The Thesis Committee for Erin Elizabeth Day
Certifies that this is the approved version of the following thesis:

Meaningful Access: A Proposal for Spanish Language Proceedings in Hidalgo County, Texas

APPROVED BY
SUPERVISING COMMITTEE:

Supervisor:

Néstor Rodríguez

Denise Gilman

Meaningful Access: A Proposal for Spanish Language Proceedings in Hidalgo County, Texas

by

Erin Elizabeth Day, B.A.

Thesis

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degrees of

Master of Arts

and

Doctor of Jurisprudence

The University of Texas at Austin

May 2012

Abstract

Meaningful Access: A Proposal for Spanish Language Proceedings in Hidalgo County, Texas

Erin Elizabeth Day, MA/JD

The University of Texas at Austin, 2012

Supervisor: Néstor Rodríguez

This paper will set out to explore the possibility of implementing Spanish-Language Judicial Proceedings in Hidalgo County, Texas. This February, the American Bar Association adopted new Standards for Language Access in State Courts, which assert the need for state courts to improve access to the judicial system for limited-English proficient (LEP) persons through the use of interpreters. This study investigates the possibility of conducting a proceeding in a language other than English, as an alternative to interpreters. The proposal will support the normative value of offering Spanish-language judicial proceedings in Hidalgo County, Texas, using frameworks endorsed by legal scholars Denise Gilman and Christina Rodriguez.

The paper will first evaluate the current state of language access in Hidalgo County and develop a picture of the legal regime surrounding language access in Hidalgo County's courts. From there, it will look at alternative approaches to language access in

other legal regimes. Finally, it will formulate a proposal for the design and implementation of Spanish-language proceedings in Hidalgo County.

Two distinct research components contribute to this study: the first involved a comprehensive review and content analysis of state and federal law that is applicable to the state courts in Hidalgo County, and which are relevant to the language access services the courts offer; the second involved original primary research, and was intended to reveal both what language access in Hidalgo County does look like, and what it could look like. The latter used qualitative interviews with lawyers, judges, and court interpreters in Hidalgo County.

One of the project's goals is to illuminate potential areas of improvement to the current language access practices in Hidalgo County, as well as the laws shaping these practices. Maybe along the way the study will offer new perspectives on meaningful access to justice, the possibility of finding novel solutions to social problems in local contexts, and institutional responses to increasing multiculturalism in the United States.

Table of Contents

Introduction

While Campaigning for the Republican presidential nomination in Puerto Rico, Rick Santorum announced that he would support Puerto Rico's decision to become the fifty-first of the United States of America upon the condition that English became the "primary language" of the island. He furthermore indicated that federal law requires that its states to be English-speaking.[1]

Of course, there is no federal law designating English as the official language of the United States. In fact, discrimination against non-English speakers is considered a form of national origin discrimination that violates Title VI of the 1964 Civil Rights Act,[2] and the Supreme Court ruled in 1923 that the protections of the Constitution extend also to those who speak a language other than English.[3] Moreover, while the 2010 census reports that eighty-eight percent of the population speaks English, nearly twenty percent of the population speaks a language other than English at home.[4]

English is undeniably part of the cultural identity of the United States. The nation's foundational documents and laws are written in English; it was the language in which the founding fathers drafted the Constitution, and the dominant language of businesses and government agencies in the United States today. The thirteen colonies that became the first states in the union were English.

---

[1] Katherine Q. Seelye and Ashley Parker, "For Santorum, Trying to Tamp Down a Firestorm Over Puerto Rico Remarks," *New York Times*, March 15, 2012, accessed May 3, 2012, http://www.nytimes.com/2012/03/16/us/politics/santorum-addresses-firestorm-over-puerto-rico-remarks.html.

[2] *Lau v. Nichols*, 414 U.S. 563 (1974).

[3] *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).

[4] U.S. Census Bureau. *Selected Social Characteristics in the United States: 2010 American Community Survey 1-Year Estimates* (Washington, DC, 2010). Specifically, 20.6% of people over the age of five speaks a language other than English at home, and 88.1% of people over the age of five speaks English "very well" or better.

Although these thirteen are known as the "original colonies," St. Augustine, Florida, is actually the nation's oldest city, founded by the Spanish in 1565 by Spanish explorers. This predates both the landing of the Mayflower at Plymouth, Massachusetts, and the settlement of Jamestown, Virginia, by over fifty years, and the short-lived Roanoke Colony by more than thirty years. Manhattan and parts of New Jersey were first surveyed and settled by the Dutch. Parts of New Jersey, Delaware, and Pennsylvania were first known as New Sweden, inhabited by Swedes, Finns, and Dutch. Louisiana, Arkansas, Missouri, and the better part of the Midwest remained French territory even after the United States asserted its independence from the British Crown. California, Texas, and most of the Southwest was part of Spain's colonial empire, and then part of Mexico before the United States absorbed the region as a result of the United States-Mexican War in 1848.

Thus, while English is the principal language of the United States, it is hardly a native language, having achieved its dominance largely by historical accident. Nevertheless, laws are written and published in English, and it is the language in which government institutions conduct affairs. Thus, the availability of public services is sometimes obstructed by limited English abilities. While the denial of public services due to limited-English language abilities is always troubling, it is especially problematic for communities with a large proportion of limited-English proficient (LEP) persons.

This paper's subject is the accessibility of public services, particularly, access to the court system. In the face of growing multiculturalism in the United States, it may be useful to look for novel solutions that are responsive to local contexts. This principal purpose of this paper is explore such a solution. Specifically, it will propose the implementation of Spanish-language proceedings in Hidalgo County, Texas.

Literature Review

Generally, scholarly work on language policy has been most attentive to English only movements, bilingual education, and more recently, the provision of language services in health care. In the courtroom context, the right of criminal defendants to interpreters and English-language ability as a prerequisite for federal jury service have attracted the attention of scholars and activists.

Doctrinally, language rights in the United States are framed in terms of individual rights and non-discrimination. These rights usually impose a negative obligation on the state to refrain from violating due process rights, and from financially supporting discriminatory practices. The restriction against discrimination is applied to language rights through the prohibition against national origin discrimination. Interestingly, law professor Juan F. Perea argues that this national origin conception in U.S. law has contributed to the stigmatizing of the Latino identity as foreign, and un-American.[5]

Denise Gilman and Cristina M. Rodriguez likewise find the current legal framework for understanding and protecting language rights insufficient. Gilman encourages a model that imports aspects of the cultural rights framework supporting language rights in international human rights law, and incorporates features from that framework into the design of language rights protection in U.S. law. [6] Gilman argues that such a hybrid framework would be particularly instructive in evaluating language policy in the context of interactions between the government and the public.[7] Rodriguez, like

---

[5] Juan F. Perea, "Los Olvidados: On the Making of Invisible People," *New York University Law Review* 70 (1995): 981-982.

[6] Denise Gilman, "A 'Bilingual' Approach to Language Rights: How Dialogue Between U.S. and International Human Rights Law May Improve the Language Rights Framework," *Harvard Human Rights Journal* 24 (2011): 101-169.

[7] Ibid., 147-148.

Gilman, finds the international understanding of language rights as collective rights, and as expressive of identity, applicable to U.S. immigrant communities.[8] She argues that it is important to understand the individual as belonging to community, and indicates that upholding the value of community identity could thus animate and strengthen the protections afforded to individuals.[9] Her thesis relies on the normative value of democratic participation, and she argues that embracing multilingualism encourages participation in civil society.[10]

In her argument, Rodriguez relies on Will Kymlicka's theories regarding multicultural societies, which insists that multiculturalism mediated through state institutions would create a peaceable and sustainable multiculturalism.[11] Although scholars have challenged Kymlicka's premise that conflict between and among cultures is avoidable, with some taking extreme positions that prognosticate balkanization or, perhaps most infamously, a clash of civilizations where distinct cultures come into contact.[12]

I will attempt to utilize the frameworks endorsed by Gilman and Rodriguez in supporting support the normative value of offering Spanish-language judicial proceedings in Hidalgo County, Texas.

---

[8] Vargas, interview; Garza, interview; Chrisina M. Rodriguez, "Language and Participation," *California Law Review* 94 (2006): 687-767.

[9] Rodriguez, "Language and Participation," 741-749.

[10] Ibid., 721.

[11] Will Kymlicka, *Multicultural Citizenship: A LIberal Theory of Multicultural Rights* (Oxford: Oxford University Press, 1995).

[12] Professor Raymond Rocco provides a competent overviews of these positions. Raymond Rocco, "Membership, Strategies of Containment, and the Public Sphere in Latino Communities, in *Latinos and Citizenship: The Dilemma of Belonging*, ed. Suzanne Oboler (New York: Plagrave MacMillan, 2006): 301-328.

Language policy has been analyzed as contested territory in immigration debates, and has thus been relevant to academic conceptions of immigrant communities in constructing theories of assimilation, accommodation, and hybridization. The possibility of implementing Spanish-language judicial proceedings has implications for language policy scholarship and advocacy. Additionally, it should offer new perspectives on understandings among legal scholars of meaningful access to justice, the possibility of finding novel solutions to social problems in local contexts, and institutional responses to increasing multiculturalism in the United States.

Outline

Before presenting its proposal for making Spanish-language proceedings available to civil litigants, this paper will introduce the community that would be served by the establishment of these proceedings. The first chapter will look briefly at the history, demographics, and language culture of Hidalgo County, Texas, and will then discuss the nature of language access in the count's state courts. The next chapters will look at the language access requirements under Texas and federal law, as they apply to Hidalgo County courts. Chapters two and three will identify discrepancies between what the law requires and what exists. Chapter four will elaborate on what the Department of Justice and the American Bar Association envision as legally sufficient language access regimes. Both the Justice Department and ABA have indicated what they envision full compliance with federal language access legislation to look like. Chapter four should thus present a clear picture of the shortcomings of Hidalgo County's language access regime. Chapter five will begin to look at alternative approaches to language access taken outside the fifty United States. Specifically, this chapter will explore the bilingual and multilingual judicial systems of Canada, Switzerland, Belgium, and Puerto Rico, looking for features that could be applied to to improve the language access program in Hidalgo County.

Next, chapter six will present the proposal for Spanish language proceedings, explaining the specifics of the proceedings and how they would fit within the system already in place, providing the reasoning behind certain choices along the way. The next chapter will suggest ways to implement these proceedings. The conclusion will offer final thoughts and recommendations.

Chapter 1: Research Methodology

Two distinct research components contribute to the evaluation of the current state of language access in Hidalgo County and proposal to introduce Spanish-language proceedings to its courts. The first component seeks to develop a picture of the legal regime surrounding language access in state courts in Hidalgo County, Texas, and the second looks at the actual state of language access in the county's state courts.

To first component involved a comprehensive review and content analysis of state and federal law that is applicable to the state courts in Hidalgo County, and which are relevant to the language access services the courts offer. I also looked at the Standards of Language Access adopted and published by the American Bar Association (ABA), as well as guidance written and published by the U.S. Department of Justice (DOJ). While the publications by the DOJ and ABA do not have the force and effect of law, they present rules and regulations that express those bodies' interpretations of current law applying to state courts. This research was intended to establish the legal framework in which Hidalgo County's courts operate to reveal both what language access is expected to look like, and the values revealed by the legal analysis used to shape courts' language access obligations.

This research is presented in the third, fourth, and fifth chapters. The chapters are organized by the source of law. That is, the third chapter expounds federal law on language access that is applicable to state courts, chapter four looks at state law, and the fifth chapter establishes how this law has been interpreted by the DOJ, the agency charged with enforcing the Civil Rights Act, which the courts have ruled applies to language-based discrimination in the judicial system, and the ABA. Within each chapter, the development of applicable language access law is presented in chronological order to show how the law developed to shape language access expectations for the state court

system. The hope is that, together, these chapters show the reader what language access should look like.

The second component involved original primary research, and was intended to reveal both what language access in Hidalgo County does look like, and what it could look like. This component involved qualitative interviews with the people directly involved in language access in Hidalgo County courts: lawyers, judges, and court interpreters. The interview questions were designed with this purpose in mind, and asked about current protocols surrounding language access services and personal experiences and opinions of those services, as well as opinions and reactions to the possibility of establishing Spanish-language proceedings in Hidalgo County.

I reached out to attorneys and interpreters by email, using the Texas RioGrande Legal Aid and National Association of Judicial Interpreters and Translators directories, respectively. I contacted those persons that were listed in the directories as being based in Hidalgo County. Fortunately, I was able to speak with private sector attorneys as well. The recruitment message briefly explained the project and the nature of the questions. While the message did the ultimate purpose of proposing Spanish-language proceedings, but informed the recruits that I was interested in their opinions and experiences with language access in Hidalgo County, generally.

Under the false impression that the only interpreters used in state courts were licensed, I did not contact any of the unlicensed interpreters that work on the court's staff. Having it to do over again, I would interview the court staff who act as interpreters, as well, to ascertain whether the perspective of these unlicensed staff members toward the task of interpreting and the role of the interpreter differs significantly from that of licensed court interpreters.

On the Hidalgo County website, I was able to get the names and addresses of all the judges currently serving in county courts of first instance, including magistrate courts, probate courts, district courts, and constitutional and statutory county courts.[13] Only two judges accepted my request for an interview. A close friend who lives in McAllen, Texas, was able to get me in contact with a federal judge working in Hidalgo County. Although he was not particularly familiar with the state courts in the county, he was familiar with the language landscape of Hidalgo County and federal law related to language access. His ten years of experience in a federal court of first instance also offered a valuable point of comparison, as were his thoughtful questions and insights about the proposal and the method of implementation.

I created three interview instruments: one for judges, one for attorneys, and one for interpreters. The interview instruments were qualitative interview guides, and were designed to shape the interview in a way that allowed me collect the information I was most interested in: the current state of language access in Hidalgo County. I was also hoping to discover potential design flaws I had not considered through these interviews, and was successful in doing that. I believe that the proposal contained in this paper is stronger for its attention to the these pitfalls.

In all of the interviews, I asked questions about the interviewee's professional experience with language access, about the mechanics of language access services, their personal language abilities, and their opinions and perspectives concerning the current language access system and regarding my proposal for establishing Spanish-language proceedings in Hidalgo County, including whether there should be language licensing

---

[13] Because the Texas Constitution establishes only one court in each of the state's 254 counties, the legislature has created additional "county courts at law" to accommodate the needs of larger counties. "Texas Courts Online: County Courts," Office of Court Administration, last modified February 6, 2012, http://www.courts.state.tx.us/courts/county.asp.

requirements for judges and attorneys to work in Spanish-language proceedings. Questions about the proposal always came at the end of the interview. I also asked attorneys and judges whether they would be comfortable conducting proceedings in Spanish. When interviewing attorneys and interpreters, I inquired about the more challenging aspects of working with language access for Spanish speakers. I also asked interpreters how they came to their jobs.

As is the nature of interviews, I was unable to follow the interview guides exactly. The interviewees sometimes answered questions before they were asked, and made compelling statements that led me to ask some subjects follow-up questions which I did not ask others. Moreover, interviewees sometimes directed the interview to some extent, in order to make certain points of personal interest, or to ask questions about my proposal. Thus, the interview guides do not necessarily reflect the questions asked, in the order asked. I have attached the qualitative interview instruments as Appendix A. All of my interview subjects were helpful, kind, and generous with their time, and I am grateful for their participation.

Because the interviews were voluntary, this likely produced a pool of interviewees that is biased in that they have personal interests in, or strong opinions about, language access in Hidalgo County, and potential changes to it. Two of my first interviews provided very different results with respect to the perceived need for changes to the system, and the wisdom of introducing opt-in Spanish language proceedings. Happy to have had this experience early in the interview process, I realized that only where there was general consensus among interview subjects could I rely on the information provided to be an accurate reflection of the reality of language access. I have tried to clearly indicate throughout this paper what was an opinion or experience of only a few, and where there was general consensus.

One of the most interesting areas of consensus that arose was the perception of interpreting. There was general agreement among judges and attorneys that even the best interpretation was not as good as direct communication. This is not to say that most judges were in any way denigrating or minimizing the important and difficult work of court interpreting. The federally licensed interpreters, on the other hand, communicated the importance of precision and exactness for their work, seeing it as essential to the smooth functioning of justice. One interpreter in particular had developed a distinct perspective of the treatment of LEP, Spanish-speaking individuals in the the court system.[14] She explained that bilingual attorneys do not have a good demand of Spanish, and have particular trouble speaking with individuals who learned Spanish in Mexico, as opposed to in Texas's Rio Grande Valley.[15] She also recalled incidents in which she observed instances of misunderstanding between attorneys and Spanish-speaking clients, and identified language as a source of tension between attorneys and their clients. While I did not discern this perspective from other interviews, even those that agreed to the existence of a Tex-Mex dialect that was sometimes misunderstood by those who spoke more correct Spanish, I continue to be troubled by her opinion, and think it deserves further research and investigation. The proposal does not purport to resolve tensions and misunderstandings generated by language differences that exist between attorneys and their clients.

Through my conversations with licensed interpreters, I have developed a deep respect for the work they do, and its difficulty. It requires an extensive knowledge of language, as well as the ability to think in two languages simultaneously. Interested in providing the most accurate interpretation possible, interpreters must be aware of the

---

[14] Cynthia De Peña (licensed interpreter), interview by Erin Elizabeth Day, McAllen, Texas, April 17, 2012.

[15] Ibid.

register in which questions are asked and answered. In other words, a question that uses formal English grammatical structures or technical or high-level vocabulary should not be interpreted in a similarly formal Spanish question. Furthermore, they must be able to communicate humor, ambiguity, evasiveness, and vagueness, without filtering the language through the filter of their own opinions. It seems like an almost artistic task.[16]

I think my most interesting and unexpected discoveries were the existence of what I refer to as collaborative interpretation, and of a unique dialect, referred to as Tex-Mex, which may be somewhat divisive. Collaborative interpretation refers to the shared responsibility of reaching an accurate interpretation assumed by the interpreter, judge, and attorneys in a proceeding, which allows for the seemingly open and non-adversarial corrections of the interpreter. Likely a result of the high proportion of bilingualism in Hidalgo County, this phenomenon is discussed further in the next chapter.

Nearly all my interviewees raised the existence of "Tex-Mex," which was not included on the interview instrument, mainly because I was unaware of its existence. This regional dialect is also discussed in the next chapter, though not in great depth. I find the development of a unique, and somewhat hybridized language, dialect of a language in a region with a different dominant language entirely fascinating, but do not spend a great deal of time elaborating its development or characteristics. I do think its existence provides an argument for introducing Spanish-language proceedings to Hidalgo County, as well as other counties along the border, because is demonstrates that Spanish,

---

[16] A conversation with Professor Hensey, although not a formal interview, gave me my first insight into the difficulty of court interpreting. He explained that you had to monitor the speech you were interpreting at the same time you monitored your own, and said that at some points, the interpreter almost becomes a telepath as they become familiar with an individual's style of speech. He also shared an instance in which he was performing conference interpretation, and the speaker used a pun that relied on both the slang and conventional meaning of a particular word, and I must admit that I was impressed he was able to relay the complete meaning of this joke in English with very little time to think about how to do so. Frederick Hensey (licensed interpreter and professor of linguistics and translation studies at the University of Texas and licensed interpreter), in discussion with the author, November 19, 2011.

especially as spoked in this region, is not a "foreign" language at all. Other than the interpreter discussed above, the interview subjects did not explicitly identify any tensions between those that spoke "Tex-Mex" and those that did not, although it seems to identify one as either belonging to a community that has been in the Valley for generations, or as a more recent immigrant to the area.[17] One judge, for instance, described the increased difficulty of communicating in Spanish with people from Mexico as opposed to speaking in Spanish with people who lived in Hidalgo County.[18]

While in Hidalgo County to conduct interviews, I had to opportunity to observe the culture of the courthouse, as well as proceedings using interpretation. I was also able to experience being in Hidalgo County, however briefly, which had an important affect on my understanding of the community, and its unique language culture.

[17] Based on author's general impressions from interviews and informal conversations in Hidalgo County.

[18] Homero Garza (probate judge), interview with Erin Elizabeth Day, Edinburg, Texas, April 19, 2012.

Chapter 2: Meet Hidalgo County

One of the reasons Hidalgo County is the subject of this proposal is that it needed an intended beneficiary. The possibility of Spanish-language proceedings is presented as a solution to a local and particular linguistic scenario. The Lower Rio Grande Valley seemed a natural protagonist for this proposal because of its high proportion of Spanish-speakers, and unique regional history. The four counties that make up this region are Hidalgo, Starr, Cameron, and Willacy.[19] Hidalgo and Cameron are home to the Valley's two largest cities. Hidalgo County's population of nearly 800,000, is almost double that of Cameron County, and contains more people who speak a language other than English at home.[20]

According to the latest figures from the U.S. Census Bureau, over ninety percent of Hidalgo County's population is of Latino or Hispanic descent,[21] and nearly eighty-five percent of the population speaks a language other than English at home.[22] Based on this data, it is likely that many of the individuals coming into contact with the court system are faced with a judicial system that operates in a language other than the language they

---

[19] These counties are identified as belonging to the Lower Rio Grande Valley by the Texas State Historical Association and the Rio Grande Chamber of Commerce. David M. Vigness and Mark Odintz, "RIO GRANDE VALLEY," Handbook of Texas Online, accessed May 3, 2012, http://www.tshaonline.org/handbook/online/articles/ryr01; "About the Valley," Rio Grande Valley Chamber of Commerce, accessed May 3, 2012, http://valleychamber.com/pages/AbouttheValley. Willacy County is the only county of these four that does not share a border with Mexico.

[20] U.S. Census Bureau. *State and County QuickFacts: Hidalgo County, Texas 2010* (Washington, D.C., 2012); U.S. Census Bureau. *State and County QuickFacts: Cameron County, Texas 2010* (Washinton, D.C., 2012). According to this data, Cameron County had a population of 406,200 in 2010, while Hidalgo County had a population of 774,769.

[21] U.S. Census Bureau. *State and County QuickFacts: Hidalgo County, Texas 2010* (Washington, DC, 2012). Specifically, 90.6% of the population is of Latino or Hispanic Descent.

[22] U.S. Census Bureau. *American Community Survey, 2006-2010: Selected Social Characteristics in the United States for Hidalgo County, Texas* (Washington, DC, 2010). Specifically, 84.8% of the population over 5 years old speaks a language other than English at home.

speak at home. Nearly ninety percent of those who speak a language other than English at home are speaking Spanish.[23] So, it is reasonable that the county's state court system would tailor its language access program to suit its population, and as the next chapter demonstrates, Texas has taken certain legislative measures to ensure the availability of Spanish-English court interpreters. Its high proportion of Spanish-speakers also makes Hidalgo County an appropriate laboratory in which to test new solutions to language access problems. Why not allow people to express themselves in court in the language they speak at home?

This chapter will provide a brief description of Hidalgo County, its language culture, and how its county courts accommodate Spanish speakers.

A local interpreter described the border area is its own cultural region, unique among other U.S. and Mexican cities. She said that in Mexico, you are either from Mexico City, from the country, or from the border.[24] As someone who spent her childhood summers in Mexico City, this statement is probably not accurate for all Mexicans, but it does underscore the fact that the border is culturally unique, and that there is a community on both sides of the border.

Today, the Rio Grande Valley's urban centers are reminiscent of Florida's Gulf coast. They share its bright sun and long, wide roads lined with palm trees and colorful storefronts decorated with looping retro font and bubble letters. Spending just a little more time in the area, however, presents a convincing argument of its uniqueness. The county's bilingualism is a striking feature that contributes to the interesting and uncommon culture of the area.

---

[23] *Id*. According to this data, 84.8% of the total population of Hidalgo County speaks a language other than English at home, and 83.8% of the total population speaks Spanish at home. These numbers indicate that 98.82% (83.8/84.8) of those who speak a language other than English at home speak Spanish.

[24] De Peña, interview.

My friend clerking at a federal court in McAllen, who knows only a handful of Spanish words told me she felt like Spanish was the region's default language, but during my brief time in Hidalgo County I found its linguistic customs to be somewhat more complex and nuanced. In coffee shops, restaurants, and in the courthouse, I saw various types of people move fluidly between Spanish and English while conversing with one another. At a taco restaurant I stopped in, the servers each used different methods to announce the order that was ready. Some announced them in Spanish, another in English, and a third would announce first in English and immediately follow with the Spanish translation. When I drove through a popular Mexican fast food restaurant, I was greeted with "*buenas noches*," but when I ordered in person, I was asked for my order in English. I guessed that she spoke to me in English because I am blond and fair-skinned. But this may be a result of my own stereotype-based assumption, as later that day, I saw an attorney speaking in heavily-Anglo accented Spanish to a fair-skinned red-headed client.

The radio station I kept on in my car, FM radio station 101.5, bills itself as *música internacional.* Originally, I thought this epithet was intended to distinguish its content from the Tejano music featured on most Spanish-language stations. Only later did I realize that the station is literally international playing on both sides of the U.S.-Mexico border. Based in Río Bravo, Mexico, but explicitly acknowledging its U.S. audience just across the border, 101.5 ran campaign ads for Mexico's presidential race alongside ads for the Disney on Ice show in Hidalgo, Texas. It would also occasionally use English terms such as "happy moment" and "independent woman" for various contests and games involving its listeners.[25] On an English radio station's morning talk show, the hosts would occasionally use Spanish words in phrases during their primarily English language

---

[25] For further information, see the website for Digital 101.5 FM - Musica Internacional: http://www.clubdigital1015.com/

dialogues. For instance, one host said "*déjala"* to the other when she would not drop a subject, and later urged a listener to share her story by saying "*a ver*." Even the host who criticized her own Spanish accent would sometimes use Spanish words, for instance sympathizing with a caller by responding "*pobre* girl."

This kind of easy movement between English and Spanish was common. In fact, some people seemed to feel constrained by the expectation to use a single language. Some feelings or concepts seemed easier to express in one language rather than another. One young man seemed very frustrated by not knowing an English translation for a Spanish expression that expressed the sentiment he was trying to convey about pride in a new purchase. A judge for county court explained that some things are simply easier for people to talk about in Spanish, saying that it is generally easier for parents to talk about their love for and commitment to the children and families in Spanish rather than English, because Spanish is the language they use at home.[26] Both lawyers and judges indicated that legal concepts were easier for them to explain and argue in English, sometimes suggesting this was due to the fact that their legal training had been in English. This deeply imprinted bilingualism may provide people with more expressive capacity, or perhaps more efficient modes of expression. For instance, the ability to move back and forth between languages allows one to use whichever language is most suited to a particular expression.[27]

Speaking Tex-Mex

Not only is the area bilingual, but it also uses a unique Spanish. One linguist and licensed interpreter described the local Spanish as a dialect that uses sixteenth-century

---

[26] Noé González (state district judge), interviewed by Erin Elizabeth Day, Edinburg, Texas, April 18, 2012.

[27] For additional reading about the benefits of bilingualism, see Yudhijit Bhattacharjee, "Why Bilinguals are Smarter," *New York Times*, March 17, 2012, New York edition, SR12.

Spanish vocabulary and English syntax. In explaining how the language used English grammatical structures, he used the example of asking someone's name. When one asks someone's name in Spanish, she will typically ask "*Cómo se llama*" " the literal translation of which is "How are you called?" In the Valley, however, people will typically ask "*Cuál es su nombre,"* which is closer to the English "What is your name?"

Various people referred to this local language as Tex-Mex, and mentioned situations in which someone fluent in Spanish might not be familiar with the way particular words or expressions are used in the region. This is especially interesting because when discussing interpretation and translation, the broad range of Spanish dialects is frequently referenced. While these discussions usually mention the difference between Spanish in Cuba and Mexico, or Spain and Chile, they rarely mention the unique development of Spanish in countries with that have a different primary language.[28]

Not only is the Spanish in Hidalgo County its own distinct dialect, but the people living there have the sense that almost everyone speaks some Spanish. For instance, many of the participants in the study asserted the large proportion of bilingual people in Hidalgo County, though they disagreed to some extent on the exact number of bilingual people living in the county. One attorney said that the juries and judges in Hidalgo County were bilingual "more often than not."[29] Another attorney hypothesized that every

---

[28] One study mentions the difficulty of knowing the at least nineteen dialects of Spanish. Lupe S. Salinas and Janelle Martinez, "The Right to Confrontation Compromised: Monolingual Jurists Subjectively Assessing the English-Language Abilities of Spanish-Dominant Accused," American University Journal of Gender, Social Policy and the Law 18 (2009): 558. Another article discusses the problems disparity in Mexican and Puerto Rican slang caused in one case. Maxwell Alan Miller, Lynn W. Davis, et al. "Finding Justice in Translation: American Jurisprudence Affecting DUe Process for People with Limited English Proficiency TOgether with Practical Suggestions," *Harvard Latino Law* REview *14* (2011): 128. Non-legal scholars have noted the phenomenon of hybrid English-Spanish dialects. Alfredo Ardila, "Spanglish: An Anglicized Spanish Dialect," *Hispanic Journal of Behavioural Sciences* 27.1 (2005): 60-81.

[29] Corinna Spencer-Scheurich (attorney, director South Texas Civil Rights Project), phone interview by Erin Elizabeth Day, April 20, 2012.

sitting judge was probably fluent in both Spanish and English.[30] A county judge guessed that more than eighty percent of the population could speak Spanish, which is an underestimate.[31] While information from the U.S. Census Bureau indicates that ninety percent of people speak Spanish at home, it does not indicate what percentage, in any, of the population speaks English at home, but would consider themselves bilingual.[32] Certainly, there is no shortage of Spanish speakers.

This judge also hypothesized that the number of people who do not speak English is decreasing, suggesting that a major change to the judicial system to accommodate Spanish speakers was akin to "shooting a moving target."[33] At the same time, however, there seems to be a flow of people into Hidalgo County from Mexico, either to move to the area or to buy property and conduct business.[34] Thus, while I was there only a short time, I would guess that the language landscape in Hidalgo County is constantly shifting, and that even as the number of people who are able to speak English increases, people will continue to know and use Spanish. Include cultural reinforcement, and information about NAFTA here, continued links to Mexico, etc, etc, as a way to indicate that the Spanish is still around.

---

[30] Ken Tummel (trial attorney), interview by Erin Elizabeth Day, Edinburg, Texas, April 19, 2012.

[31] Garza, interview.

[32] U.S. Census Bureau. *American Community Survey, 2006-2010: Selected Social Characteristics in the United States for Hidalgo County, Texas* (Washington, DC, 2010).

[33] Garza, interview.

[34] Vargas, interview; De Peña, interview; Rodriguez, "Language and Participation," 691-692. While in Hidalgo County, I observed casual business meetings between individuals from Mexico, and overheard conversations about continued population growth.

Culture of Hidalgo County Courts

The county court system's treatment of LEP persons that speak Spanish is a reflection of the area's bilingualism. Each court has a staff member that also works as an interpreter. In other words, the bailiff, court reporter, or some other person on the court's administrative staff will act as an interpreter when the need for one arises. The staff interpreter may or may not be trained and licensed in court interpreting, and will interpret in addition to her other duties. For instance, when a bailiff is acting as an interpreter, she not only continues to perform her duties as bailiff, but also interprets back and forth between English and Spanish so the judge and LEP litigant may communicate. For acting in this dual capacity, staff interpreters receive an income supplement, which is an amount budgeted to each court specifically for this purpose. When a court has more than one interpreter, they will split that budgeted amount. [35] In addition, Hidalgo County has contractually arranged for the availability of professional, licensed interpreters if one is required.[36] Generally, these licensed professionals are called in upon the objection of a party to the use of unlicensed court staff as court interpreters.[37] They are also called in for high-stakes trials, or matters that are very likely to be appealed.[38]

It is within the judge's discretion whether to use an interpreter in court, but it seems that the general practice in Hidalgo County is to use an interpreter whenever a litigant wants to communicate in Spanish.[39] One judge, however, admitted that he

---

[35] González, interview.

[36] Ibid.

[37] Ibid.

[38] Alfredo Vargas (licensed interpreter), skype interview by Erin Elizabeth Day, April 12, 2012.

[39] González, interview. Garza, interview; anonymous trial attorney, interview by Erin Elizabeth Day, Edinburg, Texas, April 19, 2012. For jurisprudence that has developed regarding judicial discretion as to whether to appoint interpreter, see chapters three and four, infra.

sometimes suggests a litigant testify in English when he is of the opinion that the subject matter of the questions is within that person's English-language abilities. The judge explained that when a party knows some English and uses an interpreter, she will often try to listen to the attorney's questions in English, as well as to the interpreter's Spanish translation of those questions. In other words, the judge will encourage a party to testify in English when he finds that the party is capable of doing so because the use of a court interpreter can be confusing and distracting for bilinguals.[40]

While it has been the practice of the county's courts to provide interpreters at no cost to the parties involved, these interpreters are only for direct communications with the LEP person. In other words, the court will provide an interpreter to translate what is said to the litigant from English to Spanish, and to interpret the litigant's responses from Spanish to English. When a witness testifies in English, however, the court does not provide an interpreter.[41] To understand English-language testimony, an LEP litigant must obtain her own interpreter, and pay the interpreter's fees, if there are any.[42] This use of interpreters suggests that the interpreter is used for the benefit of the court, and not for the benefit of the LEP litigant. Moreover, one attorney mentioned that the court had instructed him to secure an interpreter for his client's Spanish-language testimony for the first time recently.[43] This may presage a new policy toward civil LEP litigants.

---

[40] González, interview. Dr. Francois Grosjean corroborate Judge Gonzalez's perception, stating that it is impossible for bilinguals to completely ignore or disregard a language they understand. Francois Grosjean, "The Day the Supreme Court Ruled on the Bilingual Mind," Psychology Today, February 7, 2011, accessed March 10, 2012, www.psychologytoday.com/print/52437.

[41] Anonymous trial attorney, interview.

[42] For instance, when a litigant brings a friend along to interpret, there is of course no fee involved. And there are instances in which the court allows litigants to use friends or members of their community to act as interpreters. González, interview.

[43] Tummel, interview.

When interpreters are used, the English-language interpretations of Spanish testimony is preserved on the record. The Spanish-language testimony is not, nor are the interpreter's Spanish interpretations of English.[44] At times, the court reporter will indicate the use of Spanish with the notation "speaks in Spanish," but this seems to be the extent to which Spanish is typically acknowledged on the official record of the proceeding.[45] This makes appealing issues related to the quality or accuracy of interpretation very difficult.[46]

Therefore, an LEP party's counsel must address any problems with interpretation as it occurs in open court. This means that an attorney must be monitoring the interpretation accuracy during the proceeding, which places an additional burden on the LEP person's counsel. When testimony is in Spanish, the attorney is expected to both zealously advocate for her client and to double-check the interpretation.[47] Certainly, a person cannot do both effectively, especially not for any significant period of time. If the attorney is not bilingual, she has no way to raise an objection to the interpretation of a client's testimony. One attorney explained that to solve the problem of needing both an advocate and someone to check the interpreter's accuracy, his firm sent two attorneys to

---

[44] This was the unanimous response among interviewees, with the exception of Judge Randy Crane, who presides over a federal district court, which keeps a digital audio record of all proceedings rather than hiring a court reporter. Crane, interview.

[45] One attorney thought the creation of a full and accurate record was one of the clearest benefits of introducing Spanish-language proceedings. Abby Frank (attorney, Texas Civil Rights Project), phone interview by Erin Elizabeth Day, April 13, 2012; cf. Spencer-Scheurich, interview (in which interviewee related a story in which the bailiff's translation of a particular word was an issue on appeal, and the word at issue was reflected in both Spanish and English on the record).

[46] For a survey of such appeal issues (from an interpreter's perspective), read Virginia Benmaman, "Interpreter Issues on Appeal," *PROTEUS* 9.4 (2000).

[47] Salinas and Martinez, "Right to Confrontation Compromised," 549; Tummel, interview. Spencer-Scheurich, interview. Anonymous trial attorney, interview.

court whenever an interpreter was being used.[48] For complex cases that would typically require more than one attorney, he will send an additional attorney whose sole purpose is listening for interpretation mistakes. Not only does this significantly increase the cost of attorney's fees for the litigant, but it also raises concerns about the efficacy of counsel for those situations in which no bilingual attorney is present, or there is only one attorney who is trying to perform two jobs at once. Whether the need for counsel to check an interpreter's translation results in less-effective counsel, or increased cost, this increases barriers to access to the justice system for LEP parties relative to those who speak primarily English.

Fortunately, Hidalgo County's judges seem to welcome objections to the court interpreter's translation. One judge explained that he himself would correct interpreters when he thought one was misinterpreting Spanish testimony. When he did this, he would offer his understanding of what the party was trying to testify, and would then ask the attorneys whether they had any objections to the judge's correction. [49]

During their interviews, judges, attorneys, and interpreters described the accuracy of an interpretation revealed as noncontentious.[50] This should be unsurprising; as officers of the court, attorneys should not want the record to contain an inaccurate interpretation of sworn testimony. Thus, everyone has a shared interest in reaching the correct conclusion. To justify their opinions that the Hidalgo County's language access services are adequate, judges and attorneys would cite the high rate of bilingualism among jurors,

---

[48] Tummel, interview.

[49] González, interview.

[50] González, interview; Spencer-Schuerich, interview; de Peña, interview; Crane, interview. The fact that Judge Crane, a federal district judge, described a similar collaborative approach to interpretation demonstrates that the approach is related to the high rate of bilingualism in Hidalgo County, and is not merely a characteristic of Hidalgo County courts.

attorney, and judges.[51] This suggests that all the characters in the courtroom are acting as interpreters to some extent. This approach to Spanish testimony could be described as collaborative interpreting, in which a room filled with multiple bilingual people works together to reach the best English interpretation of Spanish testimony. A professional, federally-licensed interpreter recounted an instance in which she could not recall the English translation for a particular Spanish word, and a juror, perhaps noting that her English interpretation of the testimony was slowing down as she tried to remember the correct word, shouted out the appropriate translation.[52] Another judge favored the practice of allowing interpreters to explain two possible English translations of a Spanish word or term, which clearly reveals another aspect of the collaborative interpretation: the entire courtroom is aware of that interpretation as a mechanical act is a legal fiction.[53]

While this collaborative interpreting is a fascinating study of bilingual communities and interactions in the theater of the courtroom, and while it is preferable to an absence of safeguards against inaccurate interpretation, it is not a perfect system. First, it does not resolve all inaccuracies. Attorneys tend to only call the court's attention to mistakes they consider important, as they do not want to irritate the judge or unnecessarily encumber the testimony.[54] Moreover, not all inaccurate interpretations are mistranslations. Sometimes, interpreters will filter testimony rather than provide an exact translation of the testimony given, which can be damaging to a case, as well[55].

---

[51] Ibid.

[52] De Peña, interview.

[53] González, interview.

[54] Anonymous trail attorney, interview. Tummel, interview.

[55] Anonymous trial attorney, interview. Tummel, interview. When describing interpreter tendencies to synthesize information questions, Mr. Tummel remarked "that's my job!"

For instance, a bailiff was interpreting for two LEP criminal defendants during a plea proceeding, and when they answered affirmatively upon being asked whether they understood certain legal rights or consequences, she would interpret their answers as a clear, strong "yes." While this was a correct interpretation in the sense that the defendants were answering in the affirmative, one of the defendants in fact began answering "yes, sir," in English, perhaps imitating the English-speaking criminal defendant on his right. There was no need for bailiff to interpret this statement, as it was made in English. If the bailiff felt the need to provide the defendant's responses for the sake of the continuity or because the court interpreter was listening for the bailiff's response, the most accurate response would have been "yes, sir," rather than "yes." While this does not affect the outcome of the proceedings, it reveals the willingness of the interpreter to make judgments about when it is appropriate to depart from an exact interpretation of the LEP defendant's responses and testimony. Moreover, it may negatively affect the LEP defendant's experience in the proceedings.[56]

Some attorneys expressed frustration with the perceived tendency of some interpreters to alter the examination of witness and their responses. One attorney described the court staff's interpretation as "sloppy" and "inexact," and described an inclination to rush through testimony, relating "executive summar[ies]" of detailed answers.[57] Furthermore, the attorney explained that when a witness or litigant paused after being asked a question, the interpreter sometimes explains the attorney's question,

---

[56] This particular proceedings was a criminal plea proceeding in which five defendants were entering pleas of either guilty or no contest for various infractions. Two of the five defendants were sharing the bailiff as an interpreter; the other three did not use interpreters. The bailiff was only interpreting communications between the judge and the defendants who required her services as an interpreter. The experience of those defendants who could understand everything in court, including the judge's communications with attorneys and the other defendants, must have been significantly different than the experience of those defendants who were only offered a narrow window of understanding.

[57] Tummel, interview.

as if trying to help the person who is providing testimony. Professor Lupe Salinas, a former Texas district court judge, had a similar experience working as a federal prosecutor in Galveston, Texas, in which the interpreter would communicate with the testifying witness "to get clarification perhaps." Professor Salinas considered this "deviating from his duties [as an interpreter]" as it is the attorney's role to seek clarification, and he worried how this communication, taking place off the proceeding's official, record might "distort" the evidence.[58] The use of interpreters, therefore, can cause problems with regard to the accuracy of the record, even when there are multiple bilingual people in court with the capacity to correct the interpretation.

Additionally, the impulse to clarify questions for the LEP person alters the adversarial nature of court proceedings to some degree. If the person testifying is a party to the dispute, an interpreter, by explaining what an attorney is asking or filtering the party's response, may unintentionally give the LEP party a strategic edge by acting as a quasi-advocate. Furthermore, being a question twice (in Spanish and in English) may provide a bilingual litigant testifying with additional time to process the question, and then formulate an answer. Of course, language access services are intended to level the playing field, not to create a prejudice in favor of the LEP person.

Language issues also arise in the evidence-gathering process that takes place outside the courtroom. Hidalgo County does not provide court interpreters to attend depositions or assist in the preparation of interrogatories and affidavits. In these circumstances, the documents are drafted in English by one party, and then delivered to the opposing party for a reply. If the party required to reply is a Spanish speaker, that party must obtain a translation of the English language documents in order to comply with court rules. These translations are prepared at the LEP party's cost. One interpreter

---

[58] Salinas and Martinez, "Right to Confrontation Compromised," 556.

expressed concern for the lack of systematic regulation of these translations, indicating that they are without quality controls.[59]

Because there is no legally mandated procedure for translation, different attorneys handle the translation of documents differently. One firm, aware that translations can never be perfect, will not allow a client to sign an English translation of affidavits or interrogatories they have answered in Spanish. Instead, they sign the Spanish language answers they composed, and the firm will hire someone to translate the answer, and then certify the translation. This is done to avoid a moment in court when a client is forced to testify that they signed something without knowing what it said.[60]

Depositions, like in-court judicial proceedings, are conducted under oath and create records. Therefore, an interpreter is necessary in order to create a record that can be admitted into evidence. Unlike proceedings in court, however, the county provides no interpreter to assist the LEP litigant during depositions. Instead, the litigant must pay the fees of an interpreter whom she or her counsel procures herself. Depositions also require counsel to act as both lawyer and interpretation grader, as objections must be raised during deposition or lost.

Although a Spanish speaker may fair better in Hidalgo County than they would in a county with less Spanish prevalence, the above discussion demonstrates that the language access services in Hidalgo County are imperfect. As one attorney stated, "the real question is whether [LEP litigants] are afforded due process.. [or if a] linguistic stranglehold" prevents them from having their day in court.[61]

---

[59] Vargas, interview. Interestingly, he raised this issue twice during the interview.

[60] Tummel, interview.

[61] Ibid. While Tummel saw the need for reform of language access services, he did not favor the implementation of Spanish-language proceedings.

Chapter 3: Federal Law

Of course, it would seem to go against fundamental principles of justice to subject an individual to a judicial proceeding that will determine certain rights when she does not the language in which that proceeding is being conducted. The First Circuit eloquently indicated that "no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."[62] While perhaps intuitively apparent, an explicit protection against subjection to a proceeding in an unknown language without the aid of an interpreter or translator was first incorporated into federal jurisprudence in 1970. That year, the Second Circuit court clearly established a right to an interpreter via the Sixth Amendment in deciding *United States ex rel Negrón v. State of New York*.[63] The Sixth Amendment guarantees a defendant's right to participate in her own defense and confront witnesses against her.[64]

In that case, twenty-three year old Rogelio Negrón was accused of stabbing his roommate to death during a drunken altercation. He had come to New York from Puerto Rico, was educated to a sixth-grade level in Spanish, and could neither speak nor understand English. His court-appointed attorney spoke no Spanish. The prosecution hired an attorney to interpret Negrón's testimony, as well as the testimony of three Spanish-speaking witnesses for the benefit of the court, but the English testimony of the fourteen witnesses against Negrón was summarized in brief ten to twenty minute

---

[62] *US v. Carrion*, 488 F.2d 12, 14 (1973).

[63] *United States ex rel Negrón v. State of New York,* 434 F.2d 386, 390-391 (1970).

[64] The Sixth Amendment states the following: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

intervals by the prosecution's interpreter during recesses. As the court noted, "[t]o Negrón, most of the trial must have been a babble of voices," and at its conclusion, the trial court convicted Negrón of second degree murder.[65]

On appeal, the court found that Negrón's trial violated the Constitution, and in reaching this conclusion, it announced the right of a limited-English proficient criminal defendant to an interpreter, and the obligation of courts to inform defendants of that right whenever the court is on notice of a defendant's limited English abilities. In clarifying the judiciary's Constitutional obligations toward non-English speaking defendants, the Court found that without contemporaneous interpretation, the defendant was effectively denied the opportunity to confront adverse witnesses or rebut their testimony "during that period of the trial's progress when the state chose to bring [the evidence] forth."[66] Thus without an interpreter appointed for the his benefit, Negrón was unable to meaningfully exercise his Sixth Amendment right to confrontation. The court could have found the trial unconstitutional on this ground alone, but chose to go further in its decision, reasoning that Negrón was denied an "even more consequential [right]... Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial," and Negrón should not be considered fully present without an interpreter.[67] This suggests the entirety of the proceedings should have been interpreted for Negrón. Furthermore, the Second Circuit asserted that a court ought to provide an interpreter "at state expense if need be."[68]

---

[65] *Negrón*, 388.

[66] Ibid., 390-391.

[67] Ibid., 389.

[68] Ibid., 391.

In the years following the *Negrón* decision, federal courts in other circuits generally followed the Second Circuit's interpretation of the Sixth Amendment as applied to limited-English criminal defendants. In 1973, for instance, the First Circuit in *United States v. Carrion* ostensibly agreed with the Second Circuit's reasoning in *Negrón*, and characterized the holding in that case as "elevat[ing] to a right" the appointment of an interpreter where the defendant's inability to speak and understand English is clear to the court, and at the court's cost when the defendant is indigent.[69] The issue in front of the *Carrion* court was whether the defendant's English-language ability was sufficiently low so as to require the appointment of an interpreter. The Court concluded that whether a defendant required an interpreter is largely within the discretion of the trial court, and suggested factors, including the complexity of legal issues and testimony presented and the language skills of defendant's counsel, that may contribute to a court's ultimate determination of whether a defendant requires an interpreter. In the case appearing before the First Circuit court, defense counsel had been asked whether the defendant was proficient in English, and upon the attorney's affirmative response, told the defendant he could alert the court whenever he did not understand something.[70] While *Carrion* left the right to an interpreter intact, it gave judges considerable discretion to determine whether the right was triggered by an individual's particular language abilities. This grant of broad discretion has been embraced by subsequent courts.[71]

While there seems to be general agreement among the circuits that adequate protection of the Fifth and Sixth Amendments may require the appointment of a court

---

[69] *Carrion*, 14.

[70] *Carrion, 15-16*.

[71] *Luna v. Black*, 772 F.2d 448 (1985); *U.S. v. Coronel-Quintana*, 752 F.2d 1284 (1985); *U.S. v. Mayans*, 17 F.3d 1174 (1994); *U.S. v. Edouard*, 485 F.3d 1324 (2007).

interpreter, there is no Supreme Court decision clearly setting forth this right. Moreover, no federal court has asserted a constitutionally-rooted right to an interpreter in a civil matter.

Some courts have interpreted the California Supreme Court's *Jara v. Municipal Court* decision as finding that the Fifth and Sixth Amendments do not require the appointment of a court interpreter in civil cases.[72] In *Jara,* the majority ruled that the trial court's failure to provide a court interpreter to did not constitutionally impair the indigent civil defendant's access to the court system, where that defendant had counsel.[73] Federal courts, on the other hand, have not indicated that a right to an interpreter does not exist in the civil context, nor have they asserted a constitutional obligation to provide civil litigants with interpreters. The Constitutional right to an interpreter has been extended to asylum cases, however.[74]

There exists a cogent argument that Constitutional protections require the appointment of interpreters in the civil context. Within federal jurisprudence, there are suggestions of, and allusions to, notions of fundamental fairness and general due process, which underly the need for court interpreters in certain cases. For instance, the Second Circuit indicated in *Negrón* court's indication that "considerations of fairness" required the appointment of an interpreter.[75] Indeed, some state courts have found that a constitutional right to an interpreter exists in particular types of civil proceedings,

---

[72] Charles M. Grabau and Llewellyn Joseph Gibbons, "Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation," *New England Law Review* 30 (1996): 262; *Jara v. Municipal Court*, 21 Cal.3d 181 (1978); *In re: Sithon K,* Not Reported in Cal.Rptr.2d (2001).

[73] *Jara,* 186.

[74] *Tejeda-Mata v. INS*, 626 F.2d 721 (1980).

[75] *Negrón*, 389.

including child welfare cases, landlord-tenant controversies, and small claims disputes.[76] As Laura Abel points out in her report for the Brennan Center for Justice, the reasoning that leads the courts to find a constitutional right to an interpreter in these discrete cases is easily applied in all types of civil proceedings.[77]

Title VI and National Origin Discrimination

Federal statutory law has supplemented these Constitutional rights to increase courts' obligations to ensure that language does not obstruct access to justice. In 1964, Title VI of the Civil Rights Act prohibited any recipient of federal funds from discriminating on the basis of national origin. Ten years later, the United States Supreme Court interpreted national origin discrimination under the Civil Rights Act as including discrimination arising from a person's inability to speak English.[78] Thus, any obstacles to services that are caused by language are in violation of Title VI. Because state courts receive federal funds, Title VI, as interpreted by the Supreme Court, requires state courts to ensure that those who do not speak English have access to the justice system that is equal to those who speak English.

In 2000, President Clinton issued Executive Order 13166, which instructed all federal agencies, and all recipients of federal funds to "ensure that the programs and activities they normally provide in English are accessible to [Limited English Proficient] persons and thus do not discriminate on the basis of national origin in violation of title VI

---

[76] *Gardiana v. Small Claims Court,* 59 Cal. App. 3d 412 (1976) (small claims); *In re Doe,* 57 P.3d 447 (2002) (child welfare); *Figueroa v. Doherty,* 303 Ill. App. 3d 46 (1999) (employment); *Sabuda v. Kim,* 2006 WL 2382461 (2006) (restraining order); *Daoud v. Mohammad,* 952 A.2d 1091 (2008) (landlord-tenant dispute); *Caballero v. Seventh Judicial Dist. Court ex rel. County of White Pine,* 167 P.3d 415 (2007) (small claims); *Yellen v. Baez,* 676 N.Y.S.2d 724(1997) (landlord-tenant dispute); *Strook v. Kedinger,* 2009 WL 385410 (2009) (action for trespassing).

[77] Laura Abel, "Language Access in State Courts," Brennan Center for Justice, July 4, 2009, http://www.brennancenter.org/content/resource/language_access_in_state_courts.

[78] *Lau v Nichols.*

of the Civil Rights Act of 1964."[79] (The Executive Order creates no individual rights or remedies, however.) Pursuant to Clinton's Order, The Department of Justice (DOJ) released general guidelines intended to assist agencies in fulfilling their obligations toward LEP persons in 2002. Most relevant to the present discussion is the DOJ's indication hat in order to comply fully with Title VI, state courts should provide for competent interpreter services in all court proceedings, and should not impose the cost of interpreters on the LEP person.[80]

Despite the clear directions of the Executive Order and DOJ guidelines, not all state courts vigorously undertook to reform their judicial services in order to provide better access to LEP persons, or reform their budgets to accommodate for state-provided interpreters. Courts continue to deny any state obligation to provide for interpreters, and some are even willing to allow unqualified interpreters to supplement a defendant's language abilities so that the appointment of a qualified interpreter becomes unnecessary in their interpretation. For instance, the Ninth Circuit in *Gonzalez v. United States* held that because the presiding judge at trial found that Mr. Gonzalez's English "are [not] so deficient as to 'inhibit' comprehension of the proceedings," the court properly denied at interpreter.[81] This court reached this decision even after it acknowledged that both the magistrate judge and district court judge recognized that Mr. Gonzalez "had some difficulties with English."[82] The Court reasoned that even though Mr. Gonzalez's answers were "brief and somewhat inarticulate" and that he regularly consulted with his attorney

---

[79] Executive Order 13166. Code of Federal Regulations, title 3, sec. 13116.

[80] Code of Federal Regulations, Department of Justice, title 7, secs. 41455-41472; Thomas E. Perez, Assistant Attorney General, to Chief Justice/State Court Administrators, Washington, D.C., August 16, 2010, http://www.lep.gov/guidance/guidance_DOJ_Guidance.html.

[81] *United States v. Gonzalez*, 33 F.3d 1047, 1050 (1984).

[82] Ibid.

before answering, his wife's aiding his comprehension of English and his communication with his attorney largely solved the evident language gap.[83] As the dissenting judge argued in his opinion, using the defendant's wife as an interpreters in now way ensures the quality and neutrality of courtroom interpreters.[84]

As should by now be evident, the appointment of court interpreters is legally conceptualized as a way to protect the rights of persons participating in the judicial system. This is not the only approach that supports the use of interpreters in the courtroom. The court in *Negrón* offers an alternative perspective, which it does not ultimately adopt, through which the interpreter is seen as an instrument of the court whether than a safeguard of the defendant's rights. Specifically, the court acknowledged that ensuring the "potency of our adversarial system" may require the appointment of interpreters.[85] The accuracy and integrity of judicial proceedings have a value that is unrelated to the individual's rights to confrontation and due process. Because society has a vested interest in free access to the court system as a mechanism of law enforcement, any obstacles are problematic for society-at-large, and not only for those who would otherwise seek the court system. A system that imposes a use tariff on LEP persons by requiring them to pay for interpreters in order to access the courts works at cross purposes with our legal structure.

Interestingly, the Court in *Jara* distinguished between interpreters that are appointed to interpret witness testimony and interpreters that are appointed to interpret the proceedings for the a party to the controversy.[86] The distinction the court made

---

[83] Ibid., 1051.

[84] Ibid., 1054.

[85] *Negrón, 389*.

[86] *Jara, 183*.

considers the interpretation of testimony as done for the benefit of the court. Adopting this perspective toward interpretation more generally could generate important changes, having the potential to simplify legal analysis of the appointment and payment of court interpreters, shifting the obligations of the presiding judicial officer, and expanding the options available to litigants.

Chapter 4: Texas Law

In 2001, the Texas Legislature created standardized licensing requirements for court interpreters.[87] The 2001 law also created the Court Interpreter Advisory Board, an organ of the Texas Department of Licensing and Regulation (TDLR).[88] The Advisory Board is responsible for designing and administering court interpreter license examinations. The law also dictates what score a test-taker must achieve in order to obtain a court interpreter license from the TDLR. There are other, additional requirements, including the completion of eight hours of continuing education.

At the time of writing, the examination consists of both written and oral components. The written component is the English-language portion. It is three-hours long, consists of multiple-choice, and tests general language proficiency, command of court terminology, and knowledge of ethics and appropriate professional conduct. The oral component of the examination tests the candidate's ability to translate and interpret between English and the target language. During the sight interpretation part of the oral component, the candidate reviews and interprets a document written in English into the target language, and then reviews and interprets a document from the target language to English. Next, the candidate will perform the role of a court interpreter during examination, interpreting questions posed from English to the target language, and the answers from the target language to English. For the final part of the oral component, the candidate simultaneously listens to an English recording and interprets that recorded speech into the target language. Together, the three parts of the oral portion test the

---

[87] Texas Government Code, Chapter 57: Court Interpreters.

[88] Ibid., 57.042.

candidate for a total of forty-two minutes.[89] In addition to this test, the TDLR will accept written and oral examinations offered by the National Association of Judiciary Interpreters and Translation, Federal Court Interpreter Certification, and any state that belongs to the National Center for State Courts Consortium.[90]

The 77th Texas Legislature, at the same time it laid the broad strokes of a licensing procedure, indicated when a court should appoint a licensed interpreter. The statutory language indicates that a court that is in a county with a population of 50,000 or more persons shall appoint a licensed interpreter if a party files a motion requesting an interpreter, or a witness makes a request for one. A court may also appoint a licensed interpreter on its own motion where it determines a party or witness requires one. With a population of nearly 800,000, Hidalgo County is subject to these legislative provisions. The legislation also provides for limited exceptions to the rule that the court-appointed interpreter be licensed when the proceeding requires an interpreter for a language other than Spanish. That exception is not relevant to the proposal this paper presents. Subsequent judicial and Texas Attorney General opinions have found an additional exception: if a judge determines that a person does not in fact need an interpreter, the court is not required to appoint any interpreter, with or without license. The prerogative of a judge to refuse to appoint an interpreter upon deciding that a party or witness is sufficiently proficient in English is relevant to the distinctly bilingual population in Hidalgo County, and has potentially negative consequences.[91]

---

[89] "Licensed Court Interpreters Exam Information," Texas Deparment of Licensing and Regulation, accessed May 4, 2012, http://www.license.state.tx.us/court/examinfo.htm.

[90] Texas Code of Criminal Procedure, sec 38.30(a-1)(2).

[91] Salinas and Janelle Martinez, "The Right to Confrontation Compromised."

The source and amount of fees paid the certified court interpreter are likewise largely within the discretion of the court. The court will pay interpreter's fees for indigent criminal defendants and certain parties in civil domestic abuse disputes,but the state is not otherwise obligated to pay for interpreter services. A court may, at its discretion, set interpreter's fees, direct a particular party to pay them, or tax the fees as court costs.[92] Judges may also establish that interpreter's fees are paid from funds provided by law.[93] While the Texas Supreme Court's Rules of Civil Procedure seem to assert a court's ability to employ interpreters, state law authorizes only particular counties and judicial districts to employ interpreters as a matter of course.[94] Because Hidalgo County is situated on Texas's international border with Mexico, the Texas Civil Practice and Remedies Code allows the district to which the county belongs to employ interpreters.[95] In addition, the Texas Government Code seems to explicitly provide for the employment of interpreters on the staff of Hidalgo's county courts.[96]

As of September 2011, an interpreter may be licensed at one of two levels; under this new law, all licensed interpreters will be designated as either a master court interpreter or a basic court interpreter, as determined by the individual's score on the licensing examination administered by the TDLR. To be a master interpreter, the

---

92 Texas Rules of Civil Procedure, Rule 183. Additionally, the court may assess court costs against whichever party. Texas Civil Practice and Remedies Code, Sec. 31.007.

93 Texas Rules of Civil Procedure, Rule 183.

94 The interpreter's reasonable 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." Ibid. The Texas Attorney General indicates that the authority to do so is limited, however, and cites Texas Civil Practice and Remedies Code, Secs 21.021-21.031 to support this position. John Cornyn, Texas Attorney General, to Florence Shapiro, Chair, Senate Committee on Affairs, Austin, Texas, November 26, 2002, 4-5.

95 Texas Civil Practice and Remedies Code, sec. 21.021.

96 Texas Government Code, Sec. 25.1102.

interpreter must achieve a minimum score of 70% on each part of the examination discussed above (i.e., the written portion and each of the three parts of the oral portion). Master court interpreters can be appointed to provide services in all kinds of proceedings in any court in the states. To be licensed as a basic court interpreter, one must achieve a score of 60% on each part of the examination. Basic court interpreters can be appointed to interpret proceedings in justice courts and municipal courts where for proceedings that are not of record.[97] Prior to the enactment of House Bill 4445, which passed both the Texas House and Senate without evoking a single "nay" vote, only a single type of court interpreter license was offered by the TDLR, which required a score of 70% on each part of the court interpreter examination. Thus, these amendments effectively create a second, less-qualified level of interpreters to interpret for particular proceedings.[98] Various commentators and civil rights activists saw the enactment of House Bill 4445 as a blow to language access. Even the National Association of Judiciary Interpreters and Translators, a professional organization, opposed the bill.[99] Legislative history indicates that the bill was intended to address a shortage of qualified interpreters in combination with a lack of resources.[100] The passage of the law thus demonstrates the Texas legislature's concern with efficiency and limited resources with regard to the judiciary. While the cost of a policy or procedure alone should not determine its implementation, it

---

[97] *An Act Relating to the Licensing and Appointment of Court Interpreters*. HB 4445 (enrolled version), 81st Cong., regular sess., accessed May 4, 2012, http://www.legis.state.tx.us/tlodocs/81R/billtext/html/HB04445F.htm.

[98] Ibid.

[99] Elihu Dodier and Luis Garcia testified against the bill on behalf of TAJIT April 15, 2009. HB 4445 House Committee Report Witness List, accessed May 4, 2012, http://www.legis.state.tx.us/tlodocs/81R/witlistbill/html/HB04445H.htm.

[100] Carol Alvarado, Bill Analysis for House Bill 4445, 81st Congress, regular session, May 21, 2009, accessed May 4, 2012; Frank, interview.

is an important aspect to consider, especially in the face of clear concern about the distribution of limited resources.

Thus since 2001, Texas law regulates the qualifications of interpreters used in state court judicial proceedings through licensing and examination procedures. Even with the implementation of these licensing standards, state courts retain significant discretion concerning the appointment and payment of court interpreters.,This discretion is exercised through local administrative rules as well as by individual judges.

Since the introduction of licensing requirements, Texas courts have generated troubling interpretations of the statutory language regarding court interpreters. Despite the relatively clear mandate to appoint only court interpreters that are appropriately licensed,, some court opinions have found circumstances in which it is proper for a judge not to appoint a licensed interpreter. For instance, in 2007, the Fort Worth Court of Appeals upheld the lawfulness of the lower court's failure to appoint a licensed interpreter, finding that an interpreter was unnecessary when defendant's counsel could serve as an interpreter.[101] In another case, the court decided that the requirement that an interpreter is licensed is not triggered until the party or witness formally requests an interpreter be appointed, allowing a court to appoint unlicensed interpreters for parties or witnesses unable to communicate in English, in the absence of a request from those LEP persons for a licensed interpreter.[102]

Judicial interpretations of the legislation concerning court interpreters is inconsistent, however, and some court decisions reveal a more rigorous understanding of the obligation to appoint a licensed interpreter. One such instance is the *Ridge v. State*

---

[101] *Ex Parte Hernandez,* not reported in S.W.3d (2007).

[102] *Haley v. State,* 173 S.W.3d 510, 514 (2005).

case decided by Waco's court of appeals. In that case, the court looked at persuasive[103] opinions that addressed particular circumstances in which the issue of appointing a court interpreter arose, and discussed the reasoning of those cases. In doing so, the court declined to follow those courts that allowed courts to appoint unlicensed interpreters according to the jurisprudence that had developed around Article 38.30 of the Texas Code of Criminal Procedure before Section 57.001 was enacted.[104] Instead, the court found that whenever a court appoints an interpreter, whether on the motion of a party, request of a witness, or court's own motion, the obligation to appoint a licensed interpreter arises under Government Code Section 57.001.[105] The court in *Ridge* further decided that the party did not need to object to an interpreter's inadequate qualification during trial in order to preserve that issue on appeal. In applying this interpretation to the facts of the case, however, the court found that because the movant could not demonstrate that the interpreter used during trial was not licensed, the court of appeals could not overturn the lower court's decision.[106]

Ridge v. State usefully underscores Texas courts' inconsistent approach to the appointment of court interpreters, as well as the difficulty of remedying insufficient interpretation. It seems that despite the legislature's efforts to improve and standardize the use of spoken language interpreters in court proceedings, courts throughout the state continue to look to older statutes and case law that could properly be considered

---

[103] Here persuasive means that the court opinions were "[a]uthority that carries some weight but is not binding on a court." *Black's Law Dictionary* (9th ed., 2009).

[104] *Ridge v. State*, 205 S.W.3d 591, 596 (2006).

[105] Ibid., 595.

[106] Ibid., 597.

preempted by this subsequent legislation.[107] Furthermore, this case reveals the difficulty that confronts a party whose testimony has been misinterpreted or poorly interpreted, or for whom no interpreter was appointed.

An individual may waive the right to an interpreter, in which case a court has no obligation to appoint one. There is general consensus that this waiver must be affirmative, and cannot be made by the mere failure to request an interpreter. The most instructive aspect of judicial discussions of waiver of the right to an interpreter is the consistent characterization of the appointment of an interpreter as a right belonging to a party. This is significant because there it ignores an alternative viewpoint that the interpreter contributes to the court's record rather than providing services solely for the LEP individual. The correctness of an interpretation affects not only the person for whom communication is being interpreted, but also the record of proceedings. One might thus expect the court to take a more personal interest in the accuracy of interpretation; accuracy can only increase the likelihood that a proceeding's outcome will be legally correct.

Interestingly, there is no analogous regulation of the translation of foreign language documents that are entered into evidence. That is, the law does not establish licensing or examination procedure in an effort to ensure quality of translation. Introducing the introduction of Spanish-language may offer a way to render document translation services unnecessary, or at least reduce the need for them. We will reconsider the treatment of evidentiary and procedural documents when evaluating the possible iterations of Spanish-language proceedings in Chapter six.

---

[107] *Hernandez v. State*, not reported in S.W.3d (2003)

Chapter 5: Model Rules

While the creation of a second, lower level of qualified court interpreter under Texas Law seems to indicate a lack of commitment to improving the quality and consistency of language access to courts, recent activity of the Department of Justice and American Bar Association (ABA) suggest just the opposite. And, both entities exert influence over state courts.

Department of Justice Position on Language Access

The DOJ is an agency of the Executive Branch charged with the enforcement of federal laws; it enforces compliance with Title VI through its Civil Rights Branch. By taking measures to enforce Title VI, the Civil Rights Branch can directly affects state courts. The DOJ's published guidelines serve as announcements of the Executive Branch's interpretation of Title VI legislation, and policy judgments with respect to enforcement of that legislation. Thus, these guidelines are not legal authority, but they provide courts with an appropriate standard against which to measure language access programs in order to ensure compliance and avoid enforcement actions .

In the years since the DOJ released its guidelines for compliance with Executive Order 13166, the DOJ has further clarified its position through public statements and the conducting of administrative reviews of state judicial systems through the Department's Civil Rights Division. Consistently, the DOJ has instructed state court systems to increase their accessibility to LEP persons. In 2009, for instance, the DOJ informed courts that a lack of resources was not a valid excuse for failing to provide adequate language access services.[108] Moreover, the Department alerted courts that as time progressed, so would expectations of compliance with the Executive Order and accompanying guidelines.

---

[108] Merrily A. Friedlander, Chief, Department of Justice Civil Rights Division of Coordination & Review Section, to Lilia G. Judson, Executive Director, Indiana Supreme Court Division of State Court Administration, Washington, D.C., Feburary 4, 2009

Furthermore, the DOJ warned that enforcement would increase, stating that the agency "cannot reward past non-compliance with lenient enforcement today." [109] This signals that nearly a decade after the Executive Order was released, courts could expect to be held to a higher and more stringent standard.

ABA Standards for Language Access in Courts

In February, 2012, the American Bar Association (ABA) adopted Standards for Language Access in Courts, which are intended to "assist courts in designing, implementing, and enforcing a comprehensive system of language access services that is suited to the needs of the communities they serve." [110] The introductory materials of the Standards identify language access issues as being of immediate concern to U.S. legal community. Moreover, it presents the Standards as a guide to complying with the minimum language access requirements established by current constitutional law and federal legislation, and not as a collection of aspirational proposals.[111]

The ABA is a voluntary professional organization with a membership exceeding 400,000. It is responsible for the accreditation of U.S. law schools, and authors the Model Rules for Professional Conduct as well as the examination on the content of those Rules, which all prospective lawyers must pass in order to be admitted the Bar in their respective states.[112] Additionally, the ABA offers a variety of Continuing Legal Education courses. As such, the ABA is an influential national organization, and one that is in the

---

[109] Ibid.

[110] American Bar Association, *ABA Standards for Language Access in State Courts,* February 6, 2012, accessed May 4, 2012, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf, 1.

[111] Ibid., 8.

[112] "About Us," American Bar Association, accessed May 4, 2012, http://www.americanbar.org/utility/about_the_aba.html.

practice of influencing the administration of justice in the U.S. legal system through the formulation and adoption of standards.[113] In 2010, the Committee on Legal Aid and Indigent Defendants joined with four other entities with the objective of creating Standards for Language Access to Courts. After a two-year consultative process under a thirty-four person advisory board composed of judges, attorneys, and advocates representing diverse perspectives and geographical regions, the Standards were proposed in 2011. The ABA's House of Delegates officially adopted the Standards in February 2012.[114]

The official Proposal succinctly describes the purpose and organization of the Standards.[115] It presents the Standards as practical guidelines to assist state courts in complying with current law, and in implementing best practices for providing language access services. Furthermore, the Proposal describes the first Standard as communicating the appropriate objective of language access programs, and the following nine as demonstrating how to design a comprehensive language access programs that meets the definitive first Standard. The Proposal summarizes that first and fundamental Standard as the statement of a "straightforward access to justice principle: that courts need to be able to understand and to be understood by the people who come before them."[116] While this language does not abandon the notion that language access services protect specific individual rights (ultimately, the Standards are intended to ensure the availability of the

---

[113] "History," American Bar Association, accessed May 4, 2012, http://www.americanbar.org/utility/about_the_aba/history.html

[114] *Resolution to Adopt Proposed ABA Standards for Language Access in State Courts*. HoD Resolution 113, American Bar Association Standing Committee on Legal Aid and Indigent Defendants (February 6, 2012).

[115] Ibid.

[116] Ibid., 2.

judicial forum), it also frames language access as providing a need of the courts themselves. The Proposal thus contains an implicit acknowledgment of the value of language access services to the judicial process as a whole.

The Standards themselves are more explicit in upholding the value of a comprehensive language access services to the integrity of the judiciary than was the Proposal. Specifically, the commentary to Standard One states: "provision of language access services is not for the sole benefit of the LEP person; language access services also support the administration of justice by ensuring integrity of the fact-finding process, accuracy of court records, and efficiency in legal proceedings."[117] The commentary goes on to characterize the court interpreter as an officer of the court who assists the the court in performing its duties.

Upon the foundation of Standard 1, the next nine Standards construct a comprehensive language access plan, which can be adjusted to fit the specifications of different courts. Regardless of a state's resources, however, Standard 2 makes clear that courts should not charge parties for the use of interpreter services. The Commentary indicates that this requirement is consistent with the DOJ's 2010 opinion letter, and urges courts that limit the provision of interpreters to particular kinds of cases or to indigent litigants to remove these limitations.[118] The Standard's Commentary justifies the policy of providing interpreter services at state cost by arguing that the need to pay interpreters may discourage LEP persons from pursuing courts.[119] There is a second way to reach the conclusion that the court interpreter ought to be paid by the state. If interpreters' services contribute primarily to the court and justice system rather than the litigant, then it is

---

[117] ABA, *Standards,* 13.

[118] Ibid., 23.

[119] Ibid., 24.

logical that the court, and not the litigant, would be expected to pay the interpreter's fees. This understanding of the interpreter's role is also consistent with the expectations of neutrality imposed on interpreters used in judicial proceedings.[120] It seems unusual to require a party to pay the fees of a neutral person who is prohibited from acting as an advocate, or in support of their position. It bears repeating that when interpreters are conceived of as providing services to the court, the requirement that the LEP litigant pay their fees resembles a tariff on the use of the judicial system imposed on non-English speakers.

In addition to imposing the cost of court interpreters on the state rather than the litigant, the Standards expands the set of individuals to whom interpreters should be made available and increases the number of interpreters that should be used for some proceedings. Standard 4.2 instructs courts that interpreters should be provided to LEP persons that are parties, witnesses, have legal decision-making authority, or a significant interest in the matter (as determined by the presiding judicial officer).[121] Moreover, in proceedings that include both LEP witnesses and parties, the court is likely to appoint multiple interpreters. Specifically, the Commentary accompanying Standard 4.4 describes the difference between witness interpreters, who interpret during witness testimony and questions, and proceedings interpreters, who interpret the entirety of the proceedings for the LEP litigant. The witness interpreter interprets the questions into the witness's dominant language, and interprets the witness testimony for the benefit of the court. The latter is preserved as part of the record. The proceedings interpreter performs interpretation simultaneously, in whisper mode. This interpretation is not preserved on the

---

[120] "Court interpreters and translators are to remain impartial and neutral in proceedings where they serve, and must maintain the appearance of impartiality and neutrality." "Code of Ethics of the Texas Association of Judicial Interpreters & Translators," accessed May 4, 2012, http://www.tajit.org/code-of-ethics.

[121] ABA, *Standards,* 37-39.

record, nor is it be audible to anyone other than the LEP litigant. Generally, In those cases that have both LEP witnesses and litigants, a distinct interpreter should be appointed to perform each function.[122]

Cases with both LEP witnesses and an LEP litigant thus require at least two court-appointed interpreters according to the Standards. Furthermore, if the attorney cannot communicate with the litigants and witnesses in their dominant language, an interpreter is required to facilitate communication between the attorney and her client, and to assist in preparing any LEP witnesses. Using the proceedings interpreter or the witness interpreter for this function could compromise the neutrality of the interpretation; it is therefore best to appoint a third interpreter to perform this role.[123] As the state is responsible for the costs of language access services, it is readily apparent that following best practices could quickly become quite expensive for communities with large LEP populations.

The Standards include a number of other instructions useful in achieving compliance with constitutional obligations and the dictates of federal law. These include appropriate methods for identifying LEP persons that come into contact with court and state officials, and for regulating the quality of interpretation, even requiring the appointment of two interpreters for the tiring mental task of testimony interpretation so that they may switch off every thirty minutes or so. Additionally, they indicate a preference for in-person interpreters over remote interpreters that interpret via telephone or video conference, and suggest ways to coordinate efforts at improving across state boundaries. The Standards also identify moments when a qualified interpreter should be appointed to facilitate communication between a litigant and a court or state-appointed

---

[122] Ibid., 45-46.

[123] Ibid. This may also improve job prospects for English-dominant attorneys in Hidalgo County.

person outside the courtroom context. For example, whenever guardians, conservators, social workers, and psychologists are appointed to work with an LEP person, an interpreter should be appointed at state expense, unless the guardian, conservator, social worker, psychologist, or other state official is a qualified bilingual professional.[124] This constructively sanctions communication in a language other than English between an LEP person and a state official.

Moreover, the Standards emphasize the importance of finding solutions and methods that are appropriate to the particular circumstances of the courts or community. The Standards are not intended to be a panacea. The emphasis on flexibility allows courts to deviate from the program recommended by the Standards whenever they find ways to provide equal access to the judicial system for LEP persons that are more convenient or more efficient without sacrificing fundamental fairness, the integrity of the fact-finding system, or other values advanced by the Standards. The Standards seem particularly open to court and community-specific programs that are tailored to fit the shape of the linguistic community they serve. Language access services should be distributed according to the needs of the population. In other words, in a community with a significant population of LEP persons whose first language is Mandarin, there should be a ready supply of qualified Mandarin interpreters, Mandarin translations of forms and documents, clerks capable of communicating in Mandarin, *etcetera*.

Hidalgo County's linguistic landscape, as described in the first chapter, has an unusually high proportion of the population who speaks Spanish. Moreover, the region is a kaleidoscope of bilingualism, with a high number of bilingual judges and attorneys that communicate with clients in Spanish daily.[125] The ABA Standards would encourage

---

[124] Ibid., 63-64.

[125] Ms. Spencer-Scheurich said she uses Spanish with clients daily.

Hidalgo County to accommodate its relatively large Spanish-speaking population and design a program of language access services to meet that community's needs. And indeed, the Hidalgo County court system has a number of interpreters on staff, and has entered into contracts with interpreter services for those instances when the court staff's services are insufficient. Nevertheless, attorneys and judges who work in Hidalgo's courts acknowledge that interpreting, no matter how good, can be clumsy and cumbersome, and create obstacles.[126]

This region's atypically high number of Spanish speakers and bilinguals is an outcome of its unique history as the frontier of New Spain, and then Mexico, as well its current role as an international crossroads between the U.S. and its trading partner Mexico. It is this particular linguistic blend that allows for the collaborative interpreting that takes place in Hidalgo County's courts, and suggests the possibility of a novel solution to linguistic obstacles to the court system. Offering Spanish language proceedings may be a possible answer to the DOJ's insistence that state courts comply with Title VI, that is also consistent with the considered suggestions of the ABA Standards that state courts build their policies to meet community-specific needs. Moreover, the Standards embrace the possibility of non-English communication, at least in extra-judicial settings.

While perhaps uncommon, significant populations of minority language speakers exist in other areas of the world. How these communities shape language policy in the context of judicial proceedings may be instructive.

---

[126] Garza, interview; Tummel, interview; anonymous trial attorney, interview.

Chapter 6: Models Of Multilingual Judicial Systems

One of my interview subjects was a licensed master interpreter who settled in McAllen, Texas, after a living in several cities and countries, first as a student of languages and later as a Dominican diplomat. While we were discussing this proposal to implement Spanish language judicial proceedings in Hidalgo County, he was receptive but unsurprised, as if it were an obvious solution. After I mentioned the possibility of borrowing aspects of existing bilingual justice systems, he responded, "Of course. There's no need to reinvent the wheel." [127]

His observation underscored the fact that there is nothing particularly revolutionary or radical about multilingual justice systems. In fact, in what is now Belgium, the tradition of bilingual judicial proceedings extends to the Middle Ages.[128] Not only does the age of bilingual judicial proceeding serve as an argument in favor of their feasibility and wisdom, but these precedents also offer examples of how to implement and organize such proceedings, as well as lessons against what to avoid.

This section will briefly describe the multilingual justice systems of Canada, Switzerland, and Belgium. These three countries have long histories of plurilingualism, and their judicial systems reflect their respective linguistic landscape as a matter of policy. The justice systems diverge most significantly from the United States in their conception of language. In the United States, language is reached through other rights, such as the Sixth Amendment right to confrontation, the Fourth Amendment right to due process, or protection against national origin discrimination. In Canada, Switzerland, and Belgium, the use of particular languages is itself protected.

---

[127] Vargas, interview.

[128] Kenneth D. McRae, *Conflict and Compromise in Multilingual Societies, Vol. 2: Belgium*. (Ontario: Wilfrid Laurier University Press, 1986), 204.

Following a discussion of the explicitly multilingual judicial systems, this section will describe Puerto Rico's bifurcated judicial system, in which proceedings in commonwealth courts are conducted in Spanish, while proceedings in federal courts are conducted in English. While one could easily argue that this particular design demonstrates the United States' generally imperialistic attitude toward Puerto Rico, this paper will approach Puerto Rico's bilingual justice system as an example of Spanish language proceedings in the United States, paying particular attention to licensing procedures.[129]

International Models

While Switzerland, Belgium, and Canada each officially recognize multiple national languages, Switzerland and Belgium have organized their national language policy with regard to judicial proceedings around the territoriality principle. According to this principle, the language used or applied depends on the territory in question. Thus, the language of a judicial proceeding is determined by the location of the court. For example, in Belgium, when the proceeding occurs in a court in Flanders, Dutch will be the language of procedure, and when it occurs in Wallonie, French.[130]

In contrast, Canada's federal courts are bilingual regardless of location, and a designated party may determine whether the proceeding occurs in English or French. Canada's federal courts operate according to the personalty principle, according to which the language of a judicial proceeding is determined by the language of the party or parties

---

[129] And there is a conversation in legal scholarship about the injustice of judicial language policies in Puerto Rico. Jasmine B. Gonzales Rose, "The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico," *Harvard Civil Rights-Civil Liberties Law Review* 46 (2011): 497-549; Alicia Pousada, "The Mandatory Use of English in the Federal Court of Puerto Rico," *CENTRO Journal* 21.1 (2008): 2-14; Andrea Freeman, "Linguistic Colonialism: Law, Independence, and Language Rights in Puerto Rico," *Temple Political & Civil Rights Law Review* 20 (2010): 179-203.

[130] McRae, *Belgium*, 204.

involved. The provinces of Canada are responsible for authoring their own language policies, and are not obligated to offer proceedings in both of Canada's official languages. Only New Brunswick and Ontario have institutionalized bilingualism on the provincial level.[131] New Brunswick's provincial courts operate similarly to Canada's federal courts whereas Ontario's provision of bilingual services approximates the territoriality principle found in Belgium and Switzerland.

Although Switzerland's and Belgium's courts generally follow the territoriality principle, both depart from its strict application. For instance, the Federal Supreme Court of Switzerland, the country's highest court, is multilingual and conducts proceedings in Italian, German, and French.[132] The Federal Tribunal's regulations dictate the language of its proceedings. For civil proceedings being heard on appeal, Article 19 indicates that the language of procedure will be determined by the language of preliminary examination, or otherwise the language of the court whose being appealed. Where the Court is deciding a matter of first instance, the principle of personalty prevails, and the language of the proceeding is that of the parties, or, if the parties speak different languages, the language of the defendant(s). If the defendants speak different languages, the judge may determine the language of the proceeding.[133] Switzerland's federalism is a federalism of execution, which means the cantons are charged with fulfilling certain obligations and duties of the

---

131 New Brunswick's Law 88, adopted by the province's Legislative Assembly, recognizes equality between Francophones and Anglophones. Ontario's language policy is regionalized, such that parts of the province are English-only, while and others are bilingual. François Vaillancourt, Olivier Coche, et al. "Official Language Policies of the Candian Provinces: Costs and Benefits in 2006, " The Fraser Institute, January 2012, accessed May 4, 2012, http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/official-language-policies-of-canadian-provinces.pdf.

132 The name of the forum is Tribunal Fédéral in French, Tribunale Federale in Italian, Bundesgericht in German, and Tribunal Federal in Romansch.

133 McRae, *Conflict and Compromise in Multilingual Societies; Switzerland*. (Ontario: Wilfrid Laurier University Press, 1983), 143.

federal government.[134] As a result, lower federal courts are administered at a cantonal level.[135]

In Belgium, the principle of territoriality determines the language of procedure at every level. Though this may seem rigid at first gloss, the law affords parties some flexibility. For instance, the parties to a dispute can agree to conduct the proceeding in a different language, and the case will be removed to a court in the appropriate language region. Perhaps most interestingly, Brussels is a designated bilingual language region and as such, the language of the procedure is determined the principle of personalty rather than the principle of territoriality in the courts of Brussels. For suits filed in Brussels, a complicated series of rules determines the language of procedure, though it will usually be the defendant's language.[136]

Of most interest to the implementation of Spanish language proceedings along the Texas border are the philosophical foundations of the Swiss and Belgian languages policies exhibited by their multilingual judicial systems, along with the mechanics of conducting proceedings in multiple languages in those instances where it occurs.

Switzerland is a particularly interesting example because multilingualism is fundamental to its national mythology,[137] and it is widely regarded as a model

---

134 François Grin, "Language Policy in Multilingual Switzerland: Overview and Recent Developments" (paper presented at Cicle de conferències sobre política lingüística Direcció general de política lingüística, Barcelona, December 4, 1998), accessed May 4, 2012, https://docs.google.com/viewer?a=v&pid=gmail&attid=0.2&thid=136bd4c829eda13a&mt=application/pdf&url=https://mail.google.com/mail/u/0/?ui%3D2%26ik%3D18d6f325f2%26view%3Datt%26th%3D136bd4c829eda13a%26attid%3D0.2%26disp%3Dsafe%26realattid%3Df_h143r1ib1%26zw&sig=AHIEtbSbEKl7_hHdfsvdJtay5umgjAQlVg.

135 McRae, *Switzerland,* 143.

136 McRae, *Belgium, 205*.

137 Grin, 2.

multicultural society.[138] Its language policy is based on the constitutional principles of linguistic plurality and linguistic peace. Linguistic peace is achieved through balancing the principal of territoriality, discussed above, and linguistic freedom. This picture of linguistic peace resembles a Wilsonian notion of self-determination applied at the local , rather than the state, level. Each canton determines its linguistic policies, which generally reflect the linguistic makeup of the population. Cantons determine the language(s) used for institutional and administrative purposes, but its policies must leave room for the individual right to use the language of his or her choice privately.[139] These constitutional principles are embodied in the languages used it Swiss courts.

As mentioned above, Switzerland's Federal Supreme court, as well as certain cantonal courts, are multilingual. In these multilingual courts, the language for civil matters is determined by the language of the defendant.[140] Moreover, judges on the Federal Supreme Court are expected to be capable of performing their duties in French, German, and Italian, although no test is administered to determine the linguistic proficiency of elected judges before they take the bench.[141]

I would like to identify three important lessons that can be taken from the Swiss example and applied to the creation of bilingual courts in Hidalgo County. First, in a demonstration of robust federalism, it is left to the canton to determine language policy of both cantonal and federal courts. The federal government, in turn, has the onus of running a trilingual supreme court, which brings us to a second lesson: the officers of that

---

[138] Ibid., 7.

[139] Dagmar Richter, "Language Law and Protection of Mintorities in Federal Switzerland (English Summary)," *Beiträge zum Auslandischen Öffentlichen Recht und Völkerrecht* 158 (2005).

[140] Ibid.

[141] McRae, *Switzerland*, 143.

trilingual court are responsible for being able to perform their duties in each of the court's three languages. I find it appropriate to expect public servants to be competent in the languages of the communities they serve, and for the government to accommodate its multilingual community. Finally, the protection of linguistic freedom could be easily applied to a bilingual justice system in Hidalgo County. In other words, instead of the current system, in which a judge is expected to divine a party's or a witness's ability to speak and understand English, the individual can express oneself in the language of his or her choice, regardless of language abilities.

While language issues have become quite heated in Belgium in recent years, with academics and political commentators criticizing its territory-dictated language policies, it nevertheless provides for significant individual freedom with regard to the language of procedure in judicial proceedings.[142] As discussed earlier in this section, upon the agreement of the parties, a proceeding can be removed to a court in a different language region. Moreover, amendments to the Language Act of 1935 have expanded the bilingual region of Brussels, and made accommodations for those living along the borders between language regions.[143] By allowing parties to agree to move a proceeding to another court based on language, and determining the language of proceedings in the bilingual language region according to the principle of personalty, Belgium upholds an individual's right to determine the language of a judicial proceeding. The ability to move a judicial proceeding for the purpose of conducting that proceeding in a particular language suggests the unique importance of communicating in one's preferred language in the context of a judicial proceeding. Like Switzerland's recognition of linguistic freedom,

---

[142] Ulrike Vogl and Matthias Hüning, "One Nation, One Language?The Case of Belgium,"*Dutch Crossing* 34.3 (November 2010): 228-247.

[143] McRae, *Belgium,* 205.

Belgium's emphasis on choice of language in judicial proceedings may serve as an example for a bilingual judicial system operating in Hidalgo County, Texas. Both national policies suggest a system in which the parties are able to choose whether a proceeding is conducted in Spanish or English.

Canada's bilingual federal judiciary likewise affirms the importance of language choice by giving individuals, including witnesses, parties, and attorneys, the right to communicate in their choice of English or French in judicial proceedings.[144] The language of civil proceedings is determined by the parties, who may choose either French, English, or both French and English, to be the proceeding's official language or languages.[145] Canada requires the judge presiding over the proceeding must be able to understand the language or languages of the proceedings without the aid of an interpreter.[146] Like Switzerland's assumption that its Supreme Court justices are able to competently execute their duties in three languages, Canada's guarantee that judges will understand parties to a civil lawsuit whether they choose to speak English or French creates additional obligations for the judiciary. Moreover, the Canadian legislation explicitly prohibits the use of interpreters to supplement a judge's linguistic capabilities, implying that the Act's drafters perceived an important distinction between communication in a shared language and communication through an intermediary. And the legislative language seems to evidence a preference for communication without an intermediary. Interestingly, this particular language was added in 2002, following inconsistent interpretation of the right to communicate in one's choice of English or

---

[144] Constitutional Acts 1867, Sec 133. In criminal proceedings, the entire proceeding may be required in a single language

[145] Official Languages Act, Sec. 16(1)

[146] Ibid. Doesn't include matters in front of the Supreme Court, but does extend to all judges and other ocurt personel

French. Prior to the ruling, the court in *McDonald* found that the right to use either English or French does not guarantee a right to be heard in that language. At the same time, however, the court cautioned that judges "invested with certain duties and responsibilities in their service to the community. This extends to the duty to give a meaningful language choice to litigants appearing before them."[147] The court in *McDonald* thus qualified its decision such that its decision should be read narrowly.

Subsequent rulings disagreed with the holding in *McDonald,* and found that a meaningful right to testify in French or English incorporated a right to be understood in that language[148] The eventual amendment requiring a presiding judge to understand the language of the proceeding without the aid of an interpreter suggests that the legislature was unhappy with the result in *McDonald*.

Of particular importance to this paper is the reasoning the court in *Pooran* employed to reach its decision that the right to use a language of one's choice is equivalent to the right to be understood in that language without the use of an interpreter. Instead of citing Canada's policy of substantiating the equal status of its two official languages, the court indicated that the right to communicate in a language is "hollow indeed" if one "[is] not entitled to be understood except through an interpreter...akin to the sound of one hand clapping."[149] This indicates a strong connection between the ability to express oneself and the ability to be understood. Furthermore, the reasoning reveals that communication without an interpreter is preferable to communication through an interpreter.

---

[147] *MacDonald v. City of Montreal*, 1 S.C.R. 460 (1986).

[148] Ibid.

[149] *R*. v. *Pooran,* 2011 ACPB 77, para. 21(2011).

A Bilingual Judicial System in the United States

Puerto Rico's unique linguistic separation of federal and regional courts offers an example of a bilingual judicial system within the United States. Both Spanish and English are official languages of the island commonwealth. Spanish is the language of Puerto Rico's territorial laws and courts, while proceedings in front of federal courts in Puerto Rico are conducted in English.

The process of admission to the federal courts in Puerto Rico is unique in the United States, involving additional testing and a statement of English proficiency. One of the requirements for admission to the practice of law in Puerto Rico is that a candidate pass the General Bar Examination prepared by the Board of Bar Examiners.[150] This Exam is written in Spanish, but may be answered in either English or Spanish.[151] Passing the Exam, and fulfilling the other requirements established by the Board of Bar Examiners qualifies one to work in Puerto Rico's territorial courts.

To be admitted to the federal United States District Court for the District of Puerto Rico, an attorney licensed to practice in the island's local courts must take a second bar examination, which tests the taker's knowledge of federal laws and includes an English-language essay through which the candidate can demonstrate her command of the English language.[152] Furthermore, a complete Petition for Admission includes a statement on the part of the petitioner affirming her command of English. Generally, admission to a federal court requires an attorney to petition for admission, be in good standing in the attorney's

---

150 "Rules for the Admission of Applicants to the Practice of Law and the Notarial Profession: Rule 4.1.1(d)." Commonwealth of Puerto Rico Board of Bar Examiners, updated May 26, 2006, accessed May 4, 2012, http://www.ramajudicial.pr/junta/acrobat/Rules-for-the-admission-of-applicantsold.pdf

151 Ibid., Rule 5.2.1,

152 United States District Court for the District of Puerto Rico, Local Rules, Rule 83.1. Petition for Admission to the United States District Court for the District of Puerto Rico, accessed May 4, 2012, http://www.prd.uscourts.gov/courtweb/pdf/bar/Petition_for_Adm.pdf.

home state, and pay some fee. Each federal district has distinct rules of admission, which sometimes require personal references, seminar attendance, or the successful completion of training modules.[153] Only Puerto Rico's federal district court requires an additional examination.[154] While certain petitioners are exempt from the examination requirement, including persons who have worked in the federal court for at least one year, in the commonwealth court for at least five years, or as a law professor for at least ten, it is reasonable to assume that ensuring the English-language competence of admitted attorneys is a major motivation behind administering a Federal Bar Examination. It seems that a similar examination could be administered to attorneys and judges before they are permitted by local rules to provide counsel in Spanish-language proceedings. In this way, Puerto Rico may serve as an example in formulating such rules and examination procedures.

Lessons

Before leaving these examples of bilingual and multilingual judicial systems, it is important to acknowledge the fundamental differences that exist between the reality in Hidalgo County and that reality of the judicial systems of Switzerland, Belgium, Canada, and Puerto Rico. First, each of the jurisdictions discussed above have laws in multiple languages, such that when the subject of a dispute is in a particular language, the law that will determine the outcome of that dispute is also in that language.[155] In Canada, for example, both the Constitution Act and the OLA require federal legislation to be enacted

---

[153] The Federal District Court for the Southern District of Ohio requires training seminars. S.D. OH. Local Rule 83.3(c)(1), (d).

[154] United States District Court for the Southern District of Florida recently retired this requirement by administrative order in February 28, 2012. Administrative Order 2012-14.

[155] In Switzerland, for example, the French, Italian, and German versions of federal law are equally valid and enforceable. McRae, *Switzerland*, 143.

and published in both French and English.[156] Moreover, both the French and English versions are considered "equally authoritative," with both versions of the law applied to cases in front of a court.[157] It is not part of the present proposal to recommend enacting official Spanish versions of current and future laws, as it outside the scope of this paper to do so. Laws in the language of proceedings almost certainly helps bilingual and multilingual courts perform their duties, and establishing a mechanism for Spanish-language proceedings must account for the fact that English-language laws and jurisprudence will be applied to Spanish-language proceedings. The use of English laws does not necessarily preclude the possibility of proceedings in Spanish, however.

Second, the language policies of Switzerland and Canada have their foundations in the affirmative recognition of multiple official national languages. Moreover, the policies in both countries are at least partially intended to protect the status and existence of those languages. The Federal Constitution of the Swiss Confederation names German, Italian, French, and Romansch its "National Languages."[158] Canada's constitution likewise declares its official languages, which are English and French.[159] By granting particular languages official status, one might argue that these two constitutions create an obligation on the part of the government to proactively encourage and support the use of these languages. Certainly, Canadian courts have distinguished between the right to use a national language in court, and the mere ability to understand and be understood, which is guaranteed by the right to a fair trial.[160] Of course, the United States Constitution, while

---

[156] Marie-Éve Hudon, "Bilingualism in the Federal Courts" (Ottawa: Library of Parliament, 2011): 4.

[157] Ibid.

[158] McRae, *Switzerland*, 119.

[159] Canadian Charter of RIghts and Freedoms, sec. 16.

[160] *R. v. Beaulac,* 1 S.C.R. 768 (1999)

enacted in English, does not identify an official national language. It is important to recognize that the implementation of Spanish language proceedings in Hidalgo County, Texas, cannot rely on legal arguments that uphold the protection of Spanish per se.

Belgium, on the other hand, creates language areas in its constitution without designating an official national language or group of languages. Instead, it guarantees linguistic freedom, leaving language policy to be decided on a regional basis.[161] This decentralized language policy suggests that Belgium's multilingualism is a pragmatic response to a particular reality, rather than a statement of the intrinsic national value of particular languages. Belgium's approach to language seems more relevant to the peculiarities of Texas's Rio Grande Valley, and demonstrates that the establishment of multilingual government institutions need not find justification in the protection of a language for its own sake.

In summary, the bilingual and multilingual judicial branches of Switzerland, Canada, and Belgium demonstrate the feasibility of allowing court proceedings to be conducted in one of multiple designated languages, as well as the reasonableness of expecting judges and the courts to function in multiple languages. The principle of territoriality suggests the possibility of limiting the availability of languages based on the location of a court. Thus, it would be reasonable to limit the availability of Spanish-language proceedings to Hidalgo County. The principle of personalty identifies the parties involved in litigation as the appropriate persons to choose the language of the proceeding in bilingual or multilingual jurisdictions. In Brussels, the plaintiff selects the language of procedure. In the rest of Belgium, the parties are expected to agree on a proceeding's language. In Switzerland, it is the defendant or defendants that determine the language of

---

[161] Article 30 of the Belgian Constitution states: "The use of languages spoken in Belgium is optional; only the law can rule on this matter, and only for acts of the public authorities and for judicial affairs."

the proceeding. A procedure must be designed for determining who selects whether a proceeding in Hidalgo County's courts are conducted in Spanish or English. Puerto Rico's example offers a straightforward method of confirming the language skills of attorneys permitted to participate in Spanish-language proceedings. Finally, Belgium provides evidence that a multilingual court may exist as a matter of practicality, and does not necessarily require ideological assumptions regarding the value of particular languages to national identity.

Chapter 7: The Proposal

Before launching into the proposal for Spanish-language proceedings in Hidalgo County, it will be helpful to summarize the discussion up to this point. First, we discussed the current language access program in Hidalgo County, which largely relies on the bilingual individuals that work in court every day to ensure the quality of interpretation provided by court staff that act as interpreters in addition to their primary duties. Some of these interpreters are trained and licensed, and some are not. Despite a general consensus that language access in Hidalgo County's courts are adequate, it has clear shortcomings, including an increased financial cost of access the justice system for LEP individuals, and the creation of inequalities by interpreters, which can may or may not favor an LEP party. Because the record of the proceeding is in English, it is all but impossible to challenge an interpretation error after it happens.

In addition to the problems mentioned above, the current language access program complies neither with federal law nor with state law. Federal law requires the court to provide qualified interpreters, at state cost, to all judicial proceedings, which includes all civil litigation, as well as depositions. Furthermore, an LEP party should be provided with a proceedings interpreter so she can understanding the entire proceeding, and not just those questions or instructions that are directed at her. While the Texas courts have been somewhat inconsistent in their interpretation of the state's legislative mandate that "a court shall appoint... a licensed interpreter," it is likely that the casual use of unlicensed interpreters who are simultaneously performing an additional job, for which that person was ostensibly hired.[162]

Finally, we looked at multilingual court systems that determined the language of procedure either through the court's location or based on the party's preference. Canada

---

[162] *Reid*.

even offered the example of bilingual proceedings, in which both French and English could be used. In addition to offering precedent with regard to choosing a language, assigning personnel to proceedings, and appealing decisions in a bilingual judicial system, they also highlight potential problems. Particularly, most of these countries have multiple official languages whereas neither Texas nor the United States does. Belgium offers an example of a multilingual justice system which does not have official languages, however. Moreover, these international examples of bilingual courts are able to apply laws in the same language in which the proceedings occur. In Hidalgo County, both federal and state law is written in English.

With the above summary in mind, let us proceed: This proposal to implement Spanish-language proceedings in Hidalgo County is presented as a means of complying with federal law and meeting the Standards for Language Access in State Courts adopted by the ABA. Therefore, the efficiency and cost of implementing Spanish-language proceedings should be measured against the cost of complying with the aforementioned benchmarks by providing licensed interpreters as dictated by the Standards, rather than against the numerical costs currently incurred by Hidalgo County's language access program.

The implementation of Spanish-language proceedings would allow civil parties to choose Spanish as the language of procedure. Furthermore, as juries raise unique and complicated issues with regard to interpretation and language ability, many of which are already present in academic discussions, this proposal will be for proceedings without a

jury, where the judge acts as the fact-finder.[163] Of course, English-language proceedings would still be available.

Choosing Spanish as the Language of Procedure

There is a small set of possibilities as to who may decide a proceeding's language of procedure, all of which were evident in the comparative discussion of international multilingual judicial systems. The plaintiff, who files the lawsuit, may choose the language of the procedure.[164] Alternatively, the defendant, whose rights are immediately at stake in the matter, may choose the language of the procedure.[165] Which party is able to opt for proceedings in Spanish may also change depending on the nature of the case. This option is attractive because it allows the justice system to favor the language choice of the weaker party. For instance, in employment and leasing disputes, the plaintiff is usually the party with less bargaining power, and it may therefore make sense to allow the plaintiff in those cases to choose the language of procedure. In debtor-creditor disputes, on the other hand, the court may allow the defendant-debtor to select whether the proceeding is conducted in Spanish or English.

A fourth option is to allow parties to agree to choose Spanish as the language of procedure. Belgium follows this third solution to the extent that parties can agree to transfer their dispute to a court that conducts proceedings in a language the parties prefer to the local language of procedure (*e.g.*, even if they are both in Flanders, they can agree to move to a court in Walloon, if they prefer to settle their dispute in French rather than

---

[163] For further reading, see Gonzalez Rose, "Exclusion of Non-English-Speaking Jurors;" Grosjean, "The Day the Supreme Court Ruled on the Bilingual Mind;" Daniel J. Procaccini, "What We Have Here is a Failure to Communicate: An Approach for Evaluating Credibility in America's Multilingual Courtrooms," *Boston College Third World Law Journal* 31 (2011): 163-192.

[164] Brussels' bilingual courts operate according to this procedure. Chapter five, infra..

[165] This is the method adopted by Switzerland's highest tribunal, and by cantonal courts that are bilingual. Chapter five, infra.

Dutch).[166] Allowing parties to opt for a Spanish language proceeding by mutual agreement seems optimal because it does not require the courts or the legislature to balance the competing interests of the parties where one prefers English and another Spanish.[167] Where the parties agree to a Spanish language proceeding, their mutual preference for Spanish is being measured against the interests of the state and the courts not to conduct the proceeding in Spanish. This may also make the proceeding more politically palatable in that English will not be the language of procedure without agreement.

Next, we must determine how litigants can exercise this option. One possibility is to obligate local courts to communicate the possibility of a Spanish-language proceeding to litigants. As this proposal is directed at civil litigation, however, it seems awkward to require courts to inform the parties of their rights within the system. Instead, the procedure established for requesting a proceeding conducted in Spanish could require the parties to initiate an action, thus obligating counsel to inform clients of the possibility of a Spanish-language proceeding as part of the attorney's duties as an advocate.

Belgium, by allowing parties to move courts in order to change the language of procedure treats language as an issue of venue. That is, by agreement parties can transfer venue in order to conduct proceedings in a particular language.[168] Imitating this model, Hidalgo County may treat the choice of Spanish as a choice of venue, although the venue (Hidalgo County state courts) technically will not change. Therefore, when a plaintiff files a suit in Hidalgo's state courts, she would indicate in her original petition her that

---

[166] Chapter five, infra.

[167] An option not discussed here is the possibility of allowing the judge to determine whether it would be better to conduct a proceeding in Spanish, based on the language abilities of the parties.

[168] Chapter five, infra.

she would like Spanish to be the language of procedure. If the defendant preferred English, she would file a motion to change the language of procedure from Spanish to English, just as she would file a motion to transfer venue if she did not like the court in which the filed the original complaint.

One may argue that this procedure for determining language is problematic because it burdens the defendant with take affirmative action in order for a proceeding to be conducted in English. This is a small burden, however, and can be achieved through including a request for change of language in the defendant's answer, which she defendant must file regardless of the language of procedure.

Just as a defendant may file a motion requesting transfer of venue after a plaintiff files in a court which is for some reason undesirable to the defendant, the defendant could file a motion to request a change from English to Spanish or Spanish to English. If the defendant filed a motion to change the language of procedure to Spanish, the plaintiff could then file a response indicating her agreement or disagreement with this request.

Because Spanish-language proceedings would only be available where both parties agreed to conduct the proceedings in Spanish, the additional pleading requirement would be minimal, as motions to change the language of procedure, and responses to those motions, would not need to present arguments to persuade a judge which language is the optimal language of procedure for a particular case. Where both parties agreed, a proceeding would be conducted in Spanish, and where they did not, the proceeding would be in English, with the appropriate accommodations made at state expense for any LEP parties or witnesses.

One alternative procedure would be to require the parties to reach an agreement to conduct the proceedings in Spanish, and then file a joint request with the court. This is

not preferable, however, because such an agreement would likely be reached extra-judicially, and how the agreement was reached would not be documented in court filings, making it more vulnerable to issues on appeal, and less feasible in very contentions disputes. Furthermore, requiring parties to opt for Spanish as the language of procedure in their initial filings would reduce the usefulness of language as a way to delay proceedings or irritate the other party. Establishing Spanish as the language of procedure at the outset, or near the outset, of the suit is also consistent with the ABA's recommendation that courts timely provide language access services.[169] And, unlike treating the choice of language as analogous to choice of venue, creating a unique procedure for the consensual selection of Spanish as the language of procedure would increase the transaction cost associated with Spanish-language proceedings, as courts would have to determine in an ad-hoc way how to respond to and accommodate these requests.

Presiding over a Spanish-language Proceeding

Once parties have agreed that they prefer Spanish as the language of procedure, the judge must then determine whether she can continue to adjudicate the dispute, or should recuse herself because she is uncomfortable presiding over a Spanish-language proceeding. If she presides over the dispute, she may choose to seek a bilingual staff member to act as her language assitant..It is the general consensus that most judges speak some Spanish, even if it is not the judge's first language. And bilingual judges are accustomed to listening critically to Spanish narrative, often correcting the interpreter's translation.

Because of the collaborative nature of interpretation of Spanish testimony in Hidalgo courtrooms, however, judges are accustomed to having help, either from an

---

[169] ABA, *Standards*, 26.

interpreter or from bilingual attorneys, to understand Spanish-language testimony. Therefore, some judges may feel more comfortable having the assistance of a bilingual person, whom they can turn to with questions about the meaning of particular words.[170] Although the possible need for bilingual persons to assist judges in presiding over Spanish-language proceedings may at first seem to negate some of the potential benefit of not having to appoint interpreters, the use of language assistants is preferable to the use of interpreters. Court interpreting is a unique skill, which is why both federal and state law require licensing procedures in order to regulate the quality of court interpretation. Because the proceedings would be entirely in Spanish, however, the judge's language assistant would not be required to act as a court interpreter, moving quickly and easily between Spanish and English, and maintaining the tone, formality, and nuance of the questions in English and the responses in Spanish. Being bilingual, on the other hand, is more commonplace, especially in Hidalgo County. Being bilingual does not require special education or certification, making their appointment less expensive than the appointment of qualified interpreters. In fact, the ABA recommends the use of bilingual state personnel in some instances of state contact with LEP persons. For instance, the Standards discussed earlier recommends the use of qualified bilingual psychologists, social workers, and others appointed by the state to work with an LEP person. The Standards do not indicate the need for a licensing program to verify the bilingualism of these individuals.[171] Because a language assistant would not need the specific skills required of court interpreters, the bilingual members of the court staff, who sometimes serve as court interpreters, are ideal candidates for the position of language assistant.

---

[170] Crane, interview.

[171] ABA, *Standards*, 63-64.

The language assistant would not necessarily need to know English, as he could explain or define the unknown word using Spanish. For instance, it the defendant used the word *bisagra*, which means door hinge, during his testimony, and the judge was unfamiliar with its meaning, he could ask his language assistant to help him. If the language assistant did not know the English word *hinge*, he could explain it in Spanish (*i.e.,* the Spanish equivalent of "a metal fixture that connects the door to the door frame, allowing it to swing open and closed"). *Hinge* is used as an example here because an attorney used this as an example of how even expert interpretation is imperfect. During a deposition, the attorney hired a licensed interpreter who he knew and used often because he was highly skilled. The interpreter had to interpret *hinge* for a Spanish-speaking LEP who was being questioned, and could not recall the Spanish word meaning hinge.[172] This illustrates that the use of a licensed interpreter is not necessarily preferable to use of a language assistant to aid the judge. A language assistant used during a proceeding in Spanish is almost certainly preferable to unlicensed bilingual court staff acting as interpreters, which is often the means of interpretation from Spanish to English used in Hidalgo County courts today.

Nevertheless, if the notion of a judge requiring as assistant seems unfathomable, the implementing procedure for Spanish-language proceedings can prohibit language assistance, so that only judges who are comfortable presiding over a hearing in Spanish without assistance will accept matters for which the parties have chosen Spanish as the language of procedure. Judges that would be comfortable doing this already serve in Hidalgo County. For instance, one county judge said he "would welcome" the opportunity to preside over a proceeding in Spanish. He then went on to say that he sometimes conducted more informal meetings entirely in Spanish with the

---

[172] Tummel, interview.

agreement of attorneys, and found that they were more efficient and progressed more smoothly than similar proceedings done in English. The same judge indicated that his previous court interpreter was also a court reporter, and sometimes, when there no one else was available to act either as court reporter or interpreter, he would serve as both court interpreter and court reporter.[173] In those instances, and with the agreement of the parties, the judicial proceedings would be conducted in Spanish, and the court reporter-interpreter would then type an English translation of the spoken Spanish. He would present his English-language interpretation to the parties at the end of the proceeding so that they might have an opportunity to object to his interpretation. That English-language interpretation would then become the official record of the proceeding. Another judge suggesting conducting proceedings in Spanish when the parties agreed to have the proceeding off the record, thereby waiving the right to appeal,

Other judges also occasionally use Spanish. For instance, a probate judge admitted to sometimes using Spanish in uncontested probate cases in which the party was not comfortable with Spanish. He also indicated that his court reporter would interpret for him, transcribing in English what had been said in Spanish.[174] A local attorney noted that judges sometimes spoke directly to parties in Spanish, giving as an example an instance when a judge was frustrated with a young and inexperienced attorney's circuitous manner of asking questions in a divorce case, and decided to question the party himself, and in

---

[173] González, interview.

[174] Garza, interview. Judge Garza also said that while he sometimes conducted informal or off-the-record proceedings in Spanish, he was not comfortable doing so (the question asked was whether he would be comfortable presiding over a proceeding entirely in Spanish).

Spanish.[175] A second attorney indicated that in some proceedings over which a magistrate or justice of the peace preside, much of the proceeding is conducted in Spanish.[176]

No Need for Special Licensing Requirements

There is no need to elect separate, uniquely qualified judges to preside over Spanish-language proceedings. This is undesirable because creating new courts would significantly increase the cost of implementing Spanish-language proceedings, and may create an impression, however unwarranted, that the judges elected to Spanish-language courts are less intelligent, knowledgeable, or fair than those judges elected to English-language courts.[177] Furthermore, judges must abide by the Texas Code of Judicial Conduct, which regulates their behavior, and mandates that "[a] judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" [178] and may avoid hearing those "matters assigned to the judge...[if] recusal is appropriate." [179] This provision allows the judge to recuse herself from a matter once Spanish is selected as the language of procedure, obviating the need for demonstrated language credentials. If this language is found not to be sufficiently explicit, it would be relatively simple to add a provision to the Code that indicates that judges should pursue recusal when the parties have requested the language of procedure is Spanish and the judge is not comfortable presiding over a proceeding in Spanish. Moreover, Texas state court judges are elected for four-year terms,

---

[175] Tummel, interview.

[176] Spencer-Scheurich, interview.

[177] De Peña, interview.

[178] Canon 2: Avoiding Impropriety and the Appearance of Impropriety In All of the Judge's Activities, Code of Judicial Conduct, Office of Court Administration: A.

[179] Canon 3: Performing the Duties of Judicial Office Impartially and Diligently, Judicial Code of Judicial Conduct, Office of Court Administration: B(1).

demonstrating the legislature's trust in the county's registered voters to select qualified judges. And if we recall the example of Switzerland, there was an expectation that judges sitting on the country's highest court are able to preside over matters in French, German, and Italian, although no specific credential, licensing, or other proof of this language ability is required.[180]

Likewise, it is unnecessary to require lawyers to prove Spanish-language abilities. While licensed interpreters argued the importance of specially licensing attorneys to practice law in the context of Spanish proceedings, many attorneys and judges felt that such licensing was unnecessary, pointing out that it would be ethically improper for attorneys to advocate in Spanish if they did not have command of that language, and indicating that attorneys with Spanish-speaking clients who were uncomfortable working in a Spanish proceeding would simply counsel the client not to opt for Spanish as the language of procedure.[181] While misunderstandings may sometimes occur, this will be true with an interpreter, as well.

It is worth noting that it is not unusual to require clarification during a proceeding when a witness or party is giving testimony. Even in English, an attorney might need to ask additional questions to clarify the meaning of slang terminology, how someone used a word, or to what a pronoun refers. Thus, for instance, an attorney could ask a defendant to clarify whether he was referring to a standard amount of cocaine or the Cuban slang for local currency when he used the word *kilo*.[182] Conducting a hearing in Spanish would thus ameliorate issues of confusion between Mexican Spanish and the so-

---

[180] Chapter five, supra.

[181] Rule 1.01: Competent and Diligent Representation, Texas Disciplinary Rules of Professional Responsibility, Texas Bar; Spencer-Scheurich, interview.

[182] Salinas and Martinez, "Right to Confrontation Compromised," 558-559.

called Tex-Mex dialect common in the Valley; counsel would no longer have to act as both as advocate and interpreter during hearings with LEP litigants or witnesses.

Furthermore, this is a more comfortable situation for the witness or party providing testimony, because she will have a better understanding of why an attorney is seeking clarification. In other words, she is more likely to recognize whether an attorney is asking additional questions in order to clarify her use of language, or asking to continue through the facts of a particular incident or subject; she will not be reliant on the interpreter to act as intermediary. Additionally, if the court continues to use unlicensed and untrained interpreters, this solves the problem of off-the-record communication between the interpreter and the testifying party or witness, and tendencies to filter questions and testimony.

Resolving the Problem of Applying English-language Law in Spanish-Language Proceedings

Another issue the proposal must address, and which was highlighted by the multilingual legal regimes in other countries, is the fact that Spanish language proceedings would require the courts to apply laws written in English to a set of facts presented in Spanish.[183] While this may be a significant obstacle, it is not insurmountable. First, this proposal would be for proceedings without juries. Therefore, there is no need to explain laws written in English to a jury observing a trial in Spanish. Furthermore, pleadings, and any legal arguments those pleadings contain may be submitted to the court in English. Consistently, attorneys and judges indicated that they were more comfortable making legal arguments in English, as this was the language of their legal training.[184] An

---

[183] A problem the other multilingual jurisdictions surveyed do not have, supra, chapter five.

[184] Crane, interview; Garza, interview; Frank, interview; Spencer-Scheurich, interview; Tummel, interview; anonymous trial attorney, interview.

interpreter seemed to support this sentiment, explaining that many English legal terms did not have Spanish language equivalents, because they are unique features of the U.S. legal system.[185] Allowing legal arguments filed with the court to be written in English would address these potential limitations of conducting a proceeding in Spanish. These documents generally do not require the signature of the party, but only the signature of counsel as the party's legal representative. Therefore, their submission in English would not require an LEP party to sign something which she could not understand. This is not to suggest a paternalistic treatment by attorneys and the court system of litigants. Attorneys should certainly be expected to explain the legal consequences of the actions they take on behalf of their clients. There is no reason, however, that an attorney should not be able to explain to a client in Spanish legal arguments that were made in English. After all, this is currently what bilingual attorneys are expected to do for their LEP Spanish-speaking clients.

Evidence would be submitted in Spanish, as would requests for discovery and interrogatories delivered to the opposing party. Depositions of the parties would be done in Spanish; depositions of witnesses could be done in either Spanish or English. Affidavits would be treated the same. When pleadings quote Spanish-language evidence, there would be no need to translate the relevant portion of the evidence to English.

The treatment of legal argument made during the proceeding is a more difficult question. Because legal argument often relies of specific diction and terms of art, it would be difficult to make sophisticated arguments regarding law written in English in a different language, particularly when one's legal training was in English. One possibility, then, is to allow attorneys to argue issues of law in English and issues of fact in Spanish during Spanish-language proceedings. Not only would this be difficult to regulate, but

---

[185] Vargas, interview.

this option would require that the court reporter be bilingual for all Spanish language proceedings.

There may also be some value in having legal issues raised in court in Spanish. For instance, objections may be some may act as signals to the witness or party that is testifying. Furthermore, many of the more common objections are fairly easy to translate, and the courts can create a glossary of objections which all lawyers and judges will use in making, responding to, and deciding the outcome of the objection. Where an attorney must call upon a term of art, it seems appropriate to use the term of art in English. After all, the average English speaker will not be familiar with the specific and particular meaning assigned to legal terms of art, which act as shorthand for sometimes complex legal concepts. For instance, translating the phrase "reasonable person," which is employed to determine whether a defendant was acting negligently in tort cases, into Spanish may prove problematic. A first-year law student will spend multiple classroom hours on the legal concept of the "reasonable person" and its place within the framework of tort law. The judge explained that the literal Spanish translation of this term would not communicate its rich and complex meaning in the context of tort litigation. Then again, for someone untrained in U.S. tort law, the English phrase "reasonable person" also does not communicate its full meaning. Therefore, it does not significantly prejudice the parties who agreed to a Spanish-language proceeding if the attorneys use English-language terms of art. Moreover, judicial proceedings are primarily a persuasive presentation of the evidence. The bulk of the legal argument should take place in complaints, answers, briefs, and other pleadings. Again, the permissible use of English terms of art would not include routine language used to introduce evidence or make objections, as these can be translated once and a glossary of these terms made widely available.

Resolving the Problem of Appeal

Finally, we must deal with the issue of appeal. As this proposal is addressed to courts of first instance in Hidalgo County as a local solution to language access problems, the court to which appeals would be made from Hidalgo County would conduct the appeal in English. This creates the interesting problem of appealing a decision on the basis of a bilingual record, in which some filings with the court are in English, but the transcript of the proceedings and evidence is in Spanish. In order for the appeal to go forward, the Spanish-language portion of the record will need to be translated. This translation can be done shortly after the completion of the trial, allowing the attorneys to object to the translation at that point, or the translation can be done when the decision to appeal is made, again giving the attorneys a reasonable period within which to object to the translation. This second option may be preferable because the cost of translation would only be incurred in those cases in which a party decided to appeal the outcome of a proceeding. Translation of Spanish language records for the purpose of appeal is more efficient than the use of interpreters as it requires fewer personnel, because translations will only be required when a decision is appealed and there are not the kind of problems with scheduling and availability that are associated with interpreters who must be present during proceedings. The personnel that will be needed do not need the same level as training as licensed court interpreters.[186] And, when performed by a competent translator, is more likely to be accurate than interpretation because it allows time for thoughtful consideration and the use of dictionaries.

---

[186] In European linguistics schools, one learns to translation before entering training to become an interpreter. Vargas, interview. Also, this paragraph assumes that translators would be paid at state expense.

Now that the preliminary outline of the proposal has been drawn out, we will move to a discussion of how to possible methods of implementation of these opt-in civil proceedings.

Chapter 8: Implementation

As immigration and language issues can become politically heated topics, the best way to implement these procedures may be without the legislative process. This could be accomplished by using the court's administrative rules are used to establish the procedure for a Spanish proceeding.[187] These local rules generally decide administrative issues, such as the final deadline for submission of documents before a trial, or the means by which a matter can be transferred to a different court.

According to Rule 10 of the Texas Rules of Judicial Administration, counties may author their own local rules as long as they are approved by the Texas Supreme Court pursuant to Rule 3a of the Texas Rules of Civil Procedure. Through its local rules, the Hidalgo County court system could simply indicate how parties ought to request a proceeding in Spanish, and how judges ought to respond to these requests, and it would then be possible to have a Spanish language proceeding without needing to go through the state or local legislature.

The new implementing rules would need the approval of the Texas Supreme Court before becoming effective, but this may be more feasible than achieving Spanish-language proceedings through the legislative process, as this approval is probably less likely to draw political attention.[188]

Applying grant-provided funds to the project would makes its implementation more attractive. Other novel and localized language access programs for courts have received federal grant money from various agencies. Texas courts have received federal

---

[187] Crane, interview. While Judge Crane alerted me to this possibility, he was not doing so as a way of endorsing the implementation of Spanish-language proceedings.

[188] Rule 3a: Local Rules, Texas Rules of Civil Procedure, Supreme Court of Texas.

money for language access programs, as well. For instance, the Department of Justice supported the Texas Remote Interpreter Project through a grant awarded by its Office on Violence Against Women. This grant established a program for district and county-level courts in which the services of a licensed Spanish-English interpreter would be provided via telephone, internet, or computer teleconferencing for all civil domestic violence cases. Priority for receipt of these services was given to rural courts.[189] A federal grant from an office of the DOJ may be a possible way to gather the funds needed to implement this proposal.

As another possibility, a legal aid organization could seek funding to develop the precise logistics of implementing Spanish-language proceedings and apply for a grant to do so. For instance, the Legal Services Corporation (LSC), a federal agency that works to serve for equal access to justice by serving those with limited resources, has provided multiple grants through Technology Initiative Grants (TIG) to fund local projects undertaken by legal aid groups that are attempting to improve the language access program in their courts. Before awarding these grants, the LSC will approach program using technology to assist low-income LEP persons access justice. The Texas Rio Grande Legal Aid organization, for instance, received over $100,000 in TIG money to create "culturally and linguistically appropriate bilingual court order packages for self-represented clients." [190]

The financial resources needed to create and launch a procedure for Spanish-language proceedings would not be tremendous. Funds would be required to draft the implementing local rules, and perhaps to defend them to the Texas Supreme Court,

---

[189] Office of Court Administration, "Court Guide to Using the Texas Remote Interpreter Project," revised September, 2011, accessed May 4, 2012, *www.txcourts.gov/oca/DVRA/pdf/CourtGuide.pdf*.

[190] "Technology Initiative Grants 2009 Cycle," Legal Services Corporation, accessed May 4, 2012, http://tig.lsc.gov/sites/default/files/TIG/2009TIGAwards%5B1%5D.pdf.new

though legal aid organizations may be willing to donate their efforts to do this. Furthermore, the court will need to prepare a glossary of legal terminology used in making objections and introducing evidence. Educational courses that teach attorneys how to inform their clients of the ability to request a proceeding in Spanish, how to request that proceeding, appeals procedures, and unique ethical implications of working in Spanish, should be designed and organized. Similar courses could be designed for judges. Perhaps the most significant cost Spanish-language proceedings will create is the recruitment and payment of additional court staff in the form of translators, language assistants, and court reporters. It may be possible to use existing court staff as language assistants, but this should be investigated. Similarly, some court reporters already at the court may be able to create Spanish records, but is is likely that the state will need to hire at least some new court reporters who are able to transcribe a Spanish-language proceedings. Alternatively, the courts may install a system of audio recording, and then hire court reporters to transcribe testimony whenever it is required for issues of appeal.[191] Finally, contracting with a professional translation agency may be the most cost effective method of procuring translation services when they are necessary.

If the proposal is met with significant resistance, perhaps limiting its scope would make the project more feasible. For instance, Spanish language proceedings could be made available only to resolve family law issues, such as divorce or custody disputes. Or, it could be further limited to civil cases involving domestic violence or sexual assault. Alternatively, Spanish-language proceedings could be made available only if parties are willing to waive their right to appeal, in which case the court would not need to make a record of the proceeding.

---

[191] This is how the federal district court seated in Hidalgo County maintains its record. Crane, interview.

Conclusion & Recommendations

Recognizing the unlikeliness that Spanish-language proceedings will be implemented in any formal way in Hidalgo County, the principal objective of this paper is to illuminate potential areas of improvement to the current language access practices in Hidalgo County, as well as the laws shaping these practices. Moreover, it is hoped that the proposal also serves to recalibrate the conceptualization of language access. Specifically, the treatment of non-English evidence, whether documents or testimony, should reflect the court's concern with accuracy, integrity, and justice. Moreover, the health of our civil and judicial systems rely on the participation of the communities they serve. One must question how one can meaningfully participate when the language of the institutions is not the language of daily life. The difference between the percentage of residents of Hidalgo County who speak Spanish, and the percentage of the U.S. population able to speak English very at well, which includes those who speak a language other than English at home, is only about seven percent.[192] The existence of functional multilingual courts combined with the high proportion of Spanish-speakers in Hidalgo County undermines the dominance of English in the county's courts.

Recommendations

Over the course of the paper, certain problems with the availability and quality of language access services emerged as requiring attention and improvement. Even if the proposal is not adopted or even discussed, these issues should be addressed and resolved.

First, the county's staff interpreters should be licensed. Moreover, they should not

---

[192] 84.8% of the population of Hidalgo County over the age of five speak Spanish at home vs. 92% of the population of the United States over the age of five is able to speak English at least very well. U.S. Census Bureau. *American Community Survey, 2006-2010: Selected Social Characteristics in the United States for Hidalgo County, Texas* (Washington, DC, 2010).;U.S. Census Bureau. *Selected Social Characteristics in the United States: 2010 American Community Survey 1-Year Estimates* (Washington, DC, 2010).

act simultaneously as interpreter and bailiff, or interpreter and court reporter, which is true whether or not Hidalgo County licenses its staff interpreters. Interpreting requires one's full attention, as do the jobs of bailiff and court reporter. Interpreters should also be required to take breaks every thirty minutes to one hour. If Hidalgo County does not license its staff interpreters, it should at least prohibit these staff interpreters from acting as a court interpreter while also performing another task. If the regular bailiff needs to be used as an interpreter, another bailiff should be brought in to act as a bailiff. Moreover, it may be helpful to administer an oath in which the interpreter pledges to act neutrally and accurately, in order to impress upon the court the gravity and importance of the interpreter's role.[193]

Perhaps licensing interpreters would reduce the need for attorneys to both monitor interpretation and act as counsel and advocate, though this is unlikely, as the interviews suggest that this vigilance occurs whether the interpreter is licensed or not. This is a second area that is in dire need of attention. Attorneys should not serve as both interpreters and advocates. Eliminating this problem would require that the state either provide proceedings interpreters or prohibit attorneys from attending proceedings where there will be Spanish testimony alone, which would significantly raise the cost for the litigant. It is unlikely that courts will soon provide proceedings interpreters at no cost to parties, especially for civil litigation, and requiring a party to hire a proceedings interpreter may create a larger obstacle to accessing justice than does an attorney who is trying to juggle two tasks at once. Another solution is to offer some relief from the need to object when the error is made by creating a record in Spanish.

---

[193] The National Consortium of State Courts endorses interpreters take an oath before commencing their duties. William Hewitt, "Court Interpretation: Model and Guides for Policy and Practice in the State Courts," (National Consortium for State Courts, 1995): 128-129.

For the integrity of the justice system, adversarial system, and in order to create a record that accurately reflects what takes place during proceedings, Hidalgo County should keep records in Spanish. This could be done by creating and archiving digital recordings or by requiring court reporters to be bilingual and to keep a record of everything said in Spanish and English.

Finally, there should be some regulation of the translation of documents. The quality of translation of written evidence is as important for the accuracy of evidence as is the quality of interpretation.

Most of these recommendations extend to any court that serves significant proportions of LEP persons. Significantly, many of the people interviewed indicated that the bilingualism of judges and attorneys allowed the language services provided for by law adequate. This suggests that testimony interpreters would not be adequate if the attorneys, judges, and jury did not understand the language of the LEP litigant. This has important implications for communities that do not have a high proportion of lawyers and judges who speak languages other than English proficiently, which is likely the case for most parts of the United States.

Areas for Further Research

Many topics touched on in this paper deserve further research and additional scholarly attention. The process of collaborative interpretation is such an area, as it demonstrates a product of bilingual communities that may be of interest for linguists and social scientists, and reveals aspects of courtroom interpretation, including the fact that interpretation cannot be expected to be a mechanical process.

Furthermore, tensions created in the attorney-client relationship as a result of language differences also deserves further study, as an open relationship between a litigant and her attorney is essential in our adversarial justice system. In speaking with the

interpreter who alerted me to this potential problem, I got the sense that this tension was not the result of language alone, but resulted from a combination of language difference and perceived social differences. In o

Finally, the divisions within the Mexican-American community in Hidalgo County, and along the U.S.-Mexico border generally, is an interesting area of research for those interested in group identity, language as an aspect of identity, and patterns of immigration and integration. For instance, it may be interesting to see if the division is drawn between generations of migrants, such that perhaps second and third generation residents identify themselves as belonging to a different community, or if the communities are divided based on when one's family first arrived in the Valley, such the division occurs at the Mexican-American War, World War II, the enactment of NAFTA, or some other date.

A Mexican-American judge I interviewed recalled a quote from the movie *Selena* in which Selena's father Abraham says "We have to be more Mexican than the Mexicans and more American than the Americans, both at the same time! It's exhausting!"[194] Perhaps the implementation of Spanish-language judicial proceedings would allow Mexican-American individuals and communities a way to express themselves as Mexican-American.

---

[194] Garza, interview; *Selena*, directed by Gregory Nava (Corpus Christi, TX: Q Productions: 1997).

References

Abel, Laura. "Language Access in State Courts." Brennan Center for Justice. July 4, 2009. Accessed May 4, 2012. http://www.brennancenter.org/content/resource/language_access_in_state_courts.

Alvarado, Carol. Bill Analysis for House Bill 4445, 81st Cong., regular sess., May 21, 2009. Accessed May 4, 2012.

American Bar Association. "About Us." Accessed May 4, 2012. http://www.americanbar.org/utility/about_the_aba.html.

------. "History." American Bar Association. Accessed May 4, 2012. http://www.americanbar.org/utility/about_the_aba/history.html

------. *Standards for Language Access in Courts*. Adopted February 6, 2012. Accessed May 4, 2012. http://www.abanow.org/wordpress/wp-content/files_flutter/1326398698_31_1_1_9_resolution_summary.pdf.

American Bar Association Standing Committee on Legal Aid and Indigent Defendants. Resolution to Adopt Proposed ABA Standards for Language Access in State Courts. HoD Resolution 113 (February 6, 2012).

Ardila, Alfredo. "Spanglish: An Anglicized Spanish Dialect." Hispanic Journal of Behavioural Sciences 27.1 (2005): 60-81.

Benmaman, Virginia. "Interpreter Issues on Appeal." *PROTEUS* 9.4 (2000).

Bhattacharjee, Yudhijit. "Why Bilinguals are Smarter," *New York Times*, March 17, 2012, New York edition, SR12.

Freeman, Andrea. "Linguistic Colonialism: Law, Independence, and Language Rights in Puerto Rico," *Temple Political & Civil Rights Law Review* 20 (2010): 179-203.

Friedlander, Merrily A. Chief, Department of Justice Civil Rights Division of Coordination & Review Section, to Lilia G. Judson, Executive Director, Indiana Supreme Court Division of State Court Administration, Washington, D.C., Feburary 4, 2009.

Gilman, Denise. "A 'Bilingual' Approach to Language Rights: How Dialogue Between U.S. and International Human Rights Law May Improve the Language Rights Framework." *Harvard Human Rights Journal* 24 (2011): 101-169.

Grabau, Charles M., and Llewellyn Joseph Gibbons. "Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation." *New England Law Review* 30 (1996): 227-374.

Grin, François. "Language Policy in Multilingual Switzerland: Overview and Recent Developments" (paper presented at Cicle de conferències sobre política lingüística Direcció general de política lingüística, Barcelona, December 4, 1998). Accessed May 4, 2012. https://docs.google.com/viewer?a=v&pid=gmail&attid=0.2&thid=136bd4c829eda13a&mt=application/pdf&url=https://mail.google.com/mail/u/0/?ui%3D2%26ik%3D18d6f325f2%26view%3Datt%26th%3D136bd4c829eda13a%26attid%3D0.2%26disp%3Dsafe%26realattid%3Df_h143r1ib1%26zw&sig=AHIEtbSbEKl7_hHdfsvdJtay5umgjAQlVg.

Gonzales Rose, Jasmine B. "The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico." *Harvard Civil Rights-Civil Liberties Law Review* 46 (2011): 497-549.

Grosjean, Francois. "The Day the Supreme Court Ruled on the Bilingual Mind," *Psychology Today*, February 7, 2011. Accessed March 10, 2012. www.psychologytoday.com/print/52437.

Hewitt, William. "Court Interpretation: Model and Guides for Policy and Practice in the State Courts." National Consortium for State Courts, 1995.

Hudon, Marie-Éve. "Bilingualism in the Federal Courts." Ottawa: Library of Parliament, 2011.

Kymlicka, Will. *Multicultural Citizenship: A LIberal Theory of Multicultural Rights*. Oxford: Oxford University Press, 1995.

Legal Services Corporation."Technology Initiative Grants 2009 Cycle." Accessed May 4, 2012. http://tig.lsc.gov/sites/default/files/TIG/2009TIGAwards%5B1%5D.pdf.new

McRae, Kenneth D.*Conflict and Compromise in Multilingual Societies, Vol. 2: Belgium*. Ontario: Wilfrid Laurier University Press, 1986.

------. *Conflict and Compromise in Multilingual Societies: Switzerland*. Ontario: Wilfrid Laurier University Press, 1983.

Miller, Maxwell Alan, Lynn W. Davis, et al. "Finding Justice in Translation: American Jurisprudence Affecting DUe Process for People with Limited English Proficiency Together with Practical Suggestions." Harvard Latino Law REview 14 (2011): 117-154.

Office of Court Administration. "Texas Courts Online: County Courts." Last modified February 6, 2012. Accessed May 2, 2012. http://www.courts.state.tx.us/courts/county.aspl.

Office of the Texas Attorney General. Opinion No. JC-0584. November 26, 2002. Accessed May 4, 2012.

Perea, Juan F. "Los Olvidados: On the Making of Invisible People," *New York University Law Review* 70 (1995): 965-990.

Perez, Thomas E., Assistant Attorney General, Letter of Memorandum to Chief Justice/ State Court Administrators. Washington, D.C., August 16, 2010. http://www.lep.gov/guidance/guidance_DOJ_Guidance.html.

Pousada, Alicia. "The Mandatory Use of English in the Federal Court of Puerto Rico." *CENTRO Journal* 21.1 (2008): 2-14.

Procaccini, Daniel J. "What We Have Here is a Failure to Communicate: An Approach for Evaluating Credibility in America's Multilingual Courtrooms," *Boston College Third World Law Journal* 31 (2011): 163-192.

Raymond Rocco, "Membership, Strategies of Containment, and the Public Sphere in Latino Communities," in *Latinos and Citizenship: The Dilemma of Belonging*, edited by Suzanne Oboler, 301-328. New York: Palgrave MacMillan, 2006.

Richter, Dagmar. "Language Law and Protection of Mintorities in Federal Switzerland (English Summary)." Beiträge zum Auslandischen Öffentlichen Recht und Völkerrecht 158 (2005).

Rio Grande Valley Chamber of Commerce. "About the Valley." Accessed May 3, 2012. http://valleychamber.com/pages/AbouttheValley.

Rodriguez, Christina M. "Language and Participation." *California Law Review* 94 (2006): 687-767.

Salinas, Lupe S., and Janelle Martinez. "The Right to Confrontation Compromised: Monolingual Jurists Subjectively Assessing the English-Language Abilities of Spanish-Dominant Accused." *American University Journal of Gender, Social Policy and the Law* 18 (2009): 543-561.

Seelye, Katherine Q., and Ashley Parker. "For Santorum, Trying to Tamp Down a Firestorm Over Puerto Rico Remarks." *New York Times,* March 15, 2012. Accessed May 3, 2012. http://www.nytimes.com/2012/03/16/us/politics/santorum-addresses-firestorm-over-puerto-rico-remarks.html.

Selena. directed by Gregory Nava. Corpus Christi, TX: Q Productions, 1997.

Texas Association of Judicial Interpreters and Translators. "Code of Ethics of the Texas Association of Judicial Interpreters & Translators." Accessed May 4, 2012, http://www.tajit.org/code-of-ethics.

Texas Legislature. House of Representatives. *An Act Relating to the Licensing and Appointment of Court Interpreters*. HB 4445 (enrolled version), 81st Cong., regular sess. Accessed May 4, 2012, http://www.legis.state.tx.us/tlodocs/81R/billtext/html/HB04445F.htm.

U.S. Census Bureau. *Selected Social Characteristics in the United States: American Community Survey 5-Year Estimates for Hidalgo County, Texas, 2006-2010*. Washington, D.C.: Government Printing Office: 2010.

------. *State and County QuickFacts: Hidalgo County, Texas, 2010*. Washington, D.C.: Government Printing Office, 2012.

------. *State and County QuickFacts: Cameron County, Texas, 2010*. Washington, D.C.: Government Printing Office, 2012.

------. *Selected Social Characteristics in the United States: 2010 American Community Survey 1-Year Estimates*. Washington, D.C.: Government Printing Office, 2010.

U.S. National Archives and Records Administration. Code of Federal Regulations. Title 7. Department of Justice. 2002.

------. Executive Order 13166. Code of Federal Regulations, title 3, sec. 13116.

Vigness, David M., and Mark Odintz. "RIO GRANDE VALLEY." Handbook of Texas Online. Accessed May 3, 2012, http://www.tshaonline.org/handbook/online/articles/ryr01;