

**In re submission of evidence
originating in a language other than English**

AMENDED PETITION 09 - 03

The Director of State Courts, on behalf of the Committee to Improve Interpreting and Translation in the Wisconsin Courts (“the interpreter committee”), petitions the court to accept this amended petition governing the submission of evidence originating in a language other than English. This petition is made pursuant to the court’s rulemaking authority under Wis. Stat. §751.12 and its administrative authority over all courts conferred by Article VII, §3 of the Wisconsin Constitution. The proposed amendments clarify procedures for submission of translated evidence by creating Wis. Stat. §887.27 and Wis. Stat. §901.08. They also propose a related addition to translation of official court forms under Supreme Court Rule (SCR) 70.155.

Procedural history of this petition

On May 26, 2009, the Director of State Courts petitioned this court to make certain statute and rule changes relating to submission of evidence originating in a language other than English. On November 2, 2009, the Honorable Ralph Ramirez, chair of the interpreter committee, presented this petition to the court. Attorney Andrew Chevez, a representative from the Wisconsin Hispanic Lawyers Association (“the WHLA”), also presented and requested additional time to respond to the petition, which this court granted. Written comments were then received from the WHLA and from the Honorable Juan Colas and the Honorable Elsa Lamelas (“the interested judges”).

In a letter dated December 30, 2009, the court asked the interpreter committee to consider the concerns of the WHLA and the interested judges. With regard to the creation of Wis. Stat. §901.08, the WHLA and interested judges asked the committee to address five specific concerns:

- 1) define more clearly the types of evidence that would be governed by this rule;
- 2) clarify that this rule would not mandate a translation in every instance a non-English document or statement was offered as evidence and that this rule would not have an impact on the requirement of the courts to provide interpreters;
- 3) allow more discretion as to whether an alternate translation is always the most appropriate method for addressing objections about the quality of the translation or the qualifications of the translator;
- 4) allow more discretion as to the assignment of payment of a translation; and
- 5) require a more stringent affidavit of the translator.

The interpreter committee agreed that these matters were important to address, although it did not always agree with the solutions proposed by the WHLA and the interested judges. The interpreter committee submits an amended version of this petition with an explanation below.

Specific concerns raised by the commenters

1) Define more clearly the types of evidence that would be governed by this rule. The interested judges suggested that the type of evidence governed by this rule should be limited to “written” evidence. They sought to avoid translating evidence that comes to the court in an unwritten format – for example, an audio tape of a custodial interrogation conducted with the assistance of a Russian interpreter, a 911 call in Spanish, or a video taped deposition of a witness speaking Hmong. Instead, they proposed that when an out-of-court non-English oral statement is

being offered as evidence, the most appropriate practice is for the in-court interpreter to interpret as if it were a “live” non-English speaker testifying, so that a translation would not be required.

However, the interested judges’ proposal is not the standard practice. The interpreter committee surveyed certified interpreters in Wisconsin on this practice of in-court interpretation of oral statements from a video or audio tape. Ten certified interpreters responded and reported that this practice is extremely difficult and that they decline to do it when asked. The responding interpreters reported when they had engaged in this practice, their level of accuracy was greatly diminished, the sound recording was often of poor quality, and the video or audio tape needed to be stopped and started repeatedly which proved to be distracting for the jury and court, as well as stressful for the interpreter. The responding interpreters said the preferred and more accepted method for obtaining the highest level of accuracy is through the production of a transcript and translation of the non-English portions of an audio or video recording.

The problem with the proposal of the interested judges is similar to those presented by Rule Petition 09-05, where the court created an exception to the required reporting rule for audio evidence played during the proceeding, due to the difficulty of accurately reporting them. Just as court reporters find it difficult to make a record of audio tapes as if they were live, it is equally impractical to expect interpreters to interpret audio tapes with the level of accuracy required to ensure due process.

Accordingly, the interpreter committee believes inclusion of the word “written” before “evidence” makes the rule too narrow and may result in the exclusion of oral evidence that would ordinarily be transcribed and then translated. The interpreter committee believes the proposed language which states: “any party seeking to offer evidence translated into English from a language other than English shall be responsible for translating the evidence into written

format...” captures better the intent of the petition which was to provide guidance on the quality of translations of all evidence. The amended petition also includes a definition of “translation” and “translator” to better explain the process of translating. The interpreter committee believes the proposed language and this definition address both the usual translation process (written to written) and the process described above for translating an oral out-of-court statement.

2) Clarify that §901.08 does not mandate a translation in every instance a non-English document or statement is offered as evidence and that this rule will not have an impact on the requirement to provide court interpreters. The interpreter committee agrees with the concerns expressed by WHLA in its correspondence dated December 1, 2009, that the terms “translator” and “interpreter” are used interchangeably throughout the Wisconsin Statutes when referring to duties performed by a court interpreter.¹ The interpreter committee has proposed a comment to Wis. Stats. §901.08 that should preclude reading the rule to require a translation every time a document or statement originating in another language is submitted in evidence. The comment also clarifies that the requirements for court interpretation under Wis. Stat. §885.38 are not affected by the translation rule.

The interpreter committee’s proposal for §901.08 states: “Unless otherwise ordered by the court, any party seeking to offer evidence translated into English from a language other than English shall be responsible for translating the evidence into written format...” The interested judges argue that the words “unless otherwise ordered by the court” create an unintended

¹ Correspondence from WHLA dated December 1, 2009 in fn.3. “See section 102.13(1)(b), Wis. Stats. “The employee is also entitled to have a translator provided by himself or herself present at the examination if the employee has difficulty speaking or understanding the English language.” See also section 887.26(8), Wis. Stats. The translator shall append to all translations the translator’s affidavit that the translator knows English and the language of the witness, and that in making such translation the translator carefully and truly translated the proceedings from English into the witness’s language or from the witness’s language into English, and that the translation is correct.” and sec. 908.01-Annot. “When a person relies on a translator for communication, the statements of the translator are regarded as the speaker’s for hearsay purposes.” citing *State v. Patino*, 177 Wis.2d 348, 502 N.W.2d 601 (Ct. App. 1993).”

presumption instead of judicial guidance. They propose instead that the section state: “The court may require that a writing in a language other than English offered in evidence be accompanied by a written translation of the writing into English...” The interpreter committee believes the words “unless otherwise ordered by the court” is the presumption that was intended and gives judges the authority to order something other than a translation when appropriate. The interpreter committee also believes parties will most likely produce a translation when necessary without waiting for a directive by the court; this rule will provide guidance as to the requirements for doing so.

3) Allow more discretion as to whether an alternate translation is always the most appropriate method for addressing objections about the quality of the translation or the qualifications of the translator. The interpreter committee believes adding the words “may produce an alternate translation or any portion thereof” adequately attends to the interested judges and WHLA’ concern and allows the court to consider alternatives.

4) Allow more discretion as to the assignment of payment of a translation. The interpreter committee believes the party who seeks to offer the evidence should be responsible for paying for the translation unless a non-English speaking litigant’s financial ability to pay for a translation would jeopardize fundamental due process rights. The interpreter committee believes the inclusion of the words “unless otherwise ordered by the court” already allows the court to consider alternatives.

5) Require a more stringent affidavit of the translator. In the original rule, the interpreter committee had proposed the same wording as the translator’s affidavit found in §887.26(8). Based upon concerns by the interested judges and WHLA, the interpreter committee has

modified the language to require a translator to include his or her qualifications to perform the translation and to certify the translation is true and correct.

Other issues addressed by the original petition

In addition to the five issues raised by the commenters, the original petition proposed two other provisions. The WHLA and interested judges did not object to these provisions:

6) Expand the guidance on translation to cover more than depositions taken outside the state. Current statutory guidance on translations is limited to §885.26(8), depositions taken outside the state. To cover all depositions, this rule proposes to renumber §887.26(8) as §887.27 and rename the new section “Depositions, translations of” so it encompasses depositions taken within the state as well.

7) Provide consistent guidance for the affidavit of the translator. Finally, Supreme Court Rule 70.155 sets requirements for official translation of court forms. For the purpose of consistency, this rule should require attachment of the translator’s affidavit attesting to the accuracy of all translations of court forms, in the same manner as §887.27.

The changes requested by the amended petition

Accordingly, the director requests the following changes to the statutes and rules:

1. Wis. Stat. §887.26(8) should be renumbered as §887.27 and renamed to read:

887.27 Depositions, translations of. ~~(8) Translations.~~ When the witness is unable to speak the English language, the judge of the court from which the commission issues may appoint some competent and disinterested person to translate, at the expense of the noticing person, the subpoena, rules, and deposition questions and answers, or any part thereof as may be necessary, from English into the language used by the witness or vice versa; and the translation

shall be transcribed and maintained as part of the deposition transcript. The translator shall append to all translations the translator's affidavit that the translator knows English and the language of the witness, and that in making such translation the translator carefully and truly translated the proceedings from English into the witness's language or from the witness's language into English, and that the translation is correct. A translation under this paragraph shall have the same effect as if all the proceedings were in English, but the circuit court, upon the deposition being offered in evidence, may admit the testimony of witnesses learned in the language of the deposed witness for the purpose of correcting errors therein; and, if it shall appear that the first translation was in any respect so incorrect as to mislead the witness, the court may, in its discretion, continue the cause for the further taking of testimony.

2. A new statute, Wis. Stats. 901.08 should be created to read:

901.08 Submission of evidence – languages other than English. (1) Unless otherwise ordered by the court, any party seeking to offer evidence translated into English from a language other than English shall be responsible for translating the evidence into written format and shall be responsible for all costs of translation, and any other expense associated with its receipt into evidence. The translator shall attach to all translations an affidavit stating the translator's qualifications to translate to and from English and the other language and certifying that the translation is true and correct. If a party objects to the translator selected or the accuracy of the translation, the objecting party may produce an alternate

producing an alternate translation unless otherwise ordered by the court.

(2) In this section:

(a) “Translator” means a person who converts written text from one language to another.

(b) “Translation” means a document that is produced from the written conversion of one language to another.

Comment: This section does not mandate a translation be produced every time there is evidence originating in a language other than English. It governs those instances when a written translation is produced and submitted to the court. This section has no impact on the requirement of the court to provide an interpreter for people with Limited English Proficiency as mandated by s. 885.38.

3. A new subsection of Supreme Court Rule 70.155, Translation of court forms, should be created to read:

(5) Any translation shall be accompanied by an affidavit that the translator knows English and the other language and that in making such a translation the translator carefully and truly translated the information from English into the other language and that the translation is correct.

Respectfully submitted this ___ day of _____, 2010.

A. John Voelker
Director of State Courts

901.08 Submission of writings—languages other than English. (1) The court may require that a writing in a language other than English offered in evidence be accompanied by a written translation of the writing into English with an attached affidavit by the translator stating his or her qualifications to perform the translation and certifying that the translation is true and correct.

(2) A party may object to all or parts of translation offered under sub. (1) or to the qualifications of the translator. The court may order a party objecting to all or part of a translation to submit an alternate translation of those parts of the original translation to which the party objects, accompanied by a translator's affidavit as described in sub. (1). If an objection is made to the qualifications of the translator and the court finds that the translator is not qualified the court may reject the offered translation on that ground alone without requiring an alternate translation by the objecting party.

(3) The court may require a party offering into evidence a translation under sub.(1) or an alternate translation ordered by the court under sub. (2) to bear the cost of the translation.

901.08 Submission of writings -- languages other than English

- (1) Unless otherwise ordered by the court, any party seeking to offer into evidence a writing in a language other than English shall be responsible for producing an English translation of the writing accompanied by an affidavit from the translator stating the translator's qualifications to translate the writing to English and certifying that the translation is true and correct. Unless otherwise ordered by the court, the party seeking to offer the writing shall be responsible for all costs of the translation, and any other expense associated with its receipt into evidence.
- (2) A party may object to all or parts of a translation offered under sub. (1) or to the qualifications of the translator. The court may order a party objecting to all or parts of a translation to submit an alternate translation of those parts of the translation to which the party objects, accompanied by a translator's affidavit as described in sub. (1). Unless otherwise ordered by the court, the objecting party shall be responsible for all costs of the alternate translation. If an objection is made to the qualifications of the translator and the court finds that the translator is not qualified the court may reject the offered translation without requiring an alternate translation by the objecting party.
- (3) In this section:
 - (a) "Translator" means a person who converts written text from one language to another.
 - (b) "Translation" means a document that is produced from the written conversion of one language to another.

Judicial comment: S. 901.08 does not mandate that a translation be produced every time a party offers in writing in a language other than English. There may be instances where it may be more efficient to use a qualified court interpreter to orally translate the writing into English. S. 901.08 has no impact on the requirement of the court to provide an interpreter for people with Limited English proficiency as mandated by s. 885.38.