



National Association of Judiciary Interpreters & Translators
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October 29, 2020

Kansas Supreme Court
301 SW 10th Ave #374
Topeka, KS 66612

Re: Proposed Rule 1705
Kansas Judicial Branch
Court Interpreter Orientation

Madam Chief Justice Luckert and Justices Rosen, Biles, Stegall, Wilson, and Wall:

The National Association of Judiciary Interpreters and Translators (NAJIT) represents the professional interests of interpreters in state and federal courts all over the United States. We thank you for the opportunity to comment on what we consider to be the salient issues in proposed Rule 1705.

I. Completion of Orientation Required. (R.1705c)

While a free orientation for interpreters regarding the Kansas Judicial Branch is certainly helpful for those working in the courts for the first time, an orientation provides no assurance as to the candidate's ability to actually interpret in court.

NAJIT strongly recommends the Kansas Judiciary implement a more in depth evaluation and qualification process for interpreters. The current standard of being "understandable" as set forth in K.S.A. 75-4353, is a highly subjective measure. A prospective interpreter's competency can only be assessed through a criterion-referenced examination designed by expert psychometricians after identifying the critical skills a competent interpreter must master, i.e., simultaneous interpreting, consecutive interpreting, and sight translation as well as mastery of two languages at a minimum level of that possessed by an individual with 14 years of formal education. Such criterion-referenced examinations are currently available for interpreters through the National Center for State Courts (NCSC) [<https://www.ncsc.org/services-and-experts/areas-of-expertise/language-access/resources-for-program-managers>] and the Administrative Office of the U.S. Courts, (AOUSC) [<https://www.uscourts.gov/services-forms/federal-court-interpreters/federal-court-interpreter-certification-examination>], in addition to other state court administration offices.

II. Not a Substitute for Qualifications or Oath. (R.1705f)

We commend the Kansas lawmakers and courts for acknowledging that an orientation is “not a substitute for a judicial determination of an interpreter’s qualifications.” However, neither K.S.A. 75-4353 (regarding qualifications of interpreter) or K.S.A. 75-4354 (regarding the interpreter’s oath), provide for an objective evaluation of the interpreter’s competency to perform the duties of the office. The “appointing authority” can “make a preliminary determination that the interpreter is able to readily communicate with the person whose primary language is one other than English,” but that does not mean the person can interpret fully and accurately in any or all modes, including the simultaneous mode which requires the ability to listen and speak at the same time while working with two different languages. Neither is it indicative that the person comprehends or is fluent in technical legal terminology in the language combination required. The appointing authority would be unable to ascertain competency in interpreting skills during the course of a proceeding because he or she would be unable to hear the interpreter, or—assuming the appointing authority does not speak the defendant’s, witness’, respondent’s or plaintiff’s language—understand what the interpreter is telling the non-English speaker.

Furthermore, when the appointing authority relies on an external interpretation service, such as a telecommunications company, (75-4353c) to provide a qualified interpreter, the court has no assurance as to the methodologies used by that external provider to evaluate the qualifications required by this section of the statute. Concepts such as “general understanding”, “ability to interpret”, “basic knowledge” and “sound skills” are not clearly defined in the statute and therefore insufficient to guarantee the person meets the professional competency standards already identified for judiciary interpreters in the United States through the testing mechanisms designed by the AOUSC and the NCSC.

A credential obtained through an unbiased, scientific, criterion-referenced examination provides this assurance to the courts and all interested parties. These examinations evaluate a person’s knowledge or skills against a predetermined standard, performance level, or other criterion, regardless of how other candidates perform on the test.

III. Qualified interpreters and due process

The courts have long recognized the right to an interpreter for the hearing impaired, and consequently sign language interpreters have been exempted from Proposed Rule 1705. However, the Limited English Speaking (LEP) or non-English speaking criminal defendants suffering a linguistic impairment and appearing in our courts of law, still face an uphill battle ensuring that their rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution are preserved when these are precariously contingent on the appointment of a competent interpreter.

As you are well aware, in the seminal case of *U.S. ex Rel. Negron v. State of N.Y.*, (434 F.2d 386, 390-91 (2d Cir. 1970) the Court found that “a defendant who spoke no English (... ..) was not sufficiently ‘present’ to satisfy the dictates of the Sixth Amendment”

As upheld by the courts, there can be no due process, no effective assistance of counsel, no confrontation of witnesses, without the services of a competent interpreter. In fact, having a person who does not provide a full and accurate interpretation is tantamount to having no interpreter at all. The inability to understand a proceeding in which a person is facing criminal charges has been compared to a Kafkaesque experience, *United States v. Desist*, 384 F.2d 889, 897 (2d Cir. 1967), *aff'd*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969).

To require that any interpreter admitted to work in court first complete an online orientation course would be an important and complementary step stt to insuring, first and foremost, that an interpreter has the skills and ability required to provide true access to justice for the non-English and Limited English speakers coming before the Kansas courts.

Neither should this orientation requirement (R1705a) be waived simply because an interpreter provides services remotely. A web based orientation can easily be accessed by interpreters regardless of their location. Additionally, in keeping with best practices, interpreters should only provide services remotely in emergency or last resort situations, not as a standard means of providing language access.

IV. Suggested Alternative Remedies

The linguistically disadvantaged populations who come before the Kansas courts deserve the same constitutional protections as the hearing impaired who receive the services of qualified sign language interpreters and the English-speaking populations who require no interpreters. Equal access to justice can only be achieved by providing fully competent interpreters who have demonstrated their level of proficiency through criterion-referenced performance testing.

The State of Kansas can offer reciprocity to interpreters who have already been certified by other states, are federally certified and/or certified by NAJIT, and Kansas can also adopt the testing instruments already developed by NCSC [see: https://www.ncsc.org/data/assets/pdf_file/0026/38087/NCSC-State-Court-Interpreter-Testing-Desk-Reference-Manual-rev-May-2020.pdf.]

Only the use of a certified interpreter can ensure that a non-English speaking person coming before the court is linguistically present, thus making it possible for judges to make a fair determination of the facts. The State of Kansas currently has four federally-certified judiciary interpreters for Spanish, and there are many others in neighboring states. Additionally, NAJIT is always willing to assist the courts in locating duly certified interpreters.

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Kansas is one of only a handful of states that currently does not offer its own state credential for judiciary interpreters. Certifying interpreters who work in court is a clear sign of a state's recognition of the important role these professionals play in the administration of justice. It is also a clear indication that a state is committed to providing language access and language justice for its linguistic minorities.

We hope the State of Kansas and its Honorable Judicial Branch will reconsider Proposed Rule 1705, and include essential language conducive to a credentialing program for the state of Kansas that is consistent with current standards for judiciary interpreters.

We thank you for your attention and place ourselves at your disposal for any further questions you may have regarding this matter.

Sincerely,

The NAJIT Board of Directors