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Como Se Dice, Necesito a un Interprete - The Civil Litigant's Right to a Court-Appointed Interpreter in Texas.

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NOTE

¿COMO SE DICE, <NECESITO A UN INTÉRPRETE>? THE CIVIL LITIGANT'S RIGHT TO A COURT- APPOINTED INTERPRETER IN TEXAS

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FOR LISA

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*The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities.*¹

I. INTRODUCTION

Kevin² was born in Chihuahua, Mexico. He completed high school in Mexico but did not study any foreign languages, including English, in school. Kevin came to Small County, Texas as a permanent United States resident in 1999, through an arranged marriage to a United States citizen, Perla, the seventeen-year-old daughter of a family friend. Perla came to Texas from Mexico when she was four years old and later became a United States citizen. Although she grew up speaking only Spanish at home, she learned English in public school. She is conversationally fluent and can read and write in English on about a ninth-grade level. Kevin's and Perla's marriage survived beyond the two-year period during which the United States Citizenship and Immigration Service (USCIS) grants foreign-born spouses only conditional permanent residency.³ During these first two years, the couple became the parents of twin baby boys.

1. JOHN EMERICH EDWARD DALBERG-ACTON, THE HISTORY OF FREEDOM AND OTHER ESSAYS 4 (John Neville Figgis & Reginald Vere Laurence eds., Dodo Press 2008) (1907).

2. "Kevin" has become an increasingly popular name for baby boys in Mexico. See Taylor Timmons, *Mexico Just Says No to Funky Baby Names*, FOXNEWS, July 2, 2006, <http://www.foxnews.com/story10,2933,201868,00.html>. It is used here as a genuine (if kitschy) attempt at bridging the cultural gap between the Anglophones reading this Note and the non-English speakers who are its subject.

3. See Immigration and Nationality Act of 1952 (INA) § 216(g)(1), 8 U.S.C. § 1186a(g)(1) (2000) (defining "alien spouse" as "an alien who obtains the status of an alien lawfully admitted for permanent residence . . . by virtue of a marriage which was entered into less than 24 months before the date the alien obtains such status by virtue of such marriage"). An alien spouse "shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis. . . ." *Id.* § 216(a)(1). The USCIS is suspicious of marriage as a means of

In 2004, Kevin was charged as an accomplice in a drug ring. Because Kevin is a criminal defendant, he has the constitutional right to an interpreter in the proceedings against him.⁴ He is able to understand the court proceedings, and the judge and jury understand him, through his interpreter, when he takes the stand to testify. If Kevin loses his case, he will lose his freedom, but what is most important to Kevin is the fear of losing his two boys. Kevin is acquitted of the charges against him. He is particularly relieved because he cannot imagine having to live the next several years of his life away from his small boys, unable to watch them grow.

Within a few more years, Kevin's and Perla's marriage sours. Perla can no longer handle Kevin's association with men whom she believes to be dangerous drug dealers, and she divorces him. Now Kevin finds himself a defendant in a civil trial—a custody proceeding. Again, what is at stake for Kevin is the possibility of losing all access to his children. This time, however, Kevin is not a criminal defendant, and his need for an interpreter is not constitutionally protected.⁵ Because Perla speaks English

immigration and can revoke an immigrant's permanent resident status if the marriage does not last for two years. *Id.* § 216(b)(1).

In the case of an alien with permanent resident status on a conditional basis . . . , if the Attorney General determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that the qualifying marriage . . . has been judicially annulled or terminated, other than through the death of a spouse . . . the Attorney General . . . shall terminate the permanent resident status of the alien (or aliens) involved as of the date of the determination.

Id.

4. Court Interpreters Act of 1978, 28 U.S.C. § 1827(d)(1) (2000) (providing both criminal defendants and civil litigants a statutory right to an interpreter *in federal court only*). The act provides:

[I]f the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case) . . . speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, the presiding judicial officer shall appoint an available, certified interpreter.

Id.

5. Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, HARV. LATINO L. REV. 1, 3 (2004) (noting that the United States Constitution does not explicitly require that civil litigants be appointed courtroom interpreters when they do not speak or understand English). While the Court Interpreters Act does require appointment of interpreters in both civil and criminal proceedings *at the federal level*, not all states constitutionally guarantee this right to civil litigants in state courts. *Id.*; Deborah M. Weissman, *Between Principals and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1928 (2000) (stating that "no court" has ruled that civil litigants have a constitutional right to an interpreter).

well, the court asks her to interpret for her estranged husband.⁶ She reluctantly does so, but her now deep-seated mistrust of Kevin causes her interpretation to be highly biased and somewhat spotty. Perla also does not understand much of the terminology used in the proceeding, so she skips over some of what is said. And because all the questions addressed to Kevin are asked of him through his estranged wife, his responses show more anger than they would have had a disinterested party interpreted for him. Due to Perla's poor interpretation, Kevin does not fully understand the significance of the proceeding or the consequences of the outcome. When the hearing concludes, Kevin loses all custody rights to his sons. Because he did not have an unbiased, qualified interpreter, Kevin did not receive a fair trial and lost what was more important to him than his own liberty—being a father to his two boys.

Unfortunately for Kevin, what he did not know was that, although he does not have a constitutional right to an interpreter in a Texas civil proceeding, as he did in his criminal case, Texas grants civil litigants (and witnesses) the statutory right to an interpreter.⁷ If Kevin had known he could do so, he could have made a motion to the court to provide an interpreter. If the court had provided one for him, Kevin would have had a fairer opportunity to present his side of the case, possibly leading to a better outcome for both Kevin and his sons.⁸

Immigrants are too frequently subject to unfair treatment in not only the criminal justice system, but also in housing, employment, and, as in

6. See Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 375 (2000) ("It is very common for persons in need of interpretation to bring a child, friend or other family member with them to interviews to help with communication."). The author, however, warns advocates to avoid permitting clients to bring friends and family members to court to interpret. *Id.* "[A] qualified, independent interpreter should be arranged" for several reasons. *Id.* The friend or relative may not have the requisite language skills, may "not understand the requirements of exact interpretation and impartiality," or may have a conflict of interest with the person for whom interpretation is being given. *Id.*

7. TEX. GOV'T CODE ANN. § 57.002(a) (Vernon 2005) (granting parties in Texas criminal and civil court proceedings the right to request appointment of a certified or licensed court interpreter). The judge also may, *sua sponte*, appoint an interpreter where it appears the party or witness needs one. *Id.* § 57.002(b).

8. See Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 870 (2004) (stating that "perceptions [of justice] may be more important than either the actual fairness of the process or the outcome" of a case). One issue in the civil interpreter problem is the impossibility of gathering empirical data from actual cases (as opposed to mock trials) that show what impact an interpreter would have on the outcome of a particular case. *Id.* If nothing else, however, had Kevin been appointed an interpreter, his *perception* of his access to justice is likely to have improved, *even if* the legal outcome had been the same. See *id.*

Kevin's case, family law issues.⁹ The language barrier most immigrants face in court serves to add one denial of legal rights to another. When a substantive legal right, such as housing, employment, or child custody, is denied, a non-English-speaking immigrant's right to a fair adjudication of his or her claim is also denied, either by lack of access to the courts because of language barriers, or by a lack of comprehension on the part of either the litigant or the court.¹⁰

This Note will address the current state of the statutory right to an interpreter for civil litigants in Texas. In 2001, the 77th Texas legislature passed what is now Texas Government Code section 57.002.¹¹ The statute creates the right of both criminal defendants and civil litigants to have an interpreter in the courtroom, should they need one.¹² Part I of this Note discusses the importance of a civil litigant's right to an interpreter and the fact that, unlike the criminal defendant's right, it is not constitutionally protected and must be created by statute. The statutory right in Texas is introduced in Part I. Part II discusses court interpreters generally, licensing of court interpreters in Texas, and the use of both licensed and unlicensed court interpreters in Texas, as well as the use of attorneys as interpreters. Part III surveys application of the statutory right to an interpreter in civil court. Part IV discusses an informal survey conducted to gather the perceptions of the Limited English Proficiency (LEP)¹³ community, judges, and practicing attorneys on the right of civil litigants to a court interpreter. Part V offers suggestions for amendments to section 57.002 that could fill the gaps in the civil justice system left open under current legislation.

9. See Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1928 (2000) (arguing that the right to an interpreter in civil proceedings is a necessary procedural protection of "fundamental notions or fairness, due process and access to the courts").

10. *Id.* at 1928–29 (analyzing case law mandating access to the courts for indigent criminal defendants and civil litigants). "The [Supreme] Court's concern for language impediments . . . should require a trial court to consider carefully whether an interpreter should be appointed in any civil matter in which a party cannot speak English." *Id.* at 1930.

11. TEX. GOV'T CODE ANN. § 57.002 (Vernon 2005).

12. *Id.* § 57.002(a).

13. U.S. Department of Transportation, Limited English Proficiency, <http://www.dotcr.ost.dot.gov/asp/lep.asp> (last visited July 31, 2009) ("Individuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English can be limited English proficient, or 'LEP.'").

II. THE RIGHT TO A COURT INTERPRETER

A. *Importance of the Right to Court Interpretation*

Language heard in the courtroom is both specialized and complex, making content comprehension difficult for an individual who is fluent enough for daily conversations but who is not intimately familiar with English.¹⁴ In fact, even native English speakers express doubt about their ability to comprehend what lawyers and judges say in the courtroom.¹⁵ Because of this language barrier, non-English speakers are, for instance, unable to bring claims that they are being denied fair wages or defend against unfair debt collection.¹⁶ If they speak well enough to bring or defend a claim, but not well enough to be fully understood, the result is that the court's fact-finding is skewed, rendering the proceeding a diminished or distorted endeavor.¹⁷ Is this fair access to justice?

14. Jana Anette Radmann, *Do You Speak English?: A Study on English Language Proficiency Testing of Hispanic Defendants in U.S. Criminal Courts 10–11* (May 2005) (unpublished M.A. thesis, Louisiana State University), http://etd.lsu.edu/docs/available/etd-04142005-224929/unrestricted/Radmann_thesis.pdf (citing Joanne I. Moore & Ron A. Mamiya, *Interpreters in Court Proceedings*, in *IMMIGRANTS IN COURTS* 29, 32 (Joanne Moore & Margaret Fisher eds., 1999)) (emphasizing the difficulty for immigrants facing the advanced English used in legal proceedings).

Several independent studies of the linguistic level of court language have concluded that it is at or beyond high school level and legal terminology drives it up even further.

For a . . . party to be considered bilingual in a legal proceeding, the party's language level should be at the 12th grade level in both languages.

Id. at 11 (quoting Joanne I. Moore & Ron A. Mamiya, *Interpreters in Court Proceedings*, in *IMMIGRANTS IN COURTS* 29, 32 (Joanne Moore & Margaret Fisher eds., 1999)). In addition to legal jargon, "formal legal language, standard English, colloquial English, and subculture varieties (e.g. Black English)" interact in courtrooms and complicate comprehension for immigrants. *Id.* at 10 (citing WILLIAM M. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* 25 (1982)).

15. *Id.* at 15.

16. Laura K. Abel & Alice Ho, *Language Access in Civil State Court Proceedings: A Preliminary Report*, *PROTEUS* (Nat'l Assoc. of Judiciary Interpreters and Translators, Washington, D.C.), Summer 2008, at 1, http://www.najit.org/members_only/proteus/PDF_Articles/Sum08%20cover%20articles_extract.pdf.

Without court interpreters, individuals unable to speak English cannot advance or defend claims, even when they are seeking protection from an abusive spouse, being denied essential wages, facing unfair debt collections, fighting for custody of their children, disputing the cut-off of critically important welfare payments, or facing eviction from their homes.

As a result, courts' fact-finding function is debilitated such that justice cannot be done, and non-English speakers, in particular, are negatively impacted. *Id.*

17. *Id.* (noting a study of the California courts that concluded that if a party is not capable of participating fully in proceedings, the result impairs the overall function of the justice system).

B. *The Criminal Defendant's Right to an Interpreter Is Constitutionally Protected*

The right to an interpreter in the courtroom was first born in the criminal courts and is still maturing there.¹⁸ That the criminal defendant's right to an interpreter is guaranteed by the United States Constitution has been established by both federal and state courts across the nation.¹⁹ The Due Process Clauses of the Fifth and Fourteenth Amendments create the right to an interpreter when one's life, liberty, or property is placed in jeopardy by a criminal charge.²⁰ A criminal defendant's rights to effective assistance of counsel and to confront witnesses against him, both secured by the Sixth Amendment, also support the criminal defen-

18. See, e.g., *State v. Calderon*, 13 P.3d 871, 876 (Kan. 2000) ("Courts have found the absence of an interpreter violated due process where the defendant's inability to understand the proceeding or an element of the proceeding resulted in the denial of a fundamental right."). The court cited a California decision that "found reversible error where there was no translation for the defendant regarding the defendant's right to counsel." *Id.* (citing *In re Muraviov*, 13 Cal. Rptr. 466, 467 (Cal. Ct. App. 1961)). The court also references an Oklahoma case in which "the defendant pled guilty without receiving a translation of the constitutional rights that would be forfeited by the entry of the plea, denying the defendant the fundamental right to a fair trial." *Id.* (citing *Parra v. Page*, 430 P.2d 834, 838 (Okla. Crim. App. 1967)). Lastly, the court notes a Delaware decision finding reversible error "where the arresting officer was called upon to serve as the defendant's interpreter at trial, creating the inherent possibility of bias." *Id.* (citing *Gonzales v. State*, 372 A.2d 191, 192 (Del. 1977)); see also *United States v. Osuna*, 189 F.3d 1289, 1292 (10th Cir. 1999) (clarifying that "'waiver of an interpreter . . . is the defendant's decision after the [c]ourt explains to him the nature and effect of a waiver'" (quoting *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980))). The court determined that the trial judge should inquire as to whether a defendant required an interpreter under *Tapia's* standard: if the "trial judge should find that an interpreter was not sitting at the defendant's side interpreting the proceedings to him, then the court should inquire whether such failure inhibited [defendant's] comprehension of the proceedings, or whether such failure prevented him from assisting his counsel in the cross-examination of witnesses." *Id.* (citing *Tapia*, 631 F.2d at 1209).

19. Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1928-29 (2000) (stating that, while the Constitution does not explicitly provide criminal defendants a right to an interpreter, several federal and state court decisions acknowledge this constitutional right).

20. See *United States ex rel. Negron v. New York*, 434 F.2d 386, 389-90 (2d Cir. 1970) (concluding that a Puerto Rican, non-English-speaking murder defendant's Fourteenth Amendment due process rights were violated by the state court's failure to provide him a Spanish-speaking public defender or, in the alternative, an interpreter through whom he could be meaningfully present at trial, as per the Sixth Amendment guarantee); see also Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1928-29 (2000) (noting that most decisions recognizing a criminal defendant's constitutionally protected right to an interpreter rest their analyses on the Due Process Clauses, as well as the Sixth Amendment right to effective counsel and to confront and cross-examine trial witnesses).

dant's right to an interpreter in court.²¹ But the LEP criminal defendant's constitutional right to an interpreter is highly complex and, although firmly established, has faced tremendous criticism in its application.²² Important sociological and linguistic issues intertwine and remain impediments to an LEP criminal defendant's access to justice via a fair trial.²³ One example is the problematic results of allowing a judge who is untrained in linguistics to make the judgment call as to whether the defendant will be appointed an interpreter.²⁴ These same issues are, of course, present in the civil courtroom as well, but are compounded by the civil litigant's less secure (or in some jurisdictions, non-existent) right to an interpreter.²⁵ While appellate review of issues involving interpreters in criminal cases may be applicable to civil proceedings,²⁶ this Note will

21. See *Negron*, 434 F.2d at 389–90 (“Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, [a defendant] deserve[s] more than to sit in total incomprehension as the trial proceeded.”).

22. Deirdre M. Smith, Comment, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial*, 46 ME. L. REV. 87, 109 (1994) (analyzing the ways in which the federal courts apply this constitutional protection). Smith explains:

Most federal courts, following *Carrion* and *Martinez*, therefore, have regarded the right to interpretation as having a “quasi-constitutional” level of significance. While courts recognize a connection between the need for translation and other constitutional rights, they are unwilling to take the necessary steps at trial or on review to enforce these rights in a meaningful way. Frequently, an analysis of the constitutional requirements is marginal or absent. Although some states have applied a constitutional, as well as statutory, analysis, they have done so without unanimity on what the rights and responsibilities of the defendant and trial court involve.

Id.

23. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 12–14 (William M. O’Barr & John M. Conley eds., 2002) (discussing linguistic issues arising in bilingual court proceedings). The author states that “the way in which a person will speak at a given moment in time is determined by a host of factors,” including “age, sex, level of education, occupation, and income.” *Id.* at 12.

24. Jana Anette Radmann, *Do You Speak English?: A Study on English Language Proficiency Testing of Hispanic Defendants in U.S. Criminal Courts at 82–85* (May 2005) (unpublished M.A. thesis, Louisiana State University), http://etd.lsu.edu/docs/available/etd-04142005-224929/unrestricted/Radmann_thesis.pdf (providing results of a survey showing that, statistically, judges do not trust guidelines for appointing interpreters). The average response of judges surveyed was that they “disagree” or “strongly disagree” with the assertion that the guidelines for determining English proficiency would assist them in making these determinations. *Id.* at 82. The judges surveyed were state and federal judges from California, Florida, New York, and Texas. *Id.* at 82–84.

25. See Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1927 (2000) (noting the lack of certainty among courts regarding the constitutional protections afforded civil litigants who cannot speak or understand English).

26. Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1, 3 (2004) (“[A]ppellate

address only the interplay of civil law and the need for qualified interpretation.

C. *The Civil Litigant's Right to an Interpreter Must Be Statutorily Provided*

In civil cases, the right to an interpreter is not a constitutionally protected right, but rather must be provided by federal or state legislation.²⁷ 1978 marked the birth of the modern use of court interpreters in civil cases with the passing of the federal Court Interpreters Act.²⁸ The great majority of the cases to which the Court Interpreters Act applies, however, are criminal.²⁹ This is because the civil cases for which the act requires interpreters are narrowly limited to those brought against an LEP individual by the federal government itself.³⁰ Even so, Laura Abel of the Brennan Center for Justice at N.Y.U. School of Law points out that Title VI of the Civil Rights Act is also controlling on the issue and should act to fill in the Court Interpreters Act's state court gap.³¹ Title VI of the Civil Rights Act, in part, protects individuals from discrimination on the basis of national origin under programs or activities receiving federal

criminal case law analysis arguably may apply to civil, probate, and administrative proceedings as well.”).

27. Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1927 (2000). This is, of course, unless the right has been incorporated in the constitution of a particular state. See Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1, 3 (2004). Some state courts have found a partial constitutional right to an interpreter in limited types of civil proceedings, such as small claims, employment, or child welfare. Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs* (Mar. 16, 2009) (unpublished draft, on file with author) (discussing the ways in which states have determined court interpreters are a constitutional right of civil litigants).

28. Court Interpreters Act of 1978, 28 U.S.C. § 1827 (2000) (announcing the right of both civil litigants and criminal defendants to a court-appointed interpreter in all federal courts); see also SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 34 (William M. O'Barr & John M. Conley eds., 2002) (“The Court Interpreters Act, signed into law in 1978, represents a milestone in federal legislation aimed at extending justice to the linguistically disadvantaged.”).

29. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 8 (William M. O'Barr & John M. Conley eds., 2002) (stating that, even with the Court Interpreters Act in place, most state and federal courts “restrict the use of court-appointed interpreters largely to criminal cases and only to narrowly-defined civil cases”).

30. *Id.*

31. Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs* 4 (Mar. 16, 2009) (unpublished draft, on file with author).

funding.³² Abel notes that the Supreme Court has held that preventing individuals from accessing services because they lack English language skills is discrimination based on national origin.³³ She argues, therefore, that any state court system receiving federal financial assistance is obligated to provide interpreter services so that LEP litigants can fully participate in state court activities.³⁴ A cursory glance at the states' feeble court interpreter programs demonstrates that this obligation is unheeded and likely unnoticed.³⁵

Unfortunately for LEP civil litigants, the Due Process Clauses of the Fifth and Fourteenth Amendments and the Sixth Amendment's guarantee of the right to confront witnesses only provide a right to an interpreter in *criminal* cases.³⁶ This conclusion has been reached, in part, by

32. Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (2000) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

33. Laura Abel, Letting Justice Speak: Guidelines for State Court Interpreter Programs 4 (Mar. 16, 2009) (unpublished draft, on file with author) (citing *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974)) (“The United States Supreme Court has interpreted Title VI’s prohibition against national origin as prohibiting recipients of federal funding from denying services to individuals based on their inability to speak English. . . .”). In *Lau*, non-English-speaking Chinese-American students sought relief for unequal educational opportunities in the San Francisco Unified School District. *Lau*, 414 U.S. at 564. The Court concluded that the Chinese-speaking students received fewer benefits under the public school system than their English-speaking classmates and upheld the students’ claim under Title VI. *Id.* at 568–69. According to the Court, “Where the inability to speak and understand the English language excludes national-origin-minority children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.” *Id.* at 568 (quoting Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595, 11,595 (July 18, 1970)).

34. Laura Abel, Letting Justice Speak: Guidelines for State Court Interpreter Programs 4 (Mar. 16, 2009) (unpublished draft, on file with author) (arguing that the Civil Rights Act will not allow discrimination unless there is some purpose). Abel argues:

If state courts receive federal funding to support their operations, then they have a responsibility to ensure that LEP persons can participate in or benefit from their programs and activities. Moreover, an entire state court system is bound by this obligation even if only a single program within the system receives federal funding. Since most court systems receive federal funding, the vast majority must provide language access.

Id. (citations omitted).

35. See generally *id.* (providing a survey of national court interpreter programs).

36. See Nancy K. D. Lemon, *Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence?*, 21 BERKELEY J. GENDER L. & JUST. 38, 44 (2006) (“The absence of a right to an interpreter in the civil courts is due in part to the fact that the rights guaranteed by the relevant clauses of the Fifth, Sixth, and Fourteenth Amendments are generally seen as triggered only in criminal cases.”).

the viewpoint that a civil case is voluntary in nature, whereas a defendant's participation in a criminal prosecution is involuntary.³⁷ But is a woman who brings a civil domestic violence proceeding against her potentially murderous husband engaging in a wholly voluntary case?³⁸ Is it a mere *choice* for a father to defend himself at an eviction proceeding so he can keep his children from having to live out of the family car? The characterization of civil suits as merely voluntary is, in too many cases, short-sighted and naïve.³⁹ Even so, that does not change the fact that civil litigants' general right to an interpreter is not constitutionally protected.⁴⁰ Rather, the protection must come from the representative law-making body of the people.⁴¹ Because this protection has not been established by Congress, it must be put in place by the states. This piecemeal establishment of a civil litigant's right to an interpreter has been gradually making its way across the nation, and the result is a right that differs greatly from state to state.⁴²

37. *Id.* at 44–45.

38. *Id.* at 44 (“[V]ictims of domestic violence often have no choice but to utilize the civil courts in order to secure their own safety and the safety of their children.”). As a result, the author argues the need for certified court interpreters is critical to ensure justice for battered women and children. *Id.* Further, “[e]ven in the instances when interpreters are available, there are no guarantees with respect to the level of the interpretation skills provided, as there usually is no certification process or procedural guidelines to ensure accurate translations or compatibility of regional colloquialisms.” *Id.* (quoting Berta Esperanza Hernandez-Truyol, *Las Olvidadas—Gendered In Justice/Gendered Injustice: Latinas, Fronteras, and the Law*, 1 J. GENDER RACE & JUST. 354, 375 (1998)).

39. *See id.* (arguing for certified court interpreters for victims of domestic violence). Quoting a domestic violence victims' advocate, the author states:

The sad thing is that often these [non-English speaking] battered women do not take advantage of the services offered by the court system because they don't understand how the courts work. But even when they do go to the courts to get a . . . protective order, they have no idea what's going on because they don't speak the language. . . . Having an interpreter available will help the victim and the defendant understand the process and understand what a [protective] order can do for them.

Id. at 39 (citation omitted).

40. Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1, 3 (2004); Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1928 (2000).

41. *See Jara v. Mun. Court*, 578 P.2d 94, 95 (Cal. 1978) (finding that “[n]o statutory basis exists for appointment of an interpreter at public expense to assist non-English speaking litigants”). But the judicial branch “has within it the inherent power of self-preservation,” that is, the power to effect its efficient administration and to prevent impairment of its constitutional functions.” *Id.* at 100 (Tobriner, J., dissenting) (quoting *Milholen v. Riley*, 293 P. 69, 71 (Cal. 1930)).

42. Nancy K. D. Lemon, *Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence*, 21 BERKELEY J. GENDER L. & JUST. 38, 47 (2006) (noting that, while some states require certified transla-

Census data from 2000 indicates that about eighteen percent of the United States population speaks a language other than English at home.⁴³ About eight percent of the total United States population has a level of difficulty with English such that they would require an interpreter in the courtroom.⁴⁴ Contrast this national data with Texas's population: without accounting for other languages, by 2004, over one-quarter of Texas's population spoke Spanish at home,⁴⁵ with nearly fifteen percent of Texas residents being Spanish-speaking and having only limited English proficiency.⁴⁶ The second most common foreign language spoken in Texas is Vietnamese, with upwards of 120,000 speakers.⁴⁷ According to the U.S. Census Bureau, more than thirty percent of Texas residents speak a language other than English at home.⁴⁸ Therefore, well over fif-

tors in many types of proceedings, including civil proceedings, some states extend the protection even further, providing translators in civil proceedings at court expense).

43. Hyon B. Shin & Rosalind Bruno, U.S. Census Bureau, *Language Use and English-Speaking Ability: 2000*, Census 2000 Brief 1 (Oct. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf> (stating that approximately forty-seven million Americans aged five and older speak a language other than English at home, a number that has increased substantially since 1980). The data reflects that “the population aged 5 and over grew by one-fourth from 1980 to 2000, [and] the number who spoke a language other than English at home more than doubled.” *Id.* at 2. In addition, not only has the population of persons who speak a language other than English at home increased over the past twenty years, but “[t]he proportion of the population aged 5 and over who spoke English less than ‘Very well’ grew from 4.8% in 1980, to 6.1% in 1990, and to 8.1% in 2000.” *Id.* at 3.

44. *Id.* at 3 (noting that about 8.1% of Americans who speak a language other than English at home speak English less than “very well”).

45. Daniel J. Rearick, Note, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 545–46 (2004) (citing U.S. Census Bureau, 2002 American Community Survey: Ranking Table—Percent of People 5 Years and Over Who Speak Spanish at Home (2002), <http://www.census.gov/acs/www/Products/Ranking/2002/R06T040.htm>) (“More than one-quarter of the populations of New Mexico, Texas, and California speak Spanish at home, and in seven other states, more than one person in ten primarily speaks Spanish.”). In 2002, with 27.4% of people aged five years and older speaking a language other than English at home, Texas trailed only New Mexico in a national ranking of states by percentage of the population. U.S. Census Bureau, 2002 American Community Survey: Ranking Table—Percent of People 5 Years and Over Who Speak Spanish at Home (2002), <http://www.census.gov/acs/www/Products/Ranking/2002/R06T040.htm>.

46. Laura K. Abel & Alice Ho, *Language Access in Civil State Court Proceedings: A Preliminary Report*, PROTEUS (Nat’l Assoc. of Judiciary Interpreters and Translators, Washington, D.C.), Summer 2008, at 7, http://www.najit.org/members_only/proteus/PDF_Articles/Sum08%20cover%20articles_extract.pdf (“In Texas, almost fifteen percent of the residents have limited proficiency in English.” (citation omitted)).

47. U.S. English Foundation, Inc., *Vietnamese*, <http://www.usefoundation.org/userdata/file/Research/Languages/vietnamese.pdf> (last visited July 9, 2009) (stating that the 122,515 Vietnamese speakers in Texas make up 0.637% of the population).

48. U.S. Census Bureau, *State & County QuickFacts: Texas*, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited July 9, 2009) (reporting that 31.2% of Texas residents

teen percent of Texas residents, or over three million people, would probably require a court interpreter to be assured a fair civil court proceeding.⁴⁹

Because LEP litigants do not have a right in federal court to an interpreter in a civil proceeding not initiated by the United States government, they must somehow provide for one should they either be sued or desire to bring a suit.⁵⁰ While no law prevents LEP litigants from providing their own interpreters, most non-English speakers in the United States are also poor, making the practical effect of the lack of a right to a court-appointed interpreter in the civil courts a blockade to justice.⁵¹ Family and friends are often called on to interpret.⁵² It is unlikely, however, that family or friends acting as interpreters can provide quality interpretation of a legal proceeding.⁵³ In addition, using family and friends as interpreters raises other sociological and legal issues, such as confidentiality concerns and the client's willingness to be frank and forthcoming to their attorney or to the court on sensitive and perhaps embarrassing matters when a family member or acquaintance is privy to everything that is

speak a language other than English at home, as does 17.9% of the total population of the United States).

49. *See id.* (listing the population of Texas in 2007 at about twenty-four million people).

50. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 8 (William M. O'Barr & John M. Conley eds., 2002) (noting that the federal Court Interpreters Act only ensures the right to a court-appointed interpreter in federal civil court if the action is brought by the federal government or at the judge's discretion in a very narrow range of cases). "If non-English-speaking litigants were to sue the federal government, under the terms of the law, they would not be entitled to free interpreting services provided by the court." *Id.*

51. *Id.* at 9 ("Because the vast majority of the non-English-speaking fall into socio-economically disadvantaged groups, this means in effect that the American judicial system places the non-English-speaking at a distinct disadvantage in civil court."). The disadvantage mainly stems from the use of friends and family members as interpreters in these proceedings, a practice that generally yields very poor results. *Id.*

52. *Id.*; Geoff Robinson, *A Language Gap in Justice*, *THE RECORDER*, Oct. 17, 2008, http://www.calegaladvocates.org/justicecorps/library/item.232340-A_Language_Gap_In_Justice ("The unavailability of trained interpreters in civil proceedings leaves judges and litigants little option but to use unqualified interpreters—family members, friends, bystanders and sometimes children.").

53. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 9 (William M. O'Barr & John M. Conley eds., 2002); Geoff Robinson, *A Language Gap in Justice*, *THE RECORDER*, Oct. 17, 2008, http://www.calegaladvocates.org/justicecorps/library/item.232340-A_Language_Gap_In_Justice ("Study after study has shown that bilingual speakers who have no training in court interpretation cannot function adequately in a court setting."). Further, "[c]ourt interpretation is a complex task, demanding substantial skill and experience." *Id.*

said.⁵⁴ Even more unlikely, the LEP litigant can opt to pay for a professional interpreter.⁵⁵ The lawyer may front the cost of the interpreter's services if the attorney's fee is based on the contingency of a successful claim,⁵⁶ but what if the suit is for child custody, a defense against eviction, or a creditor-debtor proceeding? What if the LEP litigant has no attorney?⁵⁷

Access to a competent interpreter is especially important in municipal courts because the litigants speak directly to the judge, rather than having an attorney give the judge the facts of the case.⁵⁸ While the types of cases that come before municipal courts may seem insignificant in and of themselves (for example, parking and motor vehicle violations, animal control issues, and city ordinance violations, such as grass overgrowth or tree limbs obstructing rights of way),⁵⁹ it is important to keep the big picture in mind. The court with which the general public is most likely to have contact is a municipal court, so that is where the public's perception of the justice system is most likely to be impacted.⁶⁰ Whether a person perceives his experience in the municipal court as fair or unfair will likely

54. Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 375 (2000). The author explains:

A client may not feel comfortable fully disclosing the details of the case in front of a child, friend or other family member, particularly if it is a sensitive subject. In some cases the friend or family member may actually have a conflict of interest with the client. To cite an extreme example, a [Massachusetts] judge appointed an allegedly abusive husband to interpret for his wife at an Order For Protection hearing.

Id. (footnote omitted).

55. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 9 (William M. O'Barr & John M. Conley eds., 2002).

56. *Id.* at 8 (“[S]ome lawyers have entered into contractual agreements with federally certified interpreters, guaranteeing to pay their fees in civil cases that are not covered under the terms of the federal law.”). Such agreements, however, are unusual. *Id.* at 9.

57. There is also no general right to an attorney in civil cases. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981) (“[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”). Thus, “as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.” *Id.* at 26.

58. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 8 (William M. O'Barr & John M. Conley eds., 2002) (“The reason why the need for interpreters is particularly acute in municipal court is that much of what goes on there involves persons telling the version of an incident directly to a judge, without the benefit of a defense attorney to speak for them.”). As a result, some municipal courts in major cities in the southwestern United States employ staff interpreters, but this practice is not universal. *Id.*

59. *See id.* (noting the typical municipal court docket).

60. *See id.* (discussing the large demand for interpreters in the municipal courts of cities with large non-English-speaking populations).

impact his perception of the justice system as a whole.⁶¹ The opportunity of an LEP to communicate fully in the municipal court, through the aid of an interpreter, can cause the person to perceive his experience as fair, regardless of the outcome.⁶² This perception of general fairness may, in turn, positively impact non-English speakers' perception of other elements of the justice system.⁶³

When an LEP individual is the victim of domestic violence, obtaining civil legal aid through a protective order or divorce can be the most forceful guarantee of safety, but linguistic barriers on top of financial vulnerability can make it nearly impossible to access those services.⁶⁴ Domestic violence, in fact, is an even more acute problem among immigrants than among natural-born citizens.⁶⁵ Communication barriers and lack of understanding about services available to them make it harder for LEP women to find help from established organizations.⁶⁶ Domestic abusers have additional power over immigrant women than they do over natural-born citizens: the abuser may threaten the victim with deportation, or he may even threaten her with his own deportation, leaving the victim in fear of losing her family and financial support if she reports the violence.⁶⁷ Court intervention has been empirically shown to prevent con-

61. Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865, 870 (2004) ("Plainly, process—or at least the perception of process—matters to people. As a determinant of subjective satisfaction with dispute resolution processes, perceptions may be more important than either the actual fairness of the process or the outcome."). The author argues that the perception of fairness in access to justice is important in order to foster respect for the law and legal institutions. *Id.* at 871.

62. *Id.* ("[T]he subjective sense of justice can be largely independent of outcomes or of actual (as opposed to perceived) procedural fairness.").

63. *Id.*

64. Laura D. Wolf, *Congress Must Ensure that VAWA Does Not Expire*, *TEX. LAWYER*, Sept. 19, 2005, at 2, available at <http://www.ncdsv.org/images/CongressMustEnsurethatVAWADoesNotExpire.pdf> ("In cases of domestic violence in particular, civil legal assistance is an enormous obstacle to a victim's ability to find safety."). Moreover, "[m]ost victims of domestic violence have no access to affordable civil legal services, but often that is the area of their greatest need: protective orders, divorces, child custody issues, etc." *Id.*

65. See Karen Hopkins, *Help for Immigrants Dealing with Domestic Violence*, *TEX. CIV. RTS. PROJECT*, Feb. 15, 2009, <http://www.texascivilrightsproject.org/?p=954> (noting the particular vulnerability of immigrants to domestic violence). In addition, "[t]he language barrier silences many immigrant victims," who are often unaware of their rights in the United States and afraid of deportation. *Id.*

66. *Id.* ("With the language barrier and fears of deportation, many [immigrant women] are afraid to go to police.").

67. Sudha Shetty & Janice Kaguyutan, *Immigrant Victims of Domestic Violence: Cultural Challenges and Available Legal Protections*, *NAT'L ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN*, Feb. 2002, http://new.vawnet.org/category/Main_Doc.php?docid=384 ("Immigrant women, unlike citizens, often may not legally work and face a constant threat of deportation by their abuser."). Furthermore,

tinued abuse in a positive number of cases.⁶⁸ Thus, if court interpreters were more readily available to the LEP community, the tragic story of so many victims of domestic violence could be rewritten.

Finally, a strong statutory right to an interpreter for LEP civil litigants is of utmost importance to the state itself.⁶⁹ Without enforcement, civil laws are empty ideals, and the civil legal system requires citizens to enforce the laws through the courts. In Texas alone, three million people are unable to enforce important civil laws, such as the minimum wage and the prevention of illegal eviction, if they do not have access to a court interpreter.⁷⁰ The result is the enforcement of civil laws can wither away in LEP communities, exposing the law to possible exploitation.⁷¹

D. *Statutory Right to an Interpreter in Civil Proceedings in Texas*

In 2001, Texas took an important first step toward addressing the barrier to justice for the LEP community. Texas House Bill 2735 recognized the need for more than 1200 district and county courts in Texas to assist participants with comprehending both court proceedings and the import

[a]busers of immigrant women often use immigration-related threats to assert power and control over their spouse or intimate partner. The abuser, if he is a U.S. citizen or a permanent resident, typically uses this power to threaten to have the victim deported by reporting her undocumented status to [immigration officials], threatens to revoke residency sponsorship, or refuses to file necessary immigration petitions that would provide the victim with lawful status in the U.S. [Studies have] found that 72.3% of the battered Latinas surveyed in their study reported that their spouses never filed immigration petitions for their wives even though 50.8% of the victims qualified to have petitions filed on their behalf. In addition, those abusers who did eventually file petitions for their spouses took almost four years to do so. Fear of deportation is a very powerful tool used by abusers to prevent battered immigrant women from seeking help and to keep them in violent relationships.

Id. (citations omitted).

68. SUSAN L. KEILITZ, PAULA L. HANNAFORD & HILLERY S. EFKEMAN, NAT'L CTR. FOR STATE COURTS RESEARCH, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE 13 (1997), <http://www.ncjrs.gov/pdffiles1/pr/172223.pdf> (finding that women who were successful in obtaining a temporary protective order were more likely to obtain a permanent protective order).

69. See Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs* 5 (Mar. 16, 2009) (unpublished draft, on file with author) (“[A] lack of court interpreter systems has dire consequences for states and local communities.”).

70. *Id.* at 2 (“When millions of people are unable to [enforce state laws], the result is the [under-enforcement] of many of our most cherished laws—governing public safety, wages and other working conditions, and the protection of civil rights, just to name a few.”).

71. *Id.*

of those proceedings.⁷² The bill was enacted in 2001 as section 57.002 of the Texas Government Code.⁷³

The final bill analysis does include the important point that the legislation *requires* a court to appoint a licensed court interpreter if a motion is filed requesting one.⁷⁴ The analysis does not, however, further explore this requirement, nor does it comment on the legislature's intent.⁷⁵ Except for this one statement, in fact, the rest of the analysis centers on Texas's need for a statewide standard for court interpreters, as well as on the bill's establishment of a program for licensing court interpreters.⁷⁶

On its face, the statute requires that the court "shall" appoint an interpreter if a party or witness moves to request one.⁷⁷ Superficially, the statute seems to state that the appointment of an interpreter is not left to the judge's discretion.⁷⁸ This is a substantial improvement from leaving the linguistic determination to the untrained judge.⁷⁹ According to the bare

72. Office of the House, Bill Analysis, Tex. H.B. 2735, 77th Leg., R.S. (2001) ("[I]n Texas there are over 400 district courts and 800 county courts at law in which some participants in the court process do not speak or fully comprehend English or are deaf or hearing impaired.").

73. TEX. GOV'T CODE ANN. § 57.002 (Vernon 2005). The statute provides, in full:

- (a) A court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the court.
- (b) A court may, on its own motion, appoint a certified court interpreter or a licensed court interpreter.
- (c) Subject to Subsection (e), in a county with a population of less than 50,000, a court may appoint a spoken language interpreter who is not a licensed court interpreter.
- (d) Subject to Subsection (e), in a county with a population of 50,000 or more, a court may appoint a spoken language interpreter who is not a certified or licensed court interpreter if:
 - (1) the language necessary in the proceeding is a language other than Spanish; and
 - (2) the court makes a finding that there is no licensed court interpreter within 75 miles who can interpret in the language that is necessary in a proceeding.
- (e) A person appointed under Subsection (c) or (d):
 - (1) must be qualified by the court as an expert under the Texas Rules of Evidence;
 - (2) must be at least 18 years of age; and
 - (3) may not be a party to the proceeding.

Id.

74. Office of the House, Bill Analysis, Tex. H.B. 2735, 77th Leg., R.S. (2001).

75. *See id.*

76. *Id.*

77. TEX. GOV'T CODE ANN. § 57.002(a) (Vernon 2005).

78. *Id.* (requiring appointment of an interpreter upon a party's request).

79. *See* Jana Anette Radmann, *Do You Speak English?: A Study on English Language Proficiency Testing of Hispanic Defendants in U.S. Criminal Courts 3* (May 2005) (unpublished M.A. thesis, Louisiana State University), <http://etd.lsu.edu/docs/available/>

wording of the statute, if a motion is made, the party must receive the aid of an interpreter.⁸⁰ In fact, the statute turns the judge's discretion into a possible boon to an LEP litigant, rather than only a hindrance.⁸¹ This is because the judge is allowed to appoint an interpreter on his own motion; therefore, the judge may appoint an interpreter but cannot deny a request for an interpreter.⁸²

In application, however, courts and the Texas Attorney General have construed the statute's language to be discretionary, rather than mandatory.⁸³ According to former Texas Attorney General John Cornyn, judges still have the authority to determine whether a party who has made a motion for the appointment of an interpreter actually requires one to communicate with the court in English.⁸⁴ In practice, the only "mandatory" aspect of the statute requires that, when a judge does appoint an interpreter, he or she must be a licensed court interpreter (rather than, for instance, a clerk from down the hall or even an inmate who is known to speak the moving party's language and at least some

etd-04142005-224929/unrestricted/Radmann_thesis.pdf (explaining the widespread acceptance of the practice of untrained judges making linguistic proficiency determinations). Radmann states:

While judges have been educated many years in reading and applying existing law, they have not been trained in linguistics. Although they should be aware of the importance of language in their profession, and in the legal domain, some judges might be insensitive to the language needs of non-native English defendants. In addition, time and budget constraints might influence the judges' decision negatively, or might simply affect their methods and procedures.

Id.

80. TEX. GOV'T CODE ANN. § 57.002(a) (Vernon 2005).

81. *See id.* § 57.002(b) (permitting judges to, *sua sponte*, appoint interpreters).

82. *Id.* § 57.002(a), (b); *see also* Charles M. Grabau, *Court Interpreting: View from the Bench*, 20 ST. CT. J. (SPECIAL ISSUE) 6, 11 (1996) (describing the benefits of a judge's discretion in appointing courtroom interpreters). Judge Charles M. Grabau of Minnesota suggests that judges conduct *voir dire* of any individual requesting an interpreter and stresses that the judge should ask open-ended rather than "yes" or "no" questions. *Id.* Further, he argues judges should not ask whether the person speaks English, as this question does not really provide any useful information. *Id.* Most importantly, Judge Grabau stresses that it is best for the judge to appoint an interpreter even if he or she questions its necessity, rather than potentially deprive an LEP individual of his ability to comprehend court proceedings. *Id.*

83. Tex. Atty. Gen. Op. No. JC-0584, 27 Tex. Reg. 11341, 11350 (2002), *available at* 2002 WL 31674922 ("[W]e believe section 57.002(a)'s conditional clause—'if a *motion* for the appointment of an interpreter is filed by a party or *requested* by a witness . . .' indicates that the legislature intended for courts to have discretion to determine whether the party or witness requires an interpreter." (emphasis in original) (citations omitted)).

84. *Id.* ("Although section 57.002 clearly modifies the authority of a court to determine the qualifications of an interpreter, we do not construe section 57.002 to strip a court of its authority to determine whether a party or witness is able to communicate in English and requires an interpreter.").

English).⁸⁵ While it is laudable that the Texas legislature recognized that “the lack of adequate training impairs the quality of the translation” and results in the exclusion of LEP litigants from “full participation in the proceedings,”⁸⁶ the interpretation of “the court *shall* appoint”⁸⁷ as being discretionary has made the statute an empty right to potential LEP civil litigants.

In addition to mandating the establishment of standards for the licensing of court interpreters, section 57.042 created a nine-member advisory board to advise the Texas Department of Licensing and Regulation on the adoption of licensing rules as well as on the substance and procedures of the licensing examination.⁸⁸ The nine members of the Licensed Court Interpreter Advisory Board must consist of one judge, one administrator of the court, and one attorney, as well as three licensed court interpreters and three members of the general public.⁸⁹

Another forward-looking aspect of the statute is its broad definition of “court proceeding.”⁹⁰ Court proceedings in which interpreters must be provided when needed include arraignments, depositions, mediations, court-ordered arbitration, and other forms of alternative dispute resolution.⁹¹ But because Chapter 57 applies only to civil and criminal matters

85. *Id.* (“We construe section 57.002(a) to impose on a court the mandatory duty to appoint a certified or licensed interpreter when the court appoints an interpreter.” (emphasis in original) (citation omitted)).

86. Office of the House, Bill Analysis, Tex. H.B. 2735, 77th Leg., R.S. (2001).

The effect of this is that many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency or a speech or hearing impairment. House Bill 2735 provides a program for certification of court interpreters to aid non-English speaking and hearing-impaired individuals.

Id.

87. TEX. GOV'T CODE ANN. § 57.002(a) (Vernon 2005) (emphasis added).

88. *Id.* § 57.042(a), (g). “The licensed court interpreter advisory board is established as an advisory board to the commission. The board is composed of nine members appointed by the presiding officer of the commission, with the commission’s approval.” *Id.* § 57.042(a); see also Chris Kadas, Gen. Counsel, Tex. Dep’t of Licensing & Regulation, Licensed Court Interpreters—Implications for Texas Courts, Presentation to the 2006 Texas College for Judicial Studies (Apr. 28, 2006) (transcript available at <http://www.license.state.tx.us/court/presentation.htm>) (providing information about section 57.042 and its implications for the use of translators in Texas courtrooms).

89. TEX. GOV'T CODE ANN. § 57.042(b) (Vernon 2005); see also Chris Kadas, Gen. Counsel, Tex. Dep’t of Licensing & Regulation, Licensed Court Interpreters—Implications for Texas Courts, Presentation to the 2006 Texas College for Judicial Studies (Apr. 28, 2006) (transcript available at <http://www.license.state.tx.us/court/presentation.htm>).

90. See TEX. GOV'T CODE ANN. § 57.001(7) (Vernon 2005) (“‘Court proceeding’ includes an arraignment, deposition, mediation, court-ordered arbitration, or other form of alternative dispute resolution.”).

91. *Id.*

and not to matters before an administrative law judge, mediation ordered in an administrative hearing, such as for tax or utilities disputes, would not fall under the statute's definition of "court proceeding."⁹² The State Office of Administrative Hearings, however, will arrange and even pay for an interpreter if a written request is filed at least seven days before the administrative hearing that states what language is needed to be interpreted.⁹³

The statute does not provide for the appointment of interpreters in proceedings before political subdivisions, such as before a municipality or school district.⁹⁴ Other statutory law, however, *does* provide interpretation for the deaf and hearing impaired.⁹⁵ Not only will an interpreter for a deaf or hearing-impaired person be appointed, but the governing body before which the person's rights or privileges are at issue incurs the cost of the interpreter.⁹⁶ This is not to say that such a governing body would not appoint an interpreter for an LEP individual of its own volition, but the right is not statutorily protected as it is for the deaf and hearing-impaired.⁹⁷

92. Chris Kadas, Gen. Counsel, Tex. Dep't of Licensing & Regulation, Licensed Court Interpreters—Implications for Texas Courts, Presentation to the 2006 Texas College for Judicial Studies (Apr. 28, 2006) (transcript available at <http://www.license.state.tx.us/court/presentation.htm>) ("A mediation conducted pursuant to an administrative hearing, for example, would not qualify as a 'court proceeding,' because Chapter 57 covers civil and criminal matters, not cases before an administrative law judge.").

93. 1 TEX. ADMIN. CODE § 155.407 (2008).

A party or witness who needs an interpreter or translator in order to participate in a proceeding shall file a written request at least seven days before the setting. SOAH shall provide and pay for the following: (1) an interpreter for hearing-impaired parties and witnesses, in accordance with § 2001.055 of the APA; (2) reader services or other communication services for visually-impaired parties and witnesses; and (3) a certified language interpreter.

Id.; see also State Office of Administrative Hearings Frequently Asked Questions, <http://www.soah.state.tx.us/AboutUs/faq.htm> (last visited July 10, 2009) (requiring litigants to file a "request with SOAH at least seven days prior to the proceeding" in order to obtain an interpreter).

94. See TEX. GOV'T CODE ANN. § 57.001(7) (Vernon 2005).

95. *Id.* § 558.003(a).

In a proceeding before the governing body of a political subdivision in which the legal rights, duties, or privileges of a party are to be determined by the governing body after an adjudicative hearing, the governing body shall supply for a party who is deaf or hearing impaired an interpreter who has qualifications approved by the Texas Commission for the Deaf and Hard of Hearing.

Id.

96. *Id.*

97. See *id.*

“[C]ertain border counties,” as described in the statute, may employ full-time or part-time Spanish-language interpreters,⁹⁸ and the commissioner’s courts of those counties are empowered to set the salaries for the district courts’ interpreters,⁹⁹ to be paid out of the general fund of the county.¹⁰⁰ While the legislative history gives no indication of a specific reason for this provision in the statute for “certain border counties,” presumably, the legislature supposed that it would be cheaper for these counties with high LEP populations to employ court interpreters than to contract for them. Finally, the statute imposes criminal liability for falsely holding oneself out as a licensed court interpreter.¹⁰¹ Unlicensed persons found interpreting at a court proceeding or found advertising or representing that they are licensed court interpreters will be convicted of a Class A misdemeanor¹⁰² and may also be subject to an administrative penalty.¹⁰³

A term that the statute includes but does not define is “motion.”¹⁰⁴ The statute states that a party who files a “motion” for an interpreter, or a witness who requests an interpreter, shall be appointed one.¹⁰⁵ It may have served the legislation well if either the statute had defined the term “motion” or if the legislative history more clearly reflected the intent of

98. TEX. CIV. PRAC. & REM. CODE ANN. § 21.022(a) (Vernon 2008) (“On the request of a district judge who has made a determination of need, the commissioners court of the county shall appoint court interpreters on a full-time or part-time basis as necessary to carry out court functions.”).

99. TEX. LOC. GOV’T CODE ANN. § 152.903(a) (Vernon 2008) (“[T]he commissioners court of a county may set the compensation of interpreters employed by the district courts in the county.”).

100. *Id.* § 152.00.

Unless otherwise provided by law, the compensation, expenses, and allowances set under this code for a district, county, or precinct officer or employee may be paid from the general fund of the county in which the officer or employee serves or from any other funds that are available for that purpose.

101. TEX. GOV’T CODE ANN. § 57.050(a) (Vernon 2005) (providing that a violation is punishable as a Class A misdemeanor).

102. TEX. PENAL CODE ANN. § 12.21 (Vernon 2003) (“An individual adjudged guilty of a Class A misdemeanor shall be punished by: (1) a fine not to exceed \$4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement.”).

103. TEX. GOV’T CODE ANN. § 57.026 (Vernon 2005) (“A person may not interpret for a hearing-impaired individual at a court proceeding or advertise or represent that the person is a certified court interpreter unless the person holds an appropriate certificate under this subchapter.”); § 57.027(a) (“A person commits an offense if the person violates this subchapter or a rule adopted under this subchapter. An offense under this subsection is a Class A misdemeanor.”); § 57.050(a) (“A person commits an offense if the person violates this subchapter or a rule adopted under this subchapter. An offense under this subsection is a Class A misdemeanor.”).

104. *See id.* § 57.002(a).

105. *Id.*

the lawmakers as to exactly what kinds of actions by a party would result in the appointment of an interpreter. For example, if the party asks for help at the clerk's window, is that a motion? According to Judge Holman of the City of Lewisville Municipal Court, "maybe."¹⁰⁶ Whether a party "has moved for appointment of an interpreter will depend upon the circumstances and . . . is a matter for the [c]ourt" to decide.¹⁰⁷ This issue creates a second arena where the judge's discretion may prevent an LEP litigant from receiving the interpretation services he needs. The judge may either decide that the litigant can communicate well enough in English so as not require an interpreter, or the judge may prefer not to reach that inquiry by instead deciding that an appropriate motion was not made requesting an interpreter.¹⁰⁸

In addition to too much judicial discretion in barring the LEP litigant from being appointed an interpreter in a civil proceeding, another major shortcoming of the Texas statutory right is that no money is appropriated by the legislature to provide this important service.¹⁰⁹ Rather, the legislature requires courts to use the general fund of the county to pay interpreters' fees and expenses.¹¹⁰ Moreover, the statute does not require the court to provide for an interpreter between the attorney and the client in a civil case, as it does for criminal defendants.¹¹¹ The attorney may still ask, however, that the court, on the court's own motion, provide an interpreter for meetings between the attorney and the client.¹¹² It is unclear if such a motion would be successful, as the court would likely respond that the attorney should provide an interpreter for the client.

106. Brian Holman, Presiding Judge, City of Lewisville, Texas, *Municipal Court Interpreters: What Every Clerk Needs to Know*, <http://www.texasclerkclerks.org/pdf/What%20Clerks%20Should%20Know.ppt> (last visited July 13, 2009) (citing Tex. Atty. Gen. Op. No. JC-0584, 27 Tex. Reg. 11341, 11350 (2002), available at 2002 WL 31674922).

107. Tex. Atty. Gen. Op. No. JC-0584, 27 Tex. Reg. 11341, 11350 (2002), available at 2002 WL 31674922.

108. *Id.* ("[T]he legislature would not have intended to require courts to appoint interpreters when the witness or party clearly does not require one or has requested the appointment of an interpreter in bad faith.").

109. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 21.022-21.051 (Vernon 2009) (providing for a Spanish language interpreter's appointment, qualifications, termination of employment, duties, oath, and interpreter fee, but not legislative funding).

110. TEX. LOC. GOV'T CODE ANN. § 152.001 (Vernon 2009).

111. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 21.002(a) (Vernon 2008) ("On the request of a district judge who has made a determination of need, the commissioners court of the county shall appoint court interpreters on a full-time or part-time basis as necessary to carry out court functions."), with TEX. CODE CRIM. PROC. ANN. art. 38.31(b) (Vernon 2006) (extending the right of a court-appointed interpreter to "communications concerning the case between the defendant and defense counsel").

112. TEX. CIV. PRAC. & REM. CODE ANN. § 21.002(a) (Vernon 2008) (providing for deaf persons' right to an interpreter).

It goes without saying that the lawyer-client relationship is communication-intensive. Even with interpretation provided in the courtroom for an LEP party, it will be detrimental to the client if language barriers are not overcome in pre-trial lawyer-client communications.¹¹³ As discussed below, practicing attorneys often rely on their LEP clients' friends or family members to facilitate attorney-client communications.¹¹⁴ To address this shortcoming, either the express language of the statute or judicial interpretation of it should be expanded to extend the civil right to an interpreter to attorney-client communications outside the courtroom.¹¹⁵

Finally, and perhaps most importantly, the law does not require the court to *pay* for the interpreter.¹¹⁶ While the court may choose to pay out of the county's general public fund, the court is also authorized to require one or both of the parties to pay, or to assess the interpreter's fees as costs.¹¹⁷ In an interview with the Texas Advocacy Project, Laura Abel of the Brennan Center for Justice at the N.Y.U. School of Law was told that even when a litigant is indigent, courts are "extremely reluctant" to pay for an interpreter.¹¹⁸

113. Daniel J. Rearick, Note, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 573 (2004). Rearick argues:

With all the attention on the debate about courtroom interpreters, the importance of communication between client and attorney has been largely overlooked. The law must recognize the need to communicate with an attorney prior to and during trial. When a litigant is represented in court, pre-trial communication between a lawyer and client is likely to determine the outcome of the case.

Id.

114. Geoff Robinson, *A Language Gap in Justice*, THE RECORDER, Oct. 17, 2008, http://www.calegaladvocates.org/justicecorps/library/item.232340-A_Language_Gap_In_Justice.

115. Daniel J. Rearick, Note, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 576-77 (2004) ("The state could establish banks of certified interpreters and extend the right to an interpreter to some minimum pre-trial attorney contact.").

116. TEX. R. CIV. P. 183.

117. *Id.* ("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." *Id.*

118. Memorandum from Laura Abel, Deputy Dir., Justice Program, Brennan Ctr. for Justice at N.Y.U. Sch. of Law, to author (Mar. 16, 2009) (on file with author).

E. *The Right to Interpreters in Civil Proceedings in Other States*¹¹⁹

In 1995, the National Center for State Courts created the Consortium for State Court Interpreter Certification, to which forty states currently belong,¹²⁰ including Texas.¹²¹ The Consortium provides a way for states to share the cost of creating interpreter certification exams, curricula, and training materials.¹²² Even so, court interpreter programs and the LEP civil litigant's right to an interpreter vary significantly among states.¹²³ New Jersey, for example, does not provide the right to a *free* interpreter for LEP litigants in civil cases, but it does provide for free sign-language interpreters for deaf civil litigants.¹²⁴ Additionally, discretion is left to the New Jersey state judge to appoint a staff interpreter to a civil case, which he or she is more likely to do for a family law case than for other types of civil litigation.¹²⁵

119. The Brennan Center for Justice at N.Y.U. School of Law has examined the court interpreter programs of the fifty states and will be publishing its analysis of the study in the near future. Laura K. Abel & Alice Ho, *Language Access in Civil State Court Proceedings: A Preliminary Report*, PROTEUS (Nat'l Assoc. of Judiciary Interpreters and Translators, Washington, D.C.), Summer 2008, at 1, http://www.najit.org/members_only/proteus/PDF_Articles/Sum08%20cover%20articles_extract.pdf.

120. Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs 3* (Mar. 16, 2009) (unpublished draft, on file with author) (arguing that, as a result of the Consortium, language conditions for LEP litigants have improved).

121. Memorandum from Laura Abel, Deputy Dir., Justice Program, Brennan Ctr. for Justice at N.Y.U. Sch. of Law, to author (Mar. 16, 2009) (on file with author).

122. Consortium for State Court Interpreter Certification Frequently Asked Questions, http://www.ncsconline.org/D_Research/CourtInterp/1Consort-FAQ.pdf (last visited July 13, 2009).

The core concept behind the Consortium is to: “establish court interpretation test development and administration standards, and provide testing materials, in order that individual states and jurisdictions may have the necessary tools and guidance to implement certification programs.” Equally important as the test development cost savings, however, are the benefits that go with belonging to a standardized national testing program.

Id. (emphasis omitted).

123. *See generally* Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs* (Mar. 16, 2009) (unpublished draft, on file with author) (describing different state interpreter programs).

124. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 8 (William M. O'Barr & John M. Conley eds., 2002).

125. *Id.* The author explains:

The current New Jersey law, which for the last few years has been the target of legislative change, actually does allow for the appointment of free court-appointed interpreters to civil cases. However, such a decision is up to the discretion of the judge, and depends upon the availability of staff interpreters at the moment.

Id.

Minnesota granted the statutory right to an interpreter in 1975.¹²⁶ The findings of a task force nearly twenty years later, however, suggested that both attorneys and judges in Minnesota lacked training in how to work with interpreters.¹²⁷ Indiana law provides that LEP litigants are entitled to an interpreter, but courts are left to determine, on a county by county basis, how the interpreters will be paid.¹²⁸ Accordingly, access to interpreters is not consistent across Indiana.¹²⁹ Utah provides interpreters free of charge in certain types of civil cases, including domestic abuse, child protective orders, and other emergency motions, but interpreters are not appointed for most types of civil proceedings.¹³⁰ In Wisconsin, on the other hand, appeals courts pay interpreters up-front, and the counties are later reimbursed for interpreter services by the director of state courts.¹³¹

From these examples, it is clear that a major obstacle to LEP individuals' access to court interpreters is not that the right is not statutorily provided, but that there is no funding to provide free interpreters to the litigants who need them.¹³² Most states providing the right to an interpreter assess the cost of the interpreter's services to the litigant requesting them.¹³³ Federal funding may help alleviate this problem, and before the current economic downturn began in 2008, federal appropriation was being considered by Congress.¹³⁴ Senator Herb Kohl of Wisconsin introduced the State Court Interpreter Grant Program Act, which would have established a program whereby state court interpreter programs could,

126. Symposium, *Symposium on Racial Bias in the Judicial System: Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, 16 *HAMLIN L. REV.* 611, 621 (1993).

127. *Id.*

128. Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs* 11 (Mar. 16, 2009) (unpublished draft, on file with author).

129. *Id.*

130. *Id.*

131. *Id.* at 21.

132. *E.g.*, ARK. CODE ANN. § 16-64-111(b)(2) (2005); CAL. EVID. CODE § 755(b) (West 1995 & Supp. 2006); IND. CODE ANN. §§ 34-45-1-3-34-45-1-4(b) (West 2005); IOWA CODE ANN. § 622A.4 (West 2003); KAN. STAT. ANN. §§ 75-4351, 75-4352 (1997); KY. REV. STAT. ANN. §§ 30A.410, 30A.415(2) (West 1999); NEB. REV. STAT. §§ 25-2401-2406 (1995); OR. REV. STAT. §§ 45.273, 45.275 (2003); VA. CODE ANN. § 8.01-384.1:1 (West 1995 & Supp. 2006).

133. Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs* 10 (Mar. 16, 2009) (unpublished draft, on file with author) ("Despite the legal and practical problems created when states charge litigants for interpreter services, the vast majority of states we examined do charge nonindigent LEP individuals for interpreter services.").

134. State Court Interpreter Grant Program Act, S. 1329, 111th Cong. (1st Sess. 2009) ("To authorize the Attorney General to award grants to State courts to develop and implement State courts interpreter programs.").

through their state's highest court, apply for grants from the Department of Justice.¹³⁵ The bill would have authorized fifteen million dollars for each year through 2014.¹³⁶ Because more funds would be granted to states with a higher percentage of individuals who do not speak English at home,¹³⁷ it would have significantly increased the number of certified interpreters in Texas.¹³⁸ Unfortunately for LEP litigants and state court interpreter programs, this bill has, to date, only been referred to the Committee on the Judiciary and has not yet been passed by Congress.¹³⁹

III. COURT INTERPRETERS¹⁴⁰

A. *Licensing Procedure in Texas*

The Texas statute requires that an interpreter be a certified or licensed court interpreter, with minor exceptions.¹⁴¹ "Certified" refers to federally certified interpreters, while "licensed" interpreters are licensed by the states.¹⁴² Licensing for court interpreters is administered by the Texas Department of Licensing and Regulation (TDLR).¹⁴³ The TDLR

135. *Id.*

136. *Id.*

137. Laura K. Abel & Alice Ho, *Language Access in Civil State Court Proceedings: A Preliminary Report*, PROTEUS (Nat'l Assoc. of Judiciary Interpreters and Translators, Washington, D.C.), Summer 2008, at 6, http://www.najit.org/members_only/proteus/PDF_Articles/Sum08%20cover%20articles_extract.pdf; National Center for State Courts (NCSC), Court Interpreter Legislation Act Summary, http://www.ncsconline.org/D_Gov/briefingbook/109thCongress/miscellaneous109th.html (last visited July 9, 2009).

138. Laura K. Abel & Alice Ho, *Language Access in Civil State Court Proceedings: A Preliminary Report*, PROTEUS (Nat'l Assoc. of Judiciary Interpreters and Translators, Washington, D.C.), Summer 2008, at 6, http://www.najit.org/members_only/proteus/PDF_Articles/Sum08%20cover%20articles_extract.pdf (stating that "The Act has the potential to dramatically improve court interpretation" in South Carolina, Arizona, Utah, and Texas). In fact, "the Act . . . could enable . . . South Carolina, Texas and Utah to dramatically expand the number of qualified interpreters." *Id.*

139. GovTrack, S. 1329 [111th]: State Court Interpreter Grant Program Act, <http://www.govtrack.us/congress/bill.xpd?bill=s111-1329&tab=related> (last visited July 6, 2009).

140. Nationwide, the vast majority of court interpretation involves the Spanish language. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 6 (William M. O'Barr & John M. Conley eds., 2002). It is also interesting to note that, nationwide, interpreters are nearly always women. *Id.* at 271 n.1.

141. TEX. GOV'T CODE ANN. § 57.002(c), (d) (Vernon 2005) (noting the cases in which a court can appoint an unlicensed or uncertified interpreter).

142. See 28 U.S.C. § 1827 (2000) (establishing the requirements for federal court interpreter certification); TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon 2009) (defining a certified interpreter for civil cases); TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon 2009) (defining a certified interpreter for criminal cases); TEX. GOV'T CODE ANN. § 57.001(5) (Vernon 2009) (defining a licensed court interpreter).

143. TEX. GOV'T CODE ANN. §§ 57.041(2), 57.042(a) (Vernon 2005) (regulating the licensing of translators).

is the state's "umbrella agency for occupational licensing and safety"; the agency's broad duties include overseeing licensing for occupations, such as cosmetologists and electricians, and regulating the safety of elevators and boilers.¹⁴⁴ The TDLR regulates more than 350,000 licensees with only about 250 employees.¹⁴⁵

Texas court interpreter licenses must be renewed every year.¹⁴⁶ People seeking to be licensed as court interpreters in Texas must pass an examination demonstrating proficiency in the foreign language.¹⁴⁷ The exam consists of an oral component and a written component.¹⁴⁸ The written component has 135 multiple-choice questions, to be answered in three and one-half hours.¹⁴⁹ The questions cover language competency, legal vocabulary, and interpreter ethics.¹⁵⁰ The oral component tests the three disciplines in interpretation: simultaneous interpretation, sight interpretation, and consecutive interpretation.¹⁵¹ The exam costs four hundred dollars: three hundred dollars for the oral exam and one hundred dollars for the written portion.¹⁵² The original license application filing fee is seventy-five dollars, and the fee for a renewal license is fifty dollars.¹⁵³ The fees are all non-refundable.¹⁵⁴

B. *Licensed Court Interpreters in Texas*

As of 2006, there were nearly seven hundred licensed court interpreters in Texas, with the most-represented language being Spanish, followed by Vietnamese, Mandarin, French, Korean, and Cantonese.¹⁵⁵ A continuing

144. Chris Kadas, Gen. Counsel, Tex. Dep't of Licensing & Regulation, Licensed Court Interpreters—Implications for Texas Courts, Presentation to the 2006 Texas College for Judicial Studies (Apr. 28, 2006) (transcript available at <http://www.license.state.tx.us/court/presentation.htm>) (explaining the purpose of the TDLR, which regulates twenty-three occupations).

145. *Id.*

146. *Id.*

147. *Id.*

148. Texas Department of Licensing and Regulation, Licensed Court Interpreters Exam Information, <http://www.license.state.tx.us/court/examinfo.htm> (last visited July 13, 2009) (providing detailed information concerning the court interpreters exam).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Texas Department of Licensing and Regulation, Licensed Court Interpreters Exam Information, <http://www.license.state.tx.us/court/examinfo.htm> (last visited July 13, 2009).

154. *Id.*

155. Chris Kadas, Gen. Counsel, Tex. Dep't of Licensing & Regulation, Licensed Court Interpreters—Implications for Texas Courts, Presentation to the 2006 Texas College for Judicial Studies (Apr. 28, 2006) (transcript available at <http://www.license.state.tx.us/>

education requirement enacted in January 2007, however, has caused the number of licensed interpreters to drop to around 550.¹⁵⁶ In nearly every state in the nation, certified interpreters are in short supply, due in part to the increased number of proceedings against illegal immigrants, which often require the services of certified interpreters.¹⁵⁷ There are only about three thousand certified court interpreters in the entire nation, with about seventeen percent of those interpreters translating in languages other than Spanish.¹⁵⁸ In addition, the cost of professional interpreters ranges widely nationwide, from fifteen dollars to \$130 per hour.¹⁵⁹

In Texas, of the forty-eight people who sat for the Spanish exam in 2007, only three passed.¹⁶⁰ The shortage of interpreters has the additional negative effect of creating interpreter fatigue among the few and over-utilized certified interpreters.¹⁶¹ Interpreters' accuracy suffers when they become fatigued, which, in turn, hinders the LEP's access to justice.¹⁶² Judge Grabau of Minnesota suggests that if a trial is expected to last more than two hours, two interpreters should appear together in order to take turns.¹⁶³ But with a shortage of interpreters, this is probably

court/presentation.htm); Lois Wright, *The Interpretation Hub: A Solution for Larger Courts*, THE MUN. CT. RECORDER, May 2008, at 24, available at <http://www.tmcec.com/tmcec/public/files/File/The%20Recorder/2008/TMC%205-08press.pdf> (stating the number of interpreters as of December 2006).

156. Lois Wright, *The Interpretation Hub: A Solution for Larger Courts*, THE MUN. CT. RECORDER, May 2008, at 24, available at <http://www.tmcec.com/tmcec/public/files/File/The%20Recorder/2008/TMC%205-08press.pdf> (showing that the number fell seventeen percent to 550 by March 2008). According to Wright, "Most of this attrition is due to those license holders who were grandfathered in before the 2001 law was imposed, but had no interest in keeping their license in light of the new continuing education requirement." *Id.*

157. Maité Jullian, *Courts Need More Interpreters; Immigrant Cases Spike U.S. Demand*, USA TODAY, Nov. 19, 2008, at 3A, available at 2008 WLNR 22057505 ("Arrests leading to federal prosecutions and deportations reached record levels in fiscal year 2008.").

158. *Id.* (quoting Isabel Frammer, chairwoman of the National Association of Judiciary Interpreters and Translators).

159. NATIONAL CENTER FOR STATE COURTS, CONSORTIUM FOR STATE COURT INTERPRETER CERTIFICATION, SURVEY: COMPENSATION—CONTRACT INTERPRETERS—2006 (2006), http://www.ncsconline.org/D_Research/Res_CtInte_ConsortCertCompSurvey2006Contract.pdf (listing compensations for court interpreters across the country).

160. Brian Holman, Presiding Judge, City of Lewisville, Texas, *Municipal Court Interpreters: What Every Clerk Needs to Know*, <http://www.texasclerk.org/pdf/What%20Clerks%20Should%20Know.ppt> (last visited July 13, 2009) (noting only a 6.6% pass rate).

161. Charles M. Grabau, *Court Interpreting: View from the Bench*, 20 ST. CT. J. (SPECIAL ISSUE) 6, 16 (1996) (discussing fatigue for court interpreters).

162. *Id.*

163. *Id.* ("Some jurisdictions provide for teams of two court interpreters when the proceeding will be longer than two hours. Two court interpreters can relieve each other at periodic intervals and prevent fatigue and delays."); see also MINNESOTA SUPREME COURT INTERPRETER ADVISORY COMMITTEE, BEST PRACTICES MANUAL ON INTERPRETERS IN

impossible, especially for languages other than Spanish, which have fewer interpreters available.¹⁶⁴ If interpreters cannot work in pairs or teams, the judge should allow fifteen minute rest periods when the interpreter informs the judge that she is fatigued.¹⁶⁵

C. *Unlicensed Court Interpreters in Texas*

Texas law does provide some flexibility in the kinds of interpreters that may be appointed in certain counties.¹⁶⁶ Full or part-time interpreters employed in “certain border counties” outlined in the statute do not have to be certified in order to interpret in Texas courts.¹⁶⁷ Rather, the only qualification for employment by the district courts in border counties is that the interpreter “be well versed in and competent to speak the Spanish and English languages.”¹⁶⁸ No further explanation is given as to who determines whether the interpreter is “well versed” or “competent,” or to what standards should be employed in making that determination.¹⁶⁹ The closest instruction is that the commissioner’s court must employ the

THE MINNESOTA STATE COURT SYSTEM 19 (1999), http://www.mncourts.gov/documents/0/Public/Interpreter_Program/Ch_3_role_of_interpreter_Ch_4_when_court_must_hire.pdf (“Therefore, team interpreting is the industry standard for proceedings that run more than two hours.”).

164. See Maité Jullian, *Courts Need More Interpreters; Immigrant Cases Spike U.S. Demand*, USA TODAY, Nov. 19, 2008, at 3A available at 2008 WLNR 22057505 (noting that there is a need for interpreters in 115 languages, particularly Spanish).

165. Charles M. Grabau, *Court Interpreting: View from the Bench*, 20 ST. CT. J. (SPECIAL ISSUE) 6, 16 (1996). Grabau argues:

It is very tiring to interpret for long periods of time. If a court interpreter believes that he or she is not able to provide accurate interpretation because of fatigue, it is the obligation of the interpreter to inform the court. The judge should then call a 15-minute recess to allow the interpreter to rest.

Id.

166. See TEX. GOV'T CODE ANN. § 57.002(c), (d) (Vernon 2005).

167. TEX. CIV. PRAC. & REM. CODE ANN. § 21.021 (Vernon 2008).

This subchapter applies to a county that: (1) is part of two or more judicial districts, that has two or more district courts with regular terms, and that is part of a district in which a county borders on the international boundary of the United States and the Republic of Mexico; (2) borders on the international boundary of the United States and the Republic of Mexico and that is in a judicial district composed of four counties; (3) borders on the international boundary of the United States and the Republic of Mexico and that has three or more district courts or judicial districts wholly within the county; or (4) borders on the Gulf of Mexico and that has four or more district courts or judicial districts of which two or more courts or districts are wholly within the county.

Id.

168. *Id.* § 21.023.

169. *Id.*

interpreter requested by the district court judge.¹⁷⁰ Thus, it seems the statute considers the district judge to be the linguistic expert in such matters before the court.

Another shortcut around the shortage of licensed interpreters is an exception for counties with less than 50,000 people.¹⁷¹ In these less populated counties, the court may instead allow a noncertified person to interpret if the individual is at least eighteen years old and is not a party to the case.¹⁷² Before interpreting, the court must qualify the individual as an expert under the Texas Rules of Evidence.¹⁷³ In 2008, there were two hundred counties with populations of less than 50,000 people and fifty-four counties with populations of 50,000 or more.¹⁷⁴ In these larger counties of 50,000 people or more, the court may appoint an uncertified interpreter if the language is *not* Spanish and a certified interpreter for that language cannot be located within seventy-five miles of the court.¹⁷⁵

The National Center for State Courts has developed a model voir dire for judges faced with determining qualifications of an interpreter in the

170. *Id.* § 21.002(b) (“The commissioners court shall appoint the court interpreter designated by the district judge requesting the appointment.”).

171. TEX. GOV’T CODE ANN. § 57.002(c) (Vernon 2005) (“In a county with a population of less than 50,000, a court may appoint a spoken language interpreter who is not a licensed court interpreter.”).

172. *Id.* § 57.002(e).

173. *Id.* § 57.002(c), (e)(1); TEX. R. EVID. 604 (“An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.”); TEX. R. EVID. 702 (allowing expert witnesses to testify to assist in the understanding of expert knowledge).

174. Lois Wright, *The Interpretation Hub: A Solution for Larger Courts*, THE MUN. CT. RECORDER, May 2008, at 24, available at <http://www.tmcce.com/tmcec/public/files/File/The%20Recorder/2008/TMC%205-08press.pdf> (providing information on the number of counties with populations over 50,000, according to the 2000 Census).

The counties with a population over 50,000 are: Anderson, Angelina, Bastrop, Bell, Bexar, Bowie, Brazoria, Brazos, Cameron, Collin, Comal, Coryell, Dallas, Denton, Ector, El Paso, Ellis, Fort Bend, Galveston, Grayson, Gregg, Guadalupe, Harris, Harrison, Hays, Henderson, Hidalgo, Hunt, Jefferson, Johnson, Kaufman, Liberty, Lubbock, McLennan, Midland, Montgomery, Nacogdoches, Nueces, Orange, Parker, Potter, Randall, San Patricio, Smith, Starr, Tarrant, Taylor, Tom Green, Travis, Victoria, Walker, Webb, Wichita, and Williamson.

Id.

175. TEX. GOV’T CODE ANN. § 57.002(d) (Vernon 2005).

[I]n a county with a population of 50,000 or more, a court may appoint a spoken language interpreter who is not a certified or licensed court interpreter if

(1) the language necessary in the proceeding is a language other than Spanish; and
 (2) the court makes a finding that there is no licensed court interpreter within 75 miles who can interpret in the language that is necessary in a proceeding.

Id.

absence of certification or another qualification process.¹⁷⁶ The questions the Center suggests to gauge language proficiency include:¹⁷⁷

- How did you learn English/[the foreign language]?
- What is the highest schooling you have completed?
- Have you spent any time in the foreign country?
- Did you formally study either language in school?
- Have you had an opportunity to speak with the non-English speaking person informally?
- Were there any particular communication problems?; and
- Are you familiar with the person's dialect?

The model notes that these questions are only a minimum inquiry,¹⁷⁸ and some critics argue that such a voir dire should be used "only as a matter of last resort" and that uncertified interpreters should instead be assessed by court staff who have been trained to assess interpreter qualifications.¹⁷⁹

The use of uncertified interpreters creates a significant risk that communication in the courtroom will not be accurate or complete and even that the interpreter will interject his own opinions into the case.¹⁸⁰ To illustrate, a Massachusetts attorney who was also a certified Chinese interpreter overheard an interpretation error in a domestic violence case that could have had dire results.¹⁸¹ The victim's statement was interpreted as "[h]e scolded me," but what she actually testified was that the

176. WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 148 (1995), available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf.

177. *Id.*; see also Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 373 (2000) (listing possible questions for attorneys to ask clients in order to determine if the client needs an interpreter).

178. WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 148 (1995), available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf.

179. Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs* 13, 15 (Mar. 16, 2009) (unpublished draft, on file with author). "As a last resort, court personnel or a judge can ask an interpreter a series of questions designed to assess, at a minimum, whether the interpreter can communicate effectively in English, and is familiar with and able to comply with the applicable ethics code." *Id.* at 15. Abel argues that "[t]o ensure that competence is tested adequately throughout the state, there should be a uniform, statewide standard for determining competence, and judges and court personnel should be given uniform guidelines regarding how to assess an interpreter's abilities." *Id.*

180. See Nancy K. D. Lemon, *Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence?*, 21 BERKELEY J. GENDER L. & JUST. 38, 46 (2006) (detailing examples of interpreters inserting their own bias into their translations).

181. *Id.*

man told her, "I want you dead."¹⁸² In another domestic violence case, a presumably certified Korean interpreter was overheard both misstating the witness's testimony as well as adding his own opinion that she should forgive her abuser and go back to him.¹⁸³ Luckily, these misinterpretations were overheard, but they should serve as warnings to judges with no alternative but to use unlicensed interpreters to be wary of such inaccuracies. Additionally, attorneys should object to the appointed interpreter if the attorney feels that the appointed interpreter does not have sufficient skills to interpret the proceeding to an acceptable level of accuracy.¹⁸⁴ Attorneys should also request, in cases where an interpreter is used, that the proceeding be audio-recorded to supplement an otherwise English-only written record.¹⁸⁵ Otherwise, the attorney will not be able to appeal any issues concerning error in interpretation.¹⁸⁶

D. *Attorneys as Interpreters*

No Texas law prohibits an attorney from acting as both advocate and interpreter for the same client. The attorney should, however, carefully consider his obligations under the Texas Disciplinary Rules of Professional Conduct before attempting to play this dual role.¹⁸⁷ Judge Grabau, writing on the subject of misconceptions in court interpreting, is adamant that "an attorney *cannot* both represent a client and interpret in the courtroom at the same time."¹⁸⁸ Likewise, a law school clinical director

182. *Id.* ("Since the purpose of interpreters is to communicate the court proceedings back and forth, use of unqualified interpreters undermines the entire process.").

183. *Id.* ("While it is unknown whether or not he was a professional interpreter, this behavior exemplifies the consequences of having unqualified interpreters and is contrary to the most basic codes of ethics by which professional interpreters are required to abide.").

184. See Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 *CLINICAL L. REV.* 347, 392 (2000) (detailing an experiment that suggests that attorneys "should object as needed if an interpreter appointed by the court appears not to have the requisite skills to interpret for the person in need of interpretation").

185. *Id.* at 392-93.

186. *Id.* at 393 (noting that an objection to the mistranslation would be required to preserve error for appeal).

187. See Tex. Disciplinary R. Prof'l Conduct 103, reprinted in *TEX. GOV'T CODE ANN.*, tit. 2, subtit. G app. A (Vernon 2005) (*TEX. STATE BAR R.* art. X, § 9) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

188. Charles M. Grabau, *Court Interpreting: View from the Bench*, 20 *ST. CT. J. (SPECIAL ISSUE)* 6, 11 (1996) (emphasis in original). A bilingual individual is not necessarily qualified to interpret in court. *Id.* Court interpreting requires additional knowledge and

who teaches student-attorneys how to practice law with interpreters also insists that “a bilingual . . . attorney should always insist that a properly qualified interpreter be appointed for a person in need of one and not attempt to serve in both roles” because doing so may create role conflicts and will tax the attorney’s concentration.¹⁸⁹

Additionally, the attorney’s duty to advocate zealously for his client is likely to be undermined if the attorney has to simultaneously interpret everything spoken in the court as well as keep a keen ear on opposing counsel’s questions, witness testimony, and court rulings on objections.¹⁹⁰ The attorney’s ability to timely object to opposing counsel’s questions may be weakened by the multitasking required to interpret.¹⁹¹ An attorney who is concentrating on interpreting for his client may fail to make a timely objection, which may have a significant adverse impact for the cli-

skills. *Id.* A defendant has the constitutional right to the effective assistance of counsel and, therefore, must be able to communicate with his or her attorney via an interpreter, if necessary. *Id.*

189. Angela McCaffrey, *Don’t Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 390–91 (2000). McCaffrey asserts:

A bilingual attorney serving in the dual role of attorney and interpreter would be precluded from effectively representing his or her client due to the conflict in roles and the limits of his or her ability to concentrate on both roles. A bilingual student or attorney should always insist that a properly qualified interpreter be appointed for a person in need of one and not attempt to serve in both roles.

Id. (citations omitted).

190. *Id.* at 390 (“It is fortunate for a client to have bilingual counsel but it is not a substitute for an interpreter.”).

191. Teresa B. Morales & Nathaniel D. Wong, *Attorneys Who Interpret for Their Clients: Communication, Conflict, and Confusion—How Texas Courts Have Placed Attorneys and Their L.E.P. Clients at the “Discretion” of the Trial Court*, 37 ST. MARY’S L.J. 1123, 1138–39 (2006) (arguing against the practice of attorneys interpreting for their clients in court).

A more practical concern is the degree of multi-tasking within a trial, beyond the normal duties, such as simultaneously interpreting for a client while paying attention to witnesses, rulings, and other necessary events during the course of a hearing, trial, or otherwise. Moreover:

“The attorney may miss something being said in court because he or she is busy interpreting for the defendant; legal malpractice insurance may not cover the added interpreter function; conflict of interest issues may arise if the attorney is not completely impartial to the information given to or by the defendant or if the defendant responds with confrontational words that the attorney would prefer the court did not hear.”

Finally, when defendants appeal on the grounds of ineffective assistance of counsel, the attorney is forced to testify regarding his representative and interpretative capacity.

Id. (footnotes omitted).

ent on appeal.¹⁹² Even with these concerns, the attorney may have difficulty persuading the judge to appoint an interpreter paid from public funds when the attorney himself speaks the client's language.¹⁹³ For example, in the criminal context, a Texas appeals court found that, while the trial court erred in failing to appoint an interpreter in a punishment hearing, no new hearing was required because the defendant's counsel interpreted the proceeding.¹⁹⁴

IV. TEXAS CASE LAW

Civil cases applying section 57.002 of the Texas Government Code are few and far between. Those that do relate to the statute offer little analysis of its application. In *Tran v. Ling Ngoc Hoang*, the judge in a bench trial found for the plaintiff and split the cost of the interpreter, who was provided by the plaintiff, between the plaintiff and the defendant.¹⁹⁵ The defendant also provided an interpreter, but that interpreter was not licensed through the TDLR.¹⁹⁶ The judge made clear that, had the plaintiff not provided his own TDLR-licensed interpreter who also served during the defendant's case-in-chief, the judge would have declared a mistrial.¹⁹⁷ The opinion did not mention the option of the county paying the cost of the interpreter, but it may be of interest to note that the judg-

192. Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1, 22 (2004) ("A review of relevant court decisions indicates that timely objections to interpretation errors can have a significant impact on subsequent appellate proceedings."). This is important because "[t]imely objections to interpreter errors often preserve issues for appeal and allow the appellate courts to forego a stringent plain error standard, in favor of an abuse of discretion standard." *Id.*

193. Teresa B. Morales & Nathaniel D. Wong, *Attorneys Who Interpret for Their Clients: Communication, Conflict, and Confusion—How Texas Courts Have Placed Attorneys and Their L.E.P. Clients at the "Discretion" of the Trial Court*, 37 ST. MARY'S L.J. 1123, 1144 (2006).

194. *Guerrero v. State*, 143 S.W.3d. 283, 284 (Tex. App.—Waco 2003, no pet.) ("[T]he question of whether trial counsel should serve as an interpreter should be decided on a case-by-case basis, giving appropriate deference to the discretion of the trial court in the conduct of trial proceedings."). The court notes that, while an attorney may easily and effectively serve as both counsel and interpreter in straightforward proceedings, such as an arraignment, the attorney's ability to zealously advocate for his client may be hindered in other, more complex proceedings if the attorney attempts to simultaneously juggle both roles. *Id.*

195. *Tran v. Ling Ngoc Hoang*, No. 2005-27380, 2007 WL 4978089 (295th Dist. Ct., Harris County, Tex. Dec. 13, 2007) (finding that the cost of the interpreter should be split between the two parties).

196. *Id.*

197. *Id.*

ment awarded in this case was for nearly one hundred thousand dollars, while the interpreter fees were less than twenty-five hundred dollars.¹⁹⁸

In *Thrasher v. Cole*, the trial court also did not mention section 57.002, but did grant a continuance when the court could not understand a party and an interpreter was not available.¹⁹⁹ The case was continued when a Japanese interpreter was present.²⁰⁰

In *Casmir v. Truong*, the plaintiff in a temporary injunction proceeding paid for a licensed interpreter in Vietnamese for the benefit of the defendant.²⁰¹ Although the plaintiff was granted the temporary injunction, the court did not assess the cost of the licensed interpreter to the defendant and did not mention the statute.²⁰²

In *Hunter Heavy Equipment v. Performance Contractors*, the court ordered defendant in error to pay the full cost of the interpreter fees, which were less than one thousand dollars, compared with the judgment of nearly twenty thousand dollars.²⁰³ Again, the court made no mention of the statute.²⁰⁴

In *Breceda v. Whi*, the court seemed to neglect the statutory language altogether.²⁰⁵ Appellants contended that a certified interpreter was not present during mediation, resulting in an unfavorable settlement.²⁰⁶ But appellants' counsel did interpret throughout the mediation.²⁰⁷ The appeals court found that "appellants do not cite to any case law requiring a certified translator to be present at the mediation and we also fail to find any support for such requirement."²⁰⁸ While it is true that there may not be any case law on point, the statute does require that a licensed inter-

198. *Id.*

199. *Thrasher v. Cole*, No. 04-06-00616-CV, 2007 WL 3355496, at *1 (Tex. App.—San Antonio 2007, no pet.) (recounting the trial court's interpretation dilemma).

200. *Id.*

201. *Casmir v. Truong*, No. 2007-42476, 2007 WL 4455217 (333d Dist. Ct., Harris County, Tex. Sept. 18, 2007) ("Plaintiff paid for a certified and licensed Vietnamese interpreter for the benefit of Defendant and a record was made of the proceedings.").

202. *Id.*

203. *Hunter Heavy Equip., Inc. v. Performance Contractors*, No. 03CV1228, 2005 WL 5005669 (405th Dist. Ct., Galveston County, Tex. Feb. 24, 2005) (stating that the total court costs were more than one thousand dollars, which included the interpreter's fee).

204. *Id.*

205. *See Breceda v. Whi*, 187 S.W.3d 148, 151 (Tex. App.—El Paso 2006, no pet.) (discussing case law but not mentioning the statute).

206. *Id.* at 153 ("Appellants claim that a certified translator was not provided during the mediation and in so doing, imply Ms. Reyes did not understand what she was agreeing to.").

207. *Id.* (noting that appellants' counsel "was translating the conversations and all pertinent documents throughout the mediation").

208. *Id.*

preter, if needed and requested, must be present at mediation.²⁰⁹ In *Breceda*, the court likely came to the correct result, but it should have relied on the fact that no evidence was presented that a licensed interpreter was requested, rather than simply declaring that no such requirement exists under Texas law.²¹⁰

V. AN INFORMAL SURVEY

From my research, I was unable to find any information regarding LEP individuals' perceptions of their right to an interpreter in a civil court proceeding. Nor is much information available on attorneys' perspectives on interpreters in civil proceedings. From what I was able to find, or rather, what I was unable to find, there is certainly room in the world of scholarly legal analysis for empirical research in this area.

A. *Survey Methodology*

Because I did not have access to the results of a formal, academic study for discussion in this Note, I conducted informal surveys of both LEP individuals and practicing attorneys in order to get at least an introductory insight into the real-world status of the right to an interpreter in civil proceedings in Texas courts.²¹¹ The survey for LEP individuals consisted of multiple-choice questions, and the initial attorney survey consisted of questions calling for open-ended responses. Sacrificing the possibility of more in-depth results, I elected to make the questions short in order to encourage participation in the surveys; each of the two surveys consist of only five questions. Subsequently, I surveyed a number of attorneys and judges attending the Justice For All conference at Southern Methodist University Dedman School of Law.²¹² This second survey consisted of multiple-choice questions. Ten questions were geared toward attorneys, and ten were for judges.

The LEP survey requested that the respondent provide their native language and their level of English proficiency, which some respondents answered with a general explanation such as "beginner" or "medium," while others who attend English for Speakers of Other Languages (ESL) classes answered with the level of the class they take, such as "three." I

209. TEX. GOV'T CODE ANN. §§ 57.001(7), 57.002(a) (Vernon 2005).

210. See *Breceda*, 187 S.W.3d at 153.

211. Survey questions and responses are on file with *The Scholar: St. Mary's Law Review on Minority Issues*.

212. See S.M.U. Dedman School of Law, Justice For All: Perceptions of Racial and Ethnic Bias in Our Courts, <http://www.law.smu.edu/Default.aspx?DN=8b1a8653-5aa5-4bb8-93de-fef6507dba6a> (last visited July 14, 2009) (describing the Justice For All conference held at S.M.U. Dedman School of Law in Dallas, Texas on Tuesday, April 7, 2009).

spoke with the director at the Vickery Meadows Learning Center²¹³ to determine the numbering structure of the classes and, for survey analysis, considered levels I and II as “Basic,” levels III and IV as “Intermediate,” and level V as “Advanced.”

The survey continued with five multiple-choice questions.²¹⁴ First, the survey asked how well the respondent thought he or she could understand the lawyers and judge in a court proceeding. Next, the survey asked whether the respondent would want an interpreter if he or she were in court, and if the LEP respondent thought he or she was even allowed to ask the judge for an interpreter. Finally, the survey asked if the respondent would prefer to have his or her lawyer interpret the proceedings or to have someone else available to interpret. Surveys were filled out in person at the Vickery Meadows Legal Clinic by LEP individuals²¹⁵ who were seeking legal help, mainly on immigration matters, through Legal Aid and Catholic Charities. Five languages are represented

213. See The Vickery Meadows Learning Center About Us, <http://www.vmlc.org/about.asp> (last visited July 6, 2009). The Vickery Meadows Learning Center is a non-profit organization that provides no-charge adult English literacy classes to a high-density, low-income neighborhood in Dallas. *Id.* Most of the 36,000 people living in Vickery Meadows, which is an area of less than three square miles, are immigrants or refugees. *Id.*

214. The exact questions and answer choices provided were as follows:

1. If you were watching a court proceeding, how much do you think you could understand when the lawyers and the judge talk?
 - a. Very little.
 - b. Some.
 - c. Most.
2. If you were in court yourself (not just watching), how much do you think you could understand?
 - a. Very little.
 - b. Some.
 - c. Most.
3. If you were in court yourself, would you want to have an interpreter?
 - a. Yes.
 - b. No.
4. Do you think that you are allowed to ask the judge to appoint an interpreter?
 - a. Yes.
 - b. No.
5. If your lawyer could interpret for you, would you want your lawyer or someone else to interpret?
 - a. I would want my lawyer to interpret for me during court.
 - b. I would want someone else to interpret so my lawyer would not have to interpret during court.

215. Two of the surveys were inadvertently completed by native English speakers. Their answers were notable and will also be briefly discussed in this Note.

among the respondents to the LEP surveys (in order of greatest to least number of speakers): Spanish, Amharic,²¹⁶ Arabic, French, and Somali.

My first round of questions to practicing attorneys in Texas were asked and answered through email. A random selection of attorneys practicing in civil litigation, especially family law, were selected from the Martindale-Hubbell listings.²¹⁷ The attorney survey questions were open-ended, rather than multiple-choice, in an attempt to elicit more thorough and thoughtful participation. The questions began by asking how likely the attorney thought it was that an LEP litigant knows that he has the right to request an interpreter in a civil proceeding and how likely it is that an attorney knows that his or her LEP client has the statutory right to a court-appointed interpreter. The survey then asked the attorney how an LEP client first contacts an attorney without the aid of an interpreter and how likely it would be for a court to appoint an interpreter for lawyer-client communications outside of court. Finally, attorneys were asked if they believed that one of the parties must always pay for the interpreter, or if the court ever pays the interpreter's fees. Attorneys' responses to questionnaires varied with each respondent, in part, because some responses did not reply specifically to each question, but rather included only a general statement regarding the topic.

Attorneys at the Justice For All conference at the S.M.U. Dedman School of Law were asked the following ten multiple-choice questions (attorneys were instructed that they could select more than one response, if applicable, and were asked to answer the questions only with respect to civil proceedings in state courts in Texas):

1. Before taking this survey, were you familiar with a civil litigant's statutory right to a court interpreter in Texas state courts?
 - a. Yes, very familiar.
 - b. Yes, somewhat familiar.
 - c. No, not very familiar.
 - d. No, I knew nothing about it.
2. Have you ever participated in a civil proceeding where an interpreter was used?
 - a. Yes, for my client.
 - b. Yes, for the opposing client.
 - c. No.

216. Amharic is the official language of Ethiopia. Educational Resource Center, Ethiopia: Country Status Report (Revision), http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED253095&ERICExtSearch_SearchType_0=no&accno=ED253095 (last visited July 9, 2009).

217. See Martindale.com, <http://www.martindale.com/> (last visited July 14, 2009).

3. Have you ever represented an LEP (limited English proficiency) client?
 - a. Yes.
 - b. No.
 - c. Possibly.
4. Did you use an interpreter to communicate with your LEP client outside of court?
 - a. Yes, all or most of the time.
 - b. Yes, some of the time.
 - c. No, we got by without an interpreter.
 - d. I speak my client's language and so did not use an interpreter.
5. Did you use an interpreter for your LEP client at any evidentiary hearing?
 - a. Yes, we used an interpreter at all of our evidentiary hearings.
 - b. Yes, we used an interpreter at some of our evidentiary hearings.
 - c. No, we did not use an interpreter at any evidentiary hearings.
 - d. I interpreted for my client at evidentiary hearings.
6. Did you hire an interpreter?
 - a. Yes, using my own funds or those of my firm.
 - b. Yes, using my client's funds.
 - c. No, a friend or family member interpreted at no charge.
 - d. No, no interpreter was used and we got by.
 - e. No, no interpreter was used because I speak my client's language.
7. Did you ask the court to appoint an interpreter for your client?
 - a. Yes, informally, but no motion was filed.
 - b. Yes, by filing a motion.
 - c. No.
8. Did your court appoint an interpreter?
 - a. Yes, after a motion was so made.
 - b. No, even after a motion was so made.
 - c. Yes, on the court's own motion.
 - d. No, an interpreter was not used.
9. Have you ever been at a court proceeding where the judge had to decide whether a litigant needed an interpreter in order to communicate in English?
 - a. Yes, and the judge decided in favor of having an interpreter.
 - b. Yes, and the judge decided that no interpreter was needed.
 - c. No.
10. Have you ever had the costs of an opposing party's interpreter assessed against your client?
 - a. Yes.
 - b. No.

Judges at the Justice For All conference were asked the following questions (as with the attorney questionnaire, judges were instructed to select more than one answer choice, if applicable, and were allowed to answer the questions regardless of the jurisdiction in which they sat):

1. Where do you sit?
 - a. Texas state court.
 - b. State court outside of Texas.
 - c. Federal court within Texas.
 - d. Federal court outside of Texas.
2. As a child, what language did you speak in the home?
 - a. English.
 - b. Spanish.
 - c. Other.
3. Has an interpreter been used in your court for any civil proceedings?
 - a. Yes, at least once a month.
 - b. Yes, at least four times a year.
 - c. Yes, but only very rarely.
 - d. No.
4. In your court, who has paid for the interpreter's services?
 - a. The party who required interpretation.
 - b. The fees were assessed as costs against the losing party.
 - c. The fees were split between the parties.
 - d. The court provided an interpreter at no cost to either party.
5. Have you had to "make the call" regarding whether a party or witness would be allowed to use an interpreter?
 - a. Yes.
 - b. No.
6. How much training have you had in determining whether an individual needs an interpreter?
 - a. None.
 - b. Very little.
 - c. Some.
 - d. Extensive.
7. How much training have you had in the use of interpreters in the courtroom?
 - a. None.
 - b. Very little.
 - c. Some.
 - d. Extensive.
8. Who has served as an interpreter in your court?
 - a. State certified or licensed interpreter.
 - b. Federally certified interpreter.
 - c. Family, friend, or other person brought in to interpret.

- d. On-staff Court Interpreter.
- e. Court personnel (other than on-staff Court Interpreter).
- 9. Which of the following questions have you used in assessing whether an uncertified interpreter would be allowed to serve in a proceeding?
 - a. How did you learn English/[the foreign language]?
 - b. Did you formally study either language in school?
 - c. Do you have any problems communicating with [the LEP person]?
 - d. Do you speak this person's dialect?
 - e. None of these.
- 10. Have you seen lawyers interpret for their own clients?
 - a. Yes, during a court proceeding.
 - b. Yes, in the courtroom but not during the proceeding.
 - c. Yes, outside the courtroom.
 - d. No.

B. *Survey Results*

Twenty-nine LEP surveys were returned.²¹⁸ Only a handful of attorneys responded to the open-ended, emailed questions. At the Justice For All conference, nine attorneys and ten judges responded to the multiple-choice questionnaires.

C. *LEP Survey Responses*

From my informal questionnaires, I found that LEP individuals overwhelmingly (although not unanimously) thought that they were allowed to ask the judge for an interpreter. This is, as provided in Texas Government Code section 57.002, a correct assumption.²¹⁹ It would be interesting to see the results of a follow-up question as to why so many of the respondents answered this question correctly. For example, did so many respondents answer correctly based on their own experience with and knowledge of rights to interpreters in other arenas, such as medical care? Or are their responses the result of some global, fundamental notion of fairness and justice that a foreign-language speaker should be appointed an interpreter in a court of law?

Regarding courtroom comprehension, advanced English-speakers responded that they felt like they would understand less of the court proceeding if they were a party to the litigation than they would if they were simply watching the proceedings as a neutral observer. This evokes an

218. This number does not include the two surveys returned that were completed by native English speakers.

219. TEX. GOV'T CODE ANN. § 57.002(a) (Vernon 2005).

often-cited point in scholarly writing regarding the need for interpreters in the courtroom: even when it seems (most importantly, to the judge) that a person speaks English well enough to take part in the proceedings without the aid of an interpreter, the emotional intensity of being under the scrutiny of the court is likely to negatively impact the LEP individual's comprehension.²²⁰ Lawyers representing LEP clients should keep this factor in mind. Even if the lawyer feels that he or she can communicate successfully with his client in his own office, he or she should still file a motion for an appointed interpreter in court.²²¹ This option respects the likelihood that the client will probably experience decreased comprehension in the faster-paced, more stressful courtroom atmosphere. That being said, nearly half of the advanced English speakers responded that they would not want to have an interpreter if they were in court. Again, this would be a very interesting question for follow-up, preferably in an open-ended format, such as: If you knew you could have an interpreter, why would you prefer not to have those services? At the same time, all but one of the respondents speaking basic or intermediate English indicated that they would want an interpreter if they were in a court proceeding.

The LEP surveys produced another interesting result: nearly four out of five people surveyed responded that they would want their lawyer to interpret for them during court, rather than someone else. Both native English speakers who filled out the LEP survey also responded that they would prefer that their lawyer, rather than someone else, interpret the proceedings. As discussed in Part III, however, scholarly research suggests that when attorneys act as interpreters, the result is both of the attorney's roles are compromised.²²² While this negative impact on the

220. *E.g.*, Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 *CLINICAL L. REV.* 347, 374 (2000) (citing "a very unfortunate case in Minnesota, [in which] a teenage girl from Peru was wrongly determined to be actively psychotic, removed from Burnsville High School, and confined to a hospital psychiatric ward"). McCaffrey writes:

The young woman had visited the school nurse before she ended up in the psychiatric ward. "She said the workers have refused to acknowledge a basic point. She knows enough English to chat with her friends but she had not mastered the subtleties of the language and relies on Spanish to communicate complex ideas." Despite her lack of fluency no interpreter was arranged for her before it was decided that she should be locked up. Once confined she repeatedly asked for an interpreter but did not get one until she had been locked up overnight. Her discharge summary indicated she had not displayed any real psychotic features.

Id. (citations omitted).

221. *See id.* ("[A] person comfortable using English in a relaxed setting in a law office may need an interpreter in court, because the setting is stressful and fast-paced.").

222. Teresa B. Morales & Nathaniel D. Wong, *Attorneys Who Interpret for Their Clients: Communication, Conflict, and Confusion—How Texas Courts Have Placed Attorneys*

effectiveness of an attorney's representation could likely be explained to the LEP client, the survey results suggest that clients typically have more faith in interpretation by their own attorneys. Another possible explanation for this result is also the prerequisite for an attorney serving as the interpreter: the highly desirable fact that the attorney speaks the client's language. It appears to be common sense that a client would rather have an attorney with whom he or she may speak freely in the client's native language, without the aid of an interpreter, than an attorney with whom the client could only communicate through a third party.

D. *Attorney Survey Responses to Open-Ended Questions*

Recall that a striking majority of surveyed LEPs correctly believed that non-English-speaking litigants are allowed to request a court-appointed interpreter. The attorneys who responded to my open-ended questions, however, thought that it was overall "very unlikely" that LEP individuals would know they were allowed to ask the court to appoint an interpreter. Admittedly, this disparity could be a result of a latent flaw in the surveys: a slight difference in the wording of the questions on the LEP surveys and the attorney surveys. The LEP surveys asked, "Do you *think* you are allowed to ask the judge for an interpreter?" (emphasis added). The question to the attorneys, on the other hand, regarded the LEP's actual knowledge: "How likely is it that a limited English proficient (LEP) individual *knows* (without the help of an attorney) that he may request an interpreter in a civil court proceeding?" (emphasis added). If the attorneys had been asked how likely they thought it was that LEP clients would *think* that they had the right to ask the judge for an interpreter, perhaps the responses would not have been so divergent.

Additionally, the question remains as to whether an LEP individual in an intimidating court situation would believe that he or she could ask the judge for an interpreter without being first alerted of this possibility by a survey questionnaire. The disparity could also result from attorneys' misperceptions about immigrants and LEP individuals as being naïve in their understanding of how the American legal system works. If so, the stark differences between the responses from LEPs and attorneys on this question reminds us that treating LEPs as incapable of understanding fundamentals of American justice reflects only Anglo-American-centric naiveté.

and Their L.E.P. Clients at the "Discretion" of the Trial Court, 37 ST. MARY'S L.J. 1123, 1138-39 (2006) (suggesting that an attorney who is burdened with translating for his client while simultaneously conducting a trial or hearing cannot zealously represent his client as well as an attorney who is not distracted by interpreting).

When asked how likely the attorneys thought a fellow *lawyer*, on the other hand, would know that an LEP client had the right to an interpreter, the responses ranged from a belief that other attorneys knew *nothing* of the right to an assumption that attorneys would be *aware* of the right but, presumably, would not know anything specific about it.

Attorneys' answers to the question of how an LEP client first contacts an attorney without the aid of an interpreter were simply that a friend who speaks better English calls on behalf of the client. Likewise, attorneys' responses reflect that they tend to resort to family or friends of the client for interpretation.²²³ This fact also raises concern among scholars, as the friend or family member may not have sufficient command of English to interpret clearly and accurately in a client interview, or the interpreter may also have a vested interest in the matter.²²⁴ This could lead to two potential problems: biased interpretation by the friend or family member or less-than-forthcoming communication by the actual client.²²⁵ Because family members, in particular, will have their own sides of the story, one commentator has suggested that they are the "worst [people] you could use [to interpret] . . . [because] they add and omit things."²²⁶ Either result is clearly undesirable, but some kind of interpretation must be acquired in order for the attorney and client to discuss the client's goals, the facts of the case, and the attorney's trial strategy.²²⁷ In fact, it may be that having an interpreter for attorney-client communications

223. Cf. Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347, 375 (2000) (stating that LEPs often tend to rely on a family member or friend for court interpretation).

224. *Id.* (warning that extreme circumstances, such as may arise in domestic violence cases involving LEP immigrants, negate the utility of employing friends and family members as interpreters).

225. Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs 2* (Mar. 16, 2009) (unpublished draft, on file with author) (citing, for example, the unfortunate circumstances that may arise when LEP parents must employ their young children as interpreters). "Parents who must use their younger children have the added agony of knowing that the children are hearing the often shocking details of intimate abuse or other highly personal matters." *Id.*

226. *Id.* (quoting Maureen Dunn, courtroom interpreter).

227. Daniel J. Rearick, Note, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 557 (2004) ("It is important, for instance, for the lawyer to always look directly at the client rather than at the interpreter, and to break sentences down into clauses short enough for the interpreter to be able to translate accurately."). Furthermore,

[w]hile it is usually preferable for a lawyer to be able to communicate with her client in the same language, when that is not possible, it is essential that the lawyer and client have access to a qualified interpreter. Moreover, the lawyer must be cognizant of the skills necessary to competently communicate through an interpreter.

Id.

before trial is more important to a successful claim than actually having an interpreter at trial.²²⁸

E. *Attorneys' Responses to Multiple-Choice Questionnaire*

About half of the attorneys surveyed felt that they were at least somewhat familiar with the civil litigant's statutory right to a court interpreter in Texas state courts, and the other half responded that they were either not very familiar with the right or knew nothing about it at all. These results were actually better than I would have projected based on my research, but the responding attorneys were all in attendance at a conference about cultural differences in the courtroom, so it is very possible that the sample set was not neutral.

About half of the responding attorneys had participated in a civil proceeding where an interpreter was used, either for their client or for the opposing party, and about half of the respondents had represented an LEP client. Among those who had represented an LEP client, most reported that they used an interpreter to communicate with that client outside of court nearly all or most of the time. Four out of five of these attorneys had used an interpreter at all of that client's evidentiary hearings, and one did not use an interpreter at any evidentiary hearings. The interpreters for these proceedings were, about half of the time, paid for out of the attorney's funds. The other half were either paid for by the client or were friends or family members provided by the client to interpret.

Most of the attorneys had never informally asked a court to appoint an interpreter, although the one who had done so was appointed an interpreter by the court. None of the attorneys had ever filed a formal motion for the appointment of an interpreter. Two attorneys responded that they had experienced a court appointing an interpreter on its own motion.

Five respondents reported that they had been present in a court proceeding in which the judge was asked to determine whether an interpreter was needed. In all five cases, the judge decided in favor of appointing an interpreter. No attorney responded that he or she had ever had the costs of an opposing party's interpreter assessed against their client.

F. *Judges' Responses to Multiple-Choice Questionnaire*

Out of the ten judges surveyed at the conference, three sat in state courts in Texas, three sat in state courts outside of Texas, one was a fed-

228. *Id.* (noting that pre-trial attorney-client communication may be "an often difficult or impossible task for non-English-speaking litigants and their attorneys").

eral judge sitting in Texas, and one was a federal judge sitting outside of Texas.²²⁹ All responded that English was their first language. All responded that interpreters had been used in their courts for civil proceedings, and all responded that they have had to “make the call” whether a party or witness would be allowed to use an interpreter. Two-thirds of the responding judges used interpreters at least once a month. Eight of the ten judges responded that their courts provided an interpreter at no cost to either party, and two responded that the party who required interpretation paid for the interpreter’s services.

Training for the responding judges in court interpreter issues seemed to run the gamut. Two-thirds responded that they had “extensive” training in the use of interpreters in the courtroom, while three had no training in this area at all. Only one-third responded that they had “extensive” training in determining whether an individual needs an interpreter, while two-thirds responded that they had very little or no training in this area.

The use of state or federal interpreters, predictably, depended on whether the judge sat in a state court or a federal court. One-third of the respondents had permitted a family member or friend of the litigant to interpret, and one-third had used on-staff court interpreters. One judge reported having used court personnel other than an on-staff interpreter to interpret in court. When assessing whether an uncertified interpreter, such as a family member, would be allowed to interpret in a court proceeding, one-third of the respondents had never asked any of the questions listed under Question 9 of the Judges’ Questionnaire. Several had asked some or all of the questions listed, with the question “Do you have any problems communicating with [the LEP person]?” being asked by two-thirds of the responding judges.

Finally, while only one of the judges had seen a lawyer interpret for the lawyer’s own client during a court proceeding, eight judges responded that they had seen a lawyer interpret for the client while in the courtroom but not during the proceeding.

VI. SUGGESTED AMENDMENTS TO THE STATUTE

Texas should take steps toward notifying LEP litigants and potential litigants that they may make a motion for the judge to appoint an interpreter. What use is a theoretical right when no funding or training is provided to realize that right? If half of the attorneys surveyed did not even know they could make a formal motion for the court to appoint an interpreter, then how much less likely is it that LEP litigants themselves

229. Two of the surveyed judges did not provide information regarding their respective jurisdictions.

would be aware of this avenue toward better access to justice? LEP individuals should be notified of their right to a court-appointed interpreter when they first make contact with the court, and notice should also be posted on court websites and on signs in the lobby of the courthouse.²³⁰ If the statute is more publicly advertized, then perhaps more litigants would make a motion for the appointment of an interpreter. Even when motions are denied, they may still be reviewed on appeal. If it is found that denied motions for interpreters resulted in harmful error to the LEP party, then perhaps more light will be shed on the fact that Texas needs to appropriate funds to pay for interpreters in civil court, instead of burdening counties with additional withdrawals from their general funds or saddling LEP litigants with a cost other similarly-situated, English-speaking parties would not have to bear.

The general rule in Texas is that appeals may only be taken from a final judgment or order.²³¹ Because Texas only allows appeal of an interlocutory order if such an appeal is authorized by statute,²³² section 57.002 of the Texas Government Code should be amended to allow an interlocutory appeal of the denial of an interpreter. Finally, and perhaps most importantly, the statute should establish a presumption that anyone requesting an interpreter does actually need one.²³³

Additionally, more training in determining an LEP litigant's need for interpretation should be offered for judges and attorneys. Judges have to "make the call" regarding whether an LEP needs an interpreter in order to both understand proceedings and express himself in court in English.²³⁴ But it seems, however, that judges are not receiving training for asking appropriate questions to make this determination or for recognizing what cues to listen for in litigants' responses to those questions. Judges should also be informed on the issues of interpreter fatigue and dialect variances, both of which may hinder LEP litigants' access to justice.

Both attorneys and judges should receive training on how to implement effective questioning strategies for witnesses receiving interpretation services, such as using shorter questions and allowing only one voice

230. Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs* 8 (Mar. 16, 2009) (unpublished draft, on file with author) (discussing the need for adequate notice of the right to appointed interpreters).

231. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992).

232. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon 2005); *Jack B. Anglin Co.*, 842 S.W.2d at 272.

233. Laura Abel, *Letting Justice Speak: Guidelines for State Court Interpreter Programs* 6 (Mar. 16, 2009) (unpublished draft, on file with author) (discussing the need for eligibility standards and screening practices).

234. See TEX. GOV'T CODE ANN. § 57.002 (Vernon 2005).

in the courtroom at a time. Attorneys need training on the ethical implications of using an interpreter, such as confidentiality issues and the implications of and hindrances to fact-finding when acquaintances are used as interpreters. Attorneys also need information on the implications of acting as both interpreter and lawyer for their clients.

VII. CONCLUSION

If a language barrier in the courtroom is like a wall around justice, scalable only when an LEP individual achieves full English proficiency, interpreters are a gate in that wall. They may allow the LEP litigant to pass through, but the wall still stands as a warning to judges and attorneys to be watchful for errors in interpretation. The judge, of course, remains the proverbial gatekeeper. It is the judge who determines whether the gate may even be used or if the LEP litigant must instead attempt to scale the wall unassisted. The Texas legislature has granted authority to Texas state court judges to open this gate to those who need it, but it seems that more encouragement in the form of awareness, funding, and training is needed in order for the gates of justice to be opened to all.