIS. STAT. § 885.37 (1997-988). Section 906.04 of the Wisconsin Statutes makes an interpreter subject to the provisions of §§ 901-911, relating to the qualifications of expert witnesses, but these provisions do not provide a definition specific to the field of court interpreting. *See* WIS. STAT §§ 901-911 (1997-98).

did not understand English. In the end, a bilingual attorney acted as a *friend of the court* and assisted the defendant into pleading not guilty to the felony offense. No determination of language proficiency was ever made. In this case the judge had only the defendant's statements to rely on in making a determination of language proficiency. Since the defendant spoke some English, his proficiency was unclear.

The solution is to educate judges as to how to determine when to appoint an interpreter and how to select an interpreter.[388] For example, judges should know that

> in order for defendants to testify in their own defense they must be able to accurately and completely describe persons, places, situations, events; tell "what happened" over time, request clarifications when questions are vague or misleading, [sic] and during cross-examination: recognize attempts to discredit their testimony, refuse to confirm contradictory interpretations of facts, and defend their position.[389]

An additional solution is for the legislature to draft a statute that requires a judge to make only a preliminary finding, and if there is *any* question of proficiency, either appoint an interpreter or seek an expert opinion from a linguist as to the defendant's language proficiency.[390]

A statute alone will not solve the problem. If both solutions cannot be instituted, the education of judges should be the first priority because it is necessary to make fundamental changes.

b. Problem #2 & Solution

Ignorance of the mechanics of proper courtroom interpretation on the part of judges, lawyers, and interpreters, as evidenced by allowing interpreters to speak for a witness or defendant whose testimony or on-the-record statement is inaudible to the court.[391] In a murder trial observed,[392] the witness's interpreter sat in the witness box with the witness and spoke clearly and directly into the microphone. The witness, on the other hand, was speaking directly to the interpreter, rather than to the court through the microphone. When a witness directs her testimony to

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388. *See* HEWITT, *supra* note 25, at 129-32.

389. *Id.* at 125.

390. This could be much like the competency hearing that is required to determine a defendant's mental competency. *See* WIS. STAT. § 941.14(1)(a), (2), (3) (1997-98).

391. This problem is evidenced by observation.

392. Case name, date and judge are all on file with the author.

the interpreter rather than the court, it changes the way the jury views the witness and the testimony. In this case, the jury may have judged the *interpreter's* demeanor when in fact the interpreter should be as unobtrusive as possible.

This can be remedied by a combination of efforts. (1) If judges are educated as to the appropriate protocol, they will know to instruct the non-English speaking witness to speak into the microphone (as is done with English speaking witnesses). Judges will also instruct the attorneys to address their questions directly to the witness, not the interpreter. (2) If interpreters are trained, they will know to inform the court that they must only interpret that which is audible to the court. (3) If two microphones are available, the witness will more likely speak into the microphone. (4) If two microphones are not available, it may be the better practice for the interpreter to stand outside the witness box. The witness would be required to speak at an audible level for the interpreter. (5) If telephone interpretation is used, the witness or defendant would also have to speak loudly and clearly so that the interpreter on the other end of the line would hear. Finally, the judge should explain the interpreter's role to the participants in the courtroom, particularly the jury. A clarification for the jury should include the following instructions:

> Jurors must treat the interpretation of a witness's testimony as if the witness had spoken English and no interpreter were present;
> Jurors must not evaluate a witness's credibility positively or negatively due to the fact that his or her testimony is being given through an interpreter;
> Jurors who speak a witness's language must ignore what is said in that language and treat the evidence as only what the interpreter renders in English. Such jurors must ignore interpreting errors they think an interpreter may have made.[393]

c. Problem #3 and Solution

Lack of record of the testimony or on-the-record statements in the foreign language. There is strong evidence that this is a problem in Wisconsin from the single Wisconsin case of *State v. Santiago*.[394] Lack of a

393. *See* HEWITT, *supra* note 25, at 132. The last suggestion referring to jurors who speak the native language of the witness is appropriate if the interpreters are trained professionals. If interpreters are not trained, then they should be open to the scrutiny of the jurors, who are also presumably not trained interpreters. Of course, this would be an inadequate and inefficient system, thus all interpreters must be properly trained.

394. 556 N.W.2d 687 (Wis. 1996).

record does not just place a barrier for the defendant but also the state by the result of possible lesser charges or dismissal of the case. Lack of a record can force the prosecution to offer lesser charges because just as the defense will be unable to show mistranslation from the record, the prosecution will be unable to prove proper translation. Although the presumption is usually in favor of the prosecution, it does not have to be, as seen in *Santiago*.[395]

This problem can be remedied by audio taping all court interpretations. Because the only interpretations that are audible to the court are consecutive, this is only a solution for consecutive interpretation. In order to put simultaneous interpretations on record, specialized electronic equipment which allow interpretations to be taped from within the device may be used, or other special arrangements may be made to separately record the interpretation.[396] Recording of testimony however, should be a first priority since errors by the interpreter in consecutive mode alter the evidence presented to the court.[397]

Audio taping of all proceedings may not be immediately feasible, therefore it is recommended in at least the following situations:

> [1.] In all capital cases [currently this does not apply in Wisconsin], regardless of the qualifications of the interpreters, a record should be made of all sworn witness testimony and its interpretation;
> [2.] In proceedings involving interpretation by a non-certified interpreter, especially those in which the non-English speaking person is at risk of incarceration, a record should be made of all sworn testimony and its interpretation;
> [3.] In felony proceedings involving entry of a guilty plea that are interpreted by an unqualified interpreter, a permanent record should be made of the proceedings interpretations and statements made to the court by the non-English speaking person.[398]

Another solution is to audio tape testimony using telephone inter-

395. *See Santiago,* 556 N.W.2d at 690.

396. *See* BERK-SELIGSON, *supra* note 35, at 43-53. Berk-Seligson conducted extensive empirical research across the country which involved audio taping courtroom proceedings during interpretations. Specialized equipment was used and 114 hours were recorded. For a description of the research methods, see *id.*

397. *See* HEWITT, *supra* note 25, at 135.

398. *Id.* (parenthetical added). "Proceedings interpretation" is equivalent to simultaneous interpretation. *See id.* at 34.

pretation. This can be done by taping through the telephone itself.

d. Problem #4 & Solution

Not providing replacement interpreters or frequent breaks for simultaneous interpreters to reduce or prevent interpreter fatigue. This is a common complaint of interpreters.[399] Fatigue is a factor in most interpreter errors—even with the best interpreters—and can be easily remedied. The solution is to provide replacement interpreters every forty-five minutes. Also any interpretation requiring longer than thirty minutes of simultaneous interpretation should require an assignment of two interpreters to provide immediate replacement. Interpreters should also pay attention to the fatigue factor and should inform the court if they believe the quality of the interpretation will be affected by interpreter fatigue.[400] In order for interpreters to be aware of the importance of replacement and the effect fatigue has on performance, they must be educated.

e. Problem #5 & Solution

Poor record-keeping system. This is a fundamental problem that if corrected, would greatly improve the entire system. The Milwaukee County Circuit Courts, Administrative Division is the only office that has any formal record of interpretations that are conducted in Milwaukee County, and then only for criminal, family, and juvenile court. These records are *not* kept for the purposes of regulating or monitoring interpretations, but are kept as financial records. Clearly the records are necessary for that department; however, separate records are crucial to being able to determine the demand for court interpretation. The only records available right now are not even indicative of the real demand for interpretations, which is suspected to be much higher than the numbers indicate.[401]

Designing an additional record keeping system would be a fundamental systematic change to begin improving services. Such a record keeping system would indicate an accurate number of interpretations performed each quarter and for which languages, thus defining the need more precisely. A separate record keeping system would also be a resource for attorneys, judges, and the public to review interpretations.

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399. Interview with Interpreter B, in Milwaukee, Wis. (Nov. 26, 1996).

400. *See* BERK-SELIGSON, *supra* note 35, at 139-40.

401. *See supra* note 29 and accompanying text.

f. Problem #6 & Solution

Lack of statewide training and testing/certification of interpreters. This is a problem rooted in the legislature and in case law. Statutes need to be drafted that have specific guidelines and that define "qualified" in the context of interpreters. In Wisconsin case law, the courts have never sufficiently dealt with the issue of the qualifications of interpreters.

There is a need for formal training on a nationwide and statewide level. Unless it is instituted, the number and qualifications of court interpreters will not improve.[402] Two kinds of training are suggested: "(1) [S]hort, inexpensive and highly focused workshops to educate interpreters about the profession of court interpreting and its unique demands, and (2) longer term, formalized programs of education and training to improve interpreters' proficiency in applied interpreting skills."[403]

The necessity for a system of testing and training is based on the following: (1) All interpreters in court should be screened for their qualifications; (2) The determination of interpreters' qualifications should be made by people trained in language and interpreter screening techniques (this is based on the premise that it is unreasonable to expect judges to be the only determiner of the qualifications of an interpreter); and (3) formalized testing is the most effective way to assess the qualifications of an interpreter.[404]

For testing and certification, the problem is more expansive than training because of the costs involved.[405] Currently, there are state sponsored programs in the states of California, Massachusetts, New Jersey, New Mexico, New York, and Washington and some form of testing for screening purposes in the cities of Chicago, Los Angeles, Miami, and Phoenix. The states of California, New Jersey, and Washington serve as models for interpreter proficiency tests.[406]

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402. *See* BERK-SELIGSON, *supra* note 35, at 53.

403. HEWITT, *supra* note 25, at 54. For suggested curriculum for such workshops, see *id.* at 54-73.

404. *See id.* at 89.

405. The Federal Court Interpretation Certification Examination program is maintained at an approximate cost of $400,000 per year. *See id.* at 90.

406. *See id.* at 90-91. The three states serve as models because their

> (1) candidates must demonstrate proficiency in all three modes of interpreting (simultaneous, consecutive, and sight); (2) the tests are developed under the auspices of legislative or policy mandates that apply statewide; (3) the tests have undergone scrutiny by independent researchers or panels of professionals (including legal professionals, language professionals, language specialists, professional interpreters and

For Wisconsin, there are some plausible immediate steps that can be taken towards resolving this problem. First, all interpreters certified by federal courts, California or Washington, or who have passed the New Jersey screening test should be recognized as professional qualified interpreters in Wisconsin.[407] Second, Wisconsin should join a collaborative effort involving test development, which is becoming increasingly popular among states.[408] An example of this is the Minnesota-Oregon consortium. These states collaborated with New Jersey, Washington, and the National Center for State Courts and agreed to develop a coordinated program for sharing and developing proficiency tests. The components of the overall program include:

> [1] a Court rule establishing a code of professional conduct for interpreters; [2] mandatory basic orientation and training workshops for interpreters; [3] interpreting proficiency test for Spanish language interpreters; [4] a written test in English for interpreters in all languages that covers. . .professional responsibility. . .basic legal terms and technical vocabulary, and court procedure; [and 5] expanding the testing program in subsequent years to include the five to ten most frequently encountered languages other than Spanish.[409]

The best and most cost effective solution to the problem of requiring certification is for Wisconsin to become a member of a test-sharing coalition as described above.[410]

While adopting a training and certification program may be the greatest step to solving many of these problems, if it is not feasible, there are other smaller steps the state may take to improve interpreter services.

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testing experts) who have published studies describing their content, test administration procedures and scoring practices in detail; (4) and date are maintained by the administering agency regarding their validity and reliability.

Id. at 91.

407. *See id.* (noting that interpreters who have passed these tests are "registered" on rosters kept by the states' administrative office or by the Administrative Office United States Courts).

408. It was anticipated that by the end of 1995, an institutionalized program for court interpreter testing and certification in 8-10 languages would be available at affordable cost to any state. *See id.* at 91-94.

409. *Id.* at 245-46.

410. A form to obtain information on joining a consortium is available in HEWITT, *supra* note 25, back pages.

Of the solutions discussed, there are two immediate solutions that do not require complete overhaul of the status quo. The first solution relates to problem number two.[411] An easy solution is to draft and adopt a code of professional responsibility for court interpreters. This alone will set standards for court interpreters, as well as educate attorneys and judges about what court interpreters are expected to do. The code can be used as a hiring tool for interpreters. Interpreters who are expected to know the code will be better trained and will provide more accurate interpretation.[412]

The next solution relates to problem number five[413] and is to hire an expert to manage the interpreter services. "Hiring at least one professionally trained expert is the most effective operational step that state administrative offices or local courts can take to strengthen interpreter services . . . [T]he presence of an expert professional on staff increases the capacity for effective recruiting, screening and training of other salaried or freelance interpreters."[414]

VI. CONCLUSION

As anecdotal information suggests, there may be many cases of poor interpretation in criminal courts that never surface but that cause wrongful incarceration or free the truly guilty. In Wisconsin, we will never know without specific standards imposed on interpreters and state court systems. Without fundamental changes in its standard for court interpreting, Wisconsin will be unable to advance the fair administration of justice. As evidenced by the rising number of non-English speaking populations in the state, and the rapid increase of the court interpretations per year, change is long overdue.

411. *See supra* Part V.B.3 Problem #2.
412. *See* HEWITT, *supra* note 25, at 237.
413. *See supra* Part V.B.3 Problem #5.
414. HEWITT, *supra* note 25, at 238.