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DEPARTMENT OF JUSTICE

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October 24, 2008 OAG—9A—08

Mr. A. John Voelker
Director of State Courts
16 East, State Capitol
Madison, WI 53702

Dear Mr. Voelker:

You have asked whether the recently amended Wis. Stat. § 885.38(3), providing for court interpreters at public expense, permits the state courts to tax interpreter costs upon parties to litigation. It is my opinion that, by amending the statute, the Legislature intended for the courts to provide necessary interpreters for both the hearing impaired and for those of limited English proficiency regardless of their ability to pay, and that courts may not tax the parties for these costs.

RELEVANT STATUTES

Wis. Stat. § 885.38(3)(a)[1]:

> 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.]

Wis. Stat. § 885.38(8)(a)[2]:

> 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

[1]As amended by 2007 Wisconsin Act 20, sec. 3773.

[2]As amended by 2007 Wisconsin Act 20, sec. 3774.

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.

Wis. Stat. § 885.38(1)(b):

"Limited English proficiency" means any of the following:

1. The inability, because of the use of a language other than English, to adequately understand or communicate effectively in English in a court proceeding.

2. The inability, due to a speech impairment, hearing loss, deafness, deaf-blindness, or other disability, to adequately hear, understand, or communicate effectively in English in a court proceeding.

Wis. Stat. § 814.04:

Except as provided . . . when allowed costs shall be as follows . . . (2) Disbursements. All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process . . . 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 . . . 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 . . . an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

DISCUSSION

The obligation to provide in-court interpreters at public expense for criminal defendants originated in *State v. Neave*, 117 Wis. 2d 359, 375, 344 N.W.2d 181 (1984). This obligation was codified in the statutes shortly thereafter in 1985 Wisconsin Act 266. *See Appointment of an Interpreter in State v. Tai V. Le*, 184 Wis. 2d 860, 868, 517 N.W.2d 144 (1994). But there was little explicit guidance then as to who would ultimately bear the costs and in what circumstances. Nor was the obligation extended to non-criminal cases.

As you note in your opinion request, the Wisconsin Supreme Court subsequently asked the Legislature to amend the interpreter statute to provide interpreters at public expense, beginning with budget submissions in 2001, for individuals with limited English proficiency in both criminal and civil matters. The request specifically asked that all necessary interpreters be provided at public expense "without requiring that the participant be indigent as part of a basic right to court access." *See* Report to the Director of State Courts, *Improving Interpretation in Wisconsin's Courts* (October 2000), at 6.[3] *See also* Director of State Court's memorandum, *Statutory Change Requests for the Courts' 2007-2009 Biennial Budget Submission.*[4] Interpretations by an agency that sponsors or is charged with implementing legislation may be considered as persuasive authority. *Appointment of an Interpreter*, 184 Wis. 2d at 868-69. Because it is clear that the Legislature acted as the Court itself requested, it is my opinion that necessary interpreters must be provided at public expense as a matter of Wisconsin law.

The relevant portion of the amendment to Wis. Stat. § 885.38(3)(a) reads as follows:

> ~~In criminal proceedings and in proceedings under ch.48, 51, 55, or 938, if~~ 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 ~~and that, if the person cannot afford one, an interpreter will be provided~~ 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.]

2007 Wisconsin Act 20, sec. 3773.

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[3]The report may be found at *http://wicourts.gov/services/interpreter/docs/newsreport00.pdf* (last visited 9/18/2008).

[4]Deb Brescoll, Budget and Policy Officer, Director of State Court's Office to Robert Nelson, Senior Attorney, Legislative Reference Bureau (August 22, 2006), at 2 ("The Circuit Courts requests [sic] the following statutory language modifications in order to require the appointment of court interpreters in all cases regardless of indigency and to authorize state reimbursement for county interpreter costs related to non-indigents."). The report is part of the drafting record for 2007 Wisconsin Act 20, sec. 3773.

When the Legislature amends a statute, it is presumed to have full knowledge of existing statutes. *Murphy v. LIRC*, 183 Wis. 2d 205, 218, 515 N.W.2d 487 (Ct. App. 1994). Here, the Legislature removed prior language that had limited publicly paid and provided interpreters to indigent persons in criminal, juvenile, mental health, and protective services proceedings. The term "indigent" was also deleted from Wis. Stat. § 885.38(8)(a). The Legislature's action in striking this limiting language indicates its intention to provide for publicly financed court interpreters whenever the court determines that one is necessary.

This interpretation is consistent with federal law protecting the rights of the hearing impaired. As you know, the Americans With Disabilities Act requires reasonable accommodations to qualified individuals in the provision of government services, and that those accommodations be provided at public expense. *See* 42 U.S.C. § 12101-13 and 28 C.F.R. § 35.130(f) (2007). Courts cannot require that hearing impaired individuals bear the cost of necessary interpretation. *See id.*

Likewise, the United States Department of Justice ("USDOJ") has opined that courts (as recipients of federal funding) are responsible to provide language services for those of limited English proficiency at public expense in courtroom proceedings where significant liberties are at stake.[5] The USDOJ reasons that charging persons of limited English proficiency for necessary court interpretation services would have the effect of discriminating against them because of their national origin in violation of Title VI of the Civil Rights Act.[6]

Provision of necessary courtroom interpreters, at public expense, is thus required by Wis. Stat. § 885.38(3) and this interpretation is consistent with federal law. A trial judge does have considerable discretion in implementing the statutory requirements, because the judge determines whether an interpreter is necessary in a given case. For a criminal defendant, it is likely that interpreter services will be considered necessary. There may be many other cases, however, where interpreter services are not necessary either because of the nature of the suit or because there are reasonable, less expensive alternatives available.

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[5]*See* Department of Justice Memorandum Regarding Executive Order 13166, *Improving Access to Services for Persons With Limited English Proficiency* (October 26, 2001) available at *http:/www.usdoj.gov/crt/cor/13166.htm* (last visited 9/18/2008).

[6]*See* 42 U.S.C. § 2000d, Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, § 601, 78 Stat. 252 (1964).

RESPONSE TO ENUMERATED QUESTIONS

1. *For a criminal case, can the difference [between the actual cost of interpretation and the state reimbursement rate] be taxed to the defendant as a cost under §973.06(1)(c)?*

Wisconsin Stat. § 885.38(8) provides that counties shall pay the expenses of qualified interpreters appointed by the court, and Wis. Stat. § 758.19(8) 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). Because the hourly amount counties must actually pay to qualified interpreters often exceeds the statutory reimbursement rate, counties are left to absorb the costs unless they can pass on the costs to litigants. Nevertheless, I am unable to find support in Wisconsin law for shifting the additional costs to criminal defendants.

No Wisconsin case has discussed imposing interpreter costs on criminal defendants. The Wisconsin Supreme Court has held, however, that "costs are regulated exclusively by statute as a matter of legislative discretion." *State v. Dismuke*, 2001 WI 75, ¶ 19, 244 Wis. 2d 457, 628 N.W.2d 791. "[C]osts taxable against a criminal defendant are limited to those specifically enumerated in Wis. Stat. § 973.06." *Id.*, citing *State v. Ferguson*, 202 Wis. 2d 233, 238, 549 N.W.2d 718 (1996). Wisconsin Stat. § 973.06 provides as follows:

> Except as provided in s. 93.20 [enforcement fees of the Department of Agriculture, Trade and Consumer Protection], the costs, fees, and surcharges taxable against the defendant shall consist of the following items *and no others* [disbursements and fees of officers allowed by law, drug buy money, costs incurred due to threats to release chemical, biological or radioactive substances, fees and travel of state witnesses at preliminary hearing and trial, fees and disbursements allowed by the court to expert witnesses, and fees and travel of defense witnesses at preliminary hearing and trial].

In *Ferguson*, the Supreme Court found no statutory support for the state's argument that crime laboratory testing could be taxed as an expert witness fee or disbursement under Wis. Stat. § 973.06(1)(c), and therefore disallowed shifting such costs to the defendant. Specifically, the court held that, "[t]o constitute a fee under § 973.06(1)(c) [related to expert witnesses], the cost of performing a service must be more than an internal operating expense of a governmental unit which has been prorated or costed out; it must be chargeable to and payable by another." *Ferguson*, 202 Wis. 2d at 242, cited in *Dismuke*, 244 Wis. 2d 457, ¶ 20. Applying the reasoning of *Dismuke* and *Ferguson* here, unless there exists a statute that provides for the costs of necessary interpreters to be shifted to the litigants or defendants, such shifting is prohibited.

"By its plain language, then, the costs taxable against a defendant under Wis. Stat. § 973.06(1)(c) are limited to the items enumerated therein." *Ferguson*, 202 Wis. 2d at 238. The

only enumerated section that would seem to be potentially relevant to necessary interpreters would be that provision permitting the charging of defendants for expert witness fees. But interpreters, by their nature, are not normally considered to be expert witnesses, nor indeed are they witnesses of any kind, and we know of no case law or statute that would suggest that interpreters should be treated as expert witnesses for cost purposes. The clear language of the new interpreter statute, coupled with the rules enunciated in *Ferguson* and *Dismuke*, is controlling, and prevents the shifting of interpreter costs to defendants in a criminal proceeding.

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?*

As noted above, the Legislature specifically amended Wis. Stat. § 885.38(3)(a) to provide for public funding of necessary interpretation services in all court proceedings. Absent any clear language elsewhere, the plain language of the amended statute evidences a blanket prohibition on the taxing of such costs.

Wisconsin Stat. § 907.06(2) provides that the parties to civil cases may be taxed with compensating court appointed expert witnesses as the judge directs. There is some authority suggesting that, in the past, interpreters could have been treated as expert witnesses in civil cases for cost-shifting purposes. When adopting the Wisconsin Rules of Evidence in 1973, the Judicial Council comment noted: "*As an expert*, an interpreter will be qualified pursuant to s. 907.02 and can be supplied pursuant to s. 907.06." 59 Wis. 2d R1, R163 (1973) (emphasis supplied). Then, as now, the expert witness provisions of Wis. Stat. § 907.06(2) provided that: "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 [the statutory predecessor of s. 814.04(23)]." The Judicial Council comment might have served as support for charging civil suit parties with interpreter fees (as expert witness costs) in civil cases before 2007 Wisconsin Act 20 amended Wis. Stat. § 885.38. Today, however, the language of Wis. Stat. § 885.38 as amended coupled with the legislative history cited *infra* mandates the conclusion that, whenever interpreters are deemed necessary, they should be provided at public expense.

Nor does Wis. Stat. § 814.04 have any language contradicting Wis. Stat. § 885.38(3) which provides for the taxation of certain costs of the prevailing party against the losing party and nowhere includes court appointed interpreters.

The term "costs" in the two statutes discussed and in Wisconsin law in general has a special meaning in the context of litigation. *See State v. Foster*, 100 Wis. 2d 103, 106, 301 N.W.2d 192 (1981). "[A]ny award of a 'cost' which is not specifically authorized by a Wisconsin statute constitutes an error of law that must be reversed." *Kleinke v. Farmers Coop. Supply & Shipping*, 202 Wis. 2d 138, 147, 549 N.W.2d 714 (1996). Where the Legislature has chosen to give the courts authority to tax a party with the court's costs it has done so, for

example, in the case of a court appointed expert witness discussed above. Neither Wis. Stat. § 907.06 nor Wis. Stat. § 814.04 provide authorization for a court taxing any party or litigant with necessary courtroom proceeding interpretation services.

3. *For a civil forfeiture, can the unreimbursed amount be taxed under §778.06?*

Wisconsin Stat. § 778.06 provides as follows:

> When a forfeiture is imposed . . . the action may be brought for the highest sum specified, plus costs, fees, and surcharges imposed under ch. 814; and judgment may be rendered for such sum as the court or jury shall assess or determine to be proportionate to the offense.

As discussed above, there does not appear to be any authority within Wis. Stat. ch. 814 to impose courtroom interpreter compensation as a cost, fee, or surcharge upon any party to litigation including a defendant in a civil forfeiture action.

4. *In a municipal court, can the cost of an interpreter be taxed as a cost under §800.09?*

Wisconsin Stat. § 800.09(1),[7] like Wis. Stat. § 778.06, permits the taxation of "costs, fees, and surcharges imposed under ch. 814" on a defendant found guilty in a municipal court. As before, the lack of any clear language in Wis. Stat. ch. 814 classifying interpreter costs as a cost, fee, or surcharge, coupled with the public expense language of Wis. Stat. § 885.83(3) renders Wis. Stat. § 800.09 unavailable as a method for charging back the costs of necessary courtroom interpreters.

5. *Can the court tax unreimbursed interpreter travel costs?*

and

6. *Can the court tax the amount that <u>is</u> reimbursed by the state – the first $30 or $40 per hour?*

Wisconsin Stat. § 885.83(3) as amended provides that, when a person has limited English proficiency and an interpreter is necessary, the court is to advise the qualified individual that he or she has a right to an interpreter at the public's expense. This language, coupled with the fact that no other statutory language exists providing taxation of the costs for necessary interpreters,

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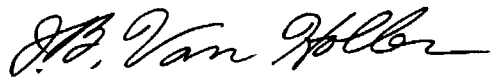
[7]Wisconsin Stat. § 800.09(1): "If a municipal court finds a defendant guilty, it may render judgment by ordering restitution . . . plus costs, fees, and surcharges imposed under ch. 814."

precludes courts from taxing unreimbursed or reimbursed interpreter costs whether for travel or compensation.

7. *For any of these questions, does it matter if the defendant is indigent or not?*

As noted above, the prior version of Wis. Stat. § 885.38(8), provided for the provision of necessary interpreters only where the qualified individual was indigent or could not afford one. These clauses were deleted from the statute, demonstrating the Legislature's intent to provide this service at public expense regardless of ability to pay. Federal civil rights laws also do not make such a distinction. Thus, for any of the questions you have posed, it does not matter if the defendant is indigent or not. If a court interpreter is necessary, then the county must assume the expense.

Sincerely,



J.B. Van Hollen
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