

CHAPTER 10

Model Court Interpreter Act





CHAPTER 10

Model Court Interpreter Act

Background

The Model Court Interpreter Act is based on a review and synthesis of federal law and statutes in states where comprehensive study and reform of practices and laws relating to the use of interpreters has occurred. The Act and its accompanying commentary are also based on analysis of legal and professional issues that have emerged in recent years through practical experience and research in the states. The document was prepared in cooperation with an advisory group of individuals who have special expertise in court interpretation. The advisory group included the judges, court administrators, and state and federally certified professional interpreters who are named in the acknowledgments for this publication.¹

A Note on the Purposes of the Act and How it May be Used

The following Model Court Interpreter Act and commentary is provided as a guide to assist policy makers who are engaged in any of the following tasks:

- Writing or updating court interpreter statutes;
- Preparing statewide rules of court for the administration of interpreter services;
- Preparing local rules of court or administrative policy to govern interpreter services in the absence of comprehensive state policy in the form of law, rule or administrative procedures.

It is recognized by the drafters of this Model Act that many states will be without the necessary financial, expert, and administrative resources to summarily adopt legislation substantially similar to it in all respects. Implementing a statewide interpreter program involves designating languages for which certification programs will be established, establishing standards and procedures for testing and certifying language interpreters, adopting programs for interpreter recruiting, training, continuing education, and interpreter evaluation. A statewide program must also provide for allocating the cost of interpreter services between government and private individuals and establish mechanisms to provide revenue for the development of the interpreter programs and services.

It is desirable and within the capacity of most states, however, to plan and enact a legislative agenda that sets policy goals consistent with the Model Act and establishes procedures and timetable for implementing them.

Model Court Interpreter Act

§ 1. POLICY DECLARATION

It is hereby declared to be the policy of this state to secure the rights, constitutional and otherwise, of persons who, because of a non-English speaking cultural background, are unable to understand or communicate adequately in the English language when they appear in courts or are involved in justice system proceedings.

It is the intent of this Act to provide for the certification, appointment, and use of interpreters to secure the state and federal constitutional rights of non-English speaking persons in all legal and administrative proceedings.²

Commentary:

A statutory preamble, introduction, or policy declaration should articulate with precision the purpose of the Act and the policy which the Act is designed to implement and support.

§2. DEFINITIONS

For the purpose of this Act, the following words have the following meaning:

A. "Appointing authority" means a trial judge, administrative hearing officer or other officer authorized by law to conduct judicial or quasi-judicial proceedings.

B. "Non-English speaking person" means any principal party in interest or witness participating in a legal proceeding who has limited ability to speak or understand the English language.

C. "Legal proceeding" means a civil, criminal,³ domestic relations, juvenile, traffic or an administrative proceeding in which a non-English speaking person is a principal party in interest or a witness.

D. "Certified interpreter" means a person who: (1) is readily able to interpret⁴ simultaneously and consecutively and to sight translate from English to the language of the non-English speaking person or from the language of that person into English; (2) is certified according to procedures approved by the Supreme Court; and (3) satisfies the standards prescribed and promulgated pursuant to this Act and the Code of Professional Responsibility for Interpreters established in this state.⁵

E. "Principal party in interest" means a person involved in a legal proceeding who is a named party, or who will be bound by the decision or action, or who is foreclosed from pursuing his or her rights by the decision or action which may be taken in the proceeding.⁶

F. "Witness" means anyone who testifies in any legal proceeding.

Commentary:

The Act should define with precision the terms used in the policy declaration and throughout the Act. These definitions should identify those individuals for whom an interpreter is required, state clearly the proceedings in which an interpreter should be used, and establish what is meant by a certified interpreter.

Court interpretation is a specialized and highly demanding form of interpreting. It requires skills that few bilingual individuals possess, including language instructors.

The knowledge and skills of a court interpreter differ substantially from or exceed those required in other interpretation settings, including social service, medical, diplomatic, and conference interpreting. Interpreters who routinely work non-court settings often cannot perform adequately as a court interpreter.

The term "certified interpreter" is broadly defined to allow flexibility in the certification standards which may vary for particular languages according to the extent of their usage within each state, the availability of bilingual persons to serve as interpreters, and other practical considerations.

This Act establishes criteria *only* for "certified interpreters." There is no use of, reference to, or definition of the term "qualified interpreter." Attempting to define a level of interpreter below that of a "certified interpreter" is problematic and unworkable.

§3. IMPLEMENTING RESPONSIBILITIES

A. The Supreme Court shall be responsible for ensuring language interpreter certification, continued proficiency, and discipline. The Supreme Court shall prescribe standards and procedures for the recruitment, testing, certification, evaluation, compensation, duties, professional conduct, continuing education, certification renewal, and other matters relating to interpreters as prescribed in this Act.

Commentary:

The establishment of a comprehensive court interpreter program is a significant undertaking requiring specialized experience and expertise. The Supreme Court should understand the size and complexity of the undertaking and be prepared to provide the support and encouragement required to see the establishment of such a program to its conclusion.

Neither the Supreme Court nor the typically configured state administrative office has the expertise or experience in language interpretation to develop, on its own, detailed policies and procedures required to implement a state wide interpreter program. That specialized expertise must be recruited and used to develop and recommend to the Supreme Court the standards for the appointment of interpreters, as well as the criteria for interpreter qualifications, duties, professional conduct, and compensation. Such expertise is available in most states from professionals employed in the fields of languages, interpreting, occupational testing, and from judges and attorneys who have worked extensively with interpreters.

Experience in states with well-developed programs suggests that the advice and services of such individuals can be obtained *pro bono* through the formation of a Court Interpreter Advisory Panel. Expertise and assistance can also be obtained from the administrative offices of the courts in some states (e.g., California, Massachusetts, New Jersey, Washington) and from the National Center for State Courts.

B. Staff and administrative support required by the Supreme Court to implement the interpreter certification program shall be provided by the administrative office of the courts.

Commentary:

The establishment and implementation of a statewide interpreter program is a substantial undertaking. It is recommended that the state Supreme Court initiate such an effort through the establishment of a Court Interpreter Advisory Panel made up of a broad range of trial and appellate judges, court administrative staff, lawyers, court interpreters practicing in the state; and experts in linguistics, interpretation, education, and occupational testing and certification. Such a panel, in conjunction with the administrative office of the courts, should conduct studies of the language interpreter needs of the courts of the state and make recommendations to the Supreme Court and to the administrative office of courts concerning interpreter needs and interpreter program implementation. The recommendations should address such matters as: (1) the designation of those languages for which there should be certification programs; (2) the establishment and monitoring of a statewide interpreter testing and certification program; (3) the establishment of periodic interpreter certification renewal requirements, (4) the promulgation of guidelines to assist judges in determining when a non-certified interpreter may be permitted to act as an interpreter in the absence of a certified interpreter, and (5) the establishment of statewide standards of practice and appropriate professional conduct for interpreters.

The Court Interpreters Advisory Panel, in conjunction with the administrative office of the courts, should assist in developing policies regarding interpreter training, mandatory continuing education, and recruitment of potential interpreters.

Of primary significance is the initial determination by the Court Interpreters Advisory Panel of those languages

which, because of their predominance, require a testing and certification program. These determinations may require surveys of individual court needs for interpreters and the examination of demographic trend data.

It is anticipated that this Advisory Panel would be reimbursed only for travel expenses related to attendance at Advisory Panel meetings. The panel would rely on the state court administrative office for staff and clerical support.

Special note on testing and certification programs.

There is growing recognition among the states and the professional community of court interpreters for the need to develop interstate testing and certification programs as a way to make testing and certification in many languages affordable for all states. The standardized tests can be shared among states and incorporated by reference into state laws, rules promulgated by supreme courts, or by administrative regulations of administrative offices of the courts. Prior to drafting legislation or rules, policy makers in the states should explore whether progress has been made toward establishing programs and standards that can be adopted by reference or used as the foundations for state programs.

C. Pursuant to Supreme Court rule, the administrative office of the courts shall administer and manage the operations of the State Court Interpreter Program.

Commentary:

The administrative office of the courts must undertake to develop the structure and the mechanics necessary to administer a court interpreter program. The specific responsibilities of the AOC should be established by Supreme Court rule and may include some or all of the following:

- (1) To establish interpreter proficiency standards;

- (2) To designate languages for certification;
- (3) To establish programs for the recruitment, training, legal orientation, testing, evaluation and certification of interpreters consistent with the proficiency standards;
- (4) To develop resources for interpreter continuing education and recertification;
- (5) To establish, maintain, and publish a current directory of certified interpreters;
- (6) To adopt and disseminate to each court an approved fee schedule for certified and non-certified interpreters;
- (7) To set interpreter certification fees as may be necessary;
- (8) To establish procedural standards and guidelines for in-court interpreted proceedings to address such matters as: modes of interpreting, appropriate procedure for correcting interpretation mistakes, interpreter fatigue and time limits for continuous in-court interpretation, and when the use of multiple interpreters working in shifts or concurrently is indicated;
- (9) To establish, administer or recommend a process to review and respond to allegations of violations the code of professional conduct for interpreters, including decertification or other disciplinary measures.

The certification process encompasses recruitment, training, testing, and evaluation of interpreters. The specialized language proficiency standards, testing criteria, and evaluation processes clearly require detailed language expertise.

Part of the certification process should involve a comprehensive orientation of interpreters to the judicial system to ensure their familiarity with the legal system, including the nature of the various criminal, civil, and other judicial proceedings, legal terminology, and the roles of officials involved in various legal settings.

Furthermore, a court interpreter program should include a component responsible for the continuing education or recertification of existing interpreters. Ideally, this program should include a system for evaluating and monitoring interpreter performance and should have the capacity to evaluate any questions of conflict of interest or ethical violations involving certified court interpreters.

In addition, the administrative office of courts must maintain and disseminate a current list of certified interpreters to the courts throughout the state. This certification list should be updated on a regular basis to be a reliable source for courts in appointing certified interpreters.

The administrative office of courts may also establish and promulgate standards or recommended guidelines and set forth appropriate levels of compensation that should be paid to interpreters, either in the form of salary or fees. Such standards or recommended guidelines may include salary schedules, rates for per diem or contract interpreters, and minimum compensation standards for an appearance in court. Rules that govern travel expense reimbursement for other court employees, or in exceptional cases for expert witnesses, should also apply to court interpreters. The compensation schedule may be standard for all jurisdictions throughout the state, or it may to reflect cost of living differentials or other relevant local conditions. Regardless of the method employed to compensate interpreters, the compensation standards should be adequate to ensure the availability of interpreters.

D. The director of the administrative office of the courts shall collect and analyze statistics pertinent to interpreter utilization. This report may be made a part of the annual report of the judiciary, and contain

analyses and recommendations for the improvement of the court interpreter program.

Commentary:

It is important to have an accurate overview of the extent of the need for and use of certified and non-certified interpreters statewide for both management and budgetary reasons. Collecting data regarding the *need* for interpreters is complex, since records are not normally kept of services that can not be provided. Data regarding the actual *use* of interpreters should be more readily available. The interpreter services programs should maintain records regarding the number of salaried interpreter employees, if any, and the number and cost of each interpreter appointment. In any case, the cost of interpreter services for each jurisdiction and statewide, and trends in interpreter requests and use rates, should be monitored for program management and planning purposes.

§4. CERTIFIED INTERPRETER REQUIRED

A. When an interpreter is requested or when the appointing authority determines that a principal party in interest or witness has a limited ability to understand and communicate in English, a certified interpreter shall be appointed.

Commentary:

The right to an interpreter accrues to the "party in interest." Recognition of the need for an interpreter may arise from a request by a party or counsel for the services of an interpreter, from the court's own voir dire of a party or witness, or from disclosures made to the court from parties, counsel, court employees or other persons familiar with the ability of the person to understand and communicate in English. When

a judge recognizes that a "party in interest" requires an interpreter, an interpreter *shall* be appointed.

This portion of the Act embodies and implements the policy declaration set out in §1 of the Act: to provide certified interpreters in all state legal and administrative proceedings where the services of an interpreter are required to secure the rights of non-English speaking persons or for the administration of justice. As a result of that policy declaration, the statute is unequivocal in asserting that an individual who has a limited ability to speak or understand the English language, who is a party in interest or a witness, is entitled to the assistance of a certified interpreter throughout the legal proceeding, or for the duration of the witness' testimony. Events included in legal proceedings encompass interviews between counsel and client, advisements regarding procedure or rights that are conducted out of the presence of counsel or the judge, and readings or other translations of court documents that are evidence in the case or that are relied on for dispositional decisions by the court.

B. The appointing authority may appoint a non-certified interpreter only upon a finding that diligent, good faith efforts to obtain a certified interpreter have been made and none has been found to be reasonably available. A non-certified interpreter may be appointed only after the appointing authority has evaluated the totality of the circumstances including the gravity of the judicial proceeding and the potential penalty or consequence involved.

Commentary:

Allowance is made for the appointment of a non-certified interpreter, but only after diligent, good faith efforts are made to secure a certified interpreter. A provision for the use of a non-certified interpreter reflects the practical realities of court operations. The exception to the general rule that certified interpreters must be provided acknowledges that jurisdictions may not have access to certified interpreters in all languages for all cases. The uniqueness of the language required, the geographical location of the court, the season of the year, and dozens of other reasons may militate against the availability of a certified interpreter for a particular language on any given date and time. The non-certified interpreter alternative should be used only as a rare exception to the general rule requiring certified interpreters.

A review of the totality of the circumstances is required, because whether a certified interpreter is "reasonably" available depends as much on the gravity of the proceeding and the jeopardy the party is placed in, as on how difficult it is to locate and obtain the services of a certified interpreter. For example, for a felony criminal trial a certified interpreter residing in a distant jurisdiction might be considered "reasonably available"; whereas in a misdemeanor case, or in a procedural hearing required to consider the release of a defendant from jail, "reasonable" availability may extend only to the geographic boundaries of the court.

C. Before appointing a non-certified interpreter, the appointing authority shall make a finding that the proposed non-certified interpreter appears to have adequate language skills, knowledge of interpreting techniques, familiarity with interpreting in a court or administrative hearing setting, and that the proposed

non-certified interpreter has read, understands, and will abide by the Code of Professional Responsibility for language interpreters established in this State.

Commentary:

In order for a non-certified interpreter to be appointed, the judge or administrative hearing officer must inquire and be assured that the proposed non-certified interpreter appears to have the requisite knowledge and skills to perform adequately the task for which he or she is appointed. Equally important, the inquiry into the interpreter's skills and experience must include a verification that the interpreter has read, understands, and will abide by the requirements of the Code of Professional Responsibility established for interpreters.

It is recommended that the administrative office of the courts develop and make available a standard voir dire guide for use by the court for the purpose of inquiring into the experience and qualifications of non-certified interpreters.⁷

D. A summary of the efforts made to obtain a certified interpreter and to determine the capabilities of the proposed non-certified interpreter shall be made on the record of the legal proceeding.

Commentary:

The requirement to make these findings on the record not only underscores the importance of using certified interpreters whenever possible, but provides a ready record for review of the circumstances under which a non-certified interpreter was used.

It is recommended that standard language for this voir dire and finding be developed for use by the judge when inquiring into the efforts made by court administrative personnel to secure the services of a certified interpreter.

§5. WAIVER OF INTERPRETER

A. A non-English speaking person may at any point in the proceeding waive the right to the services of an interpreter, but only when (1) the waiver is approved by the appointing authority after explaining on the record to the non-English speaking person through an interpreter the nature and effect of the waiver; (2) the appointing authority determines on the record that the waiver has been made knowingly, intelligently, and voluntarily; and (3) the non-English speaking person has been afforded the opportunity to consult with his or her attorney.

B. At any point in any proceeding, for good cause shown, a non-English speaking person may retract his or her waiver and request an interpreter.

Commentary:

The intent of this portion of the statute is to ensure that the non-English speaking parties or witnesses are made fully aware of their right to an interpreter. The waiver of the right to an interpreter must be knowing and voluntary, and with the approval of the judge or administrative hearing officer.

States may wish to develop a list of questions, analogous to the questions that are asked when a criminal defendant waives his or her rights to a jury trial and enters a plea of guilty, to demonstrate the knowing and voluntary waiver of the right to an interpreter.

§6. INTERPRETER OATH

All interpreters, before commencing their duties, shall take an oath that they will make a true and impartial interpretation using their best skills and judgment in accordance with the standards and ethics of the interpreter profession.

Commentary:

This is standard statutory language that appears in a variety of current statutes. An interpreter should take an oath for the same reason that any person testifying in court takes an oath--to safeguard against the possibility of knowing and willful falsification of testimony.

The Code of Professional Responsibility addresses the various ethical responsibilities of interpreters for accuracy and completeness, impartiality, confidentiality, and other matters relating to the professional conduct of interpreters. The appointing authority should be alerted to potential conflicts of interest or other violations of the Code of Professional Responsibility that may arise. The sanction of removal is justified for any violations of that Code.

It is common practice for such oaths to be sworn to and maintained on file for all interpreters who are regularly employed by a court. This simplifies the court's inquiries on the record during procedural hearings. It is recommended, however, that an oath be read and sworn to in open court in all proceedings conducted before a jury.

§7. REMOVAL OF AN INTERPRETER IN INDIVIDUAL CASES

Any of the following actions shall be good cause for a judge to remove an interpreter:

Being unable to interpret adequately, including where the interpreter self-reports such inability;

Knowingly and willfully making false interpretation while serving in an official capacity;

Knowingly and willfully disclosing confidential or privileged information obtained while serving in an official capacity;

Failing to follow other standards prescribed by law and the Code of Professional Responsibility for interpreters.

Commentary:

It is important to recognize that interpreters are sometimes called to court to interpret for someone who speaks a different language from that spoken by the interpreter. This section authorizes the appointing authority to remove interpreters who are not competent to interpret for a case for this or any other reason, or who violate the Code of Professional Responsibility which each state should adopt as a companion to legislation. For a more complete discussion of the elements of such a code see the Model Code of Professional Responsibility published by the National Center for State Courts as a companion to this Model Act.

Appointing authorities should guard against appointing interpreters who may have an interest, or the appearance of an interest, in the outcome of the legal proceedings in which the interpreter is serving. A conflict of interest exists when an interpreter acts in a situation where the interpreter may be affected by an interest in the outcome of the case or is otherwise biased. For example, an interpreter should not serve as an interpreter for someone with whom the interpreter has a familial relationship, for someone with whom the interpreter has shared a residence, or for someone with whom the interpreter has a continuing business or professional relationship. The trial court must be assured of interpretations

that reflect the precise language of questions and answers of the witness. The interpretation should not be affected by any personal interest of the interpreter in the witness' case.

§8. COST OF INTERPRETER SERVICES

In all legal proceedings, the cost of providing interpreter services shall be borne by the court or administrative agency in which the legal proceeding originates.

Commentary:

A wide variety of funding mechanisms for courts and ancillary court services are used throughout the country. The Model Act takes the position that providing a certified interpreter is a basic and fundamental responsibility of the court, and that the court should bear the burden of the costs associated with providing an interpreter, as a cost of the court proceeding.

This approach does not foreclose subsequent assessments of costs for interpreter services to parties when that is appropriate, according to the same standards or rules that are applied to court costs in other litigation.

Drafters of this statute considered and rejected an approach that attempts to initially allocate the responsibility for acquiring and paying for the cost of the interpreter to the governmental entity which initiates the proceeding, for example, a local prosecutor, state's attorney, public defender, legal services office, or welfare service agency.

§9. APPROPRIATION

To achieve the purposes of this Act, §____ is appropriated for the administrative office of courts to establish and operate a statewide court interpreter program.

Commentary:

Funding is sure to be a difficult and contentious issue. As with indigent defense, however, the costs of an interpreter program are essential to the administration of a fundamentally fair justice system.

A realistic assessment of the start-up costs of an interpreter program should be made by the administrative office of the courts. Efforts should be made to enlist the voluntary service of available experts to serve on the Court Interpreters Advisory Panel. Courts should also look to other states for program models and for the formation of interstate or other interjurisdictional service agreements. Nevertheless, AOC staff and administrative support will require state funding during the implementation stage. As with all court appropriations, this expenditure will require detailed and specific justification and substantiation.

To defray some of the costs of administering the interpreter certification program, the administrative office of courts should be authorized to assess a court interpreter certification fee or fees if necessary. Such fees may be designed to operate the court interpreter testing program on a self-sustaining basis once the start-up costs secured through a state appropriation are expended. Certification fees may cover administrative costs of testing, certification, and recertification.

Endnotes

¹ NCSC staff prepared for the work by compiling and summarizing statutes from all of the states. Statutes from states where laws have been enacted to develop statewide standards for interpreter services in the courts were then identified (e.g., Arkansas, California, New Mexico, Massachusetts, Washington), and their key concepts were extracted and summarized to provide a foundation for a discussion document. The discussion document drafted by NCSC staff was presented on July 14-16, 1993 in Williamsburg VA at a workshop attended by representatives of state and local courts and the interpreter profession throughout the country. The discussion draft was studied, critiqued, and redrafted by the conferees and NCSC staff to create a second draft document which was then submitted to the project Advisory Committee for additional review and comment. The resulting Model Act, therefore, is based both on existing state laws and the professional opinion of a broadly representative group of experienced judges, court administrative professionals, and interpreters. The individuals who contributed to the work are listed in the acknowledgments pages of this publication.

²Administrative hearings, although executive branch functions, are regularly appealed to the state court system where the reviewing court's decision is based on the administrative hearing record, including interpreted testimony. In addition, courts may require that administrative hearing litigants be accorded the same rights, constitutional and otherwise, as are accorded to criminal and civil litigants. This is a sensitive separation of powers matter, and some states may choose not to include administrative hearings within the ambit of their interpreter statutes.

³Criminal proceedings are intended to encompass grand jury proceedings and judicial inquests.

⁴ Although the term "translate" is frequently used interchangeably with or instead of "interpret," the activities are distinct and require different skills. Interpreting is oral rendering of one spoken language into another, while translation is the rendering of a written document from one language into a written document in another language. The Model Act recognizes that court interpreters will be required to perform *sight translations*, which involves reading and orally translating a written document.

⁵ See the Model Code of Professional Responsibility for Interpreters, which is a companion publication to this Model Court Interpreter Act.

⁶ It is the intent of this act to include parents of juveniles involved in court proceedings among principal parties in interest.

⁷ A model voir dire for this purpose has been developed by the California Judicial Council. A similar generic model is published by the National Center for State Courts (see Chapter 6, Figure 6.2).