**Proposed CPJC 1.15—Commentary on English-Language Interpretation at
Trial**

*Deferring to the Court Interpreter’s Interpretation*

At trial, testimony and documents are sometimes offered in languages other than English and then translated by a court-appointed interpreter so that jurors and other trial participants can understand them. From the standpoint of the record, “[i]t is as if the non-English language was never spoken … and the interpreter stands in place of the witness.” *Flores v. State*, 299 S.W.3d 843, 855 (Tex. App.—El Paso 2009, pet. ref’d). This is the end result for monolingual jurors, too.

 Jurors with knowledge of the other language, however, sometimes receive different information than their fellow jurors because they have heard or read the testimony or source material in the original language. Sometimes the juror’s interpretation of a word or phrase differs from the court interpreter’s; other times nuance is lost in the translation. One potential difficulty is that, as with jurors with specialized knowledge of any kind, a bilingual juror could inject outside evidence into deliberation. *See* *Hernandez v. State*, 938 S.W.2d 503, 507 (Tex. App.—Waco 1997, pet. ref’d) (suggesting it would be misconduct for a juror to translate a tape recording from Spanish to English for other jurors during deliberation but ultimately finding no record of prejudice); *Peralta v. State*, 338 S.W.3d 598, 602 (Tex. App.—El Paso 2010, no pet.) (raising concern about injecting outside evidence and suggesting parties avoid introducing the audio portion of non-English video-recordings). Numerous constitutional rights—including the right to a jury trial, confrontation, cross-examination, and counsel—are implicated when the jury considers evidence other than that admitted in a public courtroom. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). *See also* Tex. R. App. P. 21.3(f) (providing for new trial when the jury receives outside evidence); *State v. Scott*, 819 S.W.2d 169, 172 (Tex. App.—Tyler 1991, pet. ref’d) (upholding grant of new trial based on juror sharing expert opinion during deliberation to defendant’s disadvantage). Specific instructions prohibiting jurors from discussing their own translations serve as an important preventative safeguard; Tex. R. Evid. 606(b) prevents the trial court from discovering and remedying that misconduct after the fact because this misconduct does not constitute an “outside influence” upon the jury that may be testified to. *McQuarrie v. State*, 380 S.W.3d 145, 153 (Tex. Crim. App. 2012); *see also* *Soliz v. Saenz*, 779 S.W.2d 929, 932 (Tex. App.—Corpus Christi 1989, writ denied) (recognizing that juror who shared expertise, although not an “outside influence,” still violated the trial court’s instructions). The “only testimony and exhibits are evidence” instruction might implicitly suggest that jurors with expertise in a particular field should not share their expertise (as it is not evidence). But such an instruction will likely *not* inform multilingual jurors that the non-English part of what they hear from the witness stand or hear or read in an exhibit does not constitute evidence. Consequently, they should be so informed. The El Paso Court of Appeals suggested that jurors be given such a limiting instruction. *Peralta*, 338 S.W.3d at 606. The Committee’s recommended instruction for the jury charge, CPJC 1.18, is based on an instruction given in *Sanchez-Rodriguez v. State,* 2014 WL 1178337, at \*5 (Tex. App.—Dallas Mar. 21, 2014, no pet.) (not designated for publication). In *Sanchez-Rodriguez*, the court rejected an argument that the instruction was an improper comment on the weight of the evidence, noting that having two Spanish-speaking witnesses who testified through an interpreter “necessitat[ed]” the instruction. *Sanchez-Rodriguez*, 2014 WL 1178337, at \*5.

Guarding against the possibility that jurors might take deference to the translation too far, the Committee’s instructions clarify that accepting the translation does not mean that jurors must accept the translated testimony or evidence as true; instead, they must judge credibility and weight, just as they would for any other evidence.

*Timing of the Instruction*

The ideal time for an instruction is before the interpretation (in the case of a testifying witness) or translation (in the case of a recording or written exhibit) is admitted in evidence. The Committee therefore recommends contemporaneous instructions, CPJC 1.16 and 1.17, modeled on part of Florida’s pattern jury instruction.

The Committee recommends CPJC 1.18 for inclusion in the final instructions, even if an instruction under 1.16 or 1.17 was given at the time the non-English testimony or evidence was admitted.

*The “Hernandez Accommodation” for Jurors Noticing Errors in the Interpretation*

Requiring jurors to defer to the court-appointed interpreter is straight-forward when there is no conflict about the interpretation. But that will not always be the case. Several committee members had been in trials where participants—parties, jurors, spectators, attorneys, or witnesses—brought alleged inaccuracies in the English interpretation to the trial court’s attention. The Committee believed having an interpretation that was accurate on all points material to the trial was important for due process and ensuring a fair trial. When it interferes with a party’s ability to cross-examine a witness, it could also implicate the right of confrontation.

Texas law provides some protections to ensure that court interpretations are accurate. Under the Code of Criminal Procedure, the trial court may appoint someone to interpret for a witness who does not understand and speak the English language. Tex. Code Crim. Proc. art. 38.30(a); *see also Mendiola v. State*, 924 S.W.2d 157, 161 (Tex. App.—Corpus Christi-Edinburg 1995, pet. ref’d, untimely filed). That person is required to be sworn to interpret and may be subpoenaed and attached to act as interpreter, under the same rules for witnesses. Tex. Code Crim. Proc. art. 38.30(a). The Rules of Evidence provide that all interpreters must be qualified but do not specify such qualifications. Tex. R. Evid. 604. For the appointment of full- or part-time interpreters in certain border counties, interpreters are required to be “well versed in and competent to speak the Spanish and English languages.” Tex. Civ. Prac. & Rem. Code § 21.023. In counties with populations of 50,000 or more and where the language requiring interpretation is Spanish, the person interpreting is required to be licensed. Tex. Gov’t Code § 57.002(c), (d). The Judicial Branch Certification Commission, provided by Tex. Gov’t Code Chapter 152, establishes minimum licensing requirements and continuing education requirements for licensed court interpreters. Tex. Judicial Branch Certification Commission Rule 9.2. By statute, some, but not all interpreters, are considered official interpreters. *See* Tex. Civ. Prac. & Rem. Code § 21.031(a) (permitting county court at law judges to appoint official interpreters for their court); *see, e.g*., Tex. Gov’t Code § 24.207 (authorizing the 105th Judicial District Court, Nueces County, to appoint official interpreter). Code of Criminal Procedure Art. 38.31 similarly authorizes the appointment of interpreters for the hearing impaired, who are required to hold a professional certificate. Tex. Code Crim. Proc. art. 38.31(a), (g).

Even when an interpreter is qualified, on occasion, the accuracy of particular translations may become a fact question for the jury. *Garcia v. State*, 887 S.W.2d 862, 875 (Tex. Crim. App. 1994), abrogated on other grounds by *Hammock v. State*, 46 S.W.3d 889 (Tex. Crim. App. 2001). When that occurs, the aggrieved party “must settle the question of a translation’s accuracy at trial by impeaching the translation; cross-examination of the witness presents the most convenient vehicle, but impeachment may be accomplished by many other means.” *Garcia*, 887 S.W.2d at 875 & n.8 (listing independent evidence and cross-examination of the interpreter among those “other means”). Texas Rule of Evidence 1009 outlines a similar procedure for objecting to translations of a foreign language document, ultimately leaving the issue to the trier of fact if there is “a genuine issue about the accuracy of a material part of the translation.” When there is contrary evidence raising a fact question about the court interpreter’s translation for the jury to resolve, the instructions at 1.16 through 1.18 would have to be modified so as to not comment on how the jury should resolve that dispute—although a juror still could not rely on his or her own translation. In practice, an objection does not always result in a dispute. Sometimes the interpreter will immediately agree to the clarification or the parties can quickly resolve the matter through brief questioning of the witness. *See, e.g., Gonzalez v. State*, 752 S.W.2d 695, 699 (Tex. App.—Houston [1st Dist. 1988, pet. ref’d).

Since many attorneys are not fluent in other languages, they may be unaware of any problem with the court-interpreter’s translation. Having another interpreter available to the attorneys is one solution to that problem, *see, e.g., Liveoak v. State*, 717 S.W.2d 691, 697 (Tex. App.—San Antonio 1986, pet. ref’d), but is not always possible.

One Committee member proposed that jurors be informed that they can bring to the trial court’s attention any errors they notice in the court-appointed interpreter’s translation. This member believed that in addition to due process and confrontation concerns, inaccuracies in the translation also implicated a defendant’s right to “sufficiently understand the proceedings against him to be able to assist in his own defense.” *Linton v. State*, 275 S.W.3d 493, 500 (Tex. Crim. App. 2009). When a trial judge is aware that the defendant has a problem understanding, the judge has an independent duty to implement this right in the absence of a knowing and voluntary waiver by the defendant. *Flores*, 299 S.W.3d at 855 n.3 (citing *Garcia v. State*, 149 S.W.3d 135, 145 (Tex. Crim. App. 2004)). This member believed that informing jurors of what to do in case of erroneous translations was one way to satisfy—and perhaps was required to satisfy—the trial court’s obligation to meet a defendant’s need to understand the proceedings and to do so at the ideal time, *i.e*., during trial itself. This procedure received favorable mention in a *Batson* decision called *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion) and is referred to as the “*Hernandez* accommodation.” More specifically, the *Hernandez* plurality suggested that bilingual or multilingual jurors “could be permitted to advise the judge in a discreet way of any concerns [they had] with the translation during the course of trial.” *Hernandez*, 500 U.S. at 364. The plurality proposed this as a way, in the *Batson* context, to accommodate jurors who might understandably hesitate at having to defer to flawed translations on issues of importance to the trial and assuage any concerns (by the prosecutor in that case) about jurors’ general ability to accept the court interpreter’s interpretation. The accommodation also had support from Justice Stevens in dissent. He explained that, “[a]s is the practice in many jurisdictions, the jury could have been instructed that the official translation alone is evidence...[and] bilingual jurors could have been instructed to bring to the attention of the judge any disagreements they might have with the translation so that any disputes could be resolved by the court.” *Id*. at 379.

Both Florida and California authorize the *Hernandez* accommodation as part of their instructions that jurors must defer to the official court-interpreter’s translation. *See* Florida Standard Jury Instructions in Criminal Cases 2.1(b), 2.9, 2.10, “Jury to be Guided by Official English Translation/Interpretation,” 157 So.3d 1027 (Fla. Feb. 5, 2015); Judicial Council of California, Criminal Jury Instruction 121 “Duty to Abide by Translation Provided in Court,” (Apr. 2022 Update). Given that California, Florida, and Texas all have large—if not the largest—populations of Spanish-speakers by state, Texas would be in the minority in this group in not adopting the *Hernandez* accommodation.

However, an instruction encouraging jurors to bring concerns about interpretation accuracy to the judge’s attention, as is done in Florida and California, may not be consistent with Texas law. Both Florida and California already have an established trial procedure that would allow jurors to ask questions of witnesses. Fl. R. Crim. P. 3.371. (“At the discretion of the presiding trial judge, jurors may be allowed to submit questions of witnesses during the trial” and requiring, inter alia, questions to be submitted in writing to the judge and subject to objection outside the jury’s presence); *see also* *Morris v. State*, 931 So. 2d 821, 829 (Fla. 2006) (permitting but not endorsing the practice); Cal. Rules of Court 2.1033 (“A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury.”). In Texas, on the other hand, jurors are not permitted to ask questions of witnesses in criminal cases. *Morrison v. State*, 845 S.W.2d 882, 889 (Tex. Crim. App. 1992) (“We know of no authority establishing or authorizing jurors to ask questions of witnesses in the criminal jurisprudence of this state and therefore find the same to be error.”). The concern animating *Morrison*—that jurors would depart from their role as impartial factfinders and take on the role of advocates—is also present in an instruction based on the *Hernandez* accommodation. Without a statutory basis for such an instruction, a majority of the Committee could not recommend it.

**Proposed New CPJC 1.16—Contemporaneous Instruction on Witness Testimony for Multilingual Jurors**

You are about to hear testimony of a witness who will be testifying in [language used]. This witness will testify through a court-appointed interpreter. Although some of you may know [language used], it is important that all jurors consider the same evidence. Therefore, you must accept the English translation of the witness’s testimony. You must disregard any different meaning. Although you must defer to the interpreter’s translation, it is up to you to judge the believability of the witness and what weight to give his or her testimony, just as you would for any evidence in the case.

**Proposed New CPJC 1.17—Contemporaneous Instruction on Audio Recordings for Multilingual Jurors**

You are about to hear an audio recording in [language used] that has been translated into English [by the court-appointed interpreter]. [Each of you has been given a transcript of the .] Although some of you may understand [language used], it is important that all jurors consider the same evidence. Therefore, you must accept the English translation of the audio recording [and contained in the transcript] and disregard any different meaning. Although you must defer to the interpreter’s translation, it is up to you to judge the believability of the evidence and what weight to give it, just as you would for any evidence in the case.

**Proposed New CPJC 1.18—Instruction for the Final Charge for Multilingual Jurors**

In this case you have received [testimony/evidence] with the assistance of a court-appointed interpreter. The evidence you are to consider is only that provided through the interpreter. Although some of you may know [language used], it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English translation. You must disregard any different meaning. Although you must defer to the interpreter’s translation, it is up to you to judge the believability of the evidence and what weight to give it, just as you would for any evidence in the case.