JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
November 19, 2018

To
Hon. Mariano Florentino Cuéllar, Chair
Hon. Manuel Covarrubias, Vice-Chair
Language Access Plan Implementation Task Force

From
Hon. Steven Austin, Co-chair
Ms. Kim Turner, Co-chair
Interpreter Act Working Group

Subject
Review of the Trial Court Interpreter Employment and Labor Relations Act: Government Code Sections 71800 *et seq.*

Action Requested
For Your Information - Not a Public Document

Deadline
None

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Introduction

A working group was formed in July 2018 to address Recommendation No. 74 of the Strategic Plan for Language Access in the California Courts, which states:

> The Implementation Task Force should evaluate existing law, including a study of any negative impacts of the Trial Court Interpreter Employment and Labor Relations Act on the provision of appropriate language access services. The evaluation should include, but not be limited to, whether any modifications should be proposed for existing requirements and limitations on hiring independent contractors beyond a specified number of days.

Working group members were identified and invited to participate based on their expertise and experience with the Interpreter Act by the co-chairs with staff support and outreach. A concerted effort to assemble a diverse group of experts was made; we believe this group represents a successful effort in that regard.

Working Group Members

- Angie Birchfield, Certified Spanish Independent Contract Interpreter, Region 1
- Ginger Durham, Operations Manager/Interpreter Coordinator, Sacramento Superior Court, Region 3
- Michael Ferreira, Certified Spanish Interpreter, Los Angeles Superior Court, Region 1
- Janet Hudec, Certified Spanish Interpreter, Madera Superior Court, Region 3
- Jeff Lewis, Retired Court Executive Officer, Kings Superior Court, and Regional Negotiator, Region 3
- Shannon Mays-Fontaine, Chief Human Resources Officer, Orange Superior Court, Region 4
- Tyler Nguyen, Certified Vietnamese Interpreter, Sacramento Superior Court, Region 3
- Kathie O'Connell, Director, Courtroom Support, Stanley Mosk Courthouse, Los Angeles Superior Court, Region 1
- Pedro Ramirez-Navas, Certified Spanish Interpreter, Los Angeles Superior Court, Region 1
- Mike Roddy, Court Executive Officer, San Diego Superior Court, Region 4

Of the working group members, Judge Austin, Angie Birchfield, Janet Hudec, and Mike Roddy are current members of the Language Access Plan Implementation Task Force. Michael Ferreira, Tyler Nguyen, and Pedro Ramirez-Navas were recommended by CFI's parent union CWA (Communication Workers of America) through former CFI Administrator Carrie Biggs-Adams, who was overseeing CFI during its current/ongoing reorganization.[1]

The working group was supported by Judicial Council staff from several departments. These included the following:

- Douglas Denton, Supervising Analyst, Language Access Services
- Scott Gardner, Supervising Attorney, Labor and Employee Relations, Human Relations
- Diana Glick, Attorney, Center for Families, Children and the Courts
- Olivia Lawrence, Principal Manager, Court Operations Services
- Andi Liebenbaum, Attorney, Governmental Affairs

[1] The working group did not include members from other current court bargaining entities, such as SEIU and AFSCME. Including representatives from these and other bargaining entities may be a consideration for future efforts related to the evaluation and recommendations about the Act.

- Bob Lowney, Director, Court Operations Services
- Angeline O'Donnell, Attorney, Labor and Employee Relations, Human Resources
- Claudia Ortega, Supervising Analyst, Court Interpreters Program
- Elizabeth Tam-Helmuth, Senior Analyst, Language Access Services

Andi Liebenbaum was asked by senior Language Access/Court Operations staff to serve as the lead staff member responsible for coordinating the meetings, taking notes, and preparing this draft document.

This document represents a summary of issues covered, conclusions drawn, and recommendations for future consideration. For purposes of clarity, the term "interpreter pro tempore" may be used in lieu of but with the same meaning as temporary, as needed, IPT, and intermittent interpreters.

Framework

From the outset, the efforts of the working group were limited to several specific provisions of the Trial Court Interpreter Employment and Labor Relations Act (Interpreter Act) due to the very limited amount of time within which the working group had to serve. In order to fulfill the mandate of LAP recommendation No. 74, we identified the following areas as the focus of the working group's deliberations:

1) Regional bargaining
2) Cross assignments
3) The 45-day provision in Government Code section 71802
4) The 100-day provision in Government Code section 71802

To address these issues in an orderly fashion, the following working group timeline and list of outputs was prepared:

Date	**Milestone**
June 2018	Determine and invite proposed members of working group. Members should be made aware of the charge (specifically, LAP Recommendation #74), the primary topics to be addressed, and the compressed timeline within which the work will be accomplished. A timeline of calls and outputs will be developed at this time.
July-October 2018	Working group conducts phone calls. Principal staff to the group will be Andi Liebenbaum, Attorney in JCC Governmental Affairs, with support from the Language Access Services Unit.

Date	Milestone
September 2018	Staff will prepare a summary and update on progress for Justice Cuéllar.
September to December 2018	Proposed statutory changes are drafted and reviewed. Note: The Language Access Plan Implementation Task Force is scheduled to sunset at the end of December 2018. Another entity will be required to oversee the work of the working group, including the completion of the recommendations, the preparation of the invitation to comment (ITC) by spring 2019, and follow-up with the Judicial Council.
January 2019 to March 2019	Finalize statutory changes and ITC documents for council (PCLC) approval. Publish ITC and actively solicit feedback over an extended period of time. Working group remains active through this period. Justice Cuéllar continues to receive updates and provide feedback.
April – June 2019	Invitation to comment period.
July-September 2019	Working group reconvenes after ITC period to review comments, prepare responses, oversee preparation of memo for Judicial Council review. Note: Ideally, we would be able to keep the same working group members, but they likely will need to be overseen by and report to the new Language Access Working Group formed to carry on the work of the Task Force. Final meeting with Justice Cuéllar and/or new Chair of the Language Access Working Group Chair to review recommendations for sponsored legislation. This would be the time when a decision is made to move forward (or not) with proposals for statutory changes to the Interpreter Act.
October-November 2019	Presuming that the decision is made to pursue statutory changes to the Interpreter Act, a final draft of the legislative proposals is crafted and a memo to the council is prepared for the November Judicial Council meeting. (Note: This can be pushed to the January 2020 council meeting if necessary.)
January - September 2020	Legislation introduced and marshalled through the legislative process.

Despite the intention to recommend possible legislative changes and amendments to the Interpreter Act in this workplan, it became clear that the work involved to accomplish this goal would require substantially more time than what the working group was afforded. Staff was charged with determining the possibility of extending the timeframe within which the working group could convene; in the interim, the group agreed to focus on developing this summary. In this document, we offer a review of the issues, and some recommendations, related to how to approach changes in the Interpreter Act should additional time be provided.

To be clear, no legislative revisions are being recommended.

Given the intentional diversity of expertise, perspectives, and goals of the working group members, the meetings (five total, including one in-person meeting) were very successful. The frank discussions punctuated by divergent interests and needs aided the group's efforts. Below is a summary of those discussions and an identification of several issues that remain unresolved.

Regional Bargaining

Areas of agreement: The working group felt that a different model would be preferable, even without full agreement on precisely what that different model might be.

Qualifiers: The working group discussed three types of bargaining alternatives, all with the understanding that CFI would be the bargaining entity for the employees: statewide bargaining where all interpreter employees would be in one bargaining unit; local bargaining for all employees where the union would bargain in every court that has employee interpreters (currently approximately 40 courts); and a blended approach in which some large courts would bargain locally and individually while smaller courts would bargain together in a separate bargaining unit. While statewide bargaining was an option that was generally appreciated by all, some working group members, particularly interpreter members, suggested that regional bargaining *would be preferable* to having to bargain on a court-by-court basis. Specifically, interpreters are more inclined towards statewide bargaining, but if that is not achievable, the current regional bargaining structure would be preferable to local/court-by-court bargaining. It was recognized that several issues, for example what entity becomes the interpreter-employer and who is responsible for scheduling assignments, among many others, would have to be identified and addressed if a statewide structure is adopted. In addition, the longstanding issues of interpreter employees' vested benefits and pensions would present particular difficulties in a statewide system.

Larger courts (e.g., Los Angeles, San Diego, Orange) prefer the idea of being allowed to bargain directly with a union although there remain issues related to how courts that bargain individually would be able to compete against the wages and benefits established by a statewide entity of the "rest" of the courts. Smaller courts and interpreters prefer a group approach, specifically preferring statewide bargaining, stating that carving off several larger courts is just a revised "regional" bargaining approach and doesn't result in any efficiencies. It was pointed out that, regardless of the court's size, all the basic issues (unit work, how unit work is performed, etc.) are the same, and that "meet and confer" processes could be used to carve out differences and peculiarities at specific courts.

There was also interest in a split/hybrid approach (as opposed to the current regional bargaining system, and in contrast to either a pure statewide bargaining system or a pure localized bargaining system), in which *some* courts bargain directly with CFI while others form a larger block for statewide bargaining. This was not fully explored.

If a hybrid or new "regional" system is developed, several questions will need to be addressed:

(1) Which courts would want/be permitted to bargain directly? What threshold would be used to determine which courts bargaining directly and which bargain as a block? (Options discussed by the Working Group included courts with a minimum number of judicial officers, or those with a certain number of interpreter employees. Other ideas included dividing courts based on number of filings, and/or county population.)
(2) Would the courts that do not bargain individually necessarily become part of a single bargaining structure or is there a possibility that some employees might be absorbed into other bargaining units?
(3) Would a revised "regional" structure (for example, courts of a similar size, or representing similar demographics) be better than the geographic delineation of the current regional approach?

Regardless of what structure interpreter bargaining might employ, an issue in need of further study is interpreter funding. Recognizing that the current model – reimbursements to the courts – was rooted in the idea that the interpreter fund surplus was sufficient to allow for the expansion of interpreter services into civil cases, and given the fact that most courts have expanded their interpreter services, *and* recognizing that the surplus is calculated to be fully spent during this fiscal year due to both ongoing/increased costs for interpreter services in mandated case types and the expansion into civil, alternative funding models may be an important topic of discussion to provide courts greater certainty and capacity in their interpreter services budgets. There was consensus that how the courts are funded for interpreter services would impact/effect choices, recommendations and positions in bargaining.

Cross Assignments

Areas of agreement: The cross-assignment system is not working well, and, generally speaking, the same rules/procedures for cross assignments statewide could be very helpful.

Qualifiers: Home courts are likely to be wary of a mandatory "must recall by" deadline for their staff interpreters (courts are likely to not want to permit their staff interpreters to leave for a cross assignment if there's a home court need, regardless of the hardship this poses to recipient courts). Also, the cross-assignment procedures can be burdensome because there is little guidance in the statute, leaving the negotiations to the bargaining units and MOUs. The MOUs vary, however; there are timeframes specified in MOUs to offer and accept assignments and priority lists that

determine which employees have the option to accept assignments. Moreover, there are practical considerations with cross assignments, such as travel time and distances between assignments, particularly in areas of heavy traffic congestion (e.g. Bay Area and Southern California). In some instances, even if an interpreter wants a cross assignment, the travel time between a morning and afternoon assignment may make it impractical for the interpreter to take the assignment.

Additionally, there were discussions about how the language to be interpreted impacts cross assignments (e.g., Spanish interpreters are less likely to be available for cross assignments than are OTS interpreters), and where geographically in the state the interpreter or language need is. It is likely that an FTE Spanish language interpreter would not be made available by a home court because the need for Spanish interpretation at a court that hires an FTE Spanish language interpreter is so great, whereas an FTE interpreters who speaks a language other than Spanish is more likely to be permitted to cross assign because there is likely less of a regular need for their services in the home court.

Also, the regions differ on addressing incentive pay for cross assigned interpreters. In Region 1, a discussion of incentive pay is not included in the MOU, leaving it up to the individual courts and interpreters to ferret out, but if a court-employed interpreter pro tempore (including part-time and as needed interpreters) is not released for a cross assignment, the home court is obligated to pay the amount of wages that interpreter would have received in the cross assignment. In Regions 2 and 4, interpreters are not, pursuant to the terms of their MOUs, allowed to receive incentive pay for cross assigning, but in Region 3, the MOU expressly permits incentive pay.

Finally, it was unclear if home courts are permitting FTE staff interpreters to cross assign, or only interpreters pro tempore (i.e., part time, as needed, intermittent, and IPT interpreters).

Region 2 has resolved the problem associated with last-minute cancellations by the home court by including language in the MOU that provides that once a home court has cleared an employee to cross assign, the home court can only change its mind 5 business days or more from the date of the assignment. If the home court finds out it needs an interpreter fewer than 5 days from the date of the assignment, the home court must fill that assignment with an independent contractor.

Region 3, it was pointed out, has a generally workable cross assignment program that the courts and the interpreters believes is fair. Working group members agreed that a fair system is the ideal for all courts and bargaining units, but there was consensus that achieving that will require ongoing discussions.

45-Day and 100-Day Statutory Provisions

Areas of agreement: In 2003, when the Interpreter Act was first introduced, the goals of encouraging employment of interpreters and discouraging use of contract interpreters made sense. (Union representatives participated in the development of the Act, and all parties were invested in addressing the existing/ongoing pool of interpreters that perhaps were not interested in becoming part of the proposed regional bargaining units.) In 2018, and with fifteen years of experience with these statutory provisions, it seems clear that these purposes are not being achieved. Many contractors have no interest in becoming court employees for a variety of reasons (e.g. they prefer self-employment, they like the variety of working in fields other than the justice system, they do not value or need the stability and benefits provided by employment, or they like the flexibility of choosing when they want to work.) However, qualified contract interpreters are acknowledged to be a critical resource in providing language access in the courts so discouraging the use of contract interpreters may no longer be among the principles in developing rules for interpreter services. Courts are more interested in ensuring that interpreters are qualified, regardless of their employment status, and the availability of a reliable and stable pool of interpreters remains a priority.

Qualifiers: The statutory language specifically requires courts to offer as-needed (interpreter pro tempore/temporary/intermittent) employment, as opposed to full time employment. Employment as an interpreter pro tempore doesn't usually provide the advantages or job security of FTE employment, and thus doesn't seem beneficial when compared to the flexibility of contract employment. It was noted that, while the statutory language requires courts to offer as-needed employment, several courts have considered this a minimum requirement and have chosen to offer full time interpreter opportunities, particularly in Spanish, that are not being filled.

Where else the group could largely agree: The concerns about the 45- and 100-day provisions might be addressed with some flexibility such as the following:

1) Increasing the number of days a court may use a contract interpreter prior to offering employment or being cut off from using the contract interpreter
2) At the cut-off date, offering full time employment status
3) Amending the statute to provide for a more gradual or tiered approach (e.g., at 45 days, as-needed employment is offered; at 90 days, FTE status is offered; then, at 150 days the interpreter may no longer work at that court)
4) Permitting a court to utilize a contract interpreter beyond 100 days if the court has offered employment and employment has been rejected on one or more occasions
5) Extending the 100-day cap if there are no available interpreter resources

It's important to recognize that courts may have a need for an OTS interpreter that lasts longer than 45 days in a year (i.e., a long trial), but once that need is over, do not have a full-time need

for that language. In such a situation it is understandable why an individual court would not want to be required to hire that interpreter as a full time employee. Moreover, requiring the court to do so would likely not be the best use of limited interpreter resources.

It was presented to the group that new/younger certified or registered interpreters currently coming out of education programs and starting as contract interpreters are more likely to accept employment than were the older generation of contract interpreters that was less interested in court employment.

It was also agreed that in any event, the most important reason to create a more flexible system for interpreters is to ensure LEP litigants and other court users have the language access they need.

Next Steps

The working group agrees that, given the limited time for the group to fully explore the impact of the Interpreter Act on the provision of language access services throughout the state, the recommendations in this summary will be limited to identifying those areas that merit further research and discussion, and proposing a framework for examining those issues. Nevertheless, all participants stated that they believe the work accomplished during this short time is valuable, and all would like additional time to flesh out some of these ideas in greater detail. Additionally, all working group members stated their unequivocal interest to remain engaged. Specifically, the working group members unanimously concurred that the group's diversity of perspectives and the demonstrated ability to work collaboratively are important, and should be encouraged to continue with Judicial Council support.

The Language Access Plan Implementation Task Force will sunset on March 1, 2019. Among issues to be explored is whether the effort to review the Interpreter Act should be assigned to a new advisory body, and, if so, how that effort might be staffed and supported. While recognizing the challenges associated with "relitigating" the Interpreter Act, the broad consensus was that efforts to revise the language in the Act to provide for more robust and efficient use of interpreter services is in the interest of LEP court users, the courts, and interpreters.

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