

RQ-527



COUNTY OF SMITH

The County Auditor

100 N. Broadway, Room 107, Courthouse
Tyler, Texas 75702

Phone 903-535-0501
FAX 903-535-0516

NANCY F. BRASWELL
AUDITOR

April 12, 1993

CERTIFIED MAIL - RETURN
RECEIPT REQUESTED
P 391 505 418

RECEIVED

APR 08 93

MB5

~~FILE # 92-1015-93~~

Ms. Madeleine Johnson
Chair - Opinion Committee
Attorney General's Office
P.O. Box 12548
Austin, Texas 78711-2548

Opinion Committee

I.D.# 19815

RE: Opinion Request of the Smith County Auditor
pursuant to V.T.C.A., Government Code §402.042(b)(8)

Dear Opinion Committee:

I recently requested an opinion from the Smith County District Attorney pursuant to V.T.C.A., Government Code §41.007. An Assistant District Attorney rendered an opinion, a copy of which is dated May 14, 1992, and attached hereto as Exhibit "A" and incorporated herein for all purposes. Due to the fact that I believe that this is a question "affecting the public interest" as per Government Code §402.042(a), I have chosen to request an attorney general opinion regarding the following question: **Whether a private party to a civil suit, where one or more of the parties, speak only a foreign language, has a right to have an interpreter appointed and the interpreter's compensation paid for from the general fund of the county. For this question, assume that one or both of the parties involved in the private suit are able to pay the interpreter's compensation.** Also, due to the fact that this is a question "affecting the public interest," I have also requested that the District Attorney supplement his letter of May 14, 1992, so as to provide you with as much assistance as possible. Any assistance which you can provide would be deeply appreciated.

Sincerely,

Nancy Braswell
Smith County Auditor

Enclosures



Jack Skeen, Jr.
Criminal District Attorney
Smith County
Exhibit "A"

SMITH COUNTY COURTHOUSE
TYLER, TEXAS 75702

AREA CODE 903
535-0520

May 14, 1992

Ms. Nancy Braswell
Smith County Auditor
Smith County Courthouse, 1st Floor
Tyler, Texas 75702

RE: Whether a party to a civil dispute has a right to have an interpreter appointed and the interpreter's compensation paid for from the general fund of the county.

Dear Ms. Braswell:

This letter is in response to our telephone conference this date during which you requested that I research Tex. R. Civ. P. Rule 183 and the right, if any, of a party to a civil suit to have an interpreter's fee paid from the general fund of the county.

A brief statement of facts as I understand them are as follows: In the civil case, Cause No. 91-1808-D, *Styled In the Matter of the Marriage of Manal Adnan Khalaf and Adnan Khalaf and child* the Court appointed an interpreter pursuant to Tex. R. Civ. P. Rule 183. Thereafter, the Court sent a statement to you for payment out of the County's general fund. You have asked me to give you an opinion as to whether the County must pay for the interpreter in this civil setting.

Rule 183 is set forth below in its entirety for your convenience:

Rule 183. Interpreters

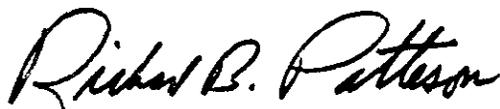
The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

According to the terms of rule 183, the appointing of an interpreter in such a civil case is not mandatory but purely discretionary with the court. Clearly there can be

no argument that any such interpreter may be at the court's own selection or that the court has the authority to fix the interpreter's reasonable compensation. However, with regard to the source from which such interpreter fees are paid, the statute states the following - "The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

I have been unable to find any legal authority where language interpreter funds (as opposed to interpreters for the deaf) are "provided by law" in the context of a civil dispute. As you know, in any criminal proceeding when it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him on the filing by any party of a motion for appointment of an interpreter or on motion of the court. In the criminal context, the right to an interpreter is an integral part of the accused's constitutional right to confront the witnesses against him, and the accused has a right under the constitution and the Code of Criminal Procedure. Even in the Quasi-Criminal context of a Juvenile case, the right to an interpreter is "provided by law." However, I have been unable to find any such broad authority for the paying of these interpreter fees from the county's general fund as "provided by law," in these circumstances. Additionally, the Legislature in Article 38.30(b) of the Code of Criminal Procedure, specifically sets forth that interpreters (in criminal cases) will receive payment for their services from the general fund of the county. Hence, the Legislature certainly knows how to squarely impose interpreter fees on the county and has done so in the criminal context. Therefore, I believe the court is limited to ordering that the compensation for the interpreter used in the above referenced case be paid "by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

Sincerely,



Richard B. Patteson
Asst. District Attorney



Jack Skeen, Jr.
Criminal District Attorney
Smith County
Exhibit "B"
Supplemental Brief

SMITH COUNTY COURTHOUSE
TYLER, TEXAS 75702

AREA CODE 903
535 0520

April 12, 1993

Ms. Nancy Braswell
Smith County Auditor
Smith County Courthouse, 1st Floor
Tyler, Texas 75702

RE: Whether a party to a civil dispute has a right to have an interpreter appointed and the interpreter's compensation paid for from the general fund of the county.

Dear Ms. Braswell:

It is my understanding that you intend to submit the above-referenced issue to the attorney general for an opinion on same due to the fact that same appears to be a question "affecting the public interest" as per Government Code §402.042(a). That being the case, it is my understanding that you have given me the opportunity of providing supplemental authority in support of my previous opinion of May 14, 1992. In the name of brevity, I will not repeat what I stated to you in my letter of May 14, 1992, but will rather offer additional authority and/or comments for my opinion that the court is limited to ordering that the compensation for the interpreter used in Cause No. 91-1808-D be paid "by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

(1) In rendering my opinion, it was significant to me neither of the private parties to the litigation was indigent. Had your question been may Smith County or the State of Texas deny access to the courts to individuals who seek judicial dissolution of their marriage solely because of their inability to pay the state required filing fee, my answer would be to cite Boddie v. Connecticut, 91 S.Ct. 780 (1971), which was analyzed as follows: In Boddie, Appellants, welfare recipients residing in the State of Connecticut, brought action in Federal District Court challenging, as applied to them (indigents), certain state procedures for the commencement of litigation, including payment of court fees and costs for service of process, arguing that same restricted access to the courts in their effort to bring an action for divorce. The

United States Supreme Court, in an opinion written by Justice Harlan, ¹ held that the state law requiring payment of costs (as to the indigent litigants) was barred by the Due Process Clause of the Fourteenth Amendment. The guiding principles were as follows: (a) Marriage involves interests of basic importance in our society; (b) The State has a monopoly on the means of legally dissolving the relationship of marriage; (c) Persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard; (d) A statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity...is beyond question; (e) The bona fides of both appellants' indigency and desire for divorce were beyond dispute. The Court clearly did not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment (Page 788). Clearly, in light of Boddie, Texas could not deny access to the courts to individuals who seek judicial dissolution of their marriage solely because of their inability to pay the state required filing fee. I cite Boddie as significant authority in relationship to the specific and limited facts presented in that case. Before Boddie comes into play, I would argue that you would have to have indigency (inability to pay required filing fees and service fees), and a divorce setting. By requiring waiver of filing fees and service fees the Court provided literal access to the courts.

In the situation presented for my review, it is significant that (1) there is no showing of indigency on the part of both parties; no one has informed me that the parties were unable to pay filing fees etc.; (2) There is no statutory authorization for imposing interpreter fees on the County (through its general fund) for an interpreter as there is in the criminal setting; (3) Tex. R. Civ. P. Rule 183, which is not mandatory, clearly states that "the compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed as costs, in the discretion of the court; such compensation does not appear to be "provided by law" (4) Foreign language is specifically excluded from coverage under the Americans with Disabilities Act; i.e. it is not considered a mental impairment that substantially limits a major life activity; therefore, there is no legal duty to make reasonable accommodation (at public expense) for simply language barrier (absent a concurring physical impairment that might conceivably make the providing of an interpreter necessary).

(2) Also helpful in assessing and analyzing the legal issues involved in the factual scenario presented, is Gomez v. Myers, 727 F.Supp. 183 (E.D.Tex.1985) which dealt with the issue of whether non-English speaking prisoners can gain meaningful

¹ I personally feel that the dissenting opinion of Justice Black is more in keeping with proper and traditional constitutional construction. Justice Black refuses to blur the long held distinction between criminal and civil cases and properly suggests that "(neither) due process nor equal protection permits state laws to be invalidated on any such nonconstitutional standard as a judge's personal view of fairness." Justice Black aptly points out that "the only way to steer this country towards its great destiny is to follow what our Constitution says, not what judges think it should have said."

access to the courts. Gomez was a 42 U.S.C.A. §1983 action wherein an indigent state prisoner filed a civil rights action against state prison officials. Although the prisoner complaint form provided by the Eastern District of Texas was written in English, Gomez stated his claims and requested relief in Spanish. Beginning on page 186 of Judge Justice's opinion, is insightful analysis of the issue entitled II. Cost of Translation. Judge Justice states that "none of the parties at this time (at the inception of the litigation) appears liable for payment of costs. By filing his complaint in Spanish and applying to proceed *in forma pauperis* Gomez maintains that he cannot afford translation costs." Justice aptly points out "It would be unfair and a violation of due process to order a defendant in a civil action to pay the plaintiff's litigation costs without affording the defendant an opportunity to oppose their imposition. Otherwise, defendants would be penalized for being sued by indigent, non-English speaking plaintiffs regardless of the merits of the claim." The Court points out that there is no statutory provision or federal rule authorizing the United States government to pay for the costs of translation in a civil action between private parties. He analyses The Court Interpreters Act, The Criminal Justice Act, The Civil Rights Attorney's Fees Awards Act, and Rule 43(f) [The source of Texas Rule 183], and concludes that "in the absence of statutory authority, the Clerk cannot be ordered to pay for the costs of translating pleadings from a foreign language to the English language." [Note: In a §1983 civil rights action, the plaintiff has no right to counsel. However, a district court has the discretion to appoint counsel in a civil right action and Judge Justice did so. Also significant, is footnote five (5) on page 186 of the opinion, which points out that if an attorney is appointed to represent a plaintiff *in forma pauperis* the attorney is expected to bear the costs of litigation, which presumably includes the costs of interpretation and translation. However, after litigation, an attorney who represents the prevailing party may be reimbursed for litigation costs and be awarded attorney's fees under 42 U.S.C. §1988.]

Though interesting, Gomez is distinguishable from the more general question posed in Smith County in several respects: (1) The State was a party to the civil rights action; (2) The party was a prisoner; and (3) The prisoner was indigent and proceeding *in forma pauperis*. However, even in Gomez, indigency was key, in that it was through indigency and proceeding *in forma pauperis* that Gomez was able to have an attorney appointed. However, Gomez would not in my opinion support the general statement that any time a private party or a witness to a law suit is non-English speaking, the County's general fund may be looked to as a source of funding.

Absent, indigency by both parties and a divorce setting, I would not advise payment for interpreter services out of the County's general fund. Boddie would certainly by its facts require the waiving of statutorily imposed filing fees and service fees in the divorce context should indigency be the only impediment to access to the courts. Should the unique situation of indigency by both parties in a divorce setting

be coupled with non-English speaking parties present itself, it is possible that the principles of Boddie might be extended to that situation such that the County's general fund could be tapped; however, waiving of fees and imposing of unknown amounts of fees are completely different matters. In any event, I could not advise that same be paid out of the County's general fund absent litigation of that point. Too much is at stake to deduce such a principle from Boddie.

Thank you for allowing me the opportunity to cite additional authority for the propositions stated. Also note that other sources of information included 16 Tex Jur 2d §292 (Criminal Law - Right To Confront Witnesses); 24 Tex Jur 3d §3266 (Criminal Law - Interpreted Testimony); 21 Tex Jur 3d §1501-1503 (Rights of Accused); Sartor v. Bolinger (1883) 59 Tex 411 [Of Historical Interest - though probably of little precedent in light of current constitutional analysis and related state statutes].

Sincerely,



Richard B. Patteson
Asst. District Attorney