



Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS

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John Voelker
Director of State Courts

May 20, 2008

Hon. J.B. Van Hollen
Attorney General
114 East, State Capitol
Madison, WI 53707-7857

RE: Taxation of interpreter fees

Dear Attorney General Van Hollen:

I am requesting guidance from your office on the application of the statutes governing payment of court interpreters. §885.38(3)ⁱ was recently amended at the Supreme Court's request to provide interpreters at public expense in all court proceedings for certain interested persons, regardless of whether the person is indigent and regardless of what type of case is before the court. Previously, this statute provided interpreters at public expense only in criminal, juvenile, and mental health cases, and only if the person was indigent.

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§885.38(3) interacts with two other statutes that were unchanged: §885.38(8)ⁱⁱ provides that counties shall pay the expenses in all proceedings of qualified interpreters appointed by the court, and §758.19(8)ⁱⁱⁱ provides that county interpreter expenses shall be reimbursed by the state at set hourly rates (\$40 per hour for a certified interpreter and \$30 per hour for non-certified). However, the hourly amount the counties must pay to hire an interpreter is often greater than the hourly reimbursement allowed by statute. Since the amendment, my office has received several questions from clerks of circuit court regarding the extent to which any unreimbursed expenses might be taxed to the parties.

Specifically, the questions are:

1. For a criminal case, can the difference be taxed to the defendant as a cost under §973.06(1)(c)?
2. For a civil case, can the unreimbursed amount be taxed as a cost under §907.06 or §814.04(2)? Can it be taxed to another party?
3. For a civil forfeiture, can the unreimbursed amount be taxed under §778.06?
4. In a municipal court, can the cost of an interpreter be taxed as a cost under §800.09?
5. Can the court tax unreimbursed interpreter travel costs?
6. Can the court tax the amount that is reimbursed by the state – the first \$30 or \$40 per hour?
7. For any of these questions, does it matter if the defendant is indigent or not?

There are several factors that may bear on this analysis:

Legislative intent: In 1999, the Director of State Courts convened a Committee to Improve Interpretation and Translation in the Wisconsin Courts. This committee issued recommendations for an overall effort to improve court services to persons with limited English proficiency, with the goal of providing access to justice for litigants and increasing the integrity and effectiveness of the court.^{iv} Statutory changes and budget requests recommended by the committee were made part of the Supreme Court's budget submissions starting in 2001 and adopted gradually over the years. The recent change to §885.38(3) was the final recommendation to be adopted. The committee's report states at p. 18:

Many Wisconsin residents, especially ones with limited English skills, live from paycheck to paycheck. Because the standards for indigency are set very low, many parties who are not technically indigent are still unable to afford the services of an interpreter in addition to all other costs. If parties are required to pay for a neutral paid interpreter, it becomes a cost that applies only to people of limited English proficiency. Equal access in communication is demanded by the Americans with Disabilities Act, in order that disabled persons may fully participate in court proceedings and obtain their rights thereby. There is no justifiable reason to deny equivalent access to speakers of foreign languages.

Even if a party can afford to hire a paid interpreter, allowing a financial relationship between interpreter and client undermines the neutrality needed by the court; the interpreter should report only to the judge. The committee considered but firmly rejected including a statute that would allow the court to assess the interpreter's fee as a court cost against a nonindigent party. Such a clause would undermine the basic premise of the statutory changes and would put pressure back on judges to cut costs at the expense of equal access to the courts. Interpreters should be provided as part of the basic package of court services, like the court reporter and the bailiff. The purpose of the interpreter is to ensure the accountability and fairness of the court proceedings, and that is a fundamental cost of government services to be borne by all.

Apart from the intent expressed by the committee's report, I am not aware of anything in the legislative history that is likely to be illuminating on questions of taxation of costs.

Americans with Disabilities Act: The ADA, 42 USC §§12101-12213, requires that state and local government facilities, including courts, be accessible to individuals with disabilities and provide reasonable accommodations to qualified persons. The U.S. Department of Justice has published regulations implementing the ADA, found in 28 CFR Part 35. The regulations require that auxiliary aids and services be provided at public expense regardless of the disabled person's ability to pay. 28 CFR 35.130(f). The U.S. Department of Justice has taken the position that §35.130(f) should be interpreted to mean that agencies may not charge any party with the cost of the interpreter as an element of "court costs". The Department also applied this interpretation to ADA's predecessor statute, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Title VI of the Civil Rights Act of 1964: 42 U.S.C. Section 2000d, §601, prohibits national origin discrimination by any program or activity receiving Federal financial assistance. Executive Order 13166 requires federal funding recipients to address the needs of persons who, due to limited English proficiency, cannot fully and equally participate in federally funded programs without language assistance. The U.S. Department of Justice has issued policy guidance on the responsibility of courts to provide language services, posted at <http://www.usdoj.gov/crt/cor/13166.htm>. Under this guidance, if funding for increased services

is limited, courts may provide interpreter services beginning with the most critical services and the most commonly used languages. Title VI addresses discrimination on the basis of national origin; the purpose of the LEP guidance is to point out how language issues are part of that problem. If immigrants have to pay extra for access to the courts, and native-born people do not, it becomes a national origin issue.

Attached is a recent letter from the U.S. Department of Justice Civil Rights Division that addresses the practice of taxing interpreter fees as costs. It states on pages 3-4:

[Our office] has noted a disturbing number of courts and court systems engaging in a practice of charging LEP persons for interpretation costs – a practice which implicates national origin discrimination concerns. DOJ’s Guidance focuses on a huge range of types of recipients. The consequences of lack of access to some of these programs is much greater than others. The guidance was written for, and intended to apply flexibly to, everything from bicycle safety courses to criminal trials, and even to serve as a model for the enormous variety of recipients of funds from other federal agencies. In this context, nearly every encounter an LEP person has with a court is of great importance or consequence to the LEP person. Thus, the guidance emphasizes the need for courts to provide language services free of cost to LEP persons:

... [W]hen oral language services are necessary, recipients [of any federal funds] should generally offer competent interpreter services free of cost to the LEP person. For DOJ recipient programs and activities, this is particularly true in a courtroom, administrative hearing, pre-and post-trial proceedings, situations in which health, safety, or access to important benefits and services are at stake, or when credibility and accuracy are important to protect an individual’s rights and access to important services (67 FR 41455, 41462)

We therefore think that the legally sound approach to providing access to LEP persons can be found in states in which courts are providing interpretation free of cost to all LEP persons encountering the system (including parents of non-LEP minors), whether it be in a criminal or civil setting. In addition, courts should be providing translation of vital documents and signage. Many states are moving in this direction, and we are pleased to continue to work independently and with the Center to send the message of compliance and best practices to all state courts, and to provide technical assistance wherever we are able. As you are aware, we also conduct investigations into allegations of national origin discrimination in courts, and are working with some states in that capacity, as well.

Thus, it is the position of the U.S. Department of Justice that “a practice of charging LEP persons for interpretation costs ... implicates national origin discrimination concerns,” and “the legally sound approach to providing access ... [is] providing interpretation free of cost.”

Interpreters as expert witnesses: Wis. Stats. §906.04 provides that “an interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.” §907.06^v provides that the court on its own motion may appoint expert witnesses who are entitled to reasonable compensation in whatever sum the judge may allow. In criminal cases expert witness fees are payable from funds which may be provided by law; in civil cases the fees shall be paid as the judge directs and charges like other costs without limitation. However, considering interpreters to be expert witnesses is not a perfect fit, since they are not witnesses in the usual sense. Under the amended §885.38, their services are a necessary part of court proceedings any time a person with limited English proficiency is in court.


Costs: The Supreme Court has stated that “costs are regulated exclusively by statute as a matter of legislative discretion.” *State v. Dismuke*, 2001 WI 75 ¶19, 244 Wis.2d 457; *State v. Ferguson*, 202 Wis.2d 333 (1996). To be taxable, disbursements and fees are those that are “ordinarily charged to and payable by another”; they do not include the internal operating expenses of a governmental unit. *State v. Dismuke* at ¶22. “The right to recover costs is not synonymous with the right to recover the expense of litigation. This right is statutory in nature and, and to the extent that a statute does not authorize the recovery of specific costs, they are not recoverable.” *State v. Foster*, 100 Wis. 2d 103, 106 (1981).

For criminal cases, §973.06(1)^{vi} provides that “the costs, fees, and surcharges taxable against the defendant shall consist of the following items and no others: (c) fees and disbursements allowed by the court to expert witnesses.” For civil cases, §814.04(2)^{vii} provides for taxation of “all the necessary disbursements and fees allowed by law” and “an expert witness fee not exceeding \$300 for each expert who testifies.” For civil forfeitures, §778.06 provides for a penalty plus “costs, fees, and surcharges imposed under ch. 814”. Similarly, for municipal court judgments, §800.09(2)(b) allows taxation of “costs, fees, and surcharges imposed under ch. 814”.^{viii} Do any of these provisions allow the court to tax a party with the cost of a court interpreter? In the past, we have advised circuit courts that they may do so, but the intent of the new legislation is to the contrary.^{ix}

Travel costs: Travel costs are also a significant issue. §758.19(8) provides a state reimbursement of 20 cents per mile within the state or from the state border; it makes no provision for hotel, meals, or flying an interpreter in from another state, although interpreters frequently travel long distances and may be needed for several days. Thus, travel costs often exceed the amount paid by the state, and the difference to a remote county faced with a long trial and a rare language may be substantial. Can the difference be taxed to a party?

Please contact Marcia Vandercook, Circuit Court Legal Advisor, 2677-7335, or Carmel Capati, Interpreter Program Manager, 266-8635, if you need further information. Thank you for your assistance with this matter.

Sincerely,



A. John Voelker
Director of State Courts

cc: Sheryl Gervasi

ⁱ As amended by 2007 Act 20, §885.38(3) provides:

(a) If the court determines that the person has limited English proficiency and that an interpreter is necessary, the court shall advise the person that he or she has the right to a qualified interpreter at the public's expense if the person is one of the following: [party, witness, alleged victim, parent of a minor party, legal guardian, a person affected by the proceedings if determined appropriate by the court].

ⁱⁱ §885.38(8) provides:

(a) Except as provided in par. (b), the necessary expenses of providing qualified interpreters to persons with limited English proficiency under this section shall be paid as follows:

1. The county in which the circuit court is located shall pay the expenses in all proceedings before a circuit court and when the clerk of circuit court uses a qualified interpreter under sub. (3) (d). The county shall be reimbursed as provided in s. 758.19 (8) for expenses paid under this subdivision.
2. The court of appeals shall pay the expenses in all proceedings before the court of appeals.
3. The supreme court shall pay the expenses in all proceedings before the supreme court.

(b) The state public defender shall pay the expenses for interpreters assisting the state public defender in representing an indigent person in preparing for court proceedings.

ⁱⁱⁱ §758.19(8) provides:

(a) From the appropriation under s. 20.625 (1) (c), the director of state courts shall reimburse counties up to 4 times each year for the actual expenses paid for interpreters required by circuit courts to assist persons with limited English proficiency under s. 885.38 (8) (a) 1. The amount of the reimbursement for mileage shall be 20 cents per mile going and returning from his or her residence if within the state; or, if without the state, from the point where he or she crosses the state boundary to the place of attendance, and returning by the usually traveled route between such points. The amount of the maximum hourly reimbursement for court interpreters shall be as follows:

1. Forty dollars for the first hour and \$20 for each additional 0.5 hour for qualified interpreters certified under the requirements and procedures approved by the supreme court.
2. Thirty dollars for the first hour and \$15 for each additional 0.5 hour for qualified interpreters, as defined in s. 885.38 (1) (c).

(b) To receive reimbursement under par. (a), a county must submit, on forms provided by the director of state courts, an accounting of the amount paid for expenses related to court interpreters that are eligible for reimbursement under par. (a). The forms must include expenses for the preceding 3-month period and must be submitted within 90 days after that 3-month period has ended. The director of state courts may not reimburse a county for any expenses related to court interpreters that are submitted after the 90-day period has ended. Reimbursement under par. (a) first applies to court interpreter expenses incurred on July 1, 2002.

^{iv} See Report to the Director of State Courts, *Improving Interpretation in Wisconsin's Courts* (2000), found at <http://wicourts.gov/services/interpreter/docs/newsreport00.pdf>.

^v §907.06, court appointed experts, provides:

(1) Appointment. The judge may on the judge's own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of the judge's own selection....

(2) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and cases involving just compensation under ch. 32. In civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs but without the limitation upon expert witness fees prescribed by s. 814.04 (2).

^{vi} §973.06(1) provides that the costs, fees, and surcharges taxable against the defendant shall consist of the following items and no others:

- (a) necessary disbursements and fees of officers allowed by law
- (am) drug buy money
- (ar) costs incurred due to threats to release chemical, biological, or radioactive substances
- (b) fees and travel of state witnesses at preliminary hearing and trial
- (c) fees and disbursements allowed by the court to expert witnesses
- (d) fees and travel of defense witnesses at preliminary hearing and trial

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- (e) defense attorney fees paid by the state or county
 - (f) CPO contributions [repealed]
 - (g) the 10% restitution surcharge
 - (h) HIV and sexually transmitted disease testing.

Per §93.20, DATCP can also recoup certain costs of enforcing ch. 88, 91 to 100 or 126.

vii 814.04(2) provides:

(2) Disbursements. All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified and other copies of papers and records in any public office; postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery; depositions including copies; plats and photographs, not exceeding \$100 for each item; an expert witness fee not exceeding \$300 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

viii 885.37 provides:

(4)(a) The necessary expense of furnishing an interpreter for an indigent person in a municipal court shall be paid by the municipality.

938.37 provides for juvenile cases:

(1) Juvenile court. A court assigned to exercise jurisdiction under this chapter and ch. 48 may not impose costs, fees, or surcharges under ch. 814 against a juvenile under 14 years of age. A court may impose costs, fees, and surcharges under ch. 814 against a juvenile 14 years of age or older.

(3) Civil and criminal courts. Notwithstanding sub. (1), courts of civil and criminal jurisdiction exercising jurisdiction under s. 938.17 may assess the same costs, fees, and surcharges imposed under ch. 814 against juveniles as they may assess against adults, except that witness fees may not be charged to the juvenile.

^{ix} In addition, costs may be allowed when they are in the nature of sanctions, such as requiring the defendant to pay the jury fee for a late-canceled trial. *State v. Campbell*, 2006 WI 99 ¶70-71, 294 Wis.2d 100. We believe these are within the judge's discretion and will rarely be at issue in this context.