WHO SHOULD PAY FOR

PROCEEDINGS INTERPRETATION

FOR CRIMINAL DEFENDANTS?

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This document represents the opinions of its author and does not necessarily reflect the official policy or opinions of the Administrative Office of the Courts. The author's purpose is to provide background information on this controversial topic.

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SUMMARY OF THE PERTINENT NEW JERSEY CASE LAW

In State v. Karaarslan, 262 N.J. Super. 123 (Law Div. January 6, 1993),[1] the Somerset County Public Defender moved to compel the county to pay for an interpreter to be seated next to the defendant, an indigent Turkish-speaking criminal defendant, in accordance with the defendant's rights under the Sixth Amendment. Judge Imbriani held that the cost of providing the interpreter next to defendant during the trial was to be borne by the Public Defender rather than the county. He concluded that Title 2B's provisions regarding court interpreters did not intend to change practice in Somerset County at the time, which was understood to be that the Public Defender was responsible to provide such interpreting services.

The case follows in the tradition of two other cases. The first was State v. Linares, 192 N.J. Super. 391 (Law Div. October 7, 1983).[2] The Office of the Public Defender in Essex County sought reimbursement for proceedings interpreting it had provided a defendant it represented during a criminal trial. The trial judge, Edwin H. Stern, denied the Public Defender's motion and preserved the status quo in Essex County.

The other was State v. Kounelis, 258 N.J. Super. 420 (App. Div. July 27, 1992).[3] Eftatios Kounelis appealed his conviction of first degree armed robbery and two lesser crimes on the grounds that his right of confrontation had been denied since no interpreter provided proceedings interpreting during the trial. The conviction was reversed and the Appellate Division held that in such cases the court should determine whether a defendant can afford an interpreter. If so, the court should delay the proceeding and give the defendant brief time to bring in his own interpreter. If not, the court should appoint one (presumably at county expense) to assist the defendant in his own defense.

CLARIFICATION OF TERMS

It is essential that the four pertinent dimensions of interpreting be clearly defined and distinguished. These concepts have emerged over the past twenty years and are widely used.[4]

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[1]The opinion is appended as Exhibit A.

[2]This opinion is appended as Exhibit B.

[3]This opinion is appended as Exhibit C.

[4]"B.G. Morris, "The Sixth Amendment's Right of Confrontation and The Non-English Speaking Accused," 41 FLA. B.J. 475 (1967); W.J. Perez, "Constitutional Law: Translators: Mandatory for Due

Process," 2 CONN. L. REV. 163 (1969); "Right to an Interpreter [Note]," 25 RUTGERS L. REV. 1970); W.B.C. Chang and M.U. Araujo, "Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant," 63 CAL. L. REV. 801 (May 1975); F.R. Zazueta, "Attorneys Guide To The Use of Court Interpreters, With An English And Spanish Glossary Of Criminal Law Terms," 8 U.C. DAVIS L. REV. (1975); A.J. Cronheim & A.H. Schwartz, "Non-English Speaking Persons in the Criminal Justice System: Current State of the Law," 61 CORNELL L. REV. 1976); J.B. Safford, "No Comprendo: The Non-English-Speaking Defendant and the Criminal Process," 68 J. OF CRIM. LAW & CRIM. 15 (1977); G. Bergenfield, "Trying Non-English Conversant Defendants: The Use of an Interpreter," 57 OREGON L. REV. 549 (1978).

(1) **Record interpreting**. In record interpreting (which has sometimes been called "witness interpreting"), the interpreter is responsible for enabling the court and the parties to conduct business that is **on the record**. The classic example is testimony by a sworn witness. When a witness cannot speak English, an interpreter is required to enable that witness to testify. What the interpreter says in English is evidence, not what the witness said in the other language. However, the concept of witness interpreting is broader since it applies to any discourse between or among interlocutors, one of whom is non-English-speaking, which is on the record, e.g., voir dire of a criminal defendant's plea of guilty.

Witness interpreters are officers of the court whose allegiance is to the court and must perform their duties with total neutrality and impartiality and absence of bias or conflict of interest.

(2) **Proceedings interpreting**. When any person who is involved in a case before a court is present, proceedings interpreting is performed to give that person access to the proceeding. The general legal concept here is rooted in constitutional rights of equal protection and due process: a litigant (or the parent of a minor litigant) cannot meaningfully be present unless proceedings interpreting is supplied. Proceedings interpreting consists of the simultaneous interpretation into the litigant's language of everything that is said in the courtroom so that the litigant hears everything he or she would have heard had he or she been an English-speaking person.

The fundamental concept here is that non-English-speaking litigants should have full and equal access to proceedings that affect them. However, the concept involves additional features in the context of criminal matters. The Sixth Amendment right of confrontation can be exercised only to the degree that the non-English-speaking defendant hears through interpretation the testimony of the state's witnesses.

As with record interpreting, proceedings interpreters are officers of the court whose allegiance is to the court and must perform their duties with total neutrality and impartiality and absence of bias or conflict of interest.

(3) **Defense interpreting**. This function of interpreting applies strictly to the **criminal** context and is provided to assure criminal defendants their Sixth Amendment right to effective assistance of counsel. Hence it covers communications between counsel and defendant and is of necessity a part of the adversarial process and is probably (there is no case law on this yet) protected by the attorney-client privilege.

(4) **Party interpreting**. This function applies strictly to non-criminal matters since civil parties have no constitutional guarantee of assistance of counsel. The function here is merely to enable a litigant in a civil matter to communicate with his or her counsel. As with defense interpreting, this too is part of the adversarial process and is theoretically protected by the attorney-client privilege.

SUPPORT FOR PROVISION BY THE COURT OF PROCEEDINGS INTERPRETING SERVICES

In all types of cases

Under these definitions and perspectives, i
the Judiciary's responsibility to provide (which
coordinate and pay for) record and proceedings i
and the Bar's or the clien
responsibility to provide defense and party inte
services.

There are many justifications for the policy position requiring "the court" to provide proceedings interpreting in criminal matters. For the purpose of this paper, "the court" implies the following funding sources: (1) county funding for each county's budget for the Superior Court, (2) municipal funding for each Municipal Court, (3) state funding for General Equity (which was exempted from county funding under Title 2B since it was a state-funded part of Superior Court), and, (4) effective January 1, 1995, state funding for all of Superior court.

Before identifying the justifications, the prima facie ambiguity of the statute in question, N.J.S.A. 2B:8-1, should be noted. It provides the following:

> Each county shall provide interpreting services necessary for cases from that county in the Law Division and the Family Part of the Chancery Division. A county may provide interpreting services through the use of persons hired for that purpose. If interpreters are employed, they shall be appointed and shall perform their duties in the manner established by the Chief Justice, and shall serve at the pleasure of the appointing authority. For the purpose of determining their compensation, these employees shall be considered county employees.

Judge Imbriani correctly observed in Karaarslan, "The history of N.J.S.A. 2B:8-1 is not very revealing of its intent" (at 126). Judge Imbriani's conclusion may have been supported by the evidence that was available to him and he is not alone in his reading of Title 2B. At least one Trial Court Administrator is known to hold a similar view and, given the lack of absolute precision in the wording of the law, it is not surprising that reasonable people can find it vague and not dispositive.

1. Unnecessarily Narrow Framing of the Issues

Sometimes the issue is too narrowly framed. The clearest example comes from Karaarslan. The opinion first argues that the holdings in three cases "strongly suggest that costs for interpreters shall similarly be borne by the Public Defender" (at 125). The three cases cited affirmed that the Public Defender must bear the costs of (1) retaining an expert on Battered Women's Syndrome (Matter of Cannady, 126 N.J. 486 [1991]), (2) securing trial transcripts for an appeal (State v. Arenas, 126 N.J. 504 [1991], and (3) retaining a psychologist to evaluate the defendant to determine whether he fell within the purview of the Sex Offender Act (Matter of Kauffman, 126 N.J. 499 [1991]).

The opinion relies on the language of State v. Kounelis, 258 N.J. Super. 420 (App. Div. 1992), which held that an interpreter must be provided to a defendant at counsel table during a criminal trial in order to protect "his rights under the confrontation and assistance of counsel provisions of our federal and state Constitutions" (at 426). This position is widely accepted and not in dispute.

However, this approach is too narrowly drawn. The issues at stake here are broader than mere assurance of Sixth Amendment rights of confrontation and assistance of counsel. Providing an interpreter at counsel table to give a criminal defendant access to the proceedings brought by the State against him is distinguishable from representing the defendant. It is widely understood that the legal function of an interpreter during such situations is not only to assure Sixth Amendment rights but also, and more broadly, to give the defendant access to the proceedings, i.e., to be present at one's own trial. Under this view, the more fundamental right at stake here is to have equal access, which flows from equal protection of the law and due process.

The larger issue of providing access to the proceedings supersedes the narrow issue of the defense process. The court must be responsible for making itself accessible to linguistic minorities. This assures that every criminal defendant (as well as civil parties) has full and equal access to the proceedings just as do English-speaking defendants. This has nothing to do with the Public Defender's role or responsibilities.

This is the position taken by the Supreme Court Task Force on Interpreter and Translation Services. By means of recommendations 7 (proposed legislation) and 8 (uniform standards), the Task Force recommended that both witness/record interpreting **and** proceedings interpreting be coordinated and paid for by the Judiciary.

EQUAL ACCESS TO THE COURTS FOR LINGUISTIC MINORITIES 187-190, 208-216 (1985). For the proposed standards which begin at page 1

Implicitly, it is also the policy of the Supreme Court. The Court endorsed in 1986 and again in 1993 the principle "that the courts should be equally accessible to all persons, regardless of their ability to communicate in English."

2. Direct Evidence of the Intent of **N.J.S.A.** 2B:8-1

The process leading up to the final draft of Title 2B clearly intended for the bill to require the court to provide proceedings interpreting in all cases in Superior Court, not just criminal. The Law Revision Commission was aware of both the work of the Supreme Court Task Force on Interpreter and Translation Services and the Court Interpreter Act. In a 1989 letter, the Executive Director of the Law Revision Commission presented two possible options for how the Commission would handle court interpreting. The comment regarding Option B explicitly referred to A2089, one of the versions of the Court Interpreter Act. At some point during the development of Title 2B, the Executive Director of the Commission called David P. Anderson, Jr., to explore whether the text of Option A was satisfactory to the AOC. During the course of that conversation, which involved input from Robert Joe Lee as well, Mr. Anderson and Mr. Cannel agreed that it was intended to cover both record and proceedings interpreting.

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of the Appendix, see particularly §§1.0.1, 1.1.8, 1.1.16, 1.1.18, 1.2.3, and 1.2.20. For the proposed statute which begins at page 49 of the Appendix, see §4 (at p. 51).

Press release re permanent program to ensure equal access to justice for linguistic minorities approved by the New Jersey Supreme Court (June 19, 1986). This endorsement was formalized by the Supreme Court in the "Action Plan on Minority Concerns" 9 (August 16, 1993): "The Court reiterates its position that the courts and their support services shall be equally accessible for all persons regardless of the degree to which they are able to communicate effectively in the English language."

Letter from John M. Cannel to Robert Lipscher (January 6, 1989). This is attached as Exhibit D.

This was confirmed in an interview with David P. Anderson, Jr. (November 29, 1993). However, neither Mr. Anderson nor Mr. Lee can remember with certainty whether the conversation was with Mr. Cannel calling on behalf of the Commission or Brian Kelley, the staff person in Governor Florio's office who was reviewing the legislation on behalf of the Governor to make sure it met the Judiciary's needs. For the purposes of this analysis, whether representatives of the AOC spoke to Mr. Cannel or Mr. Kelly is not significant. The point is that the bill was clearly understood by both the Judiciary and either the Legislature or

3. Policy Developments that Affected Development of **N.J.S.A.** 2B:8-1

Title 2B:8-1 should be seen in the context of movements to reform court interpreting that began in New Jersey twenty-three years ago, all of which support the court's obligation to provide and pay for proceedings interpretation in all parts of Superior and Municipal Court. These precedents include publications in New Jersey legal literature (including the final reports of four task forces appointed by the New Jersey Supreme Court), standards developed at the request of the Supreme Court, and statutory provisions for one sub-group of linguistic minorities.

Precedents in New Jersey Legal Literature

In a note published at 25 RUTGERS L. REV. 145 (1970), the legal rationale for proceedings interpreting was first developed. The author proposed a "Model Act for the Appointment and Use of Interpreters in Criminal Trials" to resolve the shortcomings in protecting the rights of linguistic minority defendants, the pertinent part of which provided the following:

> When it appears that an individual accused of crime may be unable to testify, to understand the testimony of the English-speaking witnesses, to communicate with his attorney and aid in his own defense, because of a lack of fluency in and comprehension of the English language, the trial court must appoint a qualified, impartial interpreter whom the accused can understand and who can understand him, to interpret the proceedings for the accused as a witness and at the defense table, and to otherwise assist him and his attorney in presenting the defense. (at 168)

The theme was taken up in 1974 by the Glassboro Project, a study authorized by the Administrative Office of the Courts and funded by the State Law Enforcement and Planning Agency (SLEPA). The project's reports assumed that court interpreters provided by the judiciary would provide proceedings interpreting throughout all phases of criminal proceedings, including trials. The reports were

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the Governor's office to include proceedings interpreting.

Leonard J. Hippchen, Chairperson of the Department of Law/Justice at Glassboro State College, was Project Director. The project's findings and recommendations were summarized in L.J. Hippchen, "Development of a Plan for Bilingual Interpreters in the Criminal Courts of New Jersey," 2 JUST. SYS. J. 258 (1977). The pertinent publications emerging from the project itself in documents it submitted to the Administrative Office of the Courts were S.B.

distributed to all Trial Court Administrators in January 1976 on an informational basis. Another memorandum to the SLEPA officer monitoring the project indicated that it had been sent to all Trial Court Administrators "for implementation in court interpretation matters...." Apparently the reports were never considered or adopted by the Supreme Court and the degree to which the AOC monitored implementation of the report is unknown.

In 1978, Gerard J. Gilligan and William J. Bryers published "A Model Court Interpreters Act" in a legal journal published in New Jersey. Their model act called for the courts to provide and pay for proceedings interpreting. In the same issue, Marilyn R. Frankenthaler and Herbert L. McCarter published "A Call for Legislative Action: The Case for a New Jersey Court Interpreters Act" (at 125). They reviewed recent developments in the federal courts and California and referred approvingly to the provision in the federal bill that proceedings interpreters be provided by the courts.

Yeldell, GUIDE TO NEW JERSEY COURTS AND RELATED DEPARTMENTS IN USE OF BILINGUAL COURT INTERPRETERS 12-13 (December 1974); S.B. Yeldell, THE HANDBOOK OF STANDARDS FOR BILINGUAL INTERPRETERS IN NEW JERSEY 34-35 (December 1974); A STUDY OF THE PROBLEMS AND NEEDS OF NEW JERSEY COURTS FOR BILINGUAL COURT INTERPRETERS 8-10 (January 1975), which includes two reports: #1, A. Martin, "Survey of Problems and Needs of New Jersey Courts for Bilingual Court Interpreters," which begins at page 12; and #2, F. Martinez, "A Comprehensive State-Wide Plan for Use of Bilingual Court Interpreters [sic] in New Jersey," which begins at page 26.

Memorandum from Richard L. Saks to All Trial Court Administrators (January 21, 1976).

Letter to John H. C. West from John P. McCarthy, Jr. (January 23, 1976).

3 SETON HALL LEG. J. 228 (Summer 1978).

See especially §7, Costs, at page 257.

The Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978), approved by President Carter on October 28, 1978.

Court Interpreter Act, A.B. 2400, CAL. GOVT. CODE §§68560-68564 (West Supp. 1979), approved by Governor Brown on May 24, 1978.

Id. at 131.

Precedents of New Jersey Supreme Court Task Forces

The Supreme Court Task Force on the Improvement of Municipal Courts insisted in 1985 that the court is responsible for providing and paying for interpreters, including proceedings interpretation. The AOC has been implementing this provision ever since.

The Supreme Court Task Force on Interpreter and Translation Services recommended in its 1985 final report that proceedings interpretation be provided and paid for by the court in all proceedings, criminal included. The Task Force recommended all interpreting services be paid out of state funds.

The next committee to address the problem was the Supreme Court Task Force on Drugs and the Courts. It observed in 1991:

> Defendants' rights to understand the proceedings against them are critical in the criminal justice process. Improvements need to be made in the services provided defendants who do not speak English. Interpreter and translator services should be routinely available in the courts; ... and interpreters who provide interpreting services to defendants must be screened, to ensure they pass basic levels of competency.

In 1992 the Supreme Court Task Force on Minority Concerns recommended that the recommendations of the Task Force on Interpreter and Translation services be implemented and that a qualified interpreter be provided for every person who needs one.

Since 1985, the AOC has informally advised the counties——notwithstanding Linares, Kounelis, and Karaarslan——to provide all proceedings interpreting services for all cases, not just criminal. This position has been based on the recommendations of these task

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REPORT OF THE SUPREME COURT TASK FORCE ON THE IMPROVEMENT OF MUNICIPAL COURTS 151-152 (June 28, 1985).

See note 4, supra.

Recommendation 8, FINAL REPORT 33 (April 1991).

Recommendation #3, FINAL REPORT 66-68 (June 1992).

Recommendation #35, id. at 265. While one might argue that including this task force in this discussion is anachronistic, this is only partially true. While the FINAL REPORT was published in 1992, an INTERIM REPORT containing similar material was published in August 1989. See Finding #3 and Recommendation #3 at 30-31.

forces, the Supreme Court's guiding policy, and the standards sought by the Supreme Court.

Development of Standards Requested by the Supreme Court

On November 4, 1985, the Supreme Court, replying to specific recommendations of its Task Force on Interpreter and Translation Services, approved a process leading to the approval and promulgation of standards designed to improve the quality and uniformity of interpreted proceedings. The process was to include a review of the standards proposed in the Appendix to the Task Force's final report by judges, interpreters, and court administrators and a submission of the final draft to the Supreme Court in early spring 1986.

During 1986 and the first half of 1987 AOC staff revised the standards that the Task Force had developed. In July 1987, the revised draft was distributed to Assignment Judges, other judges (both Municipal and Superior Court) and key managers in the Judiciary, court interpreters, and major users of court interpreting services (e.g., Public Advocate/Defender, Attorney General/Prosecutors, Legal Services, and the Bar). After considerable input from these sources, a final version was edited and produced in August 1988. The standards, following the lead of the Supreme Court Task Force on Interpreter and Translation Services, provided that all record/witness and proceedings interpreting (as well as other types of interpreting in certain situations) be coordinated and paid for by the Judiciary. Since that time the "Proposed Standards for Interpreted Proceedings" have been distributed to new judges (both Municipal and Superior Court) at each orientation, to any other judge, court administrator, or attorney upon request, and to all new interpreters trained at seminars sponsored by the AOC.

A revised version was developed in July 1993 and is now undergoing further editing by the Court Interpreting, Legal Translating, and Bilingual Services Section in preparation for a final review by the trial courts. It still provides that the court

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Memorandum to Robert D. Lipscher, Theodore J. Fetter, Earl Josephson, and Robert Joe Lee from Steven D. Bonville re Report of the Task Force on Interpreter and Translation Services -- Supreme Court's November 4, 1985 Actions (November 6, 1985).

A copy of this version is attached as Exhibit E.

See §§3:21, 3:22, and 3:31.

This version is attached as Exhibit F.

provide and pay for all interpreting services for witness/record and proceedings interpreting.

The Supreme Court recently directed the AOC to expedite completion of these standards.

Statutory Provisions for Deaf and Hearing Impaired Persons

In 1983, the Legislature passed a bill whose purpose was "to secure the rights of hearing impaired persons who, because of impairment of hearing or speech, are unable to readily understand or communicate spoken language and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them." The bill required every court to appoint and pay for certified sign language interpreters for hearing-impaired persons "throughout the proceedings" as follows:

> a. In any case before any court or grand jury in which a hearing impaired person is a party, either as a complainant, defendant or witness, or as hearing impaired parent of a juvenile.

In order to implement the statute fully, the Administrative Director of the Courts issued Directive #10-84 on April 12, 1985. In that directive he wrote the following:

> 1. The court is required to appoint a 'qualified interpreter' to assist any hearing impaired person who is a witness or party as a complainant, defendant, or as hearing impaired parents of a juvenile throughout all proceedings before any court (including motor vehicle cases appearing in Municipal Courts) and in preparation with counsel during those proceedings. (at 1)

The Administrative Director reminded all judges of the obligation to provide sign language interpreters universally by issuing Directive #6-86 on May 15, 1987.

The Legislature clearly intended the Judicial Branch to provide and pay for proceedings interpreters. The Supreme Court Task Force on Interpreter and Translation Services thought that it was inappropriate, based in part on equal protection grounds, to

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§3:2.

ACTION PLAN ON MINORITY CONCERNS 9 (August 16, 1993).

L. 1983, c. 564 (N.J.S.A. 34:1-69.7).

N.J.S.A. 34:1-69.10.

provide one class of linguistic minorities (i.e., deaf and hearing-impaired persons) with such a panoply of rights that were denied another class of linguistic minorities (i.e., persons with a mother tongue other than English). Accordingly, the Court Interpreter Act that the Task Force proposed was an amendment of the statute for deaf and hearing-impaired persons that would extend the scope of the bill to all linguistic minorities.

New Jersey Court Interpreter Act

The development of the standards was delayed in the 1985-1988 period due to the AOC's discovery of the fact that a Court Interpreter Act had been introduced in the New Jersey Assembly on September 12, 1985. That bill provided that the Supreme Court "promulgate standards governing the practice of interpreting in all courts" (§12). Furthermore, §3 of the bill called for the state to fund all witness/record interpreting **and** proceedings interpreting and §22 called for appropriating $870,000 from the General Fund to cover all interpreting services for both Superior and Municipal Courts.

The Court Interpreter Act, never having passed both houses of the Legislature, has been reintroduced in every legislative term since. Each version of the bill, including the one most recently before the Legislature, has preserved the provision that the state provide and pay for proceedings interpreting. Each bill was

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"Proposed Act Concerning the Selection, Qualification, Employment and Supervision of Court Interpreters, and Amending, Repealing and Supplementing Various Portions of the Statutory Law," in Appendix to the Final Report 51 (May 22, 1985).

Assembly No. 4175, introduced by Assemblymen Ranieri, Rod, LaRocca, Cuprowski, Vainieri and Doria.

"The appointing authority shall appoint a qualified interpreter and, if needed, an intermediary interpreter to assist all persons who are unable to readily understand and communicate in the English language throughout the proceedings and in preparation with counsel..."

It passed the Assembly twice, once in 1985 and again in 1989.

Note: it has not yet been determined whether the bill has been introduced in the present session of the Legislature.

Assemblyman McEnroe introduced each of the successive versions of the bill: Assembly No. 1911 in the 1986 legislative session, Assembly No. 2089 in the 1988 legislative session, Assembly No. 1787 in the 1990 legislative session (joined by Assemblyman

supported by letters, testimony, or both from the Administrative Office of the Courts.

4. Precedent of Practices in New Jersey and Other Jurisdictions

The second major reason that Title 2B should be interpreted as requiring the counties to provide proceedings interpretation services is that this was the common practice in most courts at the time, not only in New Jersey, but across the United States. In this section the history of the practice before, during, and after the passage of Title 2B will be reviewed and practices around the country will be reported.

Historical Background in New Jersey

First, providing and paying for proceedings interpreters was the presumptive policy of the Judiciary for all criminal matters, not just those involving indigent defendants, from at least 1971. The Assignment Judges discussed this very question at a CJ/AJ meeting on May 21, 1971. The consensus of opinion was reported as follows:

> Interpreters may be provided from a county list of interpreters in civil cases but at the expense of the party using them when they are not salaried. In criminal cases the county is to bear the expense of the interpreters. An interpreter should be provided for the complete trial of a defendant who does not speak English.

Menendez), and Assembly No. 1352 for the 1992 session.

The court made the following observations in Karaarslan: "Thus the amendment was not intended to change prior practice with respect to who should pay for an interpreter. A survey of the practices throughout the State reveals a wide disparity in this matter. Some provided county-paid interpreters for a few major languages, but most, like Somerset County, paid for interpreters in criminal cases involving indigents only when non-English speaking witnesses testified at trials or court hearings or when indigent defendants in criminal cases were arraigned, attended pretrial conferences, pleaded, or were being sentenced. The court is unaware of any county that now provides an interpreter at county expense to be seated during the trial next to the defendant." At 126-127

Memorandum to the Chief Justice and Assignment Judges, "Summary of Meeting on May 21, 1971" (June 14, 1971), published in COMPILATION OF ADMINISTRATIVE DIRECTIVES FOR NEW JERSEY JUDGES 123.

Second, although a Law Division opinion held in 1983 that this statement from the CJ/AJ meeting was not a binding policy, a survey conducted by the Task Force on Interpreter and Translation Services surveyed the trial courts in 1983 found a very different situation. The survey documented five different practices:

1. Five vicinages (Camden, Hudson, Middlesex, Passaic, and Gloucester/Cumberland/Salem) always provided proceedings interpreters to all defendants, regardless of indigency status;
2. Five vicinages (Essex, Mercer, Monmouth, Somerset/Hunterdon/Warren, and Ocean) expected the defense to always provide proceedings interpreters;
3. Three vicinages (Burlington, Morris/Sussex, and Union) provided proceedings interpreters to indigent defendants, but expected the defendant to do so when counsel was privately retained;
4. One vicinage (Bergen) left the matter up to the individual discretion of the trial judge on a case-by-case basis; and
5. One vicinage (Atlantic/Cape May) had the following practice: the county paid for the interpreter if the judge requested it, the State paid for the interpreter if the Public Defender requested it, and the party paid if a privately retained attorney requested it.

In fact, several of the court administrators surveyed felt that it was clear that the conclusion reached at the CJ/AJ meeting was dispositive and that no additional policy on the matter was needed. They believed it was self-evident that it was the court's obligation to spend county funds to supply proceedings interpreters in all criminal matters at all times.

Third, Karaarslan argues that the Legislature could not have intended to impose this cost on the counties because it would result in "a huge financial burden upon counties" (at 127). It may have been a larger financial burden **for some counties, most notably the county in which the opinion originated**, but it was clearly a burden that the courts in many if not most counties have long believed they should pay and, accordingly, have long been willing to pay.

State v. Linares, 192 N.J. Super. 391, 398 (Law Div. 1983).

BACKGROUND REPORT #7: VICINAGE-LEVEL ADMINISTRATION OF INTERPRETING AND TRANSLATION SERVICES: A SURVEY OF THE TRIAL COURT ADMINISTRATORS 65-67 (August 22, 1983).

Id. at 66.

In the early 1980s a great majority of interpreted proceedings in criminal court occurred in counties where this was the common practice. According to data collected by the Task Force on Interpreter and Translation Services, there were 681 proceedings involving interpreters in 1982. Most (n=393) occurred in just these five vicinages, accounting for 58% of all criminal courts. If the vicinages which routinely provided proceedings interpreters to indigent defendants are factored in assuming that virtually all defendants are indigent defendants, then another thirty-seven cases would be added, accounting now for a total of 63% of all proceedings.

Contemporary Practice in New Jersey When Karaarslan Was Written

Karaarslan refers to a "survey of the practices throughout the State" but provides no identification of the author, date, or method followed in the survey. Since Karaarslan concluded that it was unaware of a single county where proceedings interpreters were being provided at county expense, the survey could not have been very thorough or reliable. This was exactly what the Assignment Judges had agreed to do years before, at least five vicinages were doing so in 1983, the AOC had been advocating this since the publication of the final report of the Task Force on Interpreter and Translation Services in 1985, and at least one-half of the remaining ten vicinages had since shifted to this practice by the time Karaarslan was written early in 1993.

BACKGROUND REPORT #9: THE PRACTICES OF INTERPRETATION AND TRANSLATION IN NEW JERSEY'S COURTS, THE JUDGES' POINT OF VIEW: A SURVEY OF THE TRIAL JUDGES 117 (December 19, 1983).

This is based on the knowledge of the system gained through the ordinary duties of the Court Interpreting, Legal Translating, and Bilingual Services Section at the AOC, not on an actual survey. To the best of the Section's knowledge, all of the vicinages reported by the task force to be providing proceedings interpreters to all criminal defendants have continued to do so throughout the 1980s and 1990s, and the following vicinages have since commenced doing so: Mercer, Monmouth, Ocean, Morris/Sussex, and Union.

Contemporary Practice Nationwide When Karaarslan Was Written

Proceedings interpretation in criminal trials is almost universally provided and paid for by the Judiciary. In the Federal courts, the courts provide all interpreters, including proceedings interpreters, for all parties in all "criminal and civil cases initiated by the United States...." That obviously includes proceedings interpreting.

This is also true in the state courts. The following states provide and pay for proceedings interpreting in criminal trials: California, Connecticut, Illinois, Massachusetts, New Mexico, New York, Pennsylvania, Texas, and Washington. This is also the

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Court Interpreters Act, Pub. L. 95-539, 92 STAT. 2040 §1827(d) (October 28, 1978).

Telephone interview with Pat Martin, Staff Assistant, Interpreter/Translation Services, Los Angeles County Superior Court (November 29, 1993).

Telephone interview with Frank L. Cassello, Deputy Director, Court Operations, Office of Chief Court Administrator (November 29, 1993).

Telephone interview with Cristina Ruiz, Coordinator of Court Interpreting Services, Circuit Court of Cook County (November 30, 1993).

Telephone interview with Denise Fitzgerald, Administrative Assistant to the Coordinator of Court Interpreting Services, Office of the Chief Court Administrator (November 29, 1993).

Telephone interview with Louise Baca, Management Analyst, Administrative Office of the Courts (November 30, 1993).

N.Y. State Office of Court Administration, COURT INTERPRETER MANUAL 1 (September 1992); Telephone interview with Michael S. Miller, Director of Personnel, Unified Court System (November 30, 1993).

Telephone interviews with H. Paul Kester, Court Administrator, Bucks County Court of Common Pleas, Doylestown (December 1, 1993); David Lawrence, Chief Deputy Court Administrator, Philadelphia County Court of Common Pleas, Philadelphia (November 30, 1993); and Bob McCarthy, Deputy Court Administrator, Allegheny County Court of Common Pleas, Pittsburgh (December 1, 1993).

Telephone interview with Robert Wessells, Courts Manager, Harris County [Houston] Criminal Courts at Law (November 30, 1993).

practice in other jurisdictions with large volumes of interpreted proceedings: the District of Columbia; Dade County, Florida; Denver County, Colorado; Arizona Superior Court in Maricopa County and Pima County. The only state contacted which does not have this policy is Rhode Island, but that state is moving toward adopting this policy.

Practices Since Karaarslan

Karaarslan has had little practical impact on the subject since it was published. Counties have not changed their practices on the basis of this opinion. A 1994 estimate of current practices statewide in the criminal courts suggested that approximately 95% of the costs for full provision of proceedings interpreting and all other forms of interpreting in criminal matters in Superior Court were already being paid for by the counties.

Other Subsequent Developments

Since Karaarslan was handed down, there has been one major development that further illustrates the national trend in this direction. The National Center for State Courts, with financial

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Telephone interview with Joanne I. Moore, Esq., Court Specialist, Administrator for the Courts (November 29, 1993).

Telephone interview with Connie Landró, Coordinator of Interpreters, Superior Court of the District of Columbia (November 29, 1993).

Telephone interview with Ana I. Shore, Supervisor of Interpreters and Translators, 11th Judicial Circuit [Dade County] (November 30, 1993).

Telephone interview with Isabel Houlbreque, Staff Assistant/Court Interpreter (November 30, 1993).

Telephone interview with Sarah Shew, Judicial Administrator (November 30, 1993).

Telephone interview with Sylvia Hood, Secretary to the Chief Court Interpreter (November 30, 1993).

Telephone interview with Holly Hitchcock, Judicial Education Officer, Rhode Island Supreme Court (November 30, 1993).

Memorandum to Theodore J. Fetter from Robert Joe Lee (May 10, 1994).

support from a grant from the State Justice Institute, is completing a major project entitled "Court Interpretation: Challenge for the 1990s." One of the major products of the project is a new model court interpreter act. The present draft of the model act includes the following provisions which, in combination, make it clear that proceedings interpreting should be provided by the courts:

> §4. Certified Interpreter Required
>
> A. When the appointing authority determines that a principal party in interest or witness has a limited ability to understand and communicate in English, an interpreter shall be appointed.
>
> B. When the appointing authority determines that an interpreter is needed for a party or witness, a certified interpreter shall be appointed.
>
> §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.

Very soon, then, the model act promulgated by the National Center for State Courts will call for courts to provide proceedings interpreting in all matters.

CONCLUSION AND RECOMMENDATIONS

Karaarslan called into question the movement that was implementing the goal of assuring equal access to courts for all linguistic minorities inspired by numerous policy initiatives and legislative acts. Until the dilemma caused by the opinion is resolved, a question mark hangs over everyone: the counties that

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The author of this paper was a member of the national advisory board for the project. The quotations that follow are from an undated, unpaginated copy of the act that is circulating among members of the advisory board. According to William E. Hewitt, the Project Director at the NCSC, the anticipated completion date for the project is June 30, 1994.

However, it must be noted that the commentary to §8 presently reads: "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."

have always provided proceedings interpreters, the counties that in the last two decades have chosen to adopt the practice, the counties that were about to commence the practice when the opinion was published, and the future obligation of the Judiciary under the State assumption of county costs. It is an issue of major policy significance that first surfaced in Linares and was unfortunately overlooked in Kounelis. As with Linares, it has the effect of legalizing a practice that was the traditional way of doing things within a given county without regard to the larger policy implications, the practices in the majority of counties in the state, or the practices of virtually all jurisdictions outside New Jersey.

The following steps are recommended for resolving the problem:

1. Issue a directive that requires practices around the state in place when **Karaarslan** was published to be preserved through December 31, 1994. At a minimum, counties who may have been tempted to abandon the practice with the publication of Karaarslan should be instructed not to cease that practice. Ideally, though, counties that had not provided proceedings interpreting should be instructed to being to move toward that position and commence paying for proceedings interpreting where possible.

2. Include in the forthcoming Standards for Interpreted Proceedings a policy that clearly delineates that the courts are responsible for providing proceedings interpreters, but delay the effective date of this provision to January 1, 1995. When the State assumes the responsibility for paying all court costs currently borne by the counties, most of the issues before the court in Karaarslan will become moot. It will no longer be a dispute between a county government and a state-funded agency (i.e., the Public Defender). Instead, it will be a matter of how funds being spent at the state level should be distributed and who should be responsible for providing the service. Except for the county-State conflict, there is no compelling argument that the Public Defender should provide and pay for proceedings interpretation.

POSTSCRIPT

At no point did either the trial judge in Karaarslan or the Appellate Division in Kounelis consult the Administrative Office of the Courts or the pertinent available literature (e.g., law journal essays, Supreme Court task force reports, etc.). On the one hand judges must rely primarily on the arguments put before them. However, the Chief of the Court Interpreting, Legal Translating, and Bilingual Services Section at the AOC has been contacted by both trial and appellate judges to obtain facts and expert opinions in other cases. This practice of making decisions without

contacting available experts within the Judiciary leaves the Judiciary vulnerable to precedent-making actions which are uninformed by developments in New Jersey and elsewhere.

For example, the Appellate Division's opinion somehow failed to consider a statute on the subject, i.e., Title 2B, L. 1991, c. 119, which was approved April 25, 1991. Obviously the statute antedated both the argument (April 6, 1992) and decision (July 27, 1992). Chapter 8 of that bill, as is outlined supra, intended to settle the matter of who pays for interpreters once and for all, but this act was not referenced in the opinion. Furthermore, the opinion revealed no familiarity with the standards that the AOC had been distributing to judges on an advisory basis.