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ATTORNEY AS INTERPRETER: A RETURN TO BABBLE BILL PIATT*

Should an attorney serve as an interpreter for a non-English-speaking client in a criminal prosecution? Out of an apparent sense of duty to the court or client, some bilingual attorneys¹ have been willing to assume that role.² Moreover, trial courts which have imposed such an obligation upon counsel have generally been upheld on appeal.³ This article examines the potential harm to the client, counsel, and the administration of justice when an attorney acts as an interpreter for a client in litigation, and suggests that none of these interests are served by an attorney-interpreter.

I. THE RIGHT TO AN INTERPRETER

As with other language rights issues, problems involving interpreters develop because courts and counsel seem not to understand the significance of the interests involved.⁴ The lack of a coherent recognition of language rights in this country⁵ and the absence of

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1. Cases in this area have dealt with counsel providing interpretation for language minority clients. However, the same principles would apply to attorneys translating for their hearing or speech-impaired clients. By focusing on language translation, the author intends no disregard for the similar plight of other litigants. The importance of interpretation issues for the hearing or speech-impaired was underlined in *Terry v. State*, 21 Ala. App. 100, 102, 105 So. 386, 388 (1925):

[T]he physical infirmity of this appellant [a deaf-mute for whom no interpreter was provided at trial] can in no sense lessen his rights under the Constitution, and, in the proper administration of its laws, this . . . state must and will accord the means by which its citizens . . . shall receive all the rights, benefits, and privileges which the Constitution, laws, regulations, and rules of practice provide.

See also the provision of interpreters for the impaired in the Court Interpreters Act, 28 U.S.C. § 1827 (1988); *infra* notes 18-22; *Peeler v. State*, 750 S.W.2d 687 (Mo. Ct. App. 1988) at *infra* note 35.

2. See *infra* note 63. Although the focus of this article is on the ethical problems facing attorney-interpreters in criminal proceedings (primarily because of sixth amendment concerns regarding the right of a client to effective counsel and to confront witnesses), the ethical and due process issues analyzed in Part III, *infra*, should make counsel equally reluctant to interpret for a client in a civil or administrative hearing.

3. See section III, *infra*.

4. See Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L. Rev. 885 (1986).

5. See B. PIATT, *ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES*, University of New Mexico Press, 1990.

any United States Supreme Court decision defining and delineating the right to court interpreters undoubtedly adds to the uncertainty. Yet, the use of interpreters is becoming increasingly important to the administration of justice. For example, in 1986, interpreted proceedings constituted six percent of all federal court hearings.⁶ Examining the issues which arise when an attorney is called upon to interpret for a client first requires some understanding of the nature of the right to an interpreter. In addition, an understanding of the extent to which an attorney-interpreter fulfills the obligation of zealous advocacy is also required.⁷

Through the middle of the twentieth century, courts generally held that the appointment of an interpreter in a criminal proceeding was a matter resting solely in the trial court's discretion.⁸ Even after a provision was enacted for the appointment of interpreters in criminal proceedings in the federal courts,⁹ such an appointment was still considered to be a matter of discretion with the trial court.¹⁰ No constitutional right to a free simultaneous translator¹¹ was inferred from the apparent power of the court to appoint an interpreter under the rule.¹²

However, in 1970, the Second Circuit Court of Appeals determined that the sixth amendment's confrontation clause, made applicable to the states through the fourteenth amendment's due process clause, requires that non-English speaking defendants be informed of their right to simultaneous interpretation of proceedings at the government's expense.¹³ Otherwise, the trial would be a

6. H.R. REP. NO. 100-889, 100th Cong., 2d Sess., reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 6018, 6019. Spanish is by far the most widely used language in these proceedings. Interpreted proceedings utilizing languages other than Spanish accounted for only one-third of 1% of all federal court hearings in 1986. *Id.*

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1987).

8. *Perovich v. United States*, 205 U.S. 86 (1907). Defendant sought to have an interpreter when he was testifying. The "discretion" related to evaluation of his ability to understand the interrogation and express himself in English. See *United States v. Desist*, 384 F.2d 889, 901 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969).

9. FED. R. CRIM. P. 28(b).

10. *United States v. Desist*, 384 F.2d 889 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969).

11. In *Desist*, the issue was not merely whether an interpreter should assist the defendant in the presentation of his testimony, as in *Perovich*. Rather, defendant sought a court-appointed interpreter to render a simultaneous translation of the proceedings, contending that the denial of such an interpreter denied him his rights to due process and a fair trial, as well as his right to confront witnesses, be present at trial, and have the effective assistance of counsel. *Desist*, 384 F.2d at 901. The importance of the first-person simultaneous translation is discussed in notes 46 and 47, and accompanying text, *infra*.

12. *Desist*, *supra* note 8, 384 F.2d at 903. See other "discretionary" provisions in FED. R. CRIM. P. 43(f); FED. R. EVID. 604; 18 U.S.C. § 3006A(e).

13. *United States ex rel. Negron v. New York*, 434 F.2d 386, 390-91 (2d Cir. 1970). Defendant in a murder prosecution spoke no English; defense counsel spoke no Spanish. They were allowed to meet with an interpreter during recesses. The interpreter summarized testimony of witnesses who had already testified. She translated trial court instructions regarding peremptory challenges and translated into English the testimony of two Spanish-speaking

"babble of voices."¹⁴ The defendant would not understand the testimony against him. Counsel would be hampered in effective cross-examination.¹⁵ The Court went on to note:

Not only for the sake of effective cross examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.¹⁶

With *Negron* serving as the impetus,¹⁷ the right to an interpreter in the federal courts was expanded by enactment of the Court Interpreters Act in 1978.¹⁸ The Act requires judges to utilize competent interpreters in criminal or civil actions initiated by the government in a United States district court.¹⁹ An interpreter must be appointed when a party or witness speaks only or primarily in a

witnesses for the benefit of the court, the jury, and counsel. She did not translate the testimony of fourteen English-speaking witnesses into Spanish. Nor was an interpreter available to translate between defense counsel and the defendant. *Negron*, 434 F.2d at 388-89.

14. *Id.* at 388.

15. *Id.* at 389-90.

16. *Id.* at 390. The plight of the defendant proceeding to trial without the ability, because of a language barrier, to understand the proceedings has also been described as "Kafka-like." See *Desist*, *supra* note 8, 384 F.2d at 902. The Arizona Supreme Court has described the situation as follows:

A defendant's inability to spontaneously understand testimony being given would undoubtedly limit his attorney's effectiveness, especially on cross-examination. It would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy. Such a trial comes close to being an invective against an insensible object, possibly infringing upon the accused's basic 'right to be present in the courtroom at every stage of his trial.'

State v. Rios, 112 Ariz. 143, 144, 539 P.2d 900, 901 (1975), *en banc*, quoting *State v. Natividad*, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974), which in turn cited *Lewis v. United States*, 146 U.S. 370 (1892) and *Negron*, *supra* note 13. The *Negron* decision compared the language barrier between counsel and client to the problem of client incompetency to stand trial, quoting Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1969) for the proposition that "'the adjudication loses its character as a reasoned interaction . . . and becomes an invective against an insensible object.'" *Negron*, 434 F.2d at 389.

17. The Second Circuit noted the "surprisingly sparse discussion in the case law of the right to a translator or interpreter at criminal trials" at the time of the *Negron* decision. *Negron*, 434 F.2d at 389. It also found the federal right to a state-provided translator to be far from settled at the time of its holding. *Negron*, 434 F.2d at 390. The decision was cited as the impetus for Congressional action. H.R. REP. NO. 95-1687, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4652-53.

18. 28 U.S.C. § 1827 (1988).

19. 28 U.S.C. § 1827(d) (1988). The Court Interpreter Amendments Act of 1988 extended the right to an interpreter to pre-trial and grand jury proceedings. Court Interpreter Amendments Act of 1988, Pub. L. NO. 100-702, 100th Cong., 2d Sess., 102 Stat. 4654, 28 U.S.C. § 1827 (nt 1)(1988); H.R. REP. NO. 100-889, 100th Cong., 2d Sess., reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS 6018.

language other than English or suffers from a hearing impairment, so as to inhibit the person's comprehension of the proceedings, communication with counsel or the judge, or so as to inhibit the witness's comprehension of questions in the presentation of testimony.²⁰ The Director of the Administrative Office of the United States Courts is required to prescribe, determine, and certify the qualifications of persons who may serve as interpreters.²¹ The Director maintains a list of interpreters and prescribes a fee schedule for their use.²²

Courts have repeatedly determined that there is no constitutional right to an interpreter in civil proceedings²³ or in administrative matters.²⁴ However, there are various state constitutional and legislative provisions for interpreters.²⁵ These occasionally grant broader rights than under federal law.²⁶

II. IMPLEMENTING THE RIGHT TO AN INTERPRETER

Even though *Negron*,²⁷ the Court Interpreters Act,²⁸ and state authorities²⁹ suggest that there are constitutional³⁰ or statutory rights to an interpreter, the determination as to whether a particular litigant is entitled to an interpreter and the manner of proceeding through the use of an interpreter is still committed to the trial court's

20. 28 U.S.C. § 1827(d) (1988).

21. 28 U.S.C. § 1827(b) (1988).

22. 28 U.S.C. § 1827(b) (1988); 28 U.S.C. § 1827(c) (1988).

23. *E.g.*, *Jara v. Municipal Ct.*, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), *cert. denied*, 439 U.S. 1067 (1979).

24. *E.g.*, *Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), *cert. denied sub nom.*, *Guerrero v. Swoap*, 414 U.S. 1137 (1974). See Note, *A Right to Translation Assistance in Administrative Proceedings*, 16 COLUM. J.L. & SOC. PROBS. 469 (1981). Interpretation issues are of increasing importance in other areas, including union representation issues. The seminal work in this latter context is Gregory, *Union Leadership and Workers Voices: Meeting the Needs of Linguistically Heterogeneous Union Members*, 58 CINC. L. REV. — (1989).

25. See, for example, CAL. CONST. CODE art. I, § 14 (West 1983); FLA. STAT. ANN. § 90.606 (1985); N.M. STAT. ANN. § 38-10-7 (1978); N.Y. JUD. LAW § 380-390 (McKinney 1972); and TEX. CRIM. PROC. CODE ANN. art. 38.30 (Vernon 1988). Massachusetts provisions are discussed in Grabau and Williamson, *Language Barriers in our Trial Courts: The Use of Court Interpreters in Massachusetts*, 70 MASS. L. REV. 108 (1985).

26. Kansas, for example, provides for the appointment of interpreters for parties or witnesses before grand juries, or in any court proceeding where a person with a language, hearing, or speech impairment faces confinement or penal sanctions. KAN. STAT. ANN. § 75-4351 (1984). The right also applies in any civil proceedings, and not just those brought by the government, as in the Court Interpreters Act, 28 U.S.C. § 1827 (1988). Further, the right to an interpreter exists in administrative hearings or even when the person is arrested for criminal or city ordinance violations.

27. *Supra* note 13.

28. 28 U.S.C. § 1827 (1988).

29. *Supra* notes 25 and 26.

30. A post-*Negron* decision by the Supreme Court of Wisconsin finds no constitutional right to an interpreter in a criminal case. *State v. Neave*, 117 Wis. 2d 359, 362, 344 N.W.2d 181, 184 (1984).

discretion.³¹ Under traditional views of zealous advocacy,³² counsel for a party with a language barrier should be ethically required to urge the Court to exercise its discretion in a manner favorable to that client regarding these interpretation issues. Before turning to a discussion of counsel as interpreter, it is important to consider how counsel who is not also required to serve as an interpreter should ordinarily proceed regarding interpretation issues in litigation.

The first issue in this context is whether a client is entitled to an interpreter.³³ Courts will ordinarily not appoint an interpreter in the absence of a request to do so,³⁴ but the failure of an attorney to request an interpreter for a qualifying client has been held to constitute ineffective assistance of counsel.³⁵ An important consideration for the attorney is a recognition that a client need not be totally ignorant of the English language in order to be entitled to an interpreter. The federal test for determining whether a right to a language interpreter exists is basically whether the client speaks only or primarily a language other than English.³⁶ Thus, even though a client may be able to function in English in a social conversation, he or she may still be entitled to the use of an interpreter in litigation³⁷ given the sophisticated language level used in the courts.³⁸ Zealous

31. See *United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974). The view still exists that the defendant's constitutional rights to confront witnesses and due process must still be balanced against (and possibly outweighed by) the "public's interest in the economical administration of the criminal law." *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981). *Martinez* ignores the *Negron* decision, which was eight years old at the time the defendant went to trial on December 6, 1978. The Court Interpreters Act, 28 U.S.C. § 1827 (1988), was passed on October 28, 1978, but was held inapplicable to the defendant's case by the Fifth Circuit because it did not take effect until ninety days after enactment. *United States v. Martinez*, 616 F.2d at 188.

32. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1987).

33. In general, see Annotation, *Right of Accused to Have Evidence or Court Proceedings Interpreted*, 36 A.L.R. 3d 276 (1971); Chang & Araujo, *Interpreters for the Defense: Due Process for the Non-English Speaking Defendant*, 63 CALIF. L. REV. 801 (1975).

34. *Suarez v. United States*, 309 F.2d 709 (5th Cir. 1962); *Diaz v. State*, 491 S.W.2d 166 (Tex. Crim. App. 1973). *Cf. Negron*, 434 F.2d at 386; *State v. Rios*, 112 Ariz. 143, 539 P.2d 900 (1975) (en banc), citing *State v. Natividad*, 111 Ariz. 191, 526 P.2d 730 (1974); *People v. Sepulveda*, 412 Mich. 889, 313 N.W.2d 283 (1981). The Court Interpreters Act provides for appointment of interpreters on the court's own motion. 28 U.S.C. § 1827(d).

35. *Peeler v. State*, 750 S.W.2d 687 (Mo. Ct. App. 1988); *but cf. People v. McGinnis*, 51 Ill. App. 3d 273, 366 N.E.2d 969 (1977).

36. See Court Interpreters Act, 28 U.S.C. § 1827(d).

37. *But cf. Guerrero v. Harris*, 461 F. Supp. 583 (S.D.N.Y. 1978) (defendant rarely used interpreter and conversed in English); *State v. Topete*, 221 Neb. 771, 380 N.W.2d 635 (1986) (no abuse of discretion where court did not appoint interpreter for a defendant who had conversed with an officer and a jailer in English).

38. A study conducted by the Director of the Administrative Office of the Courts pursuant to the Court Interpreter's Act found that because of the sophisticated language level used in the courts, a minimum of fourteen years of education is necessary to understand what goes on in a criminal trial and more than that in a civil trial. See *Seltzer v. Foley*, 502 F. Supp. 600, 604 (S.D.N.Y. 1980). Query whether this suggests the need for the appointment of "interpreters" for all litigants with less than fourteen years of education, not just language-minority or speech and hearing-impaired persons.

advocacy would seem to require counsel to seek an interpreter when there is any doubt as to whether a language barrier is inhibiting his or her client's comprehension of the proceedings or interfering with the presentation of evidence on the client's behalf.³⁹

Even if an interpreter is appointed, counsel would still be under a duty to ensure that the interpreter is qualified to competently interpret. In the federal system, the Director of the Administrative Office of the Federal Courts examines and certifies interpreters and maintains lists of certified interpreters.⁴⁰ Some states also maintain similar listings.⁴¹ In the absence of such certification, however, an attorney should require the interpreter to demonstrate sufficient education, training, or experience to satisfy the trial judge that he or she can make a competent translation.⁴² Although interpreters with obvious conflicts of interest, such as a family relationship to a witness, may be allowed to serve,⁴³ opposing counsel should identify such conflicts and object, in order to preserve a record for appeal.⁴⁴

39. See *Peeler*, 750 S.W.2d 687. For a dramatic portrayal of injustice and death resulting from a language misinterpretation, see *The Ballad of Gregorio Cortez*, (Moclesuma Productions, Inc. 1982). The movie is based upon PAREDES, WITH HIS PISTOL IN HIS HAND: A BORDER BALLAD AND ITS HERO (University of Texas Press, 1971).

40. Court Interpreters Act, 28 U.S.C. § 1827(b) and (c). Through 1986 the Administrative Office of the Courts had spent over one million dollars in test development and administration for Spanish language interpreters, had administered a Spanish interpretation test more than seven thousand times (some took the test more than once), and yet had been able to certify only 292 interpreters. H.R. REP. NO. 100-889, 100th Cong., 2d Sess., reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS 6019. These certified interpreters were used 33,764 times, and non-certified Spanish language interpreters were used in another 7,737 proceedings. *Id.* The administrative office now has plans to develop certification exams for Navajo and Haitian Creole, the languages after Spanish which most require translation. *The Third Branch*, BULLETIN OF THE FEDERAL COURTS, June 1989, at 7.

41. See N.M. STAT. ANN. § 38-10-5C (Repl. Pamp. 1987).

42. *State v. Van Pham*, 234 Kan. 649, 675 P.2d 848 (1984). The difficulty, in general, of the rendition of a competent interpretation is highlighted in Berk-Seligson, *The Importance of Linguistics in Court Interpreting*, 2 LA RAZA L.J. 14 (1988). Among the factors Ms. Berk-Seligson identifies as reasons why interpretation from a "source" language into a "target" language is not always a "high fidelity rendition" is the fact that specialized vocabularies exist within languages for many endeavors, ranging from the playing of marbles, for example, to the practice of medicine. Also, the style of speech in the courtroom ranges from person to person and even within the same person, from casual to formal. Attorneys in particular vary language styles in the course of a single trial depending upon the topic and witness. In addition, the author identifies the difference between "lexical equivalents" and "true sentence meaning," influenced by many considerations including politeness, socio-economic background differences, and other concerns.

43. In general, see Annotation, *Disqualification, for Bias, of One Offered as Interpreter of Testimony*, 6 A.L.R. 4th 158 (1981). At least one court has taken the position that it is not error per se for a court to select a close friend or relative of a witness to serve as the witness' interpreter. *Kotas v. Commonwealth*, 565 S.W.2d 445 (Ky. 1978). Some cases even permit biased interpreters. *State in Interest of R.R.*, 79 N.J. 97, 398 A.2d 76 (1979) (mother of 4-year-old victim as interpreter for son to interpret his words and gestures); *Tores v. State*, 63 S.W. 880 (Tex. Crim. 1901) (assistant district attorney as interpreter for prosecution witness). See also Grabau & Williamson, *supra* note 25, at 113.

44. There is authority requiring a hearing on the issue of interpreter competence and bias. *Kley v. Abell*, 483 S.W.2d 625 (Mo. Ct. App. 1972). Still, an interpreter need not be the "least interested person available" in order to qualify for appointment. *Robinson v. State*, 444 So. 2d 902 (Ala. Crim. App. 1984).

Assuming the court appoints a competent, unbiased interpreter, counsel's obligations would not be complete. The record would still need to be protected in order to challenge possible misinterpretations at trial or on appeal. Counsel should ordinarily insist on a simultaneous translation.⁴⁵ In view of the fact that the court reporter only transcribes the English dialogue,⁴⁶ counsel should insist on a "first-person" translation to avoid a garbled record.⁴⁷ Further, in most instances, zealous advocacy requires that counsel insist on having two interpreters in the courtroom.⁴⁸ One would translate

45. *Negron*, 434 F.2d at 386. The general requirement of a simultaneous interpretation in the federal courts was added by section 709 of the *Court Interpreters Amendments Act of 1988*, Pub. L. 100-702, § 709, 102 Stat. 4656-57 (1988) (codified in 28 U.S.C. §1827(k)).

46. *People v. Martinez*, 7 Ill. App. 3d 1075, 289 N.E.2d 76 (1972).

47. The creation of a clearer record through the use of the first person when the interpreter translates the witness's response (and the use of second person by counsel) can be illustrated by the following exchange:

1. Attorney (in English): "What is your name?"
2. Interpreter (in foreign language to witness): "What is your name?"
3. Witness (in foreign language): "My name is John Doe."
4. Interpreter (in English): "My name is John Doe."

See Henry, *On the Record*, N.M. ST. BAR BULL., Feb. 17, 1983, Special Insert, p. 2.

Use of the first person creates a more intelligible record than if the interpreter responds, "He says his name is John Doe." The court reporter will only be transcribing the English dialogue. See *People v. Martinez*, 7 Ill. App. 3d 1075, 289 N.E.2d 76 (1972). In the example above, only lines 1 and 4 would appear in the transcript. In this simple example, no great confusion would occur if the interpreter had responded in the third person. In more complicated exchanges, however, the record could become garbled if the interpreter translates in the third-person:

- Q. Ask him who was there.
- A. He says his friends, Juan and Fred.
- Q. Ask him if he signed the paper.
- A. He said they did.
- Q. Who did?
- A. He said him and Juan.

However, it has been held that the right to an interpreter does not guarantee the right to a literal translation. *State v. Cabodi*, 18 N.M. 513, 138 P. 262 (1914); *State v. Van Pham*, 675 P.2d at 848. But cf. *Negron*, 434 F.2d at 389, disapproving witness summaries.

48. This author has frequently used the following (admittedly absurd) example to demonstrate why, without the presence of two interpreters, an interpretation error could be made without anyone in the courtroom even being aware an error had occurred:

1. Attorney (in English): "What is your name?"
2. Interpreter (in foreign language to witness): "What did you eat for breakfast?"
3. Witness (in foreign language): "Ham and eggs."
4. Interpreter (in English): "My name is John Doe."

Obviously there is no "third person" problem with this translation. The problem is a misinterpretation. If all attorneys and parties only speak English and if the witness only speaks the foreign language, the only person in the room who knows an error has been made is the interpreter. If the interpreter does not intentionally make the error, but rather makes the error for a lack of precision in one or both languages, nobody will catch the error. The record will only contain lines 1 and 4, which is not an accurate reflection of the witness's testimony. Accordingly, to protect the client's interests, an attorney should have his or her own interpreter in addition to the "court" interpreter. (Two interpreters were appointed in *Van Pham*, 675 P.2d at 856.) The interpreter sitting with counsel would immediately notify counsel of the translation error. Counsel could timely object and call the second interpreter as a witness, if need be. If the attorney were bilingual, he or she would

witness testimony and proceedings for the record. The other would facilitate communication between counsel and client, and advise counsel of any translation errors made by the first, or "court" interpreter. Finally, counsel should insist that testimony be tape-recorded where an interpreter is used, for correcting errors at trial or for transmission with the record on appeal if necessary.⁴⁹

At this point, the difficulties facing an attorney who attempts to serve both as counsel and an interpreter should begin to appear obvious, as should the harm to the client's interests. However, courts and counsel have failed to see these difficulties in the majority of cases where the issue has arisen. With an understanding of the nature of the interpretation process, we turn now to an examination of these cases and to an analysis of why the procedure they approve is harmful to clients, counsel, and the administration of justice.

III. COUNSEL AS INTERPRETER

In some pre-*Negron* cases courts encountered no difficulty in finding that the right to confront witnesses in a criminal proceeding was satisfied where defense counsel understood the testimony even though the defendant did not.⁵⁰ Other cases focus on the fact that the accused was apparently able to communicate with bilingual counsel, in finding no abuse of discretion for failure to appoint an interpreter.⁵¹ Thus, the presence of counsel who could communicate with their respective clients in French,⁵² Italian,⁵³ Polish,⁵⁴ as well

catch the error without the second interpreter but would be ethically prohibited from both testifying and still continuing as counsel. See discussion Part III *infra*.

Another reason why two interpreters are necessary relates to the client's need to consult with monolingual counsel. *State v. Neave*, 177 Wis. 2d 359, 344 N.W.2d 181 (1984). Consider the scenario where an English-speaking attorney represents a Spanish-speaking client in a criminal trial. A prosecution witness testifies in Spanish. An interpreter translates into English for benefit of court and counsel, thereby enabling defendant, through counsel to confront the witness. However, defendant could not point out inaccuracies to defense counsel without either halting the proceedings and having the interpreter approach counsel table, or waiting until the end of the witness's testimony when memory has faded or the time for objection has passed. In any event, there would exist potential damage to the client's right to maintain confidential communication with defense counsel, particularly if the interpreter were a prosecuting attorney, police officer, or friend or relative of the victim. See *supra* note 43.

Cf. People v. Aranda, 186 Cal. App. 3d 230, 230 Cal. Rptr. 498 (1986) (no constitutional right to a second interpreter, at least not where defense counsel is bilingual); *Compare People v. Estrada*, 176 Cal. App. 3d 410, 415-16, 221 Cal. Rptr. 922, 924 (1986) (recognizing a right to a second interpreter, though not necessarily a certified interpreter; waiver of that right by bilingual defense counsel, with apparent approval of defendant, upheld).

49. See *Van Pham*, 675 P.2d at 848.

50. *Escobar v. State*, 30 Ariz. 159, 161, 245 P. 356, 358-59 (1926); *Luera v. State*, 124 Tex. Crim. 507, 509, 63 S.W.2d 699, 701 (1933).

51. *People v. Pegleri*, 39 Ill. 2d 568, 573, 237 N.E.2d 453, 458 (1968).

52. *United States v. Desist*, 384 F.2d 889 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969). The trial judge, Judge Palmieri, also spoke French. *Desist*, 384 F.2d at 899. See *infra* note 57, regarding foreign language ability of the trial judge. The ability of the *Desist* defendants to hire a private interpreter was also determined to obviate the need for an interpreter at government expense. *Desist*, 384 F.2d at 902.

53. *People v. Vitale*, 3 Ill. 2d 99, 101, 119 N.E.2d 784, 786-87 (1954).

54. *Szukiewicz v. Warden*, 213 Md. 636, 637, 131 A.2d 390, 391 (1957).

as Spanish,⁵⁵ was held to obviate the need for the appointment of an interpreter. The "bald assertion" that an attorney who was forced to act as the client's interpreter could not thereby function effectively as counsel was found to be without merit in a case involving a Spanish-speaking defendant and bilingual counsel.⁵⁶ As a further variation on this theme, the presence of a bilingual judge was held to satisfy the constitutional right of a Spanish-speaking defendant to confront witnesses in a criminal proceeding.⁵⁷

Even after *Negron*, the failure of a trial court to appoint an interpreter has been held not to violate the defendant's rights where bilingual counsel was present.⁵⁸ Some of these cases involved language interpretation issues in the context of a full trial.⁵⁹ In others, the issue of the right to an interpreter has arisen at pretrial proceedings,⁶⁰ the entry of a guilty plea,⁶¹ or at sentencing.⁶² In still other cases, defense counsel volunteered to serve as interpreter or at least did not object, thereby waiving what otherwise would have been a right to an interpreter had the defendant been represented by monolingual counsel.⁶³

In a very few cases, however, courts have recognized that the presence of bilingual counsel cannot possibly satisfy the confrontation clause and due process clause concerns.⁶⁴ This right to an independent

55. *People v. Pelegri*, 39 Ill. 2d 568, 573, 237 N.E.2d 453, 458 (1968).

56. *United States v. Paroutian*, 299 F.2d 486, 490 (2d Cir. 1962).

57. *United States v. Sosa*, 379 F.2d 525, 527 (7th Cir.), cert. denied, 389 U.S. 845 (1967); *Mares v. United States*, 391 F.2d 538 (5th Cir. 1968).

58. *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980), cert. denied, 450 U.S. 994 (1981); *United States v. Rodriguez*, 424 F.2d 205 (4th Cir.), cert. denied, 400 U.S. 841 (1970); *Briones v. State*, 595 S.W.2d 546 (Tex. Crim. App. 1980); *Diaz v. State*, 491 S.W.2d 166, 167 (Tex. Crim. App. 1973); *People v. Arias*, 47 A.D.2d 561, 363 N.Y.S.2d 631 (1975); *People v. Martinez*, 7 Ill. App. 3d 1075, 1077, 289 N.E.2d 76, 78 (1972); *People v. Rivera*, 7 Ill. App. 3d 983, 289 N.E.2d 36 (1972), cert. denied, 412 U.S. 907 (1973).

59. *Diaz*, 491 S.W.2d at 166; *Martinez*, 616 F.2d at 185; *Rodriguez*, 424 F.2d at 205.

60. *Rivera*, 7 Ill. App. 3d at 983, 289 N.E.2d at 36.

61. *Briones*, 595 S.W.2d at 546; *People v. Martinez*, 7 Ill. App. 3d at 1075, 289 N.E.2d at 76.

62. *Arias*, 47 A.D.2d at 561, 363 N.Y.S.2d at 631.

63. In *United States v. Martinez*, defense counsel "assured the court that he was 'absolutely' able to act as an interpreter for his client." 616 F.2d at 187.

In *People v. Sepulveda*, 102 Mich. App. 777, 778, 302 N.W.2d 256, 257 (1980), the court noted the following "waiver" by counsel: "Court: Can you interpret for him? Attorney: Yes, as his attorney I will state for the record that I am bilingual. I speak Spanish fluently and have explained to him the various aspects of the case." The defendant's conviction, which was upheld by the Court of Appeals of Michigan, was ultimately reversed and remanded. *People v. Sepulveda*, 412 Mich. 889, 890, 313 N.W.2d 283, 284 (1981). The Supreme Court of Michigan found reversible error in the failure to appoint an interpreter where the record clearly shows the defendant spoke no English whatsoever. *Id.*

64. *State v. Rios*, 112 Ariz. 143, 145, 539 P.2d 900, 902 (1975); *People v. Sepulveda*, 412 Mich. 889, 313 N.W.2d 283 (1981); See also *Baltierra v. State*, 586 S.W.2d 553, 559 n. 11 (Tex. Crim. App. 1979) (appointed counsel fluent in defendant's language affords the ability to communicate, a basic aspect of effective assistance of counsel and an obligation of counsel, but does not satisfy the right of confrontation, the satisfaction of which is the duty of the court).

interpreter has been upheld even in the face of the attempt by bilingual counsel to waive it.⁶⁵

Given such a split of authority, however, it is likely that in many instances courts will continue to uphold the trial court's determination not to appoint an interpreter where the client is represented by bilingual counsel, at least in the circumstances where counsel enters no objection to the procedure. In view of *Negron*,⁶⁶ the Court Interpreters Act,⁶⁷ and state provisions and decisions,⁶⁸ reliance on the attorney as interpreter raises issues of overlapping concern to client and counsel alike. Should courts permit the compromising of a language minority client's right to participate and assist at trial,⁶⁹ the dilution of the client's right to the effective assistance of counsel,⁷⁰ and risk the loss of an adequate appellate record,⁷¹ for the sole reason that the client's attorney has additional language abilities? Should bilingual attorneys, who are state-licensed officers of the court with their reputations and professional licenses on the line each time they appear on behalf of a client, be denied the full concentration required of all trial counsel⁷² but thereby granted only to monolingual attorneys?⁷³

The failure of courts to address these issues can produce potentially severe consequences. Language minority clients may be convicted without the traditional safeguards afforded to English-speaking clients or to other language minority clients with monolingual counsel. Bilingual attorneys can be subjected to state-imposed sanctions for participation without objection in the process.⁷⁴ Counsel should become sensitized to these issues. On behalf of themselves, and consistent with their ethical obligation of zealous advocacy, they should urge courts to apply local statutes and rules to afford separate interpreters.

Constitutional ramifications should not go unnoticed. Even though there has been no Supreme Court pronouncement on the subject of a constitutional right to an interpreter, and although lower courts have often reached contradictory conclusions on the subject, the Supreme Court has found a due process right to state-furnished "basic tools," including psychiatric experts on behalf of indigents.⁷⁵

65. *Sepulveda*, 412 Mich. at 889, 313 N.W.2d at 283; *People v. Chavez*, 124 Cal. App. 3d 215, 220, 177 Cal. Rptr. 306, 311 (1981).

66. *Supra* note 13.

67. *Supra* note 18.

68. *Supra* notes 25 and 26.

69. *See Negron*, *supra* note 13.

70. *Infra* note 84.

71. *Supra* notes 44-49 and accompanying text.

72. *Supra* note 64.

73. *See generally supra* section III.

74. In this author's view, for the reasons set forth below, such conduct warrants sanction.

75. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Similarly, a showing of particularized need for an interpreter coupled with a showing as to why a bilingual attorney cannot fulfill the need should lead to a conclusion that the failure to appoint a separate interpreter violates due process. In addition, *Negron* teaches that confrontation clause and due process violations occur when a language minority client does not have an interpreter to confront adverse witnesses. *Negron* also refers to a standard of "simple humaneness."⁷⁶ Counsel should invoke these concerns as well in resisting the dual appointment as attorney and interpreter.

There are also equal protection considerations. The only apparent reason why courts require counsel to also serve as interpreters is to save the money which would otherwise be paid by the court to independent interpreters. Assuming that such a scheme effectively deprives the client of either the attorney or the interpreter to which the client would otherwise be entitled, the situation appears analogous to equal protection problems identified by the Supreme Court where state court schemes denied indigent defendants appellate transcripts.⁷⁷

Counsel should be willing to point out to the courts other specific problems caused by the use of counsel as interpreter. For example, courts have generally not made the required inquiry into the interpretation competence⁷⁸ of bilingual counsel. In many cases, no apparent inquiry was made into counsel's competence as an interpreter before determining that he or she should serve in that capacity.⁷⁹ In other cases, courts relied solely upon the attorney's assertion of interpretation competence in making the decision not to appoint an independent interpreter.⁸⁰ Yet, an interpreter ordinarily cannot, upon his or her own blanket assertion of competence, qualify for appointment.⁸¹

Moreover, even though trial courts have been given wide discretion to appoint as interpreters persons with obvious bias,⁸² inherent conflict issues flowing from the attorney-client relationship seem insurmountable if courts and counsel wish to preserve any of the traditional ethical and due process concerns. For example, the attorney who interprets for a client at trial may well end up testifying against the client on appeal if an issue as to the adequacy of the

76. 434 F.2d at 390. Another reference to due process?

77. *Griffin v. Illinois*, 351 U.S. 12 (1956).

78. See *supra* notes 21, 22, 40-42, and accompanying text.

79. *United States v. Martinez*, 616 F.2d 185, 187 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *Briones v. State*, 595 S.W.2d 546, 547 (Tex. Crim. App. 1980).

80. *People v. Martinez*, 7 Ill. App. 3d 1075, 1076, 289 N.E.2d 76, 77 (1972); *People v. Sepulveda*, 102 Mich. App. 777, 778, 302 N.W.2d 256, 257 (1980), *rev'd*, 412 Mich. 889, 313 N.W.2d 283 (1981).

81. *State v. Van Pham*, 234 Kan. 649, 657, 675 P.2d 848, 856 (1984). See also Court Interpreters Act, 28 U.S.C. § 1827, and N.M. STAT. ANN. § 38-10-5 (Repl. Pamph. 1987), requiring certification of interpreter.

82. See *supra* note 43 and accompanying text.

translation is raised.⁸³ Even though the issue of effective assistance of trial counsel is occasionally raised in criminal appeals,⁸⁴ there seems to be no good reason for counsel to agree to inject an additional potential area of conflict between themselves and clients.⁸⁵

These concerns are not limited to the attorney-client relationship at trial. For example, the entry of a guilty plea has traditionally been viewed as the waiver of constitutionally protected rights.⁸⁶ These rights include the privilege against self-incrimination, the right to trial by jury, as well as the right to confront witnesses.⁸⁷ Waiver of these rights cannot be presumed from a silent record.⁸⁸ The waiver traditionally can only be made by the defendant personally and not by counsel.⁸⁹ When a bilingual attorney agrees to interpret for his or her client at this stage of the proceedings, the attorney runs the risk of effectively testifying against his client if the issue on appeal is whether, because of the language barrier, the client made a knowing and intelligent waiver of the rights set forth above.⁹⁰ In such an appeal, the client would be arguing no waiver could have occurred because the "interpreter," who had not been certified as such, did not effectively communicate to the defendant a sufficient understanding of the interests at stake to constitute a waiver. Upholding the plea in such a circumstance is tantamount to our courts, with the approval and participation of defense counsel, telling language minority defendants:

1. You have a right to confront your accusers;
2. That right is *not* lost if you can't understand your accusers;

83. In *People v. Aranda*, 186 Cal. App. 3d 230, 230 Cal. Rptr. 498 (1986), defendant's trial counsel actually submitted an affidavit on behalf of the state on appeal:

Based on my experience as a criminal trial attorney, and on my ability to speak and understand some Spanish as a result of having had two years of Spanish in high school, I did not feel there were any accuracy or other problems with respect to the interpretation of Mrs. Varela's testimony at trial. Had I felt there was a problem with the translation, I would have brought the matter to the attention of the court. It is my belief that the interpretation of Mrs. Varela's testimony had no effect on the case.

Aranda, 186 Cal. App. 3d at 237-38, 230 Cal. Rptr. at 502.

84. *Strickland v. Washington*, 466 U.S. 668 (1984).

85. Once counsel learns, or it becomes obvious that he or she will be called as a witness other than on behalf of the client, the attorney can only continue representation of the client until it is apparent the lawyer's testimony may be prejudicial to the client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102B; MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(b), 3.7. Unless counsel is going to testify that he or she is an incompetent translator, the testimony will always prejudice the client and the attorney would be required to withdraw as counsel.

86. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

87. *Id.*

88. *Id.*

89. *State v. Neave*, 117 Wis. 2d 359, 365, 344 N.W.2d 181, 187-88 (1984).

90. *Briones v. State*, 595 S.W.2d 546, 547 (Tex. Crim. App. 1980); *People v. Martinez*, 7 Ill. App. 3d 1075, 289 N.E.2d 76 (1972).

3. That right is lost if you can't understand this inquiry as to whether you wish to waive the right to confront your accusers, because of interpretation errors by your own counsel.

Confidentiality of client communications⁹¹ might also be sacrificed. During the course of the inquiry regarding entry of the plea, the attorney-interpreter should be sworn to make a complete translation.⁹² Up to that point, the client should have been made aware that his or her communications to counsel are confidential. In the course of discussing the basis for the entry of the guilty plea, what if the client makes a statement which may adversely affect him or her at sentencing? Does the attorney comply with the oath to make a translation or with the ethical requirement of confidentiality?

Further, the ethical burden of zealous advocacy⁹³ imposed upon trial counsel and the right of the client to effective representation⁹⁴ should preclude an attorney from serving as an interpreter should the matter proceed to trial. It would be physically impossible for counsel to cross-examine witnesses, listen attentively to testimony and objections of opposing counsel, hear rulings and remarks of the judge, and still simultaneously render an accurate and complete translation of the proceeding to the client.⁹⁵ Even where one interpreter is present to translate for the benefit of the court, bilingual counsel should still have available a second interpreter to testify in the event of a language misinterpretation.⁹⁶ Otherwise, bilingual counsel must testify regarding the interpretation error if he or she wants to correct it or perfect the record for appeal, and then argue the point as counsel. Such conduct is ethically impermissible.⁹⁷

Finally, there is the troublesome result that the presence of bilingual counsel in these circumstances results in lesser protection to the client's interests than if counsel were monolingual, while at the same time exposing bilingual counsel to greater ethical risks. Bilingual attorneys who are aware of their clients' language limitations would not wish to risk the waiver of an interpreter that might result should the court happen to overhear their conversations with their clients in another language.⁹⁸ The only safe course of conduct would be to limit all communications with the client, at least in the presence of the court, to communication through an interpreter. This would

91. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6.

92. *People v. Chavez*, 124 Cal. App. 3d 215, 225, 177 Cal. Rptr. 306, 312 (1981); *State v. Van Pham*, 234 Kan. 649, 659, 675 P.2d 848, 858 (1984).

93. *Supra* note 7.

94. *Supra* note 84.

95. *State v. Rios*, 112 Ariz. 143, 144, 539 P.2d 900, 901 (1975).

96. *See supra* note 48 and accompanying text.

97. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(b), 3.7.

98. *See United States v. Desist*, 384 F.2d 889 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969).

hamper communication between attorney and client and result in violations of what should be the right of each to communicate in their language of choice.⁹⁹ If no interpreter were appointed and counsel nonetheless chose to communicate with the client, the attorney would run the risk of waiver.¹⁰⁰ If counsel were to sit silent vis-a-vis the client, he or she would almost certainly fall below the standard of zealous advocacy.¹⁰¹ The client would be denied effective assistance of counsel.¹⁰² The client would experience a "babble of voices"¹⁰³ with the trial being an "invective against an insensible object."¹⁰⁴ The client effectively would be excluded from his or her own trial.¹⁰⁵ If the current majority view continues, language minority clients and their bilingual counsel may be placed in the bizarre position of considering moving the court to appoint monolingual counsel in order to guarantee the right to an adequate interpretation.¹⁰⁶

Given what appear to be some fairly self-evident problems when counsel serve as interpreters for their own clients, one cannot help but wonder why the situation has continued. Monolingual judges may have been unaware of the inherent difficulties in the understanding of courtroom testimony and the presentation of an effective case in the presence of a language barrier. The lack of any United States Supreme Court decision defining and applying the right to an interpreter undoubtedly adds to uncertainties as to the exact nature and parameters of the right. Viewing the situation somewhat less charitably, judges may have been aware of the difficulties. They may have chosen not to rectify them, acting on the same fear, apprehension, and hostility sometimes exhibited by monolingual people toward a language they do not understand and toward the people who must employ that language to survive and function in this society.¹⁰⁷ Concerns about the cost of providing interpreters have undoubtedly played some role as well.¹⁰⁸

Bilingual attorneys may have hesitated to object to being required to interpret for their clients. They may have hesitated out of deference to the court or out of some perceived greater sense of duty to a

99. See Piatt, *supra* notes 4 and 5.

100. *Desist*, 384 F.2d at 889; see also cases cited in note 57.

101. *Supra* note 7.

102. *Peeler v. State*, 750 S.W.2d 687 (Mo. App. 1988); *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

103. *United States ex rel. Negron v. New York*, 434 F.2d 386, 388 (2d Cir. 1970).

104. *State v. Rios*, 112 Ariz. 143, 144, 539 P.2d 900, 901 (1975) (quoting *State v. Natividad*, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974)).

105. *Id.*

106. *Cf. Cervantes v. Cox*, 350 F.2d 855 (10th Cir. 1965) (Spanish-speaking indigent defendant has no right to Spanish-speaking appointed counsel).

107. See Piatt, *supra* notes 4 and 5.

108. *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981).

client who has placed a great deal of trust in that attorney based upon the common language shared by counsel and client. They may have hesitated out of concern that they would somehow appear less competent as attorneys to court or client if they did not demonstrate an ability to interpret the proceedings for the apparent benefit of both.

Whatever the previous motivations of court and counsel, it should now appear obvious that it is unfair to the client when his or her attorney must serve as interpreter in court. The client, obviously, cannot enter his or her own objection because of a lack of understanding of the language and the process.¹⁰⁹ Thus it becomes incumbent upon counsel and the courts to protect the due process and confrontation rights of clients who are not fluent in English. Proper and timely requests for competent interpreters and the preservation of a record should be the required level of conduct of trial counsel. Proper and timely objections based upon the considerations set forth in this article should be made and preserved where the court considers relying upon bilingual counsel as an interpreter.

Judges should be sensitive to the language issue even if counsel is not. The observance of an exchange between counsel and client in another language should trigger an inquiry from the court as to whether an interpreter is required,¹¹⁰ rather than serve as the basis for the court's determination that no interpreter is needed.¹¹¹ Courts should find a waiver of the right to an interpreter only after a hearing on the record using an interpreter to explain to the language

109. The following was held not to constitute a request for an interpreter:

Question to defendant by defense counsel:	"Well, the question I'm asking you and you—you answered partly right and partly—I don't think you—either you misunderstood me or something. What you are saying is, that you have in the past drank enough that you have no knowledge of what was going on around you and no recollection of what had happened to you or where you have been, is this true?"
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Answer by defendant:	"I wish I can have a interpreter, but I don't have a interpreter. See, sometimes I say something I'm not supposed to say and sometimes I say something wrong. I just say what I know the way —"
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The Court:	"You just listen very carefully to the man's questions. I think you can get along all right, to either of the lawyers, they'll put their questions to you pretty clearly, I think."
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Diaz v. State, 491 S.W.2d 166, 167 (Tex. Crim. App. 1973).

110. See *People v. Chavez*, 124 Cal. App. 3d 215, 227, 177 Cal. Rptr. 306, 313 (1981).

111. See cases cited *supra* note 58.

minority litigant the nature and extent of the right to a translation.¹¹² If the confrontation clause guarantees "face-to-face" contact¹¹³ it should also guarantee "ear-to-ear" contact.

IV. CONCLUSION

Like it or not, and in spite of the efforts of many,¹¹⁴ we are rapidly becoming a bilingual society.¹¹⁵ The fairness, or lack of fairness, with which we treat language minority people who come before our courts will serve as an important measure of our willingness to implement our constitutional guarantees on behalf of all people who appear in our courts, and not just those who happen to speak fluent English. If attorneys continue to interpret for language minority clients, those clients will effectively be forced to defend themselves in an adversary system without an advocate or to observe helplessly while a babble of voices strips them of their liberty and property.

112. This is the process required by the *Court Interpreters Act*, and the *New Mexico Court Interpreters Act*, N.M. STAT. ANN. § 38-10-6 (1978).

113. *Coy v. Iowa*, 108 S. Ct. 2798.

114. The "U.S. English" organization and others seek to have states, and eventually the federal government, adopt provisions making English the "official" language of the United States. A critique of this approach appears in the article and book by this author cited at notes 4 and 5 *supra*. On October 6, 1988, Walter Cronkite resigned from the advisory board of "U.S. English" after learning of a memo by John Tanton, co-founder of the organization. The memo depicted an America possibly doomed to conflict between a minority of educated English speakers and a majority of uneducated, poor people of ethnic and racial groups with faster population growth. On October 17, 1988, another board member, Linda Chavez, resigned because she was told major contributors to the group advocated extraordinary views on population and immigration control, including advocacy of forced sterilization. *Cronkite Tenders Resignation in Reaction to English Memo*, Lubbock Avalanche-Journal (Lubbock, Texas), October 18, 1988, at 6-C.

115. See Piatt, *supra* note 4, at 899.