TRE 203

ROBIN MALONE DARR
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385th Judicial District Court
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August 6, 2015

Chief Justice Nathan Hecht
Supreme Court of Texas
via e-mail

Mr. Gilbert I. "Buddy" Lowe
Vice Chair of Supreme Court Advisory Committee
via e-mail

Dear Chief Justice Hecht and Mr. Lowe:

A proposal to amend Rule 203 (attached) is being presented only on behalf of the Administrative Rules of Evidence Committee of the State Bar of Texas and should not be construed as representing the position of the Board of Directors, the Executive Committee or the general membership of the State Bar of Texas. The Administrative Rules of Evidence Committee is a volunteer standing committee of the State Bar of Texas. This proposed amendment has been approved by the membership of the Administrative Rules of Evidence Committee pursuant to applicable procedures and represents the views of a majority of the members of the Committee.

A subcommittee, headed by Mr. John Janssen, reviewed the Article 2 Rules and recommended the change in Rule 203. The relevant part of the subcommittee report is set out below.

> Rule 203. Determination of the Laws of Foreign Countries. The subcommittee had recommended further study of how the 30-day pre-trial deadline for raising the issue of law of a foreign countries interfaces or should interface with the 45-day before trial provision of Rule of Evidence 1009(a) relating to the translation of foreign language documents. At the February 23rd meeting, the subcommittee recommended changing the 30-day pre-trial deadline in Rule 203 to a 45-day deadline so as to align with Rule 1009.

If I can be of further assistance please do not hesitate to contact me.

Sincerely,

Robin Malone Darr
Chair, Administrative Rules of Evidence Committee

MOTION: That Rule 203 be amended to read as follows:

Rule 203. Determining Foreign Law

(a) Raising a Foreign Law Issue. A party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least ~~30~~ 45 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

matters in someone's personal knowledge, but they are not necessarily matters subject to judicial review).

In re Sigmar, 270 S.W.3d 289, 302 (Tex.App.—Waco 2008, orig. proceeding). "[M]atters of legislative fact or of other non-adjudicative fact are subject to judicial notice but are not governed by Rule 201."

Barnard v. Barnard, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied). "A court may take judicial notice of its own files and the fact that a pleading has been filed in a case. 'A court may not ... take judicial notice of the truth of allegations in its records.'"

Apostolic Ch. v. American Honda Motor Co., 833 S.W.2d 553, 555-56 (Tex.App.—Tyler 1992, writ denied). "Highway nomenclature and designations within the trial court's jurisdiction are matters of common knowledge and proper subjects for judicial notice. ... In matters involving geographical knowledge, it is not necessary that a formal request for judicial notice be made by a party."

Marble Slab Creamery, Inc. v. Wesic, Inc., 823 S.W.2d 436, 439 (Tex.App.—Houston [14th Dist.] 1992, no writ). "The trial court is entitled to take judicial notice of its own records where the same subject matter between the same parties is involved. [W]e may presume that the trial court took such judicial notice of the record without any request being made and without any announcement that it has done so." *See also* ***Sierad v. Barnett***, 164 S.W.3d 471, 481 (Tex.App.—Dallas 2005, no pet.) (trial court does not need to announce it is taking judicial notice). *But see* ***In re C.L.***, 304 S.W.3d 512, 515-16 (Tex.App.—Waco 2009, no pet.) (appellate court held that trial court did not take judicial notice when party did not request it and trial court did not announce in open court it was taking judicial notice).

TRE 202. DETERMINATION OF LAW OF OTHER STATES

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

History of TRE 202 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxv). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvi). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxi): Language was added and deleted to make it clear that all parties are entitled to notice and hearing of the court's taking judicial notice of the law of other states; the last four sentences were added. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxviii). Source: TRCP 184, 184a, TRCS art. 3731a (repealed). Former TRCP 184a, re judicial notice, was originally adopted eff. Feb. 1, 1946, by order of Oct. 10, 1945 (8 Tex.B.J. 533 [1945]).

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 438; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 128.

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Daugherty v. Southern Pac. Transp., 772 S.W.2d 81, 83 (Tex.1989). "The failure to plead sister-state law does not preclude a court from judicially noticing that law. ... Rule 202 requires the moving party to furnish sufficient information to the trial court for it to determine the foreign law's applicability to the case and to furnish all parties any notice that the court finds necessary." *See also* ***Colvin v. Colvin***, 291 S.W.3d 508, 514 (Tex.App.—Tyler 2009, no pet.) (preliminary motion required to assure application of laws from another jurisdiction).

Burlington N. & Santa Fe Ry. v. Gunderson, Inc., 235 S.W.3d 287, 292 (Tex.App.—Fort Worth 2007, no pet.). "Rule 202 simply provides a mechanism by which a party may compel the trial court to judicially notice the law of another state; it does not force a party to make a definitive declaration as to which state's law applies."

TRE 203. DETERMINATION OF THE LAWS OF FOREIGN COUNTRIES

A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may

Effective April 1, 2015, the TREs will be restyled. For a note about the proposed changes, see p. 1178.

consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

History of TRE 203 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvi). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxii): The words "all parties" were substituted for "to the opposing party or counsel" in the first and second sentences; in the fourth sentence, "all" was substituted for "the"; in the last sentence, "The court's" was substituted for "Its"; and the words "on appeal" were deleted. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxviii). Source: TRCS art. 3718; FRCrP 26.1; FRCP 44.1.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 438; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 131.

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Long Distance Int'l v. Telefonos de Mexico, S.A. de C.V., 49 S.W.3d 347, 351 (Tex.2001). "Rule 203 has been aptly characterized as a hybrid rule by which the presentation of the foreign law to the court resembles the presentment of evidence but which ultimately is decided as a question of law. Summary judgment is not precluded when experts disagree on the law's meaning if, as here, the parties do not dispute that all the pertinent foreign law was properly submitted in evidence. When experts disagree on how the foreign law applies to the facts, the court is presented with a question of law."

PennWell Corp. v. Ken Assocs., 123 S.W.3d 756, 760-61 (Tex.App.—Houston [14th Dist.] 2003, pet. denied). "Although appearing under the subtitle 'Judicial Notice' in the [TREs], the procedure established under Rule 203 for presentment of foreign law is not considered a judicial notice procedure because that term refers only to adjudicative facts and not to matters of law. Thus, the specific procedures set forth in Rule 203 must be followed for the determination of foreign law. [A] party requesting judicial notice must furnish the court with sufficient information to enable it to properly comply with the request; otherwise, the failure to provide adequate proof results in a presumption that the law of the foreign jurisdiction is identical to that of Texas." *See also Gerdes v. Kennamer*, 155 S.W.3d 541, 548 (Tex.App.—Corpus Christi 2004, no pet.).

TRE 204. DETERMINATION OF TEXAS CITY & COUNTY ORDINANCES, THE CONTENTS OF THE TEXAS REGISTER, & THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the ordinances of municipalities and counties of Texas, of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

History of TRE 204 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvii): Judicial notice upon motion of a party is made mandatory rather than discretionary. Adopted eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxii). Source: New rule.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 438; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 134.

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Office of Pub. Util. Counsel v. Public Util. Comm'n, 878 S.W.2d 598, 600 (Tex.1994). "The court of appeals ... erred by refusing to take judicial notice of the published order of [respondent]. ... The authenticity and contents of [respondent's] ratemaking order are capable of accurate and ready determination by resort to a published record whose accuracy cannot reasonably be questioned."

Eckmann v. Des Rosiers, 940 S.W.2d 394, 399 (Tex.App.—Austin 1997, no writ). "[T]he duty [to take judicial notice is] mandatory, even in the absence of a request under Rule 204, respecting administrative agency regulations published in the Texas Register and Texas Administrative Code. ... They are legislative facts, or a part of the body of law a court is required to apply in reasoning toward a decision."

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

History of TRE 1008 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxxiii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lxvii). Source: FRE 1008.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 1030.

TRE 1009. TRANSLATION OF FOREIGN LANGUAGE DOCUMENTS

(a) Translations. A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.

(b) Objections. Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation. Such objection shall be served upon all parties at least 15 days prior to the date of trial.

(c) Effect of Failure to Object or Offer Conflicting Translation. If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.

(d) Effect of Objections or Conflicting Translations. In the event of conflicting translations under paragraph (a) or if objections to another party's translation are served under paragraph (b), the court shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trier of fact.

(e) Expert Testimony of Translator. Except as provided in paragraph (c), this Rule does not preclude the admission of a translation of foreign language documents at trial either by live testimony or by deposition testimony of a qualified expert translator.

(f) Varying of Time Limits. The court, upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this Rule.

(g) Court Appointment. The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

Comment to 1998 change: This is a new rule.

History of TRE 1009 (civil): Adopted eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxxiv). Source: New rule.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 1032.

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In re DC, No. 01-11-00387-CV (Tex.App.—Houston [1st Dist.] 2012, pet. denied) (memo op.; 3-1-12). Father "complains that the initial return was in Spanish, and because it was not translated into English until after trial, it violated [TRE] 1009, which requires that all foreign documents to be admitted at trial must be translated 45 days before trial and be accompanied by an affidavit from a qualified translator. [¶] However, rule 1009 is a rule of evidence governing the admission of foreign documents of trial. [Father] has cited no cases in which rule 1009 requires the translation of foreign returns of service into English, or that such a translation could not be done in an amended return while the trial court still had plenary power. We have found no authority holding that rule 1009 trumps [TRCP] 118, which permits amended returns of service '[a]t any time.'"

Doncaster v. Hernaiz, 161 S.W.3d 594, 601 (Tex. App.—San Antonio 2005, no pet.). "[P] did file a copy of the [foreign-language document] with a translation with her initial summary judgment motion, but failed to attach the translator's affidavit. Later, [P] supplemented her motion with an affidavit from the translator.... Because of [P's] late supplementation, the trial court provided [D] a one-week continuance before conducting the summary judgment hearing. Rule 1009 provides the court with authority to lengthen or shorten the time limits set by the rule. [A]ny error in failing to initially provide the affidavit of the translator was cured by its inclusion in the supplement, and it was therefore within the court's discretion to admit [the document]."

only that immigration forms be authenticated through some recognized procedure, such as those required by [government] regulations or by the [FRCPs]."

AMFAC Distrib. v. Harrelson, 842 F.2d 304, 306-07 (11th Cir.1988). "Under [FRCP] 44(a)(1), two things are required to authenticate a copy of a state court judgment. First, the copy must be attested to by the officer having the legal custody of the judgment or by his deputy. Second, there must be a certificate that the attesting officer has legal custody; this certificate is to be made by a judge of a court of record of the district or political subdivision in which the judgment is kept and must be authenticated by the seal of the court. [¶] [If P] did not substantially comply with Rule 44(a), ... the Texas judgment is admissible under the [FREs]. [FRE] 902 provides for authentication by certificate when a copy of the judgment bears a seal purporting to be that of a state court and a signature purporting to be an attestation of the custodian of the original judgment."

FRCP 44.1. DETERMINING FOREIGN LAW

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

See selected Notes of Advisory Committee to FRCP 44.1, p. 1289.

History of FRCP 44.1: Adopted Feb. 28, 1966, eff. July 1, 1966. Amended Nov. 20, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-N, p. 411; *O'Connor's Federal Civil Forms* (2014), FORMS 5M.

See also FRE 201 (judicial notice).

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In re Griffin Trading Co., 683 F.3d 819, 822 (7th Cir.2012). "Although it is true that Rule 44.1 requires any party who intends to present evidence of foreign law to 'give notice by a pleading or other writing,' the language of the rule itself reveals that no particular formality is required. Any 'other writing' will do, as long as it suffices to give proper notice of an intent to rely on foreign law. *At 823:* 'If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.'"

Northrop Grumman Ship Sys. v. Ministry of Def. of the Republic of Venez., 575 F.3d 491, 496-97 (5th Cir. 2009). FRCP 44.1 "is intended to 'avoid unfair surprise,' not to 'set any definite limit on the party's time for giving the notice of an issue of foreign law....' When the applicability of foreign law is not obvious, notice is sufficient if it allows the opposing party time to research the foreign rules. Some of the factors that should be considered in determining whether notice is reasonable include '[t]he stage which the case had reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised....'" *See also* ***APL Co. Pte. Ltd. v. UK Aerosols Ltd.***, 582 F.3d 947, 955-56 (9th Cir.2009).

Mutual Serv. Ins. v. Frit Indus., 358 F.3d 1312, 1321 (11th Cir.2004). "The district court is not required to conduct its own research into the content of foreign law if the party urging its application declines to do so." *See also* ***Grand Entm't Grp. v. Star Media Sales, Inc.***, 988 F.2d 476, 488 (3d Cir.1993) (court may conduct its own supplemental research).

DP Aviation v. Smiths Indus. Aerospace & Def. Sys., 268 F.3d 829, 848 (9th Cir.2001). "Absent extenuating circumstances, notice of issues of foreign law that reasonably would be expected to be part of the proceedings should be provided in the pretrial conference and contentions about applicability of foreign law should be incorporated in the pretrial order. This gives parties ample opportunity to marshal resources pertinent to foreign law, which normally will not be as well known as domestic law to parties and courts."

Republic of Turk. v. OKS Partners, 146 F.R.D. 24, 27 (D.Mass.1993). "'Statutes, administrative material, and judicial decisions can be established most easily by introducing an official or authenticated copy of the applicable provisions or court reports supported by expert testimony as to their meaning...[.] In addition ... a litigant may present any other information concerning foreign law he believes will further his cause, including secondary sources such as texts, learned journals, and a wide variety of unauthenticated documents relating to foreign law.'"

FRCP 45. SUBPOENA

(a) In General.

(1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must:

to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact.' [¶] However, personal knowledge of a fact 'is not an absolute' to Rule 602's foundational requirement, which 'may consist of what the witness thinks he knows from personal perception.' Similarly, a witness may testify to the fact of what he did not know and how, if he had known that independently established fact, it would have affected his conduct or behavior."

Payne v. Pauley, 337 F.3d 767, 772 (7th Cir.2003). "[A]lthough personal knowledge may include reasonable inferences, those inferences must be 'grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.'"

U.S. v. Sinclair, 109 F.3d 1527, 1536 (10th Cir. 1997). "Although Rule 602 provides that a witness's testimony must be based on personal knowledge, it 'does not require that the witness' knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible ... only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to.'" *See also* ***U.S. v. Brown***, 669 F.3d 10, 22 (1st Cir. 2012).

SEC v. Singer, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992). "Testimony is admissible even though the witness is not positive about what he perceived, provided the witness had an opportunity to observe and obtained some impressions based on his observations. [¶] Testimony can be admissible under Rule 602 even if the witness has only a broad general recollection of the subject matter. [¶] [A] witness' *conclusion based on personal observations over time* may constitute personal knowledge despite the witness' inability to recall the specific incidents upon which he based his conclusions."

FRE 603. OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

History of FRE 603: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.

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U.S. v. IMM, 747 F.3d 754, 770 (9th Cir.2014). FRE 603 "'is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and *children*.' '[A]ffirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.'" *See also* ***Doe v. Phillips***, 81 F.3d 1204, 1211 (2d Cir.1996); ***U.S. v. Saget***, 991 F.2d 702, 710 (11th Cir.1993).

U.S. v. Mensah, 737 F.3d 789, 806 (1st Cir.2013). FRE 603 "provides that the requisite declaration 'must be in a form designed to impress that duty on the witness's conscience'—but does not say that only a verbal warning or response suffices. Hence, it appears that the inquiry into whether an oath has been given is routinely treated as a question of substance rather than form: '[it] turns on whether the declarant expressed the fact that ... she is impressed with the solemnity and importance of ... her words and of the promise to be truthful, in moral, religious, or legal terms.'"

U.S. v. Solorio, 669 F.3d 943, 950 (9th Cir.2012). See annotation under FRE 604, this page.

U.S. v. Frazier, 469 F.3d 85, 92 (3d Cir.2006). "Oaths are administered to witnesses as a reminder to them of their obligation to testify *truthfully*. They are not intended to guarantee *accuracy*. The fact that a witness is under oath has no bearing on the quality of a witness' memory (such that one is more or less likely to make a mistake under oath)." *See also* ***U.S. v. Zizzo***, 120 F.3d 1338, 1348 (7th Cir.1997) (idea of oath is to make witness amenable to perjury prosecution if he lies).

FRE 604. INTERPRETER

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

History of FRE 604: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.

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U.S. v. Solorio, 669 F.3d 943, 950 (9th Cir.2012). FRE 604 "does not ... indicate whether ... an oath must be administered in any particular manner or at any specified time, including whether the oath must be administered for each trial. ... Although some courts administer oaths to interpreters each day, or once for an entire case, others 'administer the oath to staff and contract interpreters once, and keep it on file.' [¶] We