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LSC America's Partner for Equal Justice
LEGAL SERVICES CORPORATION

July 21, 2022

To: Administrative Board of the Courts

From: Legal Services of the Hudson Valley

Re: Request for Public Comment on a New Court Rule That Requires Judges to Establish the Provisional Qualifications of Court Interpreters Not Already Qualified by the Office of Language Access

Legal Services of the Hudson Valley represents clients in civil courts throughout the 3rd and 9th Judicial district. Many of our clients are of limited English proficiency. Our staff regularly appear in high-volume courts where there are large proportions of unrepresented litigants.

Proposed court rule 217.3 has limited potential to marginally improve language access.

Our staff report that where a friend or family member accompanying a litigant to court offers to translate, the court proceeds with that friend or family member serving as an interpreter without asking any questions about language proficiency or a potential conflict of interest. Codifying the best practice described in the benchcard might make it more likely that judges ask questions about language proficiency. However, the proposed rule is only a vague suggestion – "[i]f the court is *unsure* of an interpreter's qualifications, the judge *should* review the interpreter's credentials by asking *a few questions*. . ." (emphases added). Unless it is mandatory that a judge ask specific questions of any interpreter not qualified by the Court, the proposed rule does not adequately protect litigants' rights to language access.

The proposed rule does not address the potential for conflicts of interest. A person accompanying a litigant to court may have adverse interests, such as hoping to move into an apartment that is the subject of a landlord-tenant proceeding. Allowing the case to proceed to a stipulation or resolution without a qualified interpreter can thus result in grave harm. The rule should state that calling upon an interpreter on "emergency basis" is limited to: informing the litigant of the nature of the proceedings that day; scheduling a future court date with a qualified interpreter; conveying a settlement offer by an opposing party; and ordering any

emergency relief on an interim basis. The rule should state that under no circumstances may a court so-order a stipulation, issue any permanent order, or otherwise take any action that disposes of the case.

A person may have adequate proficiency in English and the language of the LEP litigant but be unfamiliar with legal terms and court proceedings. The proposed rule and benchcard upon which it is based do not address this. *Compare*, Court Interpreter Manual and Code of Ethics at 8-10 (linking to glossary of legal terms and legal dictionaries; describing how to handle a word or concept without an equivalent in the foreign language). The rule should require that a judge state on the record that they will explain any legal terms they may use and instruct the emergency interpreter how to communicate to the court if anyone uses a word or phrase they do not understand.

The Court cannot assume that a lay person will translate word-for-word. The rule should require that a judge state on the record that the lay interpreter must translate word-for-word and cannot summarize or rephrase any statements by the Court, or any litigant or witness, and require that the lay interpreter confirm on the record that she understands and will abide by this directive.

Respectfully submitted,

Marcie Kobak

Litigation Director, LSHV

Brooklyn Defenders

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July 22, 2022

Sent via email to: rulecomments@nycourts.gov

Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York, 10004

Re: Public Comment on Proposed Court Rule 22 NYCRR § 217.3, That Requires Judges to Establish the Provisional Qualifications of Court Interpreters Not Already Qualified by the Office of Language Access

To Whom It May Concern:

On behalf of Brooklyn Defender Services, we would like to thank the Office of Court Administration (OCA) for the opportunity to provide comments on adopting a new court rule that requires judges to establish the provisional qualifications of court interpreters not already qualified by the Office of Language Access.

Brooklyn Defender Services (BDS) is a public defense office whose mission is to provide outstanding representation and advocacy free of cost to people facing loss of freedom, family separation and other serious legal harms by the government. For over 25 years, BDS has worked in and out of court, to protect and uphold the rights of individuals and to change laws and systems that perpetuate injustice and inequality.

BDS represents people in criminal, family, immigration, and housing court. We represent approximately 25,000 people each year who are accused of a crime, facing loss of liberty, their home, their children, or deportation. Our staff consists of specialized attorneys, social workers, investigators, paralegals, and administrative staff who are experts in their individual fields. BDS also provides a wide range of additional services for our clients, including civil legal advocacy, assistance with educational needs of our clients or their children, housing, and benefits advocacy, as well as immigration advice and representation.

Below, we address the importance of language access in the courts and proceedings where we represent people and offer our recommendations for immediate steps needed to protect the rights of litigants when, in an emergency, judges must establish the provisional qualifications of court interpreters not already qualified by the Office of Language Access.

BDS applauds the Advisory Committee on Language Access for taking steps to ensure that people with limited English proficiency have access to the courts. Court interpreting services are a critical part of our legal system and the protection of litigants' due process rights. New Yorkers speak

many languages and dialects. While New York State courts provide interpreting services in an array of languages, these interpreting services do not yet cover all the language needs of New Yorkers. Even in New York City, where courts provide access to many resources, there is a need to improve the provision of language services to litigants.

The Need for Qualified Language Services

The proposed rule (22 NYCRR § 217.3) addresses the need to provide language services on an emergency basis in court when neither a staff court interpreter nor a *per diem* interpreter on the UCS Registry of Qualified Court Interpreters are available. We understand the need for a temporary solution in an emergency, however the use of non-staff, non-registered interpreters pose a risk that litigants are not provided adequate translation or interpretation. Competent, quality translation and interpretation are essential to ensuring true access to justice. Without staff court interpreters or *per diem* interpreters available to translate for a litigant, the court system runs the risk of having inadequate translation available for people facing serious legal harm. Additionally, the court system uses complex, legal terms and jargon that are difficult to translate for those who are not legal interpreters. Addressing such critical matters without adequately trained interpreters may lead to misunderstanding and confusion, leaving litigants with limited English proficiency unable to protect or enforce their legal rights.

New York City is home to many people who speak indigenous languages from their countries of origin, such as "K'iche' and Mam from Guatemala; Garifuna from Honduras, Belize and also Guatemala; Kichwa from Ecuador; and Mixtec and Nahuatl from Mexico, among various others."[1] Yet, there is a shortage of indigenous interpreters in New York courts.[2] Furthermore, according to the Endangered Language Alliance "indigenous immigrants are often mistakenly assumed to be part of a monolithic Spanish-speaking group."[3] Our office serves many people who speak indigenous languages or subsets of more common languages. We have seen even fully qualified interpreters fail to properly assess the language a person we serve speaks. For example, we have represented people who speak only a specific dialect of Arabic, and the court has used an interpreter of modern standard Arabic or a different dialect of Arabic, only to find that the people we serve could not understand important parts of the court proceeding.

The use of non-qualified interpretation, even in emergency situations, runs the risk of placing vulnerable litigants in complicated dynamics where a family or community member—often someone with a vested interest in the outcome—is asked to interpret during a court appearance. The stand-in translator may attempt to persuade the litigant one way or another, may leave out important pieces of information or may simply not understand legal terms. The use of a temporary, non-qualified interpreter may have grave consequences, especially in proceedings where litigants

[1] Patty Gorena Morales, *New York's Dire Need for Indigenous Interpreters*, Documented (June 17, 2022), *available at* https://documentedny.com/2022/06/17/indigenous-languages-interpreters-court-immigrants/
[2] See *Id*.
[3] See *Id*.

may be facing immediate loss of liberty, eviction, or family separation. Due to the serious nature of court appearances—including custody, Article 10 matters in Family Court, eviction proceedings, criminal court appearances—litigants may feel pressured into using a temporary, non-qualified interpreter. We urge the OCA to ensure that use of temporary interpreters is extremely limited, particularly in cases where people are facing serious legal harm.

OCA Must Clarify the Limited Use of Non-Qualified Interpreters

Given the stakes in many of the proceedings in New York Courts, such as the temporary or permanent loss of custody of a child, imprisonment, and the loss of one's home, the proposed rule must be very narrowly tailored to protect the rights of litigants. We strongly recommend the rule be modified to limit the use of these interpreters to routine adjournments and make clear this option would not be available for substantive or fact-finding proceedings such as a hearing or a trial. We realize that OCA qualified interpreters may not be as readily available outside of New York City and we would not want a person to have to wait for the availability of OCA qualified interpreters, especially for a routine adjournment.

Litigants Must Have an Opportunity to Be Heard on Temporary Interpretation Services

We also recommend a modification to the proposed rule that requires a judge to review the temporary interpreter's qualifications by asking questions on the record at the outset of the proceeding and allowing the parties to have an opportunity to be heard on the person's qualifications and ability to act as a temporary translator in this one court appearance prior to the start of each proceeding. Part of the *voir dire* process must include a representation by the interpreter that they have attempted to speak with the client and are successfully able to translate.

Expanding Access to Counsel Will Protect the Rights of Those Who Need Language Access in Courts

The safeguards put forth in this proposed rule are only impactful if a litigant can give informed consent about the use of a non-qualified interpreter. To be able to give informed consent to the use of a non-qualified interpreter in an emergency, a litigant must be able to consult with an attorney to weigh the risks involved.

To this end, we recommend the proposal include a requirement that litigants be reminded of their right to be represented by an attorney and be given reasonable adjournments to obtain them. Beyond this, written notice, in the languages required by Executive Order 26.1, that the court intends to proceed with an interpreter not previously qualified by the Office of Language Access should be provided to each litigant.

Brooklyn Defenders

Efforts to expand a right, or access, to counsel will be the biggest drivers of a truly meaningful opportunity to be heard for litigants with limited English proficiency and we urge OCA to continue to prioritize this goal.

Thank you for the opportunity to provide comment on this important proposed rule. If you have questions about our recommendations, please contact Catherine Gonzalez, Senior Attorney and Policy Counsel at CGonzalez@bds.org.

From: Cheryl Keshner <CKeshner@empirejustice.org>
Sent: Friday, July 22, 2022 3:31 PM
To: rulecomments
Subject: Comments on Proposed Rule regarding Provisional Qualifications for Court Interpreters

Categories: Interpreters

July 22, 2022

Eileen D. Millett, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York, 10004

Thank you for providing the Empire Justice Center with the opportunity to submit these comments in response to OCA's proposal to establish provisional qualifications for court interpreters not already qualified by the Office of Language Access.

It is imperative that all individuals who are engaged in court proceedings fully understand the nature of those proceedings and be able to communicate with the judge and all concerned parties, as appropriate, regarding their case. If the individual is Limited English Proficient, then the court has a duty to provide an interpreter at no charge who is competent, who possesses the necessary interpretation skills and experience, and who possesses relevant vocabulary and an understanding of his/her/their ethical obligations.

While we appreciate the intent, we believe that the screening questions contained in the Bench Card for Judges, which the proposed rule suggests using for provisional interpreters, is insufficient to adequately measure the interpreters' skills or competency. We recognize that this is a proposal for "filling in" during absolute emergencies when an interpreter cannot be found. However, the risks posed to the individual in a legal matter when inaccurate interpretation is provided must also be considered. Interpreter errors may result in criminal convictions, removal of children from the home, excessive fines, evictions, and other severe penalties. We recommend that the courts make every effort to find qualified interpreters, even when this entails using other professional resources outside its network, particularly for languages of lesser diffusion. If interpreters are to be used on an emergency basis who are not on the OCA list, then the chief court interpreter or a person in a similar position in the Judicial Department must also assist in evaluating whether the interpreter is able to competently perform the necessary duties.

The interpreter shortage is troubling and may result in a severe backlog of cases. We recommend that the Office of Court Administration be proactive in pursuing long-term solutions which include engaging in more extensive outreach to high schools, colleges, and ethnic community organizations in order to recruit and train a pool of new and culturally and linguistically diverse interpreters. We also strongly recommend that Civil Service exams for court interpreters be offered more frequently, and that opportunities for staff and per diem interpreters be more widely advertised.

Thank you for the opportunity to comment on this proposed rule change.

Cheryl Keshner, MSW
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Office of the **Conflict Defender**
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Adam J. Bello
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Mark D. Funk, Esq.
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July 22, 2022

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
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New York, New York 10004

Re: Written Testimony of Monroe County Conflict Defender Mark D. Funk regarding a proposed New Court Rule that Requires Judges to Establish the Provisional Qualifications of Court Interpreters Not Already Qualified by the Office of Language Access

Dear Ms. Millett:

The Monroe County Conflict Defender's Office submits this letter to comment on the proposed new rule regarding the use of interpreters not already qualified by the Office of Language Access. Without more clarification of certain issues, the Monroe County Conflict Defender's Office cannot support the new proposed rule.

First, the sample *voir dire* referred to in the rule does not go far enough to determine the qualifications of the proposed interpreter and does not address whether the interpreter may have any biases that will affect the court proceedings.

Second, this proposed rule does nothing to address the fact that court personnel (judges, court staff and attorneys), are incapable of adequately assuring that an interpreter, particularly one not qualified by the Office of Language Access, is correctly interpreting the complex legal issues that are discussed in court. The guidance provided on page 41 of the Language Access Plan is simply not sufficient to give this assurance. Thus, the rule must also make clear that significant actions on a court case, such as testimony, pleas/admissions, sentencing in criminal matters or dispositions in Family Court matters, should not be undertaken with interpreters not qualified by the Office of Language Access.

Third, although it is understood that the intent of this rule it for the use of non-qualified interpreters “only on an emergency basis”, this proposed rule threatens to become the default for most courts as it is far easier to use whoever is available as opposed to the most qualified interpreter. The proposed rule must require each court to have comprehensive policies and procedures consistent with the Language Access Plan to address non-emergency and emergency situations.

Only after these concerns are addressed will the new proposed rule be compliant with Title VI of the Civil Rights Act of 1964, 42 USC 200d et seq. Thank you for your consideration of these issues.

Very truly yours,

Mark D. Funk, Esq.
Conflict Defender

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