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Session 1
Assisting the Pro Se Litigant on Appeal

Shon Hopwood, Associate Professor of Law,
Georgetown University Law Center

*Opperman Speaker*

Sunday, July 29th, 2018
4:00 p.m. – 5:30 p.m.
Catalina Ballroom
Shon Hopwood is an Associate Professor of Law at Georgetown University Law Center. Shon’s unusual legal journey began not at law school, but federal prison, where he learned to write briefs for other prisoners while serving a 12-year sentence for robbing banks. Two petitions for certiorari he prepared were later granted review by the United States Supreme Court, and he won cases for other prisoners in federal courts across the country. Shon’s story has been featured in the New York Times, Washington Post, The New Yorker, NPR, and on 60 Minutes.

Shon received a J.D. from the University of Washington School of Law as a Gates Public Service Law Scholar. He clerked for Judge Janice Rogers Brown at the United States Court of Appeals for the District of Columbia Circuit. He then served as a Teaching Fellow at the Georgetown University Law Center’s Appellate Litigation Program, where he litigated criminal, immigration, civil rights, and federal statutory cases in federal courts of appeals.

Shon co-wrote a memoir entitled *Law Man: Memoir of a Jailhouse Lawyer*, and his scholarship on courts and the criminal justice system has been published in the Harvard Civil Rights-Civil Liberties, Fordham, Washington, and American Criminal Law Review as well as Georgetown Law Journal’s Annual Review of Criminal Procedure. He serves on the Board of Directors for Families Against Mandatory Minimums and is the co-founder of Prison Professors L.L.C., a company dedicated to teaching prisoners how to transform their lives from the inside. He frequently speaks about the vital need for criminal justice reform.
THE GROWING CHALLENGE OF PRO SE LITIGATION

by

Stephan Landsman*

This Article addresses the already substantial and rapidly growing docket of pro se cases in both state and federal courts. Despite the long-standing recognition of the right to self-representation in the Anglo-American legal tradition, its effects on the legal system are still poorly understood. Pro se cases pose inherent problems: they can cause delays, increase administrative costs, undermine the judges' ability to maintain impartiality and can leave the often unsuccessful litigant feeling as though she has been treated unfairly. These problems are likely to worsen since pro se cases already account for approximately forty-three percent of all appeals in the federal courts of appeal each year. Around fifty-four percent of these filings involve petitions brought by prisoners, but more than 10,000 are non-prisoner appeals.

Two broad factors may be responsible for the large volume and growth of pro se litigation. First, multiple trends have made legal services increasingly unavailable at an affordable price. The legal profession has tilted away from representing individuals and towards representing businesses. Federal support for legal services for the poor has declined by a third over the last twenty years. Tort reform has set caps on damages awards thereby reducing available contingent fees, and the power of the courts to require the provision of counsel has been narrowed. Second, American culture has long celebrated the notion of the “noble amateur.” Do-it-yourself legal guides are a thriving industry, providing self-help manuals for everything from wills to divorces. Many laypeople believe that with the right guidebook they can master whatever legal challenge they face. At the same time the legal community’s investment in the adversarial method has delayed reform. The organized bar has a long history of protecting its monopoly on the practice of law and has resisted measures that could broaden competition to provide legal services.

The Author advocates the adoption of a set of initiatives guided by the goal of giving pro se litigants a genuine opportunity to voice their views to a responsive decision maker. Courts should adopt practices that are transparent and acknowledge both sides. In many cases, however, there is no substitute for legal representation. Policy-makers should consider more robust use of the appointment authority along with the creation and maintenance of a pool of lawyers willing to accept appointment.

* Robert A. Clifford Professor of Tort Law and Social Policy at DePaul University College of Law.
I. INTRODUCTION—THE GENESIS OF A PROBLEM

In 1940, the world was thrilled by an innovative movie from Walt Disney Studios that presented a series of cartoon interpretations of great classical music scores. For the film entitled *Fantasia*, the Disney artists paired works by Bach, Tchaikovsky, Dukas, Stravinsky, and Beethoven, among others, with animated material. One of my favorites is the nine-minute Dukas segment in which Mickey Mouse is presented as a hapless sorcerer's apprentice who gets into trouble by using his master's magic to enchant a broomstick into filling a cistern with water for him. Mickey discovers, too late, that he does not know how to stop the broomstick's ever more manic efforts. As the floodwaters start to rise, Mickey takes an ax to his nemesis. This proves ill-advised as the number of enchanted broomsticks multiplies and the torrent of water grows. Total disaster is only averted when Mickey's master returns, commands the waters to recede and restores order.

Today, America's courts appear to be facing an inexorably rising tide of pro se litigation. We have neither enchantment to blame for our dilemma nor a magician to set things right. The purpose of this Article is to explore how we came to face so substantial a pro se challenge and what options we might consider in addressing it. At the outset, it should be noted that such a task is seriously complicated by the shortage of data about pro se litigation. It is only in the last few years that we have even begun to consider the matter in a rigorous fashion. Presently, we have only the most fragmentary information about pro se trends and those who occupy the ranks of the self-represented.

The bits and pieces we have accumulated, however, seem to point toward a burgeoning pro se caseload. Turning first to the state courts, much of what we know is based on studies of specialized courts, most particularly those dealing with domestic relations. The National Center
for State Courts found, based on 1991–1992 data, that in eighteen percent of domestic relations cases neither side had counsel and that in only twenty-eight percent of cases were both sides represented.\(^4\) Those numbers are comparable to the figures reported in a number of states. Based on data from the early 1990s, it has been determined that sixty-seven percent of domestic relations court litigants on one side or the other proceeded without counsel in California.\(^5\) In Maricopa County, Arizona, a pro se litigant appeared in eighty-eight percent of divorce cases in 1990. In 1985 the figure was forty-seven percent, and in 1980 it was twenty-four percent.\(^6\) In other words, over the course of ten years the percentage of pro se litigants virtually quadrupled.

Domestic relation courts are far from unique. In Montana’s civil courts in 2004, 9.4 percent of all non-prisoner civil filings came from self-represented litigants.\(^7\) In New Hampshire in 2004, eighty-five percent of district court filings and forty-eight percent of superior court filings were by unrepresented litigants.\(^8\) When New York University social scientist Tom Tyler polled 1575 Chicago residents for a 2006 book about obedience to the law, 147 said they had recent experience as litigants and seventy-one percent of them did not have counsel.\(^9\) A California court survey in 2005 asked 2414 residents whether “the cost of hiring an attorney (kept/might keep) you from going to court.”\(^10\) An astounding sixty-nine percent agreed with this proposition.

The situation in the federal courts appears to be similar although, again, the data are patchy and only occasionally longitudinal. A Federal Judicial Center Study of ten district courts between 1991 and 1994 reported that twenty-one percent of all filings were by pro se litigants and


\(^5\) Meeting the Challenge, supra note 4, at 8.

\(^6\) Id. at 8–9.

\(^7\) Nina Ingwer VanWormer, Note, Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon, 60 Vand. L. Rev. 983, 990 (2007). In conformity with the general approach in the field, I will not focus on prisoner litigants. For an excellent analysis of prisoner litigation, see Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555 (2003).

\(^8\) VanWormer, supra note 7, at 990.


\(^10\) See Tom R. Tyler & Nourit Zimerman, The Psychological Challenges of Pro Se Litigation 33 (July 14, 2008) (unpublished draft manuscript, on file with author). These data do not indicate what percentage of Californians have proceeded pro se, but suggest an inclination to do so among the population of the state.

\(^11\) Id.
thirty-seven percent of these were non-prisoner cases. 12 Perhaps the best snapshot of district court pro se litigation was provided by a student note in the 1996–1997 volume of the Hastings Law Journal which analyzed 1993 San Francisco filings in the Northern District of California. 13 The note identified 683 non-prisoner pro se cases filed in 1993 and closed by the end of 1995. 14 Of these, a sample of 227 was closely scrutinized. 15 In fifty-two percent of the sample there was a pro se plaintiff. 16 Surprisingly, seventy percent of pro se litigants did not seek in forma pauperis status under 28 U.S.C. § 1915. 17 Only 8.5 percent of self-represented litigants filed a request for the appointment of counsel, 18 and about eight percent actually got counsel. 19 The success rate for pro se litigants in San Francisco in 1993 was not very high, 76.2 percent of them had judgment entered against them. 20 Pro se litigants won only 3.5 percent of their cases while another 20.5 percent were settled or transferred to another forum. 21 Among the sampled cases, pro se litigants lost on the basis of a preliminary motion to dismiss fifty-six percent of the time. 22 A total of 67 of the 227 studied cases involved pro se civil rights claims. 23 Other legal areas in which there were ten or more claims included contract, labor, social security, and tort cases. 24 On average, in a number of these categories, pro se cases had more docket entries and took longer to resolve than typical non-pro-se filings. 25

This snapshot is skewed by the vagaries of the single city and district in which it was conducted, by the use of an arguably non-random sample of 227 of the 687 cases, 26 and by the exclusion of cases that had not closed by February of 1996. 27 This last consideration is especially significant because it means that the longest-lived pro se cases were not included in the sample, thereby driving down case duration statistics and lawsuit survival rates and, in all likelihood, understating win and/or

14 There were actually a total of 725 non-prisoner pro se cases, but 42 had not closed by February of 1996, the termination date of the study. Id. at 848 n.41.
15 Id. at 824.
16 Id. at 823.
17 Id.
18 Id.
19 Id. at 834.
20 Id.
21 Id. at 834–35.
22 Id. at 835.
23 Id. at 832.
24 Id.
25 Id. at 837.
26 Id. at 847.
27 See supra note 14.
settlement percentages as well. It is troubling that we have little more than a single student piece to help us understand the pro se experience in federal district court.

In the federal courts of appeal, we have greater information because the Administrative Office of the United States Courts has been gathering data about self-represented litigants for more than a decade. What the data indicates for 2006 and 2007 is that pro se filings in the courts of appeal are substantial—approximately forty-three percent of all appeals. Around fifty-four percent of these filings involve petitions brought by prisoners. This still leaves a very substantial number of non-prisoner pro se appeals—over 10,000 per year.

The sorts of factors that may be responsible for the large volume and apparent growth of pro se litigation are diverse but may be grouped under two broad headings: the first having to do with the operation of the justice system and the second arising outside the system in society at large. At the very top of almost every list of the justice-system-based causes is the unavailability of legal services at an affordable price. Virtually every study and report about the pro se issue makes this point. As already noted, sixty-nine percent of Californians polled in 2005 saw the cost of retaining counsel as a significant deterrent to "going to court" at all rather than proceeding unaided. Their perception about the difficulty of finding counsel to assist them is borne out by changes in the legal profession that have tilted the market away from individuals toward corporate clients. Professor Marc Galanter has provided some statistics concerning the shift in the legal profession. In 1967, fifty-five percent of lawyer time was devoted to individuals and thirty-nine percent to businesses. By 1992, these numbers had been reversed with individuals getting forty percent of ‘lawyers’ attention while businesses commanded fifty-one percent. In the second of the famous Heinz and Laumann studies of the Chicago bar (focusing on 1995) the distribution is even

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29 Id.
30 Id.
31 See, e.g., MEETING THE CHALLENGE, supra note 4, at 10; NINTH CIRCUIT JUDICIAL COUNCIL TASK FORCE ON SELF-REPRESENTED LITIGANTS, FINAL REPORT 26 (2005) [hereinafter NINTH CIRCUIT FINAL REPORT].
35 Id.
more lopsided. Business gets sixty-four percent of lawyer effort while individuals only get twenty-nine percent.\textsuperscript{36}

That many people with legal needs are too poor to hire an attorney has long been acknowledged. Despite this, over the past 20 years the amount provided by the federal government to support legal services for the poor has declined by a third.\textsuperscript{37} Today it is generally agreed that four out of five poor people cannot get their legal needs met and that the same difficulty affects three out of five members of the middle class.\textsuperscript{38}

Moreover, two litigation-based methods of securing counsel have been substantially narrowed during the same period. In a number of states, contingent fees have been reduced by the imposition of caps on pain and suffering awards, as well as other sorts of damages.\textsuperscript{39} The upshot in places like California\textsuperscript{40} and Texas\textsuperscript{41} has been the withdrawal of counsel from fields like medical malpractice despite the existence of sound and often poignant claims.\textsuperscript{42} The power of the courts to recognize the need for and require the provision of counsel has also been substantially narrowed. In \textit{Lassiter v. Department of Social Services of Durham County}, the Supreme Court held that a mother facing the termination of parental rights was not constitutionally entitled to the appointment of counsel.\textsuperscript{43} That decision requires case-by-case consideration of due process claims for appointment and indicates the Supreme Court’s disinclination to require appointment.\textsuperscript{44} The effect of all these developments has been to place an attorney out of reach for a substantial segment of the population—even when potential litigants have meritorious claims or an urgent need for assistance.

Economic and doctrinal barriers are not all that explains why a growing number of citizens have turned to self-representation. One of the most provocative pieces of information to come out of the \textit{Hastings}

\textsuperscript{40} Id. at 1279–80. See also Nicholas M. Pace et al., \textit{Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA 30–33} (Rand 2004).
\textsuperscript{42} See Finley, \textit{supra} note 39, at 1279–80.
\textsuperscript{43} 452 U.S. 18, 33 (1981).
\textsuperscript{44} \textit{John E. Nowak & Ronald D. Rotunda, Constitutional Law} 639 n.42 (7th ed. 2004).
study is that seventy percent of pro se litigants in the Northern District of California sample did not seek to proceed "in forma pauperis." There may be a number of overlapping reasons for this (including the presence of a large number of lawyers facing disbarment in the sample) but the fact still remains that a sizeable body of pro se litigants was able to go forward without financial assistance. Anecdotal observation of the presence among pro se litigants of a number of individuals who can afford counsel but choose not to hire a lawyer has been made in both the law review literature and case law. The Hastings study noted that even when "in forma pauperis" status was sought, the court denied it about forty percent of the time, again, at least implicitly, signaling the availability of resources.

The reasons litigants may go forward alone vary. The citizenry of the United States is fairly well educated. In light of this basic level of competence, lawyers, reportedly, have felt it appropriate to advise certain potential litigants that their problem is “simple” and that they can handle it on their own. In an Idaho study, thirty-one percent of pro se litigants decided to go pro se after consulting counsel. The advice to do it on your own plays into two popular notions in American culture; that the “Home Depot” do-it-yourself method applies to a lot more than house repairs and that in the internet era, the “noble amateur” can do just about anything as well as the expert. The “Home Depot” attitude has produced a thriving industry of publishers providing self-help manuals and computer training programs for everything from wills to divorce.

When a leading legal manual publisher, Nolo Press, was challenged by the Texas Bar because of the alleged unauthorized practice of law, not only did it succeed in overcoming regulator objections to self-help materials, but the matter provoked the Texas Legislature to pass a statute declaring:

‘practice of law’ does not include the design, creation, publication, distribution, display, or sale, including publication, distribution,

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45 See supra note 17 and accompanying text.
46 See, e.g., Drew A. Swank, The Pro Se Phenomenon, 19 BYU J. PUB. L. 373, 378 (2005). “In one survey, forty-five percent of pro se litigants stated that they chose to represent themselves because their case was simple . . . . Only thirty-one percent stated they were pro se because they could not afford to retain counsel. Almost half indicated that they had the necessary funds to hire an attorney, but chose not to.” Id.
47 See, e.g., Bauer v. Comm’r, 97 F.3d 45, 49 (4th Cir. 1996).
48 See Park, supra note 13, at 831. “[T]he overwhelming majority of pro se litigants, 72%, were not legally ‘indigent’ . . . .” Id.
49 In Defense of Rules, supra note 37, at 1575.
53 In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768, 769 (Tex. 1999).
display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.\textsuperscript{54}

The reaction of the Texas legislature speaks volumes about social and political attitudes toward the pro se decision. With respect to the internet, it has been observed that devotees are inclined to rail against “the dictatorship of expertise” and extol the virtues of the “noble amateur” in all sorts of information-based contexts.\textsuperscript{55} It seems likely that these views are connected with the choice of at least some self-represented litigants to do their own legal work.

Popular entertainment has emphasized similar themes. Television shows featuring charismatic “kadi” judges\textsuperscript{56} have become wildly popular. The People’s Court and Judge Judy vie on a daily basis with each other and similar shows for viewers’ attention. Their not too subtle message is that the wise (and wisecracking) judge, with the assistance of the litigants, can sort out any legal problem. Counsel is never in evidence on these shows and things still turn out just fine. This message, in turn, plays into a widely held and long established set of anti-lawyer attitudes among the general public. Professor Galanter has collected jokes about lawyers into a brilliant volume.\textsuperscript{57} That volume suggests how intense anti-lawyer feeling has become. It also makes clear that the feeling is often translated into a go-it-alone attitude. Consider the following joke reproduced by Galanter:

“Have you a lawyer?” asked the judge of a young man brought before him.
“No, sir,” was the answer.
“Well, don’t you think you had better have one?” inquired His Honor.
“No, sir,” said the youth. “I don’t need one. I am going to tell the truth.”\textsuperscript{58}

From the jokester’s point of view only liars need lawyers—representatives whose stock in trade seems to be untruthfulness. Americans have been saying such things about attorneys since the founding of the Republic.\textsuperscript{59} Many have concluded that we have returned,\textsuperscript{54,55}

\textsuperscript{54} TEX. GOV’T CODE ANN. § 81.101 (Vernon 2005).
\textsuperscript{55} See KEEN, supra note 51.
\textsuperscript{56} See MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 976–78 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (defining “kadi” justice as unsystematic, lacking governing principles, and offering inconsistent results). See also Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) (“This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.”).
\textsuperscript{57} See GALANTER, supra note 34.
\textsuperscript{58} Id. at 34.
\textsuperscript{59} See ANTON-HERMANN CHROUST, 2 THE RISE OF THE LEGAL PROFESSION IN AMERICA 16–17 (1965), quoted in GALANTER, supra note 34, at 4.
with a vengeance, to our lawyer-bashing ways. The logical response is, if at all possible, to avoid hiring an attorney. While more might be said about the cultural underpinnings of pro se thinking, these suggestions should suffice to indicate that such notions are deeply anchored in America’s current social outlook and prior history.

II. WHY WE HAVE DELAYED RESPONDING

The pro se tide has been rising for some time but we, like the slumbering Mickey in the *Sorcerer’s Apprentice*, have taken a long time to notice. Our tardy response is understandable both because of our social attitudes and a number of system-based impediments to action. Judges, bar leaders, and legislators all apparently share the pro se litigant’s faith in self-help and have, therefore, held back from more energetic intervention. The courts, when they act, have been drawn to solutions that focus on providing the self-represented with the rudiments of case preparation through educational programs and one-off advising sessions. These, so the theory goes, will prepare intelligent laypersons to navigate the legal system. This faith is the same one that fills the bookstore shelves with “how-to” manuals and fills the court advising kiosks with willing customers who believe they can master the challenge. Rather than consider systemic change we have banked on education in the hope that pro se litigants can help themselves.

We have inclined this way not simply because of our faith in self-help, but also because of our firm belief in the adversarial approach to adjudication. Judges and lawyers are acculturated to think in adversarial terms. This means that both groups favor arrangements in which neutral and essentially passive decision makers preside over contests in which the burden of choosing and presenting proofs is assigned to the litigants. Advocates of alternative dispute resolution (ADR) have long complained about the legal system’s preoccupation with adversarial methods. While their alternatives leave a great deal to be desired, their complaint has merit. Our adversarial ideology has led us to view the presence, or absence, of counsel as a private problem that must be left in each litigant’s hands. This is nowhere more clearly signaled than in cases like *Link v. Wabash Railroad Co.*, where the Supreme Court declared that ineffective assistance of counsel in civil matters is not a basis for reversal.

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60 See GALANTER, supra note 34, at 6–9.
but the consequence of a binding personal choice by the litigant. The matter of failed representation is, thus, one for each party, not society, to deal with.

Even if reformers were invited to address the procedural defects that impede the handling of pro se claims, they would encounter substantial resistance from three key groups of players: rule makers, bar leaders and judges. The process by which the federal courts go about rule making has evolved in such a way that sweeping change or radical reform is virtually unimaginable. Each proposed rule change is reviewed as many as a dozen times and draws the most intense scrutiny from judges, academics, interest groups, and legislators. Neither speed nor dramatic restructuring have been the hallmarks of the system. If the pro se challenge requires major changes, the prospects of their coming through the present rule-making process are de minimis. This was the conclusion reached by the Ninth Circuit Task Force that looked at the question in 2005. For its part, the bar has offered a different kind of resistance to the sorts of changes that might address the pro se challenge. The organized bar has a long history of protecting its monopoly on the practice of law. It has resisted virtually every reform that expands the competition to provide legal services. The charge of “unauthorized practice of law” is one heard frequently and it has scuttled even modest reforms proposed in response to the pro se problem. The dispute between Nolo Press and the Texas bar neatly illustrates the bar’s approach. Many judges too look upon pro-se-friendly procedures with a jaundiced eye. Commentators have regularly noted that at least some judges are inclined to view the self-represented as “crazies” or “weirdos” and to believe that they are not seeking legal redress but “personal”

66 Id. at 913–19.
67 NINTH CIRCUIT FINAL REPORT, supra note 31, at 13 (“Realistically, the Task Force recognized that no such major changes in the administration of justice were likely to result from its work. The federal rules are here to stay.”).
69 See, e.g., Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (holding that attorney advertising is protected by the First Amendment in response to Arizona Supreme Court ruling that such activity violated state bar rules); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (holding that a minimum fee schedule for residential real estate transactions imposed by state and county bar rules was a violation of the Sherman Act).
71 See NAT’L CTR. FOR STATE COURTS ET AL., 2 NATIONAL JUDICIAL CONFERENCE ON LEADERSHIP, EDUCATION AND COURTROOM BEST PRACTICES IN SELF-REPRESENTED LITIGATION: COURTROOM CURRICULUM 3 (2007) [hereinafter CONFERENCE ON SELF-REPRESENTED LITIGATION, VOLUME TWO].
objectives. Much of this mistrust may arise from judges’ experience in the criminal courts where counsel is guaranteed and where most judges view pro se litigants as a radical and troublesome fringe. Such wariness about the self-represented serves as a powerful deterrent to proactive intervention.

III. THE PRICE OF IGNORING THE PRO SE CHALLENGE

In light of the substantial resistance to change, might it not be a good strategy to ignore the problem? The brief answer is that we can no longer afford to do so. The rising volume of pro se cases and the difficulties they present make such an approach unworkable. The growing stream of self-represented claimants slows the clearing of court dockets. Pro se litigants today cause delays and increase administrative costs. They are likely to miss or be unprepared for scheduled courtroom sessions, thereby forcing adjournments and rescheduling. They are non-professionals in a professional system. They often do not know what is expected and force deviation from court routines designed for the efficient handling of cases. When polled about the amount of time they spend on pro se litigation, eleven percent of a group of about 100 court clerks from around the country reported that they devote more than fifty percent of their time to the unrepresented; and, another twenty-three percent said they use somewhere between twenty-six and fifty percent of their available hours on such individuals. The Hastings study found that many types of pro se cases take longer to resolve than the average non-pro-se case. While this data is not definitive, it lends support to the impression of most court personnel that the pro se administrative burden is serious, growing and needs to be addressed.

More than nine out of ten judges surveyed in 1997 by the American Judicature Society and the Justice Management Institute stated “that their courts had no general policy addressing the manner in which pro se litigants should be handled in the courtroom or in the litigation process

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72 Meeting the Challenge, supra note 4, at 52.
75 Id.
76 See VanWormer, supra note 7, at 993.
77 See Tyler & Zimerman, supra note 10, at 5, 8.
78 Meeting the Challenge, supra note 4, at 122.
79 See Park, supra note 13, at 837.
generally."80 It would appear that throughout the country, courts deal with unrepresented litigants in an ad hoc manner. This has yielded strikingly inconsistent treatment of such parties.81 Courts, generally, have followed the direction of the Supreme Court in Haines v. Kerner to review civil pro se pleadings with liberality, holding them "to less stringent standards than formal pleadings drafted by lawyers . . . ."82 Some courts have carried this principle beyond the pleading stage and have relaxed requirements relating to service of process, motions to dismiss, summary judgment, compliance with discovery rules, and introduction of evidence.83 The motivation for doing so seems to be the laudable judicial desire to facilitate pro se litigants being heard on the merits. One of the leading decisions taking this approach is Balistreri v. Pacifica Police Department, in which the Ninth Circuit rejected an argument that a pro se plaintiff’s failure to satisfy the briefing requirements of Federal Rule of Appellate Procedure 28 should lead to the dismissal of her appeal.84 The Circuit Court stated: “This court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements.”85

Balistreri’s strong language regarding “duty” has not been accepted by all courts or in all situations. There is a raft of judicial decisions declaring that rules should not and will not be bent for the self-represented. The seminal decision on the right to proceed in propria persona in criminal cases is Faretta v. California,86 which will be discussed in greater detail below. In that case, after finding that a criminal defendant has a Sixth Amendment right to proceed on her or his own, the Court stated: "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."87 This proposition has been reiterated and amplified upon by the Supreme Court and lower courts in a series of criminal and civil cases. In McKaskle v. Wiggins, the Court, in the course of approving judicial insistence on the presence of “standby counsel” at a criminal trial, stated that there is no “constitutional right to receive personal instruction from the trial judge on courtroom procedure.”88 That language was picked up and expanded upon in 2004 when the High Court in Pliler v. Ford decided that trial

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80Goldschmidt, supra note 12, at 19.
82404 U.S. 519, 520 (1972).
83See John L. Kane, Jr., Debunking Unbundling, 29 Colo. Law. 15 (2000), cited in Buxton, supra note 38, at 118 n.91; Bradlow, supra note 81, at 672–73.
84901 F.2d 696, 698–99 (9th Cir. 1990).
85Id. at 699.
86422 U.S. 806 (1975).
87Id. at 834–35 n.46.
88465 U.S. 168, 183 (1984). The stringency of such a rule was mitigated in McKaskle by the presence of “standby counsel.”
judges in habeas corpus proceedings have no duty to warn the unrepresented of the potentially fatal procedural pitfalls they may face because of a set of litigation choices placed before them by the trial judge. These restrictive ideas have been interpreted by a number of courts as warranting the abandonment of pro se litigants to their own devices after the pleading stage. In the end, the two streams of cases seem to give the trial judge virtually unfettered discretion to enforce or waive various procedural requirements. The inevitable result is inconsistent decisions—some lenient and others strict. The trouble with this approach is that it is unpredictable and likely to give the onlooker the impression of unprincipled decision making. Such impressions are likely to erode the courts’ credibility and serve as an invitation to citizen cynicism and legislative intervention.

There are a number of other reasons why the pro se problem cannot be ignored. Perhaps most important, the experiences of the self-represented appear in a substantial number of cases to produce frustration, anger, and even violence. As the number of pro se litigants grows, these difficulties are likely to increase, rendering our courts less satisfying and potentially more dangerous places. Trial judges tell us that many self-represented litigants come to court expecting significant assistance and a hearing on the merits. When those expectations are not fulfilled (which is the case most of the time, if the Hastings data and similar analyses are to be believed) the self-represented are likely to come away feeling a “sense of unfairness, helplessness, and futility.” After surveying the available empirical data, Tom Tyler and Nourit Zimerman suggested that the pro se courtroom experience often produces a sense of “frustration” and distrust. The consequence of this is heightened anger and hostility. What is more, the absence of counsel deprives the pro se litigant of a “reality check” to reign in unrealistic expectations. The absence of an attorney also removes the sort of lawyerly counseling that can temper strong emotions arising out of the underlying dispute. Furthermore, the pro se litigant has no interest in a long-term relationship with the court and little motivation to “adhere to rules of appropriate conduct.” Litigant volatility is, for all these reasons, likely to

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90 See, e.g., United States v. Pinkey, 548 F.2d 305, 305 (10th Cir. 1977); Dozier v. Ford Motor Co., 702 F.2d 1189, 1189 (D.C. Cir. 1983); Jacobsen v. Filler, 790 F.2d 1362, 1364–35 (9th Cir. 1986).
91 See Goldschmidt, supra note 12, at 16.
92 See MEETING THE CHALLENGE, supra note 4, at 53 (“Judges often encounter self-represented parties who expect the court to assist them.”).
93 MEETING THE CHALLENGE, supra note 4, at 53.
94 See Tyler & Zimerman, supra note 10, at 23–24, 32.
95 NINTH CIRCUIT FINAL REPORT, supra note 31, at 9.
96 Tyler & Zimerman, supra note 10, at 5.
be heightened. It is, therefore, no surprise that those who have thought most carefully about the management of pro se litigants have emphasized the need to train judges to manage angry litigants and prepare for the possibility of violence. 97 The Ninth Circuit’s Task Force on Self-Represented Litigants acknowledged the safety problem when it suggested that expenditures for the training of court personnel to handle pro se litigants might be placed “within the category of improving court security.” 98 That the risk of violence is real is, unfortunately, beyond doubt. The heinous attack by a pro se litigant upon a federal judge’s family in 2005 provides all too vivid a reminder of the possible risks involved. 99

Pro se litigants present another sort of challenge to judges—a testing of their ability to maintain impartiality. It has already been observed that many trial judges think of the self-represented as “weirdos” or worse. Their presence can provoke hostility and even biased treatment by court personnel. 100 Judges tend to see the special demands created by pro se litigants as potentially embroiling them in the proceedings in ways that suggest partiality. 101 Justice Thomas articulated this concern in Plier v. Ford, when he declared that requiring a district judge to explain “the details of federal habeas procedure” to a pro se litigant “would undermine district judges’ role as impartial decisionmakers.” 102 Other courts too have expressed such fears. Those concerns are lent enhanced credibility by cases like Oko v. Rogers, 103 in which a represented litigant sought appellate reversal of a decision in favor of a physician who had represented himself because the judge had assisted and allegedly favored the doctor.

Courts involved in cases with the self-represented may be tempted to assume a paternalistic attitude toward the litigants before them—abandoning adversarial neutrality in favor of a fatherly or motherly effort to do “what is best” for all concerned. This is particularly likely where one party is represented and the other is not. Many judges will, in such a situation, “bend over backwards to keep [the] pro se litigant from being

97 See Conference on Self-Represented Litigation, Volume Two, supra note 71, at 173 (outlining steps for dealing with “angry litigants”).
99 On February 28, 2005, the husband and mother of Federal District Judge Joan Lefkow were murdered by Bart Ross, a pro se plaintiff in a medical malpractice case pending in the judge’s court. A lawyer who had once represented an attorney Ross was suing said: “As his legal remedies were becoming fewer, as he had less success, he became more angry, more agitated.” Don Babwin, Police: Wisconsin Death Has Lefkow Tie, CHICAGO TRIBUNE.COM (March 11, 2005).
101 See Meeting the Challenge, supra note 4, at 29 (“The data collected in this study show that the most serious concern of trial judges is their perceived inability to assist a pro se litigant due to their duty to maintain impartiality.”).
taken advantage of.” In his dissent in *Indiana v. Edwards*, Justice Scalia expressed concern about judicial paternalism in the context of the mentally impaired criminal defendant. He decried what he perceived to be the Court’s restriction of the constitutional right to self representation “for [a litigant’s] own good,” arguing for judicial respect for the right to choose one’s own fate. Those concerns are pertinent for civil, as well as criminal, litigants.

Failure to recognize and respond to the needs of pro se litigants can fuel not only litigant anger but also social upheaval. When courts appear to curtail access, to avoid the merits, or to act against an identifiable group of litigants, they are likely to kindle onlooker skepticism about judicial legitimacy. Tyler and other social scientists tell us that outside observers tend to base legitimacy judgments on the apparent fairness of observed proceedings. To the non-professional eye, the handling of the self-represented (which seldom results in reaching the merits, let alone winning) is not particularly likely to seem fair and may render the courts vulnerable to attack. A number of fringe groups appear inclined to exploit this situation—most particularly the so-called “common-law activists.” They have championed a series of dubious assertions, all based on the alleged illegitimacy of the courts which, they say, thwart the wishes and needs of the people. When the Ninth Circuit Task Force held public hearings about pro se litigation, it faced a sharp challenge from constituents of such groups calling for “the abolition of judicial immunity and criticiz[ing] the availability of immunity for judges as a recent and pernicious violation of litigants’ rights to seek redress.” Such attacks are deeply concerning and underscore the need to maintain the appearance as well as the reality of justice.

In an intriguing article published in 2000, Curtis Milhaupt and Mark West examined the Japanese justice system. They found a system with too few attorneys, too little opportunity for ordinary citizens to secure legal representation, and extremely high transaction costs. To meet the needs of those with a range of common legal problems, such as recovery for injuries suffered in automobile accidents, it was found to be common for the Japanese to turn to organized criminal gangs, the so-called

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104 MEETING THE CHALLENGE, supra note 4, at 53 (alteration in original).
106 Id. at 2394.
109 NINTH CIRCUIT FINAL REPORT, supra note 31, at 11.
Yakuza, to secure compensation.\textsuperscript{111} Of course, this system does not rely on the rule of law but on the threat of violence.\textsuperscript{112} It is a dramatic illustration of what can happen when a system denies access and fails to address the legal needs of its citizens. It underscores the importance of responding to the pro se challenge.

IV. PROHIBITING THE PRO SE PROSECUTION OF CIVIL CASES

In light of all the problems posed by pro se litigants, it is tempting to consider whether parties might be barred from proceeding in court without representation. Setting aside the administrative difficulties of such a scheme, American legal tradition and present law both make it abundantly clear that such a strategy is impermissible. The right to represent oneself has long been recognized in the Anglo-American legal tradition. The one glaring exception was England’s Star Chamber, which required counsel’s signature to validate pleadings and considered the absence of counsel as the functional equivalent of a confession.\textsuperscript{115} That body was eventually discredited and its methods have become synonymous with legal oppression. The American colonies strongly supported the concept of pro se litigation.\textsuperscript{116} Immediately after the drafting of the Constitution, Congress, in the Judiciary Act of 1789, embraced self-representation, declaring the right of all parties to “plead and manage their own causes personally or by the assistance of . . . counsel.”\textsuperscript{117} The Judiciary Act was recodified in 1948, but the opportunity for self-representation remained unaltered, as it does to this day in 28 U.S.C. § 1654.

In a series of criminal cases, the Supreme Court has confirmed the broad reach of the right to represent oneself, anchoring that right in the Sixth Amendment to the Constitution. The seminal decision was \textit{Faretta}. Justice Stewart, writing for the Court in 1975, reviewed at length the history of a defendant’s right to represent him or herself.\textsuperscript{116} Justice Stewart found that right deeply embedded in our legal tradition.\textsuperscript{117} Although \textit{Faretta} is a criminal case supported by the Sixth Amendment, it has been viewed as affecting civil litigation as well.\textsuperscript{118} This is the continuation of an approach established in the Judiciary Act of 1789 and embraced in such early cases as \textit{Osborn v. Bank of the United States} where, in 1824, the Court stated “[n]atural persons may appear in Court, either

\begin{itemize}
\item \textsuperscript{111} Id. at 69 (describing the work of Yakuza \textit{jidanya} [settlement specialists]).
\item \textsuperscript{112} Id. at 50–51.
\item \textsuperscript{113} See \textit{Faretta v. California}, 422 U.S. 806, 821–22 (1975).
\item \textsuperscript{114} Id. at 826–28.
\item \textsuperscript{115} Id. at 831 (quoting 28 U.S.C. § 1654).
\item \textsuperscript{116} Id. at 812.
\item \textsuperscript{117} Id. at 832.
\item \textsuperscript{118} See, e.g., \textit{Eagle Eye Fishing Corp. v. U.S. Dep’t of Commerce}, 20 F.3d 503, 506 (1st Cir. 1994) (relying on \textit{Faretta} for the proposition that pro se status does not relieve a litigant of the burden of complying with procedural and substantive rules).
\end{itemize}
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by themselves, or by their attorney.” The opportunity to proceed pro se also seems to undergird the liberal pleading rule announced in *Haines v. Kerner.* Recently, the American Bar Association (ABA) has added its voice to those supporting self-representation. In the new ABA Model Code of Judicial Conduct, Rule 2.6 states: “a judge shall accord [all] . . . the right to be heard . . . .” This rule is reinforced by the Commentary to ABA Rule 2.2 which assures judges that assistance rendered to pro se litigants for the purpose of ensuring that their claims are heard is not a breach of strictures requiring judicial impartiality. While legal tools exist in federal court for the early termination of pro se cases brought *in forma pauperis* and for those involving prisoners, no such mechanism exists for other types of cases pursued by litigants on their own behalf. The banning of the unrepresented from court seems beyond the authority of the judiciary and perhaps of the legislative branch as well.

V. OPTIONS AVAILABLE TO RESPOND TO THE PRO SE CHALLENGE

A. Educating the Self-Represented

Probably the most popular option for addressing the pro se challenge is expansion of programs designed to teach the self-represented how to manage their own cases. This response capitalizes on our widely shared individualist and do-it-yourself attitudes. Clearly, there are substantial benefits to be gained by expanding educational programs and a particular need to make such programs available where they do not exist. Yet, education by itself seems unlikely to solve the pro se dilemma. First, educational programs require funding, and resources for such efforts seem in short supply. Second, it is doubtful that any amount of education will overcome the high attrition rates suffered by pro se litigants at every step in the litigation process. Education programs cannot turn laymen into lawyers—there is a ceiling on lay efficacy. Third, as the National Judicial Conference on Leadership, Education and Courtroom Best Practices in Self-Represented Litigation (held at Harvard in 2007 and hereinafter referred to as the Conference on Self-Represented Litigation) concluded in its curricular materials: “No matter how good the self help is, some litigants really need representation.” The same conference suggested that what happens in the courtroom,

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119 22 U.S. 738, 829 (1824).
121 MODEL CODE OF PROF’L CONDUCT R. 2.6(A) (2007).
122 Id. at R. 2.2 cmt. 4.
123 See NINTH CIRCUIT FINAL REPORT, supra note 31, at 13.
124 See In Defense of Rules, supra note 37, at 1557–58.
125 See CONFERENCE ON SELF-REPRESENTED LITIGATION, VOLUME THREE, supra note 74, at 29.
rather than in education sessions, is critical and that the judge, rather than the litigants, is the crucial player in this regard.\footnote{126}{See Conference on Self-Represented Litigation, Volume Two, supra note 71, at 58.}

Intimately tied to the self-help approach is the installation of automated systems like Arizona’s “Quickcourt” mechanism to help pro se litigants draft pleadings and other documents that, when completed, will be accepted for filing by the courts.\footnote{127}{Meeting the Challenge, supra note 4, at 76.} A step beyond this sort of help might be achieved with the introduction of computer programs that assist litigants in preparing briefs and assembling proofs. Yet, the likelihood of software taking the place of lawyers in civil litigation still seems a substantial ways off. It also raises the most serious questions about the unauthorized practice of law, underscoring the “tension between providing information and legal advice . . . .”\footnote{128}{Ninth Circuit Final Report, supra note 31, at 44.} Moreover, new problems arise as one approaches the advising threshold, most particularly related to the provision of unsound or misleading advice.\footnote{129}{See Engler, supra note 100, at 2026.}

B. Shifting Toward an Inquisitorial System

Critics of the educational solution suggest that it will never meet the needs of pro se litigants, and that procedures must be revised to provide the judge with a mandate to seek out the facts underlying each claim.\footnote{130}{For a summary of these arguments, see In Defense of Rules, supra note 37, at 1560–73.} What these suggestions are really urging is a shift toward an inquisitorial system in which the judicial officer is charged with finding the truth.\footnote{131}{See Stephen Landsman, Readings on Adversarial Justice: The American Approach to Adjudication 38 (1988).} In such a system, lawyers become far less important as judges ask more questions, call more witnesses, and firmly control the process. It is interesting to note that many of the recommendations of the Conference on Self-Represented Litigation, including heightened activity on the judge’s part and judicial interrogation of witnesses, seem to tend in an inquisitorial direction.\footnote{132}{See generally Conference on Self-Represented Litigation, Volume Two, supra note 71.} This is not the place to rehearse all the weaknesses of an inquisitorial system, but Lon Fuller’s observations about the risk of prejudgment\footnote{133}{See Lon Fuller, The Adversary System, in Talks on American Law 39–45 (H. Berman ed. 1971).} and the appreciable reduction of litigant control, with its attendant drop in litigant satisfaction,\footnote{134}{See John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis 83 (1975).} should not be disregarded.
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There is substantial reason to believe that attempting to engraft inquisitorial mechanisms into a judicial system with an adversarial orientation will present substantial difficulties. As noted above, American judges have, because of their training and outlook, resisted suggestions that they become more actively involved in proof gathering and advising. Concerns about impartiality have served as a substantial deterrent to engagement in other contexts as well. Such hesitancy may be glimpsed in federal judges’ reactions to Federal Rule of Evidence 706, which allows a court to appoint expert witnesses. In United States v. Craven, the First Circuit observed that the introduction of experts untested by adversary methods and relied upon in decision making into the adjudicatory process is deeply troubling. The risks inherent in such initiatives include ex parte communications between the expert and the judge and the surrender of the task of appraising the facts to strangers to the litigation who have no stake in its outcome. Judge Jack Weinstein in his evidence treatise reiterates the Craven criticisms and goes on to note that court designation of experts is likely to undermine adversary mechanisms like cross-examination. All of this has resulted in the court appointment of experts being “a rare occurrence,” displaying quite dramatically the resistance of adversarially-trained judges to inquisitorial mechanisms. It is likely that many judges would react similarly to the proposed use of inquisitorial techniques on behalf of pro se litigants.

C. A Synoptic Approach

It is unlikely that there is a quick or easy fix for the pro se litigant problem. What is needed is the employment of a diverse set of initiatives. While wide ranging, these initiatives should all be guided by an insight derived from recent empirical work on procedural justice—that participants in the legal system tend to experience greater satisfaction when they feel that they have been given a genuine opportunity to voice their views to a decision maker who is listening and responsive to their input. Where litigants are given “voice,” they tend to be far more satisfied with the process, no matter the outcome. This proposition has been confirmed in a number of contexts from tort claims to felony

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135 FED. R. EVID. 706.
136 239 F.3d 91,102–03 (1st Cir. 2001).
138 Id.
140 E. Allen Lind et al., In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System, 24 LAW & SOCY. REV. 953, 980 (1990).
criminal trials in which substantial prison sentences are fixed. The methods by which this might be accomplished in the pro se context are not mysterious and form the foundation of many of the recommendations presented at the Conference on Self-Represented Litigation. They include offering each litigant a chance to be heard on the merits; avoiding legal jargon and procedural mystification that may silence pro se litigants; encouraging behaviors that demonstrate the judge’s careful attendance to each party’s points; and preparing decisions that acknowledge the claims made by losing litigants as well as victors. The research data suggest that processes which lend litigants “voice” not only enhance their satisfaction but strongly influence onlookers, who tend to base their judgments about legitimacy and fairness on what they see taking place in the courtroom.

To address the needs of many pro se litigants, all that is needed is the adoption of a set of best practices that provide them with useful training and respectful treatment in the courts. These have been outlined in the Conference on Self-Represented Litigation materials, and the goal should now be an education effort that makes judges throughout the country aware of what works in assisting pro se litigants to manage their own cases. The ABA Litigation Section and Judicial Division are presently preparing such a training package and would be grateful for any assistance that might be offered. Along with better techniques, the judicial system needs to be more transparent to allow justice to be seen. Training and dialogue should go a long way, especially with pro se litigants who have a solid educational background.

For a significant number of pro se litigants, however, such approaches will not suffice. For them, it will be necessary to consider a more robust use of the appointment authority provided in 28 U.S.C. § 1915(e)(1).

142 See generally CONFERECE ON SELF-REPRESENTED LITIGATION, VOLUME TWO, supra note 71.
143 LIND & TYLER, supra note 139, at 170.
144 I am involved in that effort, as well as in the organization of an ABA Litigation Section Symposium held in Atlanta in mid-December of 2008, to rethink a range of questions concerning access to counsel in civil proceedings.
145 See Zotz, supra note 73, at 436.
146 Id. at 438.
the appointment power only in “exceptional” situations. 148 Such a craddled approach needs to be reconsidered and significant impediments to change need to be overcome. The first stumbling block is finding counsel willing to serve. The Supreme Court has, in Mallard v. United States District Court, held that an unwilling attorney can refuse appointment. 149 What is needed is a concerted effort on the part of the courts, with the assistance of the organized bar, to create and maintain a pool of lawyers willing to accept appointment pro bono or with modest support. Such programs will have to address the special challenges to appointment posed by the need for an effective withdrawal mechanism and for reasonable malpractice protection. 150 When the Ninth Circuit surveyed its districts, it found that some courts wall off certain categories of pro se cases from the appointment of counsel. 151 The idea that some sorts of cases should be favored and others excluded is troubling. It is not required by the statute and denies judges a chance to intervene in pro se cases where such action may be critical because of fairness concerns.

While this may be neither the place nor the time for an extended discussion of the subject, the rule fixed in Lassiter v. Department of Social Services of Durham County, that there is no constitutional right to the appointment of counsel in civil cases not involving liberty, may warrant eventual re-examination. Litigant competence, serious life-affecting consequences, educational deprivation, and involuntary involvement in litigation may all be factors that, in some cases, warrant the extension of Gideon v. Wainwright 152 and its progeny (albeit not because of the mandate of the Sixth Amendment) to at least some corners of the civil realm. Such a right has been recognized in a number of other countries including England. 153

Finally, voluntary programs that offer pro se litigants an opportunity to choose specially tailored adjudicatory processes should be tested. Judge William Schwarzer has recommended something of the sort through the institution of a “small claims calendar” in federal court. 155 This seems an approach worth testing.

148 See, e.g., United States v. $292,888.04 in Currency, 54 F.3d 564, 569 (9th Cir. 1995); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Miller v. Simmons, 814 F.2d 962, 966 (4th Cir. 1987); Bradlow, supra note 81, at 662.


150 See NINTH CIRCUIT FINAL REPORT, supra note 31, at 36–38.

151 Id. at 26–29.


154 See Buxton, supra note 38, at 126.

VI. CONCLUSION

There is a great deal we do not know about the pro se challenge. Data is desperately needed to appraise the nature of the challenge and what sorts of responses will prove effective. We have only just begun to grasp the nature of the pro se challenge. A great deal remains to be learned. Perhaps now is the time to consider a serious commitment to the study of the problem with any eye toward fashioning effective reforms.
SLICING THROUGH THE GREAT LEGAL GORDIAN KNOT: WAYS TO ASSIST PRO SE LITIGANTS IN THEIR QUEST FOR JUSTICE

Shon R. Hopwood*

In Greek mythology, the Gordian Knot was a large intertwined rope that was impossible to untie. The knot was the work of Gordius, a king in what is now Turkey. Legend has it that King Gordius fastened his chariot to a pole using the Gordian Knot. Then Alexander the Great arrived and attempted to unravel it. Anyone who has ever tried to unpack the box of last year’s Christmas lights can appreciate what Alexander was up against. He tried, unsuccessfully, and became frustrated at his inability to undo what could not be undone. So he finally opened the Gordian Knot by cutting through it with his sword. Alexander’s solution to the problem led to the idiom “cutting the Gordian Knot,” which simply means solving a complicated problem through bold action.¹

The problems facing pro se litigants are as daunting as the famed Gordian Knot. Imagine trying to unravel the law without knowing where the ends of the knot begin. Or for that matter, imagine trying to plead your case without the benefit of a legal education. This was the quandary that confronted me.

From 1998 to 2008, I was incarcerated in a federal prison—the result of five bank robberies I committed as a foolish young adult. While in prison, I was fortunate to receive a job in the prison law library. There, I sat reading novels until June of 2000, when the Supreme Court handed down Apprendi v. New Jersey,² a case calling into question the U.S. Sentencing Guidelines (Guidelines). Although at the time I could not have named a right in the Bill of Rights, I began the process of learning the law through self-study so that I could challenge my sentence. It ended badly. I filed a post-

² 530 U.S. 466 (2000).
conviction motion with the Eighth Circuit only to learn that I had filed the motion with the wrong court. Once it was in the hands of the right court, it was unceremoniously denied.

But the result did not discourage me, and I went on to write post-conviction motions and appeals briefs for other prisoners over an eight-year span. While I did have some success, this is definitely not the norm.

I witnessed firsthand the difficulties that pro se litigants face both while I was in prison and later at Cockle Law Brief Printing Company—one of the largest U.S. Supreme Court brief printers in the country and the only printer I am aware of that assists pro se litigants filing petitions for certiorari. Brief printing is kind of a misnomer at Cockle, because that is the easy part. At Cockle, my primary job is to consult with attorneys and pro se parties on everything from filing requirements to how to phrase the Question Presented in a manner to attract the Court’s interest. Before the briefs are ready to print, we often consult and sometimes plead with parties to make stylistic and substantive changes to their briefs.

Dealing with pro se litigants is not easy. When a brief comes into Cockle, the office manager sets the documents on a counter where one of the staff will snatch it up to start the process. When a pro se brief is placed on the counter, more often than not, it lingers longer than an attorney-prepared brief. To be sure, someone will eventually take it, but nobody really wants to; they are twice, often four times, more work than a normal brief.

I bet avoiding pro se briefs is a common occurrence among clerks in courts across the country. I recently read a legal blog post discussing a particularly poor circuit brief written by an attorney. In the comment area, someone said that while the brief was awful, it was better than the ones he had read in his three years as a pro se clerk. The next comment was telling on the state of pro se litigation. The comment said: “They should award purple hearts for suffering through that.”

The increase in pro se litigation during these difficult economic times is well documented, as are the problems facing pro se litigants. People


filing pro se must try to untie the tangled rope of procedure, rules, and precedent on their own. The result is often a morass of indecipherable legal pleadings, forfeiture of basic rights, and clogging of court dockets. Thomas O’Bryant, a prisoner serving a life sentence in Florida, described the obstacles confronting him as a pro se prisoner:

I had to engage in two extremely difficult tasks: I had to teach myself the law, and I had to represent myself. I had to perform these tasks using only the limited resources available to me inside the prison walls and while trying to adjust to prison life, overcome mental health issues, such as severe depression, and fight a drug addiction.6

Rather than providing some overarching solution for the myriad problems faced by pro se litigants (because no one-size-fits-all solution exists and I am not that smart), I will discuss three specific difficulties I have witnessed and how these problems could be rectified. The first problem involves federal prisoners filing post-conviction motions; the second involves pro se prisoners filing civil rights actions; and the third involves pro se civil litigants filing an appeal. Although the impediments associated with pro se litigation are overwhelming, they can be reduced through targeted legislation, court action, and the assistance of the bar.

In 1995, Timothy McVeigh committed a heinous act of terrorism. While tragic, the government’s response—as is usually the case when it acts in the moment—was to pass legislation that was almost equally as tragic. On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 19967 (AEDPA). Among other things, the Act established a one-year limitation for federal defendants wishing to collaterally attack their conviction or sentence through a motion under 28 U.S.C. § 2255. That one-year period runs from when the judgment becomes final, which could be as quick as ten days after sentencing, or after the direct appeal is completed.8

In signing AEDPA, President Clinton hailed it as a way for the United States to remain “in the forefront of the international effort to fight terrorism through tougher laws and resolute enforcement.”9 In describing the changes to prisoners’ ability to avail themselves of the writ of habeas corpus, the President stated: “First, I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty. For

6. O’Bryant, supra note 5, at 300.


too long, and in too many cases, endless death row appeals have stood in the way of justice being served."10

While President Clinton may have thought the goal of the Act was to confront terrorism and reduce the amount of time death row inmates have to challenge their convictions and sentences, the actual statute had a far broader sweep than was needed to accomplish those goals. As I noted, AEDPA bars all federal prisoners from filing post-conviction motions challenging their case unless those prisoners file the motion within one year of sentencing or direct appeal.

To the casual observer, that seems like a reasonable procedure. After all, federal defendants do receive an attorney for a direct appeal to an appellate court, so every conviction and sentence has the possibility of review. Thus, why would prisoners need another appeal? Even if they did, it seems reasonable to require them to file it within a reasonable amount of time.

But those arguments assume that appellate review ferrets out every case where a legal error or a miscarriage of justice has occurred.11 Worse yet, such an argument assumes that lawyers are infallible, because only claims raised at the trial court level and subsequently appealed are subject to review. If the trial attorney commits a grave error, and she is the same counsel on appeal, how likely is it that she will find and raise her own error before the appellate court? It is not.

For this reason, we have post-conviction motions that are used primarily to challenge attorney acts or omissions amounting to ineffective assistance of counsel.12 While I was in prison, post-conviction motions under § 2255 were the principal way that prisoners would challenge everything from attorney sentencing error to counsel’s failure to file a timely notice of appeal.13

The writ of habeas corpus, under which § 2255 motions fall, is not some extravagant, ill-advised method for prisoners to receive another bite at the apple. Rather, it is a sacred right secured in the body of the Constitution, a right that the “Framers viewed . . . as a fundamental precept of liberty” and a “vital instrument to secure . . . freedom.”14 Although the Framers thought that habeas corpus was a necessary component to a free society, subsequent Congresses have not shared that sentiment.15

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10. Id.
AEDPA’s one-year statute of limitations places significant hurdles in front of federal prisoners who are ill-equipped to meet the Act’s deadline. These hurdles were on full display in the case of Melvin Brown. Melvin was a gentle twenty-four year old from Chicago, whom I met at the Federal Correctional Institution in Pekin, Illinois. Melvin had been charged with possession with intent to distribute six grams of cocaine base. The evidence against Melvin was overwhelming and based upon his attorney’s sound advice, he pled guilty. His sentencing occurred in 2003, before the big Blakely and Booker cases threw federal sentencing into chaos by making the Guidelines ranges discretionary.

Melvin came from poverty, and his criminal record reflected it. He had been charged with petty theft and distributing small amounts of narcotics, including one conviction in Illinois for what the state information said was possession with intent to distribute 0.1 grams of crack. Since Melvin had been convicted of a serious “controlled substance offense” and had two previous controlled substance offenses, he was subject to the Guidelines’ career offender provision. That provision boosted his sentence from a Guidelines range of approximately five to seven years to a range of sixteen to eighteen years. He was sentenced to fifteen years and eight months.

Ten days later, Melvin’s conviction became final, because Melvin’s attorney believed there were no meritorious grounds for appeal. Three months later, Melvin was still awaiting his final destination to a federal prison. By the time Melvin arrived in Pekin, the AEDPA clock had clicked down to seven months. Melvin, with his ninth grade education, was required to learn the law, find the legal errors in his case, draft a lucid § 2255 motion, and have it prepared in seven months.

This set of circumstances was not an anomaly: every week a bus would arrive at Pekin with new uneducated prisoners. Most had no attorney to prepare a post-conviction motion because whatever funds they and their family did possess had already been poured into trial and appeal. These legal novices were expected to learn the law and learn how to write within a year; otherwise, they would forever forfeit the ability to challenge their conviction or sentence.

Melvin knocked on my cell door about two-and-a-half weeks before his § 2255 motion was due. In his hands was a stack of disheveled papers. He asked if I could take a look at his paperwork to see if he had an avenue to attack his sentence.

I went through Melvin’s papers, which included documents from his prior state convictions, the ones used to increase his sentence under the career offender provision. I found the Illinois conviction for which Melvin

was originally charged with possession of 0.1 grams of crack with intent to distribute. That charge had led to a plea to the reduced charge of simple possession, meaning it was not a distribution charge.\textsuperscript{21} This was a meaningful distinction under the Guidelines and meant that Melvin did not have the requisite number of prior convictions: the career criminal provision did not apply.\textsuperscript{22}

We filed the motion and the District Court Judge first ordered the probation officer, who prepared the Presentence Investigation Report, to respond. The officer, to his credit, candidly admitted the mistake. The Government agreed. Melvin was sentenced to a little over five years.

These types of stories are legion in federal prisons. They illustrate that as long as fallible lawyers, probation officers, and judges exist, we need meaningful post-conviction avenues for federal prisons. The current post-conviction statute, as amended by AEDPA, restricts prisoners’ abilities to file a coherent motion, and therefore, the statute prevents federal prisoners from having a meaningful opportunity to challenge their convictions and sentences.

So what is the solution to this problem? Given our current financial outlook, I doubt Congress would spring for prisoner legal education. The easiest solution would simply be for Congress to remove the one-year statute of limitations for non-capital federal offenders. Why just non-capital offenses? For one, the political climate surrounding the death penalty is always icy and by keeping the one-year requirement for capital offenses, legislators would both avoid politicizing the amendment to AEDPA and serve the original purpose of the Act. Moreover, while I have qualms about the federal death penalty, the one-year requirement for post-conviction matters does not concern me; under current federal law, a federal capital defendant must be appointed two attorneys to represent her throughout post-conviction proceedings.\textsuperscript{23} To put it differently, the statute of limitations provision does not require indigent, uneducated prisoners on death row to learn the law and present their claims pro se.

Also, if the one-year statute of limitations were removed, prisoners would not feel compelled to file frivolous motions under time constraints. Many would prefer to wait and file when new decisions are handed down that may affect their case, but the one-year limit forces them to file before they are ready.

The next item I would like to discuss is one of the most vexing problems facing prisoners: a lack of health care. Due to prison overcrowding and

\textsuperscript{21} See U.S.S.G. § 4B1.2(h).
\textsuperscript{22} See id. §§ 4B1.1(a), 4B1.2(c).
\textsuperscript{23} See 18 U.S.C. § 3599(a)(2) (2006) (“In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).”).
budget constraints, prisoners are often denied treatment altogether. Even when treatment is provided, it is sometimes delayed by weeks, months, or years. This was a particular problem in the prison where I was housed.

I had a sixty-year-old friend named John Davis. One day John was standing on a plastic chair so he could reach the pen lying on the top of his bunk bed. The chair leg broke and John was sent plummeting to the floor. John fractured his wrist in two places. After waiting several hours at the prison medical facility, John was taken to an orthopedic surgeon who reset the bones and placed John’s wrist in a half-cast. John and the prison medical staff were instructed to re-examine and x-ray John’s wrist a week later. Conducting a new x-ray within a week was vital, the surgeon said, because if the bones had aligned improperly the surgeon would need to re-align John’s wrist before the bone fused together during the healing process.

The next week, John waited for his name to be called for an appointment at the prison medical facility. It never was. John tried to discuss the problem with the prison medical administrator, who told him that he would be placed in segregation if he did not return to his housing unit. The x-ray was never conducted and when John visited the surgeon a month later, the surgeon was furious because his order had been disobeyed. The bones in John’s wrist had healed improperly, leaving John with significant lost functionality of his wrist.

John sued the prison medical staff for deliberate indifference to his serious medical needs under the Eighth Amendment. He survived a motion to dismiss and discovery began. When he contacted the outside surgeon, he received no response. Later, when the prison filed a motion for summary judgment, the surgeon—who had a long-running contract with the prison—had changed his story, now claiming that the x-ray would have made no difference.

I had my sister conduct research online, which indicated that the prison’s delay in x-raying John’s wrist could have contributed to the improper healing and loss of function. But under circuit precedent, that was not enough. John was required to show, through verifying medical evidence, that the delay in treatment caused harm. We tried to contact medical experts but no one would respond, so we filed a motion to conduct a deposition with the surgeon who had treated John and a surgeon who did not possess a contract with the prison.

Since John made only twenty cents an hour at his prison job, he was unable to afford the witness, transcription, and subpoena fees required to perform a deposition. We argued that the in forma pauperis (IFP) statute

25. See Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996) (holding that an inmate alleging deliberate indifference delay in medical care “must place verifying medical evidence in the record to establish the detrimental effect of delay” or risk dismissal of his suit (quoting Beyerbach v. Sears, 49 F.3d 1324, 1326 (8th Cir. 1995))).
allowed the court to waive the deposition fees for indigent litigants who have no other way to obtain the verifying medical evidence required to succeed on a deliberate indifference claim. That argument was rejected with little discussion by the District Court and the Seventh Circuit on appeal.26

In my experience, the difficulty indigent prisoners have in obtaining evidence to support their deliberate indifference claims is significant. How can any prisoner expect to succeed in proving, through verifying medical evidence, that the delay in their treatment caused medical harm without access to doctors and medical specialists? If prisoners have no ability to obtain the evidence necessary to prove their claims, it follows that they cannot remedy a violation of their constitutional rights. In effect, the Eighth Amendment prohibition on cruel and unusual punishment is nothing more than dead words on paper—a pleasant ideal that is never enforceable.

What is most unfortunate is that, in 1892, Congress provided indigent litigants with a way to obtain depositions sans fees. In fact, the IFP statute specifically addresses this issue. That statute states that “officers of the court shall issue and serve all process, and perform all duties in such cases” and “[w]itnesses shall attend as in other cases.”27 Unfortunately, this language was read right out of the statute by federal courts of appeals in the 1980s and early 90s,28 due to concerns that the statute would create a waste of resources by frivolous prisoner suits. Those opinions conflict with a later Supreme Court decision,29 confuse the history of the IFP statute,30 and are based upon policy concerns that have largely been ameliorated with the passage of the Prison Litigation Reform Act of 1995.31 For these reasons, I have argued that courts should reconsider how they construe the IFP statute.32

One small note: even if my construction of the IFP statute does prevail, it would not result in a waste of resources for overburdened courts. The Prison Litigation Reform Act allows district courts to dismiss frivolous suits before the discovery stage or at any other time if they feel that the claim is frivolous. In addition, most indigent prisoner suits do not require

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26. Davis v. Samalio, 286 F. App’x 325 (7th Cir. 2008).
28. A consensus of circuits holds that § 1915 does not authorize courts to waive indigent litigants’ witness fees in civil actions. See Pedraza v. Jones, 71 F.3d 194, 196–97 (5th Cir. 1995); Malik v. Lavalley, 994 F.2d 90, 90 (2d Cir. 1993); Tedder v. Odel, 890 F.2d 210, 211–12 (9th Cir. 1989); Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987); McNeil v. Lowney, 831 F.2d 1368, 1373 (7th Cir. 1987); Cookish v. Cunningham, 787 F.2d 1, 5 (1st Cir. 1986); U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1057 (8th Cir. 1984) (en banc); Johnson v. Hubbard, 698 F.2d 286, 289–90 (6th Cir. 1983).
outside medical evidence in order to succeed. The only result of the
construction I propose is that indigent litigants with arguably meritorious
claims would have the ability to conduct a deposition without fees in cases
where there is no other means for obtaining the relevant evidence. While
this issue will undoubtedly be litigated by pro se prisoners at the trial level,
that is not enough. Members of the bar are needed to confront the courts of
appeals in order for the issue to be taken seriously.

The last item I will discuss is my experience working with pro se civil
litigants on appeal. The past few years have seen a huge increase in the
amount of people filing civil appeals pro se. In 2004, for example, non-
prisoner pro se litigants filed over 4,500 civil appeals in federal circuit
courts, accounting for 14 percent of the civil appeal docket.33

The obstacles that pro se litigants face on appeal are similar to those
found at the trial court level. But on appeal, courts generally seem to
enforce more stringent rules for pleadings and exhibit far less leniency than
their trial court brethren. This sometimes produces multiple deficiency
letters and exasperation both from the party and the pro se clerk.

I routinely work with these litigants at Cockle Printing. Many of them
contact us after they have received a deficiency letter from the Supreme
Court Clerk’s Office. Just talking with them takes the right amount of
patience, tact, and at times, a delicate dose of forcefulness. The majority of
pro se people I encounter have sued big business or the government for
discrimination and, right or wrong, they feel that injustices have been
committed against them. They also understand, especially after I kindly tell
them, that their chances in the Supreme Court are next to nil. It is usually
then that they say, “I know, Shon, but I have got to take my chance
anyway.” To them, the Supreme Court is not only the place where the little
guy gets his chance. It is also, in the eyes of a pro se litigant, a place of
closure.

Solutions start with the courts. While many appellate courts—including
the Supreme Court—have added pro se resources for filing requirements to
their websites,34 few have added substantive tools necessary for pro se
litigants to succeed when presenting their claims.

Online tools can play a profound role in assisting pro se litigants. Cockle
has a whole page dedicated to the services it can provide to pro se

33. See Admin. Office of the U.S. Courts, Judicial Business of the United States
JudicialBusiness/2004/tables/s4.pdf (citing statistics for the twelve-month period ending
September 30, 2004); see also Admin. Office of the U.S. Courts, Judicial Facts and
JudicialFactsAndFigures/2006/Table204.pdf (noting that, in 2004, all pro se appellants filed
over 25,000 appeals, accounting for 42.7 percent of the federal circuit court docket).

34. See Guide for Prospective Indigent Petitioners for Writs of Certiorari, U.S. Supreme
Memorandum to Those Intending to Prepare a Petition for a Writ of Certiorari in Booklet
Format and Pay the $300 Docket Fee, U.S. Supreme Court (2010),
litigants, and more importantly, provides two different sample petitions that they can use as guides. Courts too would be wise to place sample motions and briefs on their website. (One word of caution for courts thinking about adding sample briefs to their websites: make sure the briefs you display meet all of the court’s filing requirements. Pro se filers will follow those sample briefs sometimes to the letter and if the brief contains mistakes so will their filings.)

Another way to assist pro se litigants in improving the quality of their briefs is through online education. I believe that a series of online tutorials could save court clerks a vast amount of time, and therefore increase the efficiency of the courts. In deciding what type of information should be provided in the tutorials, nothing should be taken for granted. The very first tutorial should offer a summary of the appellate court’s role and explain what types of claims are reviewable. For courts with discretionary review, a video explaining the chances of success would be the best advice any court could give to a would-be filer. Most pro se petitioners at the Supreme Court level simply do not understand the odds against them and an explanation from the Court of the success rate and types of claims that are reviewed would deter some of these financially-strapped people—who have little chance at review—from filing in the first place. Appellate courts should also place forms and fact sheets on their websites, like forms for simple motions such as extensions of time and fact sheets answering common questions on filing requirements and the appellate process.

The bar can also help pro se parties on appeal by providing “unbundled” services, which, in the case of appellate work, amounts to ghostwriting briefs. While ghostwriting was once looked upon with disdain, in recent times it has recently been viewed as an opportunity for the bar to provide cost-effective legal guidance to those who cannot afford full representation. Indeed, even the American Bar Association has given its imprimatur to ghostwriting by recently loosening the ethical rules surrounding it.

Through my company, I have worked with attorneys that regularly provide ghostwriting services to pro se parties on appeal. In every one of the cases, the client could not afford the cost of full representation and it was for that reason that they had contacted the attorney about unbundled services. All of the clients seemed to appreciate the low-cost services we

provided and in return for a reduced fee, they received an attorney-prepared brief that they filed pro se—placing them in a much better position to succeed on their claims.

From my experience, I can tell you that there is no rule of law, ethical guideline, or policy preference that can place pro se litigants on equal footing with those represented by counsel. Yet there are ways for us to reduce the inherent inequities in our adversarial system for those unable to afford the cost. Success for the pro se litigant is not unreachable. They simply need some help. It is up to every part of the legal system to provide that help so that justice may be acquirable for all.
SIXTH CIRCUIT REVIEW

Will a Judge Read My Brief?
Prejudice to Pro Se Litigants from the Staff Attorney Track

COLTER L. PAULSON*

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I. INTRODUCTION

Few outside of court employees and appellate attorneys know there is a two-track system at the Sixth Circuit and all other federal appellate courts. On the familiar track, the appeal is assigned to a federal judge, who will receive input from her clerks, discuss the case with her colleagues, often after oral argument, and issue a reasoned decision applying the law to the facts. On the less well-known track, the case is assigned to staff attorneys who will review the briefs and draft a succinct opinion without oral argument. Unlike law clerks, staff attorneys do not work for a particular judge, and are usually supervised by a more senior staff attorney rather than a judge. The opinion drafted by the staff attorney will be reviewed and approved by a panel of federal judges, and will sometimes result in an unsigned per curiam opinion.

The appeals that are shunted to the alternate track are filed by those with the least ability to protect themselves in the system, including almost all pro se

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1See 6th Cir. I.O.P. 202(c)(3) (“The court appoints a senior staff attorney and supervisory staff attorneys to supervise the staff attorney’s office. The office provides legal support to the court as a whole, rather than to individual judges by making dispositional recommendations in those cases that the court has decided do not require oral argument . . . .”).

WILL A JUDGE READ MY BRIEF?

The staff attorney system was implemented as a band-aid during the enormous expansion of federal appeals by pro se litigants during the 1970s, and remains the only workable solution to a much-expanded judicial caseload. Pro se appeals make up the vast majority of the cases decided by staff attorneys—and the majority of all appeals decided by the Sixth Circuit and other federal circuit courts. To handle these thousands of pro se appeals, the Sixth Circuit has hired staff attorneys, roughly two such attorneys per active judge. Other circuits (such as the First, Second, and Fourth) have three staff attorneys per active judge, in addition to the four elbow clerks. Staff attorneys also review new appeals for appellate jurisdiction and draft proposed opinions on motions.

This short Article examines whether the creation of this alternate track results in worse outcomes for pro se litigants, and concludes that staff attorney review makes it more likely that a pro se appeal receives close scrutiny from federal appellate courts and may result in a higher chance of reversal for pro se appellants.

II. CRITICISM OF THE STAFF ATTORNEY TRACK

The fact that the unrepresented, the prisoner, and the non-citizen systematically receive different treatment in the federal appellate courts raises serious due process issues and questions of fundamental fairness. Some scholars have argued that this the alternate track for pro se appellants leads to “less” and “different” justice for pro se parties. They argue that pro se parties


4 U.S. Courts of Appeals, U.S. CTS., http://www.uscourts.gov/Statistics/Judicial Business/2013/us-courts-of-appeals.aspx (last visited Feb. 20, 2015) [http://perma.cc/7385-L39F]. In addition, nearly 95% of the original proceedings filed in the Sixth Circuit, such as applications for a writ for mandamus, are filed by a pro se party. Id.


6 Id.

“disproportionately receive a quick skim of their briefs, no oral argument, and an unpublished decision copied out of a bench memo by a clerk”—leading to unfair outcomes.\(^8\) Some scholars question both the competence and impartiality of staff attorneys when dealing with pro se parties.\(^9\) Many have said that the only solution to this problem is to dramatically increase the number of federal appellate judges.\(^10\) Admittedly, that is the only way to ensure that an Article III judge will have time to carefully read the briefs in every appeal.

Given the amount of political will that would be required to expand the judiciary, the empirical question of the actual harm pro se parties receive from the alternate track has great significance. An important part of that question is whether the outcomes of appeals by pro se litigants are adversely affected because they are placed on the staff attorney track. One would expect that pro se litigants would lose more often than represented litigants both because they fail to follow appellate procedures (such as filing a timely notice of appeal) and because their claims are intrinsically less likely to succeed (else, at least in civil cases, an attorney would be interested in the case). The question, then, is whether pro se parties do worse than they would otherwise because their cases are sent to staff attorneys to draft a proposed decision.

As discussed below, however, there is significant evidence that pro se parties benefit from the current two-track system and very little evidence that staff attorney review causes otherwise valid appeals to be dismissed for non-merits reasons.

\(^8\) Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 32, 49 (2005); see also Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1492 (2004) (decrying “the delegation of much judicial work either to clerks or to staff attorneys who are often junior, inexperienced, minimally trained, and dissatisfied with the tasks assigned them, mean that judges often do not read any part of the record of an appeal before ‘signing off’ on an unpublished opinion written by a staff attorney”).


\(^10\) Richman & Reynolds, *supra* note 7, at 277.
III. THERE IS LITTLE OR NO EMPIRICAL EVIDENCE THE ALTERNATE TRACK RESULTS IN WORSE OUTCOMES FOR PRO SE LITIGANTS IN THE FEDERAL APPELLATE COURTS

There is no question that pro se appeals are generally less successful than the average. In one Ohio state court, pro se criminal appeals were six times less likely to win reversal than in represented cases.11 Represented litigants before the Board of Immigration Appeals are four times more successful than unrepresented,12 and roughly three times more successful before the United States Court of Appeals for Veterans Claims.13 In a comprehensive study of the federal circuit courts of appeals, counseled appeals were more than ten times more successful than pro se appellants.14 Given the practice of appointing counsel only in cases that appear likely to succeed, these statistics do not say much about the chances for a pro se litigant on appeal—and say nothing about the staff attorney process.

Interestingly, studies about decisions in pro se cases suggest that pro se litigants are just as likely to win a reversal in a federal appeals court as any other litigant.15 One study found that the reversal rate in written decisions in pro se prisoner cases in the Eleventh Circuit was significantly higher than the average reversal rate.16 Similarly, a review by the Fifth Circuit found that the reversal rate for pro se prisoner appeals was the same as its overall reversal rate.17 A recent review of one year of the Sixth Circuit decisions in civil pro se cases found that the reversal rate for pro se litigants was actually higher than the average reversal rate.18

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15 Similar results may occur in the district courts when a case is actually decided on the merits. See Kevin M. Clermont & Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, 1 J. EMPIRICAL LEGAL STUD. 429, 445 (2004) (finding that trial win rates in different type of employment discrimination cases are not affected by differences in the percentage of pro se representation).
18 Compare Ryan Goellner, Pro Se Litigants in the Sixth Circuit: A Year in Review, SIXTH CIRCUIT APPELLATE BLOG (Nov. 12, 2014), http://www.sixthcircuitappellate
One article reaches a contrary conclusion based on data that unpublished decisions in the Ninth Circuit are more likely to go against asylum seekers, arguing that this shows the hand of the staff attorneys. But because more than 80% of all opinions are unpublished—a number that often reaches almost 90% in the Ninth Circuit—unpublished status is a poor indicator of whether it was written by staff attorneys. Opinions that are issued unsigned or per curiam, rather than unpublished, are a far better indicator because that status allows judges to issue an opinion written by a staff attorney as the decision of the panel without any dishonesty. Strangely, while the article uses data from an earlier study, it rejects that study’s conclusions about the data.

To look for differences in outcome between staff-written and judge-written opinions, I searched Sixth Circuit opinions in non-prisoner civil cases over the last five years where at least one litigant appeared pro se. (Civil cases should provide the most accurate data because the Sixth Circuit appoints counsel in certain pro se criminal and habeas appeals, often on the basis of merit.) Many of those cases then go to a panel of judges.) Out of the 145 cases where the pro se party was the appellant, that party won at least a partial reversal in 32 cases—approximately a 22% reversal rate. This is significantly higher than the 13% reversal rate for all civil cases over the same period. However, the Sixth Circuit was also more likely to reverse where the appellee


See Pether, supra note 9, at 40–43.


Pether, supra note 9, at 42 (“[T]here is an apparently more plausible interpretation of the data . . . .”).

There were also two opinions, which were excluded from the study, where both sides proceeded pro se.


Table B-5, supra note 18.
was pro se, reversing at least partially in 8 of the 21 cases—a 38% reversal rate in that small sample.

These high reversal rates are surprising given that pro se parties are far more likely to appeal than those represented by counsel. Pro se appellants filed 28,800 appeals in 2013, which means that roughly that 38% of the 77,311 pro se cases in the district court resulted in an appeal.\textsuperscript{25} The remaining 207,293 district court cases where both parties were represented by attorneys generated just 27,675 appeals, an appeals rate of just 13% of filed cases.\textsuperscript{26} One answer to this is that pro se cases probably do not settle, though at least one study has shown that pro se parties settle at the same rates as represented parties.\textsuperscript{27} Nor are these only habeas seekers pursuing a hopeless appeal under AEDPA, because less than half of pro se appeals come from prisoner petitions.\textsuperscript{28}

Data from the Sixth Circuit also refutes the assumption that pro se cases were more likely to end up with a “lesser” per curiam opinion. During 2013, the Sixth Circuit issued 1,079 signed and 2,502 unsigned per curiam opinions.\textsuperscript{29} A search for per curiam opinions in pro se cases for those same dates shows only 113 opinions during that time—less than 10% of the total number.\textsuperscript{30} Indeed, while per curiam decisions generally make up about 60–70% of all of the Sixth Circuit’s decisions, only 37% of the circuit’s opinions in pro se cases in the past five years were issued per curiam. And a mere 27% of the opinions in civil cases with a pro se litigant were issued as an unsigned opinion by the panel. These statistics support the idea that pro se cases receive more scrutiny from the Sixth Circuit and less deference to the lower court than in the usual appeal.


\textsuperscript{26}Id.

\textsuperscript{27}Tiffany Buxton, Foreign Solutions to the U.S. Pro Se Phenomenon, 34 CASE W. RES. J. INT’L L. 103, 145–46 (2002) (“Where the rates of settlement were analyzed by type of claim, the rate of settlement was virtually identical to the rate in the general sample of represented parties.”).

\textsuperscript{28}TABLE S-4, supra note 25.

\textsuperscript{29}TABLE S-3, 2013, supra note 20.

\textsuperscript{30}The reporting year for the federal courts is September 30, 2011 to September 30, 2012. The statistics were similar in 2012, when the Sixth Circuit issued 1,261 signed and 2,220 per curiam opinions. TABLE S-3, 2012, supra note 20. There were only 198 per curiam opinions in pro se cases during 2012—still less than 10% of the total.
The difference between the overall appellate success rates for pro se litigants versus their success rate in written decisions is almost certainly due to non-merits dismissals. Of the 5,462 appeals that the Sixth Circuit terminated in 2013, almost 30% were terminated for procedural reasons. This included 476 for lack of jurisdiction and another 700 for default or other reasons, which includes the failure to prosecute and follow procedural rules. Almost all of those non-jurisdictional terminations were performed by staff attorneys and clerks, suggesting that most of the terminations involved pro se parties. But this provides no reason to criticize the use of staff attorneys, who are no more likely than busy federal judges to dismiss appeals for failure to prosecute. And Article III judges review every jurisdictional dismissal (though there is little to no discretion involved in such dismissals). These high attrition rates for non-merits reasons are not unexpected—failure to comply with procedure is the first trap for those proceeding unrepresented.

While proceeding pro se can be devastating to the chances of winning on appeal, there is little or no empirical evidence that the alternate track harms a pro se litigant’s chances of winning on appeal.

IV. CONCLUSION

It may be difficult to defend, from a normative perspective, the decision to place the most vulnerable litigants on an alternate track for decisions where they receive less direct scrutiny from federal judges. But given the political unlikelihood of a dramatic increase in the number of appellate federal judges, determining the extent of the actual detriment that staff attorneys cause to pro se parties is critical to understanding the importance of finding a better solution. This small study finds that pro se parties in civil cases fare far better, at least once their appeal reaches the merits, than one would otherwise expect. Instead of finding that pro se appellants quickly lose through unpublished per curiam decisions, pro se parties are winning more often and receive more signed opinions than do parties that are represented by counsel.


33 TABLE B-5A, supra note 32.

34 Id.

35 Id.
This data casts doubt on the generalized arguments that pro se parties are intrinsically harmed by the practice of all federal appellate courts of placing them on the alternate track. Either the staff attorneys themselves or the process of federal appellate judges reviewing the draft opinions from the staff attorneys is resulting in better outcomes for those vulnerable parties.
Session 2

Implicit Bias

Michael Roosevelt, Principal Consultant and Founder, MAAT Consulting Services (Oakland, CA)

Monday, July 30th, 2018
8:30 a.m. – 10:00 a.m.
Catalina Ballroom
MAAT Consulting Services was founded in 1980 to provide education, professional development, training and strategic planning to help organizations become inclusive and culturally responsive.

**Michael Roosevelt** is a trained psychotherapist with undergraduate and graduate degrees in psychology from San Francisco State University. He completed post-graduate training in clinical psychology at Children’s Hospital, Oakland, California, where he treated children and families and conducted psychological assessments and personality evaluations. As a consultant, he has trained lawyers, judges, teachers, state and federal employees and school administrators about cultural differences and how to effectively work with people from different backgrounds.

Michael Roosevelt designs and delivers programs for judicial officers, lawyers, court staff and administrators, public and private agencies on diversity matters. He developed and taught *Beyond Bias: Assuring Fairness in the Courts*, a fairness and diversity curriculum for court staff. This three-hour training consisted of modules on culture, bias, stereotypes, perception, disability and sexual orientation. This comprehensive curriculum was designed and delivered to reach 15,000 court employees. To reach that audience, he delivered the curriculum and conducted train-the-trainers throughout the state of California. The curriculum has become the standard throughout the state for covering diversity topics. He also develops judicial, court staff programs covering implicit and unconscious bias with a focus on mediating its impact on decision-making.

Mr. Roosevelt’s model implicit bias education program is designed to help people and organizations understand how the mind works and what can be done to mediate the influence of bias in our interactions and decision-making. The presentations that he and his colleague delivers is grounded in the neuroscience and social psychology. However, their programs are not off the shelf, but designed to fit the need of the organization, agency or department. The programs he and his colleagues delivers are very practical and applicable to work and one’s personal life.

Some recent workshops: Implicit Bias and Decision-Making, Implicit Bias for Leaders and Managers, Beyond Bias, Ethics and Implicit Bias, Procedural Fairness and Implicit Bias for Court Leaders and Knowledge, and Skills and Abilities Critical for Addressing Bias.
Mr. Roosevelt has served on many diversity panels, and as a keynote speaker and conducted implicit bias training throughout the United States. In the last few weeks, he has presented in the states of Virginia, Missouri, Florida and the District of Columbia.
ABA Diversity and Inclusion 360 Commission
Toolkit Introduction

Dear User,

The information provided in this Toolkit is designed to help you recognize some of the biases that we all have, including, specifically, the implicit biases of judges, prosecutors, and public defenders. The goals of this toolkit are to:

1. Explain the social science term implicit bias;
2. Provide some examples of where implicit biases live and thrive;
3. Explain how they exist;
4. Raise consciousness about the power of these unknown “mind bugs,” as some have called them, and their ability to negatively impact decision-making;
5. Help you identify some of your own implicit biases;
6. Examine how implicit biases might show up in the performance of your job;
7. Provide some tools to help you catch and correct snap decision-making that may be linked to harmful implicit biases; and
8. Provide you with the knowledge that will allow you to help others catch decision-making that might be based on implicit biases.

We all have biases. Every one of us. This is not a finger-pointing expedition. Rather, we are sharing with you the evidence of this science, offering strategies for you to find the implicit biases hidden within you to help you reduce their harmful effects. As you learn more about how these biases work in society and in your life, you will not only become more mindful and deliberate in your decision-making but also be able to help others in the profession with whom you interact regularly: court personnel, including law clerks, officers of the court, other lawyers, parties to litigation, witnesses, and jurors.

Implicit biases are unwitting and unconscious cognitions that include stereotypes, beliefs, attitudes, intuitions, gut feelings, and related intangibles that we categorize in our brains—without conscious effort—every fraction of a second. For instance, if we think that a particular category of human beings is frail—the IAT (Implicit Association Test) indicates that many of us categorize the elderly in this way—we will not raise our guard around them. That is a stereotype in action. If we identify someone as having graduated from our beloved alma mater, we will feel more at ease—that is an attitude in action.

Your ever-efficient brain automatically organizes all of the information it receives and places the information into cognitive boxes, shorthand, or schemas, if you will. A more colloquial way to think of a schema is the aforementioned “stereotype,” though the two terms are not entirely interchangeable. Consider some of the data collected about what many people think when they see an Asian male. The data shows that many people believe Asians and Asian-Americans are extremely smart, excellent students, excellent in mathematics, and pretty good at some martial art; play, really well, some musical instrument; and are also really polite, kind, and shy—in other words, the model minority. These labels have

2.) You will learn much, if you have not already, by taking an “implicit association test,” or “IAT” as it is commonly known. The IAT is explained in other parts of your Toolkit. One of the IAT’s deals with how people implicitly view the elderly. The fragile and the elderly are always paired together. For more about this result in particular or the IAT generally, visit https://implicit.harvard.edu/implicit/.
implicit origins. Based on information that we are fed in society through television, movies, the media, work, and social exposures, our mind quickly creates schemas and puts these associations into one box. These social schemas form based on everything that we’ve ever consciously and unconsciously seen and heard. So when we see an Asian male, we immediately think of many of the characteristics and adjectives referenced above even though we do not know that individual. These judgments, assumptions, and attitudes require no contemplative, deliberate thought. It just happens.

Social scientists categorize our dual ways of thinking into two systems: System 1 and System 2. System 1 is the unconscious mode, which helps us make snap judgments and is where our schemas live. System 2 is our deliberative mind, i.e., the conscious mode that is active in explicit biases. The focus of this Toolkit is to get you more conscious of System 1, that place where, as it turns out, 90 percent of your mind operates.

In a similar vein, we also must think about coded words and microaggressions. Take coded language, for example. It is not uncommon for women to be referred to as aggressive or bossy, characteristics viewed positively with male employees but considered negatively with female employees. Is the woman “opinionated” or “sassy”? Why? And why are men not ever similarly categorized? Consider some race-related terms and words. Inner city and urban education are terms most quickly associated with predominantly black, brown, and poor areas. Thugs is a word almost exclusively used in connection with black men.

Microaggression is another type of behavior the ABA is hopeful that this Toolkit will help reduce and ideally eliminate. Microaggressions are “commonplace daily indignities, whether intentional or unintentional, that communicate racial slights and insults towards [minorities].” Studies have shown that the recipients of microaggressions experience greater degrees of loneliness, anger, depression, and anxiety. There are many examples of microaggressions in daily life, some of which include assuming that a black student in an elite school is there because of affirmative action, confusing black attorneys for court staff, telling an LGBT person that s/he does not “look like” an LGBT person, telling a black person that s/he is “articulate,” touching someone else’s hair without permission, asking people of color where they are from, and assuming that all Asian-Americans are Chinese and/or speak an Asian language. An attempt to be aware of microaggressions and taking a thoughtful approach to language when speaking with minority groups are part of this process of consciousness raising, education, and correction.

This program is designed to help with all of these areas. It includes a PowerPoint presentation that focuses on the aforementioned goals. It includes a video, too—just a short 10 to 12 minutes, designed to allow you to hear from experts and others who perform the very same role that you do in the judicial system. Implicit biases are analyzed in the video; and others, whether judge, prosecutor, or public defender, share their own implicit biases and strategies for how they work to be continually mindful of them in order to interrupt them. Finally, this Toolkit contains a comprehensive bibliography and resource list, including a large category of books, articles, and websites that focus on implicit bias generally for those who want to learn more about this fascinating social science; material specifically addressed to judges; material specifically addressed to prosecutors; and material specifically addressed to defenders.

Whether you are a judge, a prosecutor, or a defender, we hope that you find this Toolkit useful. This is fascinating yet challenging work. It is not rocket science, but because biases are in our DNA, it will require great determination and conscious effort to catch assumptions that are made and applied automatically. The Toolkit will reveal the benefits of deliberation, i.e., slowing down to take a few extra moments to focus on the person in front of you before making decisions that will or might affect that person.

We are confident that you will not only learn about that stranger that lives within you but also actually enjoy the materials contained herein and this journey.

Thank you
A.) **IAT WEBSITE**

B.) **BOOKS**


MARGARET REUTER & CLARINIA WENG, Navigating Cultural Differences, in Learning from Practice (3rd ed. 2015).


SARAH E. REDFIELD, *Diversity Realized: Putting the Talk with the Talk for Diversity in the Pipeline to the Legal Profession* (2009).


C.) **UCLA LAW PROFESSOR JERRY KANG’S WEBSITE**

Professor Kang has worked with courts to created implicit bias primers for the court system; has written many law review articles on the subject; and conducts CLEs, etc. See http://jerrykang.net. In particular, see Jerry Kang, Nat’l Ctr. for State Courts, Implicit Bias: A Primer for Courts (Aug. 2009), available at http://jerrykang.net/research/2009-implicit-bias-primer-for-courts/. See also his TED talk and other relevant videos of his work in this area:

https://www.bing.com/videos/search?q=jerry+kang+ted+talk&view=detail&mid=C199BFAA2157E6F0C7FBC199BFAA2157E6F0C7F&FORM=VIRE.

http://uwtv.org/watch/PluF2WiuqyE/.

http://uwtv.org/watch/dMvC1n599vg/.
D.) THE NATIONAL CENTER FOR STATE COURTS WEBSITE  

E.) MATERIALS SPECIFIC TO JUDGES, PROSECUTORS, AND DEFENSE COUNSEL  
 Judges:  
ABA Commission on Diversity and Inclusion 360, Videos for Judges: https://www.dropbox.com/sh/uddq3ep0l94p1g/AACfh5lhcq7NpDPTKICEoy9Sa?dl=0&preview=Implicit+Bias+Final+Render+-+Paulette+Intro+-+Credits+-+-Logo.mp4.

Prosecutors:  
Prosecutor TED Talk: http://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system?language=en#t-421101.

Defense Counsel:  

F.) COGNITIVE REFLECTIONS TEST (CRT) WEBSITE  
The CRT is designed to assess an individual’s ability to suppress an intuitive and spontaneous wrong answer in favor of a reflective and deliberative answer. The test is available at http://www.sjdm.org/dmidi/Cognitive_Reflection_Test.html#

G.) PERCEPTION INSTITUTE WEBSITE  
http://perception.org/.

H.) KIRWAN INSTITUTE WEBSITE  
Shared research from researchers, grassroots advocates, policy makers, and community leaders: http://kirwaninstitute.osu.edu/.

I.) ARTICLES  
GENERAL  

Russell G. Pearce et al., Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships, 83 FORDHAM L. REV. 2407 (Apr. 2015).


Jessica M. Salierno et al., Give the Kid a Break—but Only If He’s Straight: Retributive Motives Drive Biases Against Gay Youth in Ambiguous Punishment Contexts, 20 PSYCHOL. PUB. POL’Y & L. 398 (2014).


Adam Hahn et al., Awareness of Implicit Attitudes, 143 J. EXPERIMENTAL PSYCHOL. 1369 (2014).


Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. REV. 1124 (2012).


Ronald Wheeler, We All Do It: Unconscious Behavior, Bias, and Diversity, 107 LA. L. REV. 325 (Spring 2015).


Jessica M. Salierno et al., Give the Kid a Break—but Only If He’s Straight: Retributive Motives Drive Biases Against Gay Youth in Ambiguous Punishment Contexts, 20 PSYCHOL. PUB. POL’Y & L. 398 (2014).


Adam Hahn et al., Awareness of Implicit Attitudes, 143 J. EXPERIMENTAL PSYCHOL. 1369 (2014).


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Justin D. Levinson & Danielle Young, Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence, 112 W. VA. L. REV. 307 (2010).

Adam Benforado, Frames of Injustice: The Bias We Overlook, 85 IND. L.J. 1333 (Fall 2010).


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Deborah L. Rhode, Gender and the Profession: The No-Problem Problem, 30 HASTINGS L.J. 1059 (2005).


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Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489 (2005).


**JUDGES**


Rebecca Gill, Implicit Bias in Judicial Performance Evaluations: We Must Do Better Than This, JUST. SYS. J. 1 (2014).


Michael B. Hyman, Implicit Bias in the Courts, 102 Ill. JUDGES’ J. 30 (Jan. 2014).


Valena E. Beety, Criminality and Corpulence: Weight Bias in the Courtroom, 11 Mich. B. Hyman,  Implicit Bias in the Courts, 102 Ill.

**PROSECUTORS**


Justin Murray, Remaking Criminal Prosecution: Toward a Color-Conscious Professional Ethic of Prosecutors, 49 AM. CRIM. L. REV. 1541 (Summer 2012).


Morgan Tillerman, Transforming the Provocation Defense, 100 J. CRIM. L. & CRIMINOLOGY 1659 (2010).

Kerala T. Cowart, On Responsible Prosecutorial Discretion, 44 HARR. C.R.-C.L. L. REV. 597 (Summer 2009).


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Jonathan Rapping et al., The Role of the Defender in a Racially Disparate System, 37 CHAMPION 50 (July 2013).


Andrew E. Taslitz, Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?, 45 TEX. TECH L. REV. 315 (Fall 2012).


JURIES


Anna Roberts, (Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias, 44 CONN. L. REV. 827 (Feb. 2012).


Karl L. Wuensch et al., Racial Bias in Decisions Made by Mock Jurors Evaluating a Case of Sexual Harassment, 142 J. SOC. PSYCHOL. 587 (2002).
Implicit Bias

A Primer for Courts

Jerry Kang

Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts

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ABOUT THE PRIMER

This Primer was produced as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts. The Campaign seeks to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness across the nation's state courts. The Campaign is funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. Points of view or opinions expressed in the Primer are those of the author and do not represent the official position of the funding agencies. To learn more about the Campaign, visit www.ncsconline.org/ref.

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Implicit Bias: A Primer

Schemas and Implicit Cognitions (or “mental shortcuts”)

Stop for a moment and consider what bombards your senses every day. Think about everything you see, both still and moving, with all their color, detail, and depth. Think about what you hear in the background, perhaps a song on the radio, as you decode lyrics and musical notes. Think about touch, smell, and even taste. And while all that’s happening, you might be walking or driving down the street, avoiding pedestrians and cars, chewing gum, digesting your breakfast, flipping through email on your smartphone. How does your brain do all this simultaneously?

It does so by processing through schemas, which are templates of knowledge that help us organize specific examples into broader categories. When we see, for example, something with a flat seat, a back, and some legs, we recognize it as a “chair.” Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category “chair.” Without spending a lot of mental energy, we simply sit. Of course, if for some reason we have to study the chair carefully—because we like the style or think it might collapse—we can and will do so. But typically, we just sit down.

We have schemas not only for objects, but also processes, such as how to order food at a restaurant. Without much explanation, we know what it means when a smiling person hands us laminated paper with detailed descriptions of food and prices. Even when we land in a foreign airport, we know how to follow the crazy mess of arrows and baggage icons toward ground transportation.

These schemas are helpful because they allow us to operate without expending valuable mental resources. In fact, unless something goes wrong, these thoughts take place automatically without our awareness or conscious direction. In this way, most cognitions are implicit.

Implicit Social Cognitions (or “thoughts about people you didn’t know you had”)

What is interesting is that schemas apply not only to objects (e.g., “chairs”) or behaviors (e.g., “ordering food”) but also to human beings (e.g., “the elderly”). We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories.

Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail—such as the elderly—we will not raise our guard. If we think that another category is foreign—such as Asians—we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term “implicit bias”
includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense? Or have we already internalized the lessons of Martin Luther King, Jr. and navigate life in a perfectly “colorblind” (or gender-blind, ethnicity-blind, class-blind, etc.) way?

**Asking about Bias (or “it’s murky in here”)**

One way to find out about implicit bias is simply to ask people. However, in a post-civil rights environment, it has become much less useful to ask explicit questions on sensitive topics. We run into a “willing and able” problem.

First, people may not be willing to tell pollsters and researchers what they really feel. They may be chilled by an air of political correctness.

Second, and more important, people may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection. For example, slight environmental changes alter our judgments and behavior without our realizing. If the room smells of Lysol, people eat more neatly. People holding a warm cup of coffee (versus a cold cup) ascribe warmer (versus cooler) personality traits to a stranger described in a vignette. The experiments go on and on. And recall that by definition, implicit biases are those that we carry without awareness or conscious direction. So how do we know whether we are being biased or fair-and-square?

**Implicit measurement devices (or “don’t tell me how much you weigh, just get on the scale”)**

In response, social and cognitive psychologists with neuroscientists have tried to develop instruments that measure stereotypes and attitudes, without having to rely on potentially untrustworthy self-reports. Some instruments have been linguistic, asking folks to write out sentences to describe a certain scene from a newspaper article. It turns out that if someone engages in stereotypical behavior, we just describe what happened. If it is counter-typical, we feel a need to explain what happened. (Von Hippel 1997; Sekaquaptewa 2003).

Others are physiological, measuring how much we sweat, how our blood pressure changes, or even which regions of our brain light up on an fMRI (functional magnetic resonance imaging) scan. (Phelps 2000).

Still other techniques borrow from marketers. For instance, conjoint analysis asks people to give an overall evaluation to slightly different product bundles (e.g., how do you compare a 17” screen laptop with 2GB memory and 3 USB ports, versus a 15” laptop with 3 GB of memory and 2 USB ports). By offering multiple rounds of choices, one can get a measure of how important each feature is to a person even if she had no clue to the question “How much would you pay for an extra USB port?” Recently, social cognitionists have adapted this methodology by creating “bundles” that include demographic attributes. For instance, how
would you rank a job with the title Assistant Manager that paid $160,000 in Miami working for Ms. Smith, as compared to another job with the title Vice President that paid $150,000 in Chicago for Mr. Jones? (Caruso 2009).

Scientists have been endlessly creative, but so far, the most widely accepted instruments have used reaction times—some variant of which has been used for over a century to study psychological phenomena. These instruments draw on the basic insight that any two concepts that are closely associated in our minds should be easier to sort together. If you hear the word “moon,” and I then ask you to think of a laundry detergent, then “Tide” might come more quickly to mind. If the word “RED” is painted in the color red, we will be faster in stating its color than the case when the word “GREEN” is painted in red.

Although there are various reaction time measures, the most thoroughly tested one is the Implicit Association Test (IAT). It is a sort of video game you play, typically on a computer, where you are asked to sort categories of pictures and words. For example, in the Black-White race attitude test, you sort pictures of European American faces and African American faces, Good words and Bad words in front of a computer. It turns out that most of us respond more quickly when the European American face and Good words are assigned to the same key (and African American face and Bad words are assigned to the other key), as compared to when the European American face and Bad words are assigned to the same key (and African American face and Good words are assigned to the other key). This average time differential is the measure of implicit bias. [If the description is hard to follow, try an IAT yourself at Project Implicit.]

Pervasive implicit bias (or “it ain’t no accident”)

It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the stereotype of “career” versus “family”), light-skinned over dark skin, youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of implicit bias, are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements.

These pervasive results do not mean that everyone has the exact same bias scores. Instead, there is wide variability among individuals. Further, the social category you belong to can influence what sorts of biases you are likely to have. For example, although most Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks, African Americans show no such preference on average. (This means, of course, that about half of African Americans do prefer Whites, but the other half prefer Blacks.)

Interestingly, implicit biases are dissociated from explicit biases. In other words, they are related to but differ sometimes substantially from explicit biases—those stereotypes and attitudes that we expressly self-report on surveys. The best understanding is that implicit and explicit biases are related but different mental constructs. Neither kind should be viewed as the solely “accurate” or “authentic” measure of bias. Both measures tell us something important.
Real-world consequences (or “why should we care?”)

All these scientific measures are intellectually interesting, but lawyers care most about real-world consequences. Do these measures of implicit bias predict an individual’s behaviors or decisions? Do milliseconds really matter? (Chugh 2004). If, for example, well-intentioned people committed to being “fair and square” are not influenced by these implicit biases, then who cares about silly video game results?

There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world—in ways that can have real effects on real lives. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- implicit bias predicts the rate of callback interviews (Rooth 2007, based on implicit stereotype in Sweden that Arabs are lazy);
- implicit bias predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- implicit bias predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- implicit bias predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decisionmaking in hard cases;
- implicit bias predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);
- implicit bias predicts the amount of shooter bias—how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);
- implicit bias predicts voting behavior in Italy (Arcari 2008);
- implicit bias predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).

With any new scientific field, there remain questions and criticisms—sometimes strident. (Arkes & Tetlock 2004; Mitchell & Tetlock 2006). And on-the-merits skepticism should be encouraged as the hallmark of good, rigorous science. But most scientists studying implicit bias find the accumulating evidence persuasive. For instance, a recent meta-analysis of 122 research reports, involving a total of 14,900 subjects, revealed that in the sensitive domains of stereotyping and prejudice, implicit bias IAT scores better predict behavior than explicit self-reports. (Greenwald et al. 2009).

And again, even though much of the recent research focus is on the IAT, other instruments and experimental methods have corroborated the existence of implicit biases with real world consequences. For example, a few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment (Banks et al. 2006; Blair 2004).

Malleability (or “is there any good news?”)

The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit. Fortunately, there is evidence
that implicit biases are malleable and can be changed.

- An individual’s motivation to be fair does matter. But we must first believe that there’s a potential problem before we try to fix it.
- The environment seems to matter. Social contact across social groups seems to have a positive effect not only on explicit attitudes but also implicit ones.
- Third, environmental exposure to countertyypical exemplars who function as “debiasing agents” seems to decrease our bias.
  - In one study, a mental imagery exercise of imagining a professional business woman (versus a Caribbean vacation) decreased implicit stereotypes of women. (Blair et al. 2001).
  - Exposure to “positive” exemplars, such as Tiger Woods and Martin Luther King in a history questionnaire, decreased implicit bias against Blacks. (Dasgupta & Greenwald 2001).
  - Contact with female professors and deans decreased implicit bias against women for college-aged women. (Dasgupta & Asgari 2004).
- Fourth, various procedural changes can disrupt the link between implicit bias and discriminatory behavior.
  - In a simple example, orchestras started using a blind screen in auditioning new musicians; afterwards women had much greater success. (Goldin & Rouse 2000).
  - In another example, by committing beforehand to merit criteria (is book smarts or street smarts more important?), there was less gender discrimination in hiring a police chief. (Uhlmann & Cohen 2005).
  - In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking. This recognition is the opposite of various forms of “blindness” (e.g., color-blindness).

In outlining these findings of malleability, we do not mean to be Pollyanish. For example, mere social contact is not a panacea since psychologists have emphasized that certain conditions are important to decreasing prejudice (e.g., interaction on equal terms; repeated, non-trivial cooperation). Also, fleeting exposure to countertyypical exemplars may be drowned out by repeated exposure to more typical stereotypes from the media (Kang 2005).

Even if we are skeptical, the bottom line is that there’s no justification for throwing our hands up in resignation. Certainly the science doesn’t require us to. Although the task is challenging, we can make real improvements in our goal toward justice and fairness.

The big picture (or “what it means to be a faithful steward of the judicial system”)

It’s important to keep an eye on the big picture. The focus on implicit bias does not address the existence and impact of explicit bias—the stereotypes and attitudes that folks recognize and embrace. Also, the past has an inertia that has not dissipated. Even if all explicit and implicit biases were wiped away through some magical wand, life today would still bear the burdens of an unjust yesterday. That said, as careful stewards of the justice system, we
should still strive to take all forms of bias seriously, including implicit bias.

After all, Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done—and be seen to be done.
Glossary

Note: Many of these definitions draw from Jerry Kang & Kristin Lane, A Future History of Law and Implicit Social Cognition (unpublished manuscript 2009)

Attitude

An attitude is “an association between a given object and a given evaluative category.” R.H. Fazio, et al., Attitude accessibility, attitude-behavior consistency, and the strength of the object-evaluation association, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 339, 341 (1982). Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. See also stereotype.

Behavioral realism

A school of thought within legal scholarship that calls for more accurate and realistic models of human decision-making and behavior to be incorporated into law and policy. It involves a three step process:

First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of human behavior and decision-making embedded within the law. These latent theories typically reflect “common sense” based on naive psychological theories.

Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of “the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view.” Kristin Lane, Jerry Kang, & Mahzarin Banaji, Implicit Social Cognition and the Law, 3 ANNU. REV. LAW SOC. SCI. 19.1-19.25 (2007)

Dissociation

Dissociation is the gap between explicit and implicit biases. Typically, implicit biases are larger, as measured in standardized units, than explicit biases. Often, our explicit biases may be close to zero even though our implicit biases are larger.

There seems to be some moderate-strength relation between explicit and implicit biases. See Wilhelm Hofmann, A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures, 31 PERSONALITY & SOC. PSYCH. BULL. 1369 (2005) (reporting mean population correlation r=0.24 after analyzing 126 correlations). Most scientists reject the idea that implicit biases are the only “true” or “authentic” measure; both explicit and implicit biases contribute to a full understanding of bias.

Explicit

Explicit means that we are aware that we have a particular thought or feeling. The term sometimes also connotes that we have an accurate understanding of the source of that thought or feeling. Finally, the term often connotes conscious endorsement of the thought or feeling. For example, if one has an explicitly positive attitude toward chocolate, then one has a positive attitude, knows that one has a positive attitude, and consciously endorses and celebrates that preference. See also implicit.
Implicit
Implicit means that we are either unaware of or mistaken about the source of the thought or feeling. R. Zajonc, Feeling and thinking: Preferences need no inferences, 35 AMERICAN PSYCHOLOGIST 151 (1980). If we are unaware of a thought or feeling, then we cannot report it when asked. See also explicit.

Implicit Association Test
The IAT requires participants to classify rapidly individual stimuli into one of four distinct categories using only two responses (for example, in a the traditional computerized IAT, participants might respond using only the “E” key on the left side of the keyboard, or “I” on the right side). For instance, in an age attitude IAT, there are two social categories, YOUNG and OLD, and two attitudinal categories, GOOD and BAD. YOUNG and OLD might be represented by black-and-white photographs of the faces of young and old people. GOOD and BAD could be represented by words that are easily identified as being linked to positive or negative affect, such as “joy” or “agony”. A person with a negative implicit attitude toward OLD would be expected to go more quickly when OLD and BAD share one key, and YOUNG and GOOD the other, than when the pairings of good and bad are switched.

The IAT was invented by Anthony Greenwald and colleagues in the mid 1990s. Project Implicit, which allows individuals to take these tests online, is maintained by Anthony Greenwald (Washington), Mahzarin Banaji (Harvard), and Brian Nosek (Virginia).

Implicit Attitudes
“Implicit” attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.” Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection. See also attitude; implicit.

Implicit Biases
A bias is a departure from some point that has been marked as “neutral.” Biases in implicit stereotypes and implicit attitudes are called “implicit biases.”

Implicit Stereotypes
“Implicit” stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category” Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection. See also stereotype; implicit.

Implicit Social Cognitions
Social cognitions are stereotypes and attitudes about social categories (e.g., Whites, youths, women). Implicit social cognitions are implicit stereotypes and implicit attitudes about social categories.

Stereotype
A stereotype is an association between a given object and a specific attribute. An example is “Norwegians are tall.” Stereotypes may support an overall attitude. For instance, if one likes tall people and Norwegians are tall, it is likely that this attribute will contribute toward a positive orientation toward Norwegians. See also attitude.
Validities
To decide whether some new instrument and findings are valid, scientists often look for various validities, such as statistical conclusion validity, internal validity, construct validity, and predictive validity.

- Statistical conclusion validity asks whether the correlation is found between independent and dependent variables have been correctly computed.
- Internal validity examines whether in addition to correlation, there has been a demonstration of causation. In particular, could there be potential confounds that produced the correlation?
- Construct validity examines whether the concrete observables (the scores registered by some instrument) actually represent the abstract mental construct that we are interested in. As applied to the IAT, one could ask whether the test actually measures the strength of mental associations held by an individual between the social category and an attitude or stereotype.
- Predictive validity examines whether some test predicts behavior, for example, in the form of evaluation, judgment, physical movement or response. If predictive validity is demonstrated in realistic settings, there is greater reason to take the measures seriously.
Bibliography


Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1491 (2005)


Luciano Arcuri et al., Predicting the Vote: Implicit Attitudes as Predictors of the Future Behavior of Decided and Undecided Voters, 29 Political Psychology 369


Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes:*


Session 3
The Importance of Civics Engagement: A Conversation with the Chief Justice of California

The Honorable Tani G. Cantil-Sakauye, Chief Justice, California

The Honorable Carolyn M. Caietti, San Diego Superior Court

Monday, July 30th, 2018
10:30 a.m. – 11:30 a.m.
Catalina Ballroom
Chief Justice Tani G. Cantil-Sakauye

In her seven and a half years in office, Chief Justice Tani G. Cantil-Sakauye has emerged as one of the country’s leading advocates for equal access to justice, transparency, and the reform of state court funding models that unfairly impact the poor.

When the Chief Justice Cantil-Sakauye was sworn into office in January 2011 as the 28th Chief Justice of California she was the first Filipina American and the second woman to serve as the state’s chief justice.

In recent years, Chief Justice Cantil-Sakauye has raised awareness about the unfair financial impact of fines, fees, and the bail system on the poor. She is a leading national advocate calling for reform the bail system by addressing concerns about fairness and public safety. She convened a work group of judges that developed recommendations to end the current money bail system in California. In addition, she has asked federal authorities to protect the integrity of the state court system by not arresting undocumented residents at courthouses.

As leader of California’s judicial branch and chair of the Judicial Council, Chief Justice Cantil-Sakauye has helped lead the judicial branch out of the state’s worst fiscal crisis since the Great Depression. She has improved the branch’s efficiency, accountability, and transparency. When she became Chief Justice, she opened meetings of the Judicial Council and its advisory bodies that were once closed to the public and she has made public comment more accessible. Judicial Council meetings are now webcast, as are state Supreme Court oral arguments.

The Chief Justice is a leader in revitalizing civic learning in the state through her Power of Democracy initiative. She, along with other state leaders, fulfilled one of the initiative’s goals in July 2016 when the state Board of Education unanimously approved an instructional framework that encourages civic learning.

The Chief Justice has also convened leaders to address issues of implicit bias, human trafficking, and truancy—which is part of a national movement to keep kids in school and out of the criminal justice system.
Hon. Carolyn M. Caietti  
San Diego Superior Court  
P.O. Box 122724, San Diego, CA 92112-2724  
Telephone: (619) 844-2555 or (858) 634-1501

Judicial Assignments

Criminal Judge (Central) (2018 - Present)  
Preside over general trial department hearing criminal matters

Presiding Judge, Juvenile Division (2013 - 2018)  
- Manage a total of twelve delinquency and dependency departments in five branch court locations  
- Preside over dependency and delinquency proceedings including trials, settlement conferences, crossover youth, mental competency, human trafficking, non-minor dependent calendars  
- Provide collaboration and leadership with juvenile stakeholders to include public and private agencies with an emphasis on improving outcomes for at risk youth and families  
- Developed first San Diego Human Trafficking Court for minors known as RISE Court (Resiliency is Strength and Empowerment)  
- Implemented a dedicated Non-Minor Dependent Calendar for former dependent and juvenile justice involved youth  
- Serve on the Court Executive Committee, Security Committee

Assistant Presiding Judge, Juvenile Division (2011 - 2013)  
- Manage five delinquency departments  
- Preside over delinquency proceedings including trials, motions, settlement calendars  
- Provide leadership, collaboration with public and private agencies in area of juvenile justice  
- Assist Presiding Juvenile Court Judge on leadership and collaboration with an emphasis on juvenile delinquency matters

Juvenile Court Judge (2008 - 2011)  
- Presided over thousands of juvenile delinquency matters to include trials, motions, disposition  
- Developed the annual “Passport to Life, An Education and Career Exposition” attended by 700 probationary, at risk youth aimed to provide opportunities for future success

Criminal Judge (East County) (2006 - 2007)  
- Presided over volume misdemeanor court handling approximately 500 cases each week, including arraignments, pleas, sentencings

Statewide:
- Member, Family Juvenile Law Advisory Committee to Judicial Council (2013 - Present)  
  Sealing legislation work group  
  WIC 709 mental competency legislation work group  
  Court-appointed counsel funding allocation joint subcommittee  
  Inter county transfer work group
Member, Power of Democracy Steering Committee (2017 - Present)

Member, Child Welfare Council (2014 - Present)

Member, Keeping Kids in School and Out of Court Steering Committee (2015 - Present)

Member, Juvenile Court Judges of California Association (2008 - Present)

Member, National Association of Women Judges (2006 - Present)

Member, California Judges Association (2006 - Present)

Member, California Bar Association (1986 - 2006)

San Diego:

Co-Chair, Power of Democracy San Diego Civics Learning Partnership (2015 - Present)

Member, American Board of Trial Advocates (ABOTA) (2005 - Present)

Member, University of San Diego School of Law, Alumni Board of Directors (2012 - Present)
Executive Board (2013 - Present)

Member, Lawyers Club of San Diego (2007 - Present)

Member, Association of Business Trial Lawyers (2015 - Present)

Member, Children’s Initiative, Board of Directors (2013 - 2018)

Member, Child Abuse Prevention Coordinating Council (2013 - 2018)

Co-Chair, Foster Youth Services Advisory Committee (2013 - 2018)

Chair, San Diego Blue Ribbon Commission (2012 - 2018)

Chair, Dependency Policy Group (2013 - 2018)

Chair, Delinquency Policy Group (2013 - 2018)

Member, Commercial Sexually Exploited Children Steering Committee (2015 - 2018)

Member, San Diego County Bar Association (1986 - 2006)

Member, American Inn of Court, Louis Welsh Chapter (1992 - Present)
Alumni (1993 - Present)
   Member (1986 - 1993)
   Treasurer (1992)
   Education Committee (1992)
   Staff Writer *Update* (1992)

San Diego Superior Court:

- Member, Executive Committee (2013 - Present)
- Member, Education Committee (2018 - Present)
- Member, Bench Bar Committee (2018 - Present)
- Member, San Diego Superior Court Security Committee (2016 - 2017)
- Member, San Diego Superior Court Retreat Committee (2010 - Present)

Presentations, Teaching Experience

Creator,Presenter, “Passport to Life, Career and Education Expo” (2008 - Present)

- Faculty, CJER Juvenile Delinquency Primary Assignment Overview Course (2010 - 2016)
- Presenter, Juvenile Law Institute (2012 - Present)
- Presenter, Beyond the Bench (2012 - Present)
- Presenter, “Justice 101” for high school seniors (2008 - Present)
- Presenter, “Justice 101” for parents (2009 - Present)
- Presenter, variety of juvenile justice issues to local and statewide organizations (2008 - Present)
- Presenter, moderator, Commercial Sexually Exploited Children panels (2012 - Present)
Select Judicial Honors

- Recipient, California Judges Association Outstanding Jurist
  Wilton Sweeney Juvenile Court Judge of the Year (2016)

- Recipient, San Diego County Bar Association
  Judge of the Year (2013)

- Recipient, Juvenile Justice Commission
  Judge of the Year (2010)

- Recipient, San Diego County Alcohol Policy Panel
  Prevention of Underage Drinking (2008)

Legal Practice

- Walters & Caietti
  Shareholder (2002-2006)
  Civil litigation with concentration on tort, insurance coverage and employment law

- Walters, Frazier, Caietti, Rutan & Lopez, LLP
  Civil litigation practice with emphasis on tort litigation

- Shifflet, Walters, Kane & Konoske
  Civil litigation practice with emphasis on torts and insurance coverage

- Shifflet, Sharp & Walters
  Associate (1986-1991)
  Civil litigation with emphasis on defense of personal injury claims

Legal Education

- University of San Diego, School of Law, J.D. (1986)

- University of San Diego, B.B.A. Business Economics (1983)
Session 4
How Effective Leadership Can Enhance Employee Engagement

Bob Lowney, Director, Appellate Court Services/Court Operations Services, Judicial Council of California

Monday, July 30th, 2018
1:00 p.m. – 4:00 p.m.
Catalina Ballroom
**Bob Lowney** is the Director of Appellate Court Services at the California Judicial Council. Prior to taking this position, for over 20 years, Bob was the Principal Manager at the California Center for Judicial Education & Research where he was responsible for developing judicial, administrative and leadership education for the California Judicial Branch. Bob also served as faculty at the San Francisco Law School for 13 years where he taught Real Property law.
(Mr. Lowney will be distributing physical copies of any materials used during his presentation)
Session 5

#Engage: It’s Time for Judges to Tweet, Like, and Share

The Honorable Stephen Dillard, Chief Judge,
Georgia Court of Appeals

Monday, July 30th, 2018
4:00 p.m. – 5:00 p.m.
Catalina Ballroom
Chief Judge Stephen Louis A. Dillard was appointed as the 73rd judge of the Court of Appeals of Georgia on November 1, 2010 by Governor Sonny Perdue. Prior to his appointment, Judge Dillard was in private practice with James, Bates, Pope & Spivey in Macon (serving as chairman of the firm's appellate practice group), served as law clerk to Judge Daniel A. Manion of the U.S. Court of Appeals for the Seventh Circuit, and worked as an associate at Stone & Baxter in Macon (handling complex civil matters). In 2012, Judge Dillard was elected by his fellow Georgians to serve a full six-year term on the Court. On July 1, 2017, Judge Dillard was sworn in as the 30th Chief Judge of the Court of Appeals of Georgia. Judge Dillard was then elected to another six-year term in May 2018, which will run through the end of 2024.
#engage

it’s time for judges to tweet, like, & share

BY STEPHEN LOUIS A. DILLARD
The judiciary is, in many respects, the least understood branch of government.

The law can be mysterious and a bit frightening to those who do not work in the legal profession. Indeed, the imagery often associated with the judiciary is that of a wise but entirely detached body of individuals who sit on elevated benches, adorn themselves in majestic black robes (with gavels in hand), and dispassionately rule on the various and sundry disputes of the day (and do so largely out of the public eye). And in some respects, this may very well be an accurate understanding of the judiciary’s relationship with the public.

I think we can do better.

Judges are public servants, whether they are appointed or elected. And judges are charged with serving their fellow citizens during their most vulnerable moments:

- When someone’s liberty, perhaps even his or her life, is at stake in a criminal proceeding.
- When deciding the scope of, severely restricting, or even terminating parental rights.
- When resolving business disputes that may very well make or break a company or an individual.

These are just a few examples of serious matters being decided by our judges on a daily basis. In my view, we judges owe it to our fellow citizens to educate them about, among other things, the role of the judiciary in our tripartite system of government (as well as the separation of powers), our system of appointing and electing judges, the training judges receive, the structure and operation of our judicial system, the judicial decision-making process, and what rights “we the people” have in relation to the judicial system (e.g., the right of the public to witness courtroom proceedings).

In short, I think judges have a duty to educate those we serve about the important role the judiciary plays in their daily lives. But in order to do that, we need to rethink the way we engage with the public.

In my view, reimagining the judiciary’s engagement with those we serve begins with putting to rest the notion that it is a good idea for judges to essentially separate themselves from the rest of society. We have come to expect this from our judges. We have come to believe that judges are somehow different from other public officials. And in some respects, that is true. Judges should not engage in partisan politics or in any other behavior that would call into question their ability to be fair-minded to those who appear before them. Judges also do not have the luxury of acting in a politically expedient manner in difficult cases. We are often called upon to make decisions that will almost certainly prove to be politically unpopular. But as a judge, that is your job: To follow the law, regardless of the consequences you may suffer for doing so. Suffice it to say, these unique duties and attributes of judges need to be promoted and preserved at all costs. The rule of law and the independence of the judiciary depend upon it.

Unfortunately, many judges have done more than just disengage from political life. They also have felt compelled to entirely withdraw from the public eye. I think this is deeply unfortunate. The pernicious perception that a judge must remain cloistered in his or her chambers in order to foster or maintain judicial independence needs to change.

I’ll say it again: Judges are public servants. They are accountable to the people, and they need to be accessible to the people, so long as they do so in a manner that is consistent with their oath of office and the code of judicial conduct. There is no reason that a judge cannot maintain the integrity of his or her office and engage the public in a more meaningful sense. But in order to do this, we — especially those of us in the legal profession — need to get past our collective unease with technology and embrace the social-media platforms that are increasingly used by those we serve. Indeed, there is an increasing desire (some might even say demand) for a far greater degree of engagement by the judiciary with the public.

There are several ways for judges to interact with the public outside of the courtroom. And to be sure, some of the more traditional methods of engagement are still important. Judges need to be actively involved in their local community by speaking to students and community organizations on a regular basis, as well as attending local events where they will have an opportunity to stay involved in the lives of those they serve. Judges will also, naturally, spend a great deal of time with law students and lawyers. This too is time well spent. Judges should be leaders of their respective legal communities, and set the highest possible standards for lawyers to emulate.

But the reality is that there are only so many events that a judge can attend, only so many hands that a judge can shake, and only so many hours in the day. After all, a judge does still have to perform his or her...
... [H]ow can an intermediate appellate judge, who is a statewide public official, even begin to meaningfully engage with over ten million constituents? This, in my view, is where technology and social media can be of a tremendous benefit to the public.

judicial duties, which are often extraordinarily difficult and time consuming. So, how can a judge effectively communicate and build relationships with as many of his or her constituents as possible? This is the exact question I asked myself at the beginning of my judicial career. More specifically, and personally, how can an intermediate appellate judge, who is a statewide public official, even begin to meaningfully engage with over ten million constituents? This, in my view, is where technology and social media can be of a tremendous benefit to the public. Indeed, the ability of a judge to use social media to directly reach and communicate with his or her constituents is nothing short of revolutionary.

But the legal community has been slower than others to embrace the benefits and transformative nature of technology. This is especially true when it comes to judges actively using social-media platforms.

One of the primary concerns often voiced by critics of judges using social media is that it is demeaning to the office. I do not consider this argument particularly persuasive. To be sure, a judge can demean his or her office through the use of social media, just as he or she can do so at a local bar event by engaging in unprofessional behavior. The difference is that an unprofessional remark on social media by a judge is far more likely to receive widespread attention than a similar comment made at an event in front of only a handful of people. Indeed, this type of “viral” incident can and will harm the reputation of that judge and, no doubt, the confidence that many have in the judiciary. Nevertheless, the fact that there is the potential for some judges to embarrass themselves on social media is not, in my view, a compelling reason to support a blanket ban of all judges doing so. One could even argue that there is some benefit to having the missteps of judges documented on social media, just as the missteps of other elected officials are documented. Transparency reveals what it reveals, and it is not always going to be pretty. But knowing more about our public officials’ actions and beliefs allows us to make informed decisions on Election Day. And that, in my view, is a good thing.

That said, if you are a judge who is considering using social media to communicate with your constituents, it is important to have a clear idea of what you wish to convey to those you serve.

Some judges take a very conservative approach to social media, and simply use it to highlight campaign and public appearances. I did a good bit of this when I first became a judge, and there is nothing wrong with getting a certain degree of comfort with a platform before moving beyond this basic approach. But in doing so, you need to be aware that you are not likely to gain much of a following or establish a true online presence if you are unwilling to engage the public in a more personal way.

There are, of course, any number of social-media platforms that a judge can use to communicate with his or her constituents: Facebook, Twitter, Tumblr, YouTube, LinkedIn, Snapchat, to name just a few. A judge can also post entries on a blog detailing life on the campaign trail, upload videos of speeches, live-stream events, display personal and professional photographs, etc. The key, of course, is for the judge to use good judgment.

One judge who has done an excellent job of communicating with his constituents (and others) using social media is Justice Don Willett of the Supreme Court of Texas, who has almost 70,000 followers on Twitter (he is also the editor of this edition of Judicature). He is, by any objective measure, the “most avid judicial tweeter in America,” which he likens to being “the tallest midget in Oz.”

Justice Willett’s tweets are smart, humorous, and informative; he has quickly established a national reputation on social media as a result of his ability to strike the proper balance between accessibility and appropriate judicial decorum. My colleague on the Georgia Court of Appeals, Judge Carla McMillian, is another good example.

I also seek to strike the balance between accessibility and decorum on a daily basis, and I have clearly defined goals for my Twitter account, which is my preferred social-media platform.

1 My primary goal is to explain to the citizens I serve exactly what we do as judges on the Court of Appeals of Georgia. Now, it may very well be that the vast majority of the citizens I serve are not interested in learning more about my court. But for those who are interested, I want to educate them about what we do on a daily basis; how many appeals we handle; the types of cases that come before our court; how many times we hold oral argument, what happens at oral argument, how cases are assigned, how cases are circulated, how cases are decided, our constitutional deadlines, the inner workings and culture of our court, and the like.
I also want to share my experiences as an appellate judge with those who choose to follow me on social media. If I attend the State of the State, State of the Judiciary, a judicial swearing-in ceremony, or any other event that I think may be of interest to my constituents, I will often tweet photos or videos to allow them to experience what I am experiencing in the moment. And in doing so, I have received positive feedback from citizens and lawyers across the state who cannot always make the trek to Atlanta to attend these events.

In my position, I also have a vested interest in promoting excellence in appellate practice, which means that I spend a considerable amount of time sharing articles and tips on how lawyers can improve their legal writing and oral-advocacy skills. I have even held impromptu Q&A sessions with law students and lawyers, offering general advice on how to write a persuasive brief or craft an effective oral argument.

I also care deeply about professionalism and civility. It is important for judges to encourage law students and lawyers to treat our profession as a profession, rather than as just some other job. I want law students and young lawyers to care passionately about their reputations and to constantly strive to improve their skills. I also want to challenge the conventional view that lawyers should be “zealous advocates.” As I am often fond of saying: In what other area of life are zealots considered popular or endearing? Unfortunately, our law schools and profession promote zealotry as the ideal attribute of a lawyer. Respectfully, we need to stop doing this. In my view, a good lawyer is an effective advocate, a problem solver, and someone who tries to resolve disputes in the most efficient and expeditious manner possible. And I try to do what I can to promote this viewpoint on social media. I also firmly believe in the virtue of civility, both in and out of the courtroom, and I do what I can to encourage those that follow me on social media to treat each other with dignity and respect.

Additionally, I use social media to be a virtual mentor to law students and young lawyers in Georgia and throughout the United States. In my view, one of the most important things that we do as lawyers and judges is to serve as mentors for others. I remember how thankful I was for judges and lawyers who were willing to take even a few minutes out of the day to offer me advice or encouragement. I vividly remember how challenging the transition from law school to law practice was for me, and I often felt as if I was just expected to figure things out on my own. That is not necessarily a bad thing, of course. It is crucial for lawyers to be problem solvers. But more experienced lawyers and judges can and should do a better job of giving law students and young lawyers the benefit of their insights into the profession and experiences in the trenches. And I promised myself, back when I was a young lawyer, that I would never forget what it was like to be in that position. As a lawyer, and now as a judge, I have made mentoring others a top priority. And social media allows me to do that on a widespread basis. Whether it is quickly responding to a question from a law student about applying for a clerkship, or simply offering a word of encouragement to someone taking the bar or arguing her first big motion, I can impact lives in a small but meaningful way on a daily basis. And that means a great deal to me. As trite as it may sound, I firmly believe that the greatest legacy I will leave as a lawyer, judge, and human being is the time I invest in others. I am truly thankful for social-media platforms like Twitter that allow me to do this.

Finally, I want those who follow me on social media to know who I am as a person. I am not just a judge. I am a husband, a father, a person of faith, and I have a life outside of the courthouse. I love reading, history, sports, music, my church, and spending time with my family and friends. And I am blessed beyond measure to wake up every day and work at a job that I dearly love. My hope is that the people who follow me on social media will sense this about me — that I am a joyful public servant. My goal is for my online personality to be an accurate reflection of who I am in real life. And if my constituents truly get a sense of who I am as a person from my engagement with them on social media, then my time online will have been well spent.

STEPHEN LOUIS A. DILLARD is vice chief and presiding judge of the Georgia Court of Appeals. He currently serves as co-chair of the Georgia Judicial Council’s Strategic Plan Standing Committee and as a member of the Council’s Standing Committee on Technology. This article was originally delivered as a speech in conjunction with the Georgia State University Law Review symposium, “Invisible Justices: Supreme Court Transparency in the Age of Social Media,” on Feb. 10, 2016, in Atlanta. You can follow Judge Dillard on Twitter at @JudgeDillard.

PROPORTIONALITY GUIDELINES AND PRACTICES AVAILABLE ONLINE NOW

The Duke Law Center for Judicial Studies 2016 publication, Revised Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality, is online at:

https://law.duke.edu/judicature/volume100-number4/guidelines

Also, find regularly updated annotations to the Guidelines and Practices at:

https://law.duke.edu/judicialstudies/conferences/publications
Session 6
Threat Assessment

Edwin Olavi, Investigator,
California Highway Patrol

Tuesday, July 31st, 2018
8:30 a.m. – 10:15 a.m.
Catalina Ballroom
Edwin Olavi is a 22-year veteran of the California Highway Patrol (CHP). He is currently assigned as an investigator to CHP’s Threat Assessment Unit (TAU). The TAU is responsible for the investigation and management of threats and inappropriate contacts directed toward California state-elected officials, Supreme and Appellate Court justices, and other designated public officials. In his 22 years of law enforcement experience with the CHP he has been assigned as the lead investigator in many complex investigations. After the September 11, 2001 terrorist attacks, Investigator Olavi was assigned to a multi-agency counter-terrorism task force. As a task force agent his duties included: undercover and surveillance operations, intelligence gathering, and investigation of terrorism related incidents. Currently, as a member of the TAU, Investigator Olavi is involved in the identification, assessment, and management of numerous threatening situations every year. Investigator Olavi also provides training in the threat assessment process and principles to protection professionals, other law enforcement agencies, elected officials, and State Supreme and appellate Court justices and their staff.

Investigator Olavi is a member of the Association of Threat Assessment Professionals’ Los Angeles Chapter and most recently graduated from Gavin De Becker & Associates’ Advanced Threat Assessment Academy.
Threat Assessment Defined

1) Identify
2) Assess
3) Manage
Threats

- Direct Threats
- Conditional Threats
- Veiled Threats
- Third Party Threats
Violence

- Impromptu or Affective
- Intended or Predatory
Path to Intended Violence
Grievance

• Sense of Injustice
• Sense of Mission
• Sense of Loss
• Sense of Destiny
• Desire for Revenge
• Desire for Recognition or Fame
Ideation

• Discuss with Others
• Identify with Other Assailants
• Violence is the Only Alternative
• Fascination with Weapons
• Fixation on Anniversaries
Research / Planning

- Information Gathering
- Stalking
- Suspicious Inquiries
- Target Research
Preparation

• Acquire Weapon
• Assemble Equipment
• Arrange Transportation
• Observe Significant Dates
• Conduct Final Act Behaviors
• Costume
Breach

• Probing Security
• Surreptitious Approach
Attack
Identify
Identify

- Sources of information
- Training
- Inappropriate Contact & Communication (IC&C)
- Reporting process
Sources of Information

• Protection Detail
• Protected Person
• Staff
• Co-workers
• Friends
• Social Media
• Law Enforcement
• Parking Attendants
• Security Officers
• Restaurant / Coffee Shop Employees
IC&C
Inappropriate Contact & Communication

I heard those star spangled 666, (super race) mad dogs, you call cops, holes.

You kill people.
You hate.

Never trust or believe anyone.

News flash Clinton impeached.

You are not true humans.
IC&C

Reporting Criteria

Inappropriate Contact & Communication (IC&C)

Reporting Criteria

THREATS: Report all threats to harm a California governmental official or any other person received by written correspondence or telephone conversations. Threats may not always be direct or specific, but could be implied ("you'll pay you're days") or conditional ("you better do... or I will...").

Correspondence that contains the following references or information should be immediately reported to the Threat Assessment Unit (TAU) of the California Highway Patrol (CHP):

- A special history shared with a California governmental official.
- A special meeting shared with a California governmental official.
- A direct communication (e.g., there is direct communication between a California governmental official and victim).

Religious and historical themes involving a California governmental official (including when the writer alternatively a California governmental official in order to change his/her lifestyle).

- Death, suicide, weapons, etc.
- Extortion or blackmail
- A debt that is owed by the victim to a California governmental official (not just money but any type of debt).
- A California governmental official to someone other than himself/herself (an impostor, a historical figure, the writer's relative, etc. has replaced himself).
- Persons who have been attacked in public (Lincoln, Lincoln, Srebrenica, Kennedy, etc.).
- Persons who have carried out attacks against public figures (Osama, Hitler, Sicko, etc.).
- Mental illness (psychiatric care, anti-psychotic medication, etc.).
- Bodyguards, security, safety, security, etc.

Beyond these general categories, please include anything that is disruptive, transparent or otherwise questionable. This should include threats or unreasonable solicitations. We will retain anything that, after assessment, does not meet reporting criteria.

The CHP will require the original piece of correspondence. You may wish to make a copy for your records.

Prompt notification regarding threatening and inappropriate correspondence should be made to:

California Highway Patrol
Threat Assessment Unit
Sacramento (916) 377-4321
Los Angeles (310) 997-4841
24-hour line (560) 446-3299
IC&C
Reporting Criteria

- A special history shared.

- A special destiny shared.

- A direct communication (belief that there is direct communication).

- Religious and historical themes.

- Death, suicide, weapons, etc.

- Extreme or obsessive admiration or affection.
IC&C
Reporting Criteria

• A debt that is owed the writer.

• A California governmental official is someone other than himself/herself.

• Persons who have been attacked in public (Lincoln, Lennon, Kennedy).

• Persons who have carried out attacks against public figures (Oswald, Hinckley, Sirhan, et al.).

• Mental illness.

• Bodyguards, security, safety, danger, etc.
Reporting Process
Assess
Fuck The Government
Yesterday at 8:07 AM · 0
Keep that in mind my docile sheep

Our Forefathers did NOT politely protest the British. They did NOT vote them out of office. impeach the king, march on the capitol, or ask permission for their rights.

THEY FUCKING SHOT THEM.
Assess

1. Circumstances & Context of IC&C
2. Stakes from Subject’s view point
3. Intimacy Effect
4. Subject’s behavior
   • Hunter
   • Howler
Circumstances

- Why was target selected?
- Any significant changes in subject’s life?
- Change in behavior toward target?
- Previous IC&C(s)?
- Target’s current situation?
- Has target received IC&C(s) in the past?
- Is Intimacy Effect at play?
Content

• Request or Demand?
• Target knowledge
• Intimacy Effect
Context

• Changes in Subject’s life?
• Significant change in previous behavior?
• Has Subject made previous IC&C(s)?
• Target’s current situation?
• Has target received IC&C(s) in the past?
Stakes

• Personal
• Ideological
• Political
• Financial
• Religious
• Moral
• Emotional
• Delusional
Inhibitors

- Home
- Family
- Career
- Material and Financial Resources
- Reputation
- Health
- Alternatives
- Religious / Moral Beliefs
- Self-esteem
- Dignity
Hunter or Howler

- Path to intended violence
- Exceptional Case Study Project (ECSP)
- Dietz-10
Exceptional Case Study Project (ECSP)

- National Institute of Justice & United States Secret Service
- R.A. Fein & B. Vossekuil
- 83 Persons known to have attacked, or approached to attack a prominent public figure between 1949-1996.
Exceptional Case Study Project (ECSP)

• The age range was from 16 to 73.
• Almost half had attended some college or graduate school.

• Had a history of mobility and transience.

• Two-thirds were described as social isolates.

• Few had ever been incarcerated in State or Federal prison.
• Few had histories of arrest for violent crimes or for crimes that involved weapons.

• Most had a history of weapons use, but few had formal weapons training.
ECSP

• Many had a history of harassing other persons.

• Most had a history of explosive, angry behavior, but only half are known to have had a history of violent behavior.
ECSP

• More than half had experienced a major life stressor event in the year before their attack or near-lethal approach.

• Many had a history of major depression or despair.
• Many had attempted to kill themselves, or are known to have considered killing themselves at some point.
• Many had contact with mental health professionals or care systems.

• Almost half had histories of delusional ideas.
None of the 43 assassins or attackers communicated a direct threat about their target to the target before their attack.

Fewer than a tenth of all 83 attackers and near-attackers communicated a direct threat about their target to their target or to a law enforcement agency.
Two thirds are known to have spoken or written in a manner that suggests they were considering mounting an attack against a target. Would-be assassins told family members, friends, work colleagues, and associates about their thoughts and plans, or wrote their ideas in journals or diaries.
Almost all had histories of grievance and resentments against a public official or public figure.
Dietz-10

- A mental disorder
- An exaggerated idea of self
- Inappropriate contact with some public figure
- Exhibited random / targeted travel
- Identified with a stalker or assassin
- Ability to circumvent security
- Created a diary or journal
- Made repeated approaches
- Obtained a weapon / fascination with weapons
- Researched the target / Victim
Manage
Take No Further Action at This Time
Watch & Wait
3rd Party Control or Monitoring
Subject Interview
Civil Order
Mental Health Commitment
Arrest
Passive
Active
Information Gathering
Refocus or Assist
Warning or Confronting
Non-Confrontational
Confrontational
Threat Management Process

- Determine the facts
- Initial assessment
- Immediate actions
- Continuous assessment
- Management plan
- Follow-up
Bart Ross

• 57 year old Polish immigrant
• Migrated to the U.S. in early 1980’s
• Electrical engineering degree in Poland
• Worked as an electrician and held an Illinois real estate license
• 1992, Diagnosed with cancer
• 1993, Underwent surgery
• 1995, Filed his first civil lawsuit
• 1996, Sent letters to Illinois lawmakers
• 1997, Case dismissed by court
Bart Ross

• 1999, Appeals court affirmed the initial decision, 600 page petition seeking $25 million in damages, sent to the President, entire US Congress, and Illinois Governor
• 2000, Filed Federal malpractice cases
• 2001-2003, Continued filing cases federally until US Supreme Court denied appeals
• 2004, Judge Lefkow was assigned to a new lawsuit accusing the judiciary of treason and terrorism. The case was dismissed
Bart Ross

- 2005, Appeals court affirmed Lefkow’s decision
- 02/14/2005, Began living in his car
- 02/28/2005, Murdered Michael Lefkow and Dona Humphrey
- 03/09/2005, Committed suicide
I seem to have lived and acted with some degree of self-control. I read the Declaration of Independence and realized that I was a part of it. I wrote with the intent to make a mark. I wrote with the desire to create something that would endure. I wrote with the intention to leave a legacy.

I lived in my own way, not always understanding why. I lived in the shadows of others, never fully realizing my own worth. I wrote, thinking of the future, knowing that my words would be read by others. I wrote, understanding that my thoughts would be shared, that my ideas would be discussed.

But I lived in a world of words. I had a lot to say, but I didn't say it. I didn't let it out. I didn't let it go. I didn't let it be heard.

I wrote, but I didn't publish. I wrote, but I didn't share. I wrote, but I didn't express.

I lived, but I didn't live. I lived, but I didn't say. I lived, but I didn't create.

I was a writer, but I was not a publisher. I was a thinker, but I was not a speaker. I was a creator, but I was not a creator of words.

I wrote, but I didn't write. I wrote, but I didn't write for others.

I thought, but I didn't think. I felt, but I didn't feel. I wrote, but I didn't write for others.

I was a writer, but I was not a publisher. I was a thinker, but I was not a speaker. I was a creator, but I was not a creator of words.

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I wrote, but I didn't write. I wrote, but I didn't write for others.
California Highway Patrol
Threat Assessment Unit

Investigator Edwin Olavi
eolavi@chp.ca.gov

Office (213) 897-4564
Cell (213) 761-2103
FAX (213) 897-8350
Session 7
Applying Education: What We’ve Learned

Pauline Brock, Clerk of the Court of Appeals, Colorado

Douglas T. Shima, Clerk of the Court, Kansas Appellate Courts

Tuesday, July 31st, 2018
10:30 a.m. – 11:00 a.m.
Catalina Ballroom
Pauline Brock has been with the Colorado Court’s since 1996 and is currently the Clerk of Court for the Colorado Court of Appeals and the District Administrator for the Appellate Courts. Polly graduated from the University of Colorado School of Law in 1992. Before her current position, Polly was a staff attorney for the Colorado Court of Appeals specializing in motions and jurisdiction for over 10 years. She is a graduate of the Colorado Judicial Executive Leadership Development Program (2015) and the Colorado Institute for Faculty Excellence in Judicial Education (2017).
Doug Shima grew up in Rocky Ford, Colorado. A small farming community in southeastern Colorado along the Arkansas river. He is a self-proclaimed small-town-city-boy and the son of one of only two doctors in Rocky Ford at the time. Doug attended Bethel College in North Newton, Kansas, and then Washburn Law School graduating in 1994. He started his law career in the Kansas Court of Appeals central research staff and then hired on as chambers counsel with the Hon. G. Joseph Pierron, Jr., in 1995. Doug was with Judge Joe from 1995 until January of 2016 when he was appointed Clerk of the Kansas Appellate Courts overseeing the Kansas Supreme Court and Kansas Court of Appeals. Doug is married to Michelle and they have three kids – Tyler, Zach, and Kaitlyn. Doug never gave up on having a daughter so he would have someone to look after him when he got old. Doug is a past chairman of the board of directors of the Topeka Bar Association. He has served in many capacities on the TBA board and its committees, including serving as board chair and board secretary. Doug currently co-chairs the TBA membership committee and is a regular contributor to the TBA Briefings newsletter. Doug received the TBA’s Outstanding Young Lawyer Award in 1997. In April 2014, Doug received the TBA’s prestigious award, the "Hon. E. Newton Vickers Professionalism Award," as a member who by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents or encourages other lawyers to follow the highest standards of the legal profession. Doug has also been active in the Sam A. Crow American Inn of Court since graduating from Law School and currently serves as the Inns' secretary/treasurer.

Doug is active in many organizations in addition to the Topeka Bar Association and Inns of Court. He is a long-time supporter of Meals on Wheels, having served meals on wheels for over 25 years, and for the last 15 years has organized two corporate routes -- one for the Kansas Judicial Center and the other for his church, Southern Hills Mennonite Church. He served in many capacities with the board of directors of meals on wheels and ended his tenure after serving as board chairman for two years. In 2013, Doug was awarded the Rueter Award for distinguished service to meals on wheels.

In his spare time, Doug enjoys watching his kids in their many activities. He also enjoys playing many sports including basketball, softball, and golf. Any time left after that, he is usually gardening at Topeka West High School where is daughter attends. In October 2014, the Topeka Public Schools recognized Doug with its "Above and Beyond Award" for his gardening efforts.
Session 8

We Hear You—Making Appellate Courts Accessible Through Use Of Interpreters and Technology

The Honorable Jonathan K. Renner, Associate Justice, California Third Appellate District Court of Appeal

Stacey Marz, Director of Self-Help Services, Alaska Court System

Pauline Brock, Clerk of the Colorado Court of Appeals

Tuesday, July 31st, 2018

12:30 p.m. – 1:30 p.m.

Catalina Ballroom
Justice Renner was nominated to the Third Appellate District of the California Court of Appeal by Governor Edmund G. Brown, Jr. Following his unanimous confirmation by the Commission on Judicial Appointments, and election by California voters, Justice Renner joined the court in January of 2015.

Raised in the California foothills, Justice Renner graduated from high school in Grass Valley, California. He received a Bachelor of Arts degree from the University of California at Davis and a Juris Doctor degree from the University of the Pacific, McGeorge School of Law.

After graduation from law school, Justice Renner worked as an associate attorney with the law firms of Porter, Scott, Weiberg & Delehant and Kronick, Moskovitz, Tiedemann & Girard. While in private practice, he litigated a diverse range of cases for both private and government entities.

Justice Renner left private practice to focus on public service as a Deputy Attorney General with the California Department of Justice. During more than 10 years with the Department of Justice, he represented state-level elected officials, state agencies and state departments. Justice Renner litigated cases at the trial and appellate level on a wide range of topics involving the operation of state government and the authority of government officials. He was promoted to Supervising Deputy Attorney General, and eventually appointed to run the statewide operation of the Government Law Section as the Senior Assistant Attorney General.

In the four years prior to joining the court, Justice Renner served as the Legal Affairs Secretary to Governor Brown. Justice Renner provided advice and counsel to the Governor and top administration officials, and oversaw the defense of significant litigation against the Governor and the administration.
Stacey Marz is the Alaska Court System Director of Self-Help and Language Access Services. She oversees the Family Law Self-Help Center that provides remote facilitated self-help services. She creates content and maintains the court’s self-help websites and plain language forms. Stacey works on access to justice initiatives, including triage, simplification projects and language access. She also trains judicial officers and court staff on how to work effectively with self-represented litigants and limited English proficient litigants through interpreters. Stacey co-coordinates the SRLN national working group on simplification of court processes. She is a Fellow to the NCSC Institute for Court Management. Prior to working for the courts, Stacey was a staff attorney for Alaska Legal Services and public interest environmental attorney. She clerked for the Alaska Supreme Court from 1993-1995 after graduating from the University of Oregon School of Law.
Pauline Brock has been with the Colorado Court’s since 1996 and is currently the Clerk of Court for the Colorado Court of Appeals and the District Administrator for the Appellate Courts. Polly graduated from the University of Colorado School of Law in 1992. Before her current position, Polly was a staff attorney for the Colorado Court of Appeals specializing in motions and jurisdiction for over 10 years. She is a graduate of the Colorado Judicial Executive Leadership Development Program (2015) and the Colorado Institute for Faculty Excellence in Judicial Education (2017).
Trust me, I'm a CERTIFIED Translator!

Trust me, I'm a CERTIFIED Interpreter!

What does it mean to be a CERTIFIED linguist?
Working with Interpreters

Stacey Marz
smarz@akcourts.us

Administrative Rule 6

- Court system provides free interpreters for all parties, witnesses, victims with limited English proficiency
- Ensures highest quality for court proceedings
- May be in-person, telephonic or video remote
Role of the Interpreter

- Provides language access for Limited English Proficient (LEP) parties for court and court-ordered matters;
- Follows professional code of ethics;
- Interprets everything that is said without adding or omitting;
- Assumes a neutral role;
- Takes an oath to interpret meaning of everything stated accurately; and
- Becomes officer of the court once interpreter has been sworn in.
What are the modes of interpretation?

- Consecutive
- Simultaneous
- Sight translation

https://www.youtube.com/watch?v=Y7N_Fslb5a4
Consecutive Interpreting

- English Speaker
- Interpreter
- French Speaker

- Listens
- Speaker stops speaking
- Renders into target language

Note-taking for Consecutive Interpretation
Direct Speech

Interpreter

- speaks in the **first person**
- uses the same grammatical voice as the speaker
- refers to him/herself in the third person

Helpful for judge to advise witnesses to reply directly to the judge, attorney and not to the interpreter

- [https://www.youtube.com/watch?v=1_Rcvvgecxs](https://www.youtube.com/watch?v=1_Rcvvgecxs)
Code of Ethics

- Accuracy
- Impartiality and Avoidance of Conflicts of Interest
- Confidentiality
  - Attorney-client privilege
  - Public comment
- Limitation on Scope of Practice
- Restriction on Public Comment

Code of Ethics (cont.)

- Professionalism
  - Know when recusal is appropriate
  - Alert parties/court to impediments
  - Continuing education
  - Collegiality
  - Duty to report ethical violations
- Accurate Representation of Qualifications

https://www.youtube.com/watch?v=JawVinVsNIE
Correcting mistakes

- As soon as possible
- Use 3rd person
- https://www.youtube.com/watch?v=Y7NFslb5a4

Challenges Facing the Interpreter

- Fatigue
- Multiple voices
- Physical and mental interference (poor acoustics, visual obstruction, mumbling, speed of speech)
- Relay interpreting (both spoken languages and ASL)
Team interpreting

- 2 interpreters for trials or longer hearings
- Switch off every ½ hour or so
  - Fatigue
  - Accuracy
    https://www.youtube.com/watch?v=aNXQOVABk2c

Best Practices

- Use certified court interpreter when possible
- Never use a family member, friend or a minor to interpret
- Refrain from using bilingual attorneys to interpret in court
Certifications

- Federal Court Interpreter Certification (3 Languages, testing currently only in Spanish)
- State Court Interpreter Certification (18 Languages)
- ASL and other Signed Languages (Registry for Interpreters for the Deaf (RID)

Certification Exams

- Written exam – English
- Oral exam (if pass written exam)
  - Consecutive interpreting of witness examination (bidirectional), up to 40 words at a time
  - Simultaneous interpreting of legal matters from English, 120 words per minute
  - Sight translation of legal texts into and out of English
- Pass rate for both written and oral is about 10-20% nationwide
### Interpreters for the Deaf and Hard of Hearing

- American Sign Language (ASL)
- Certified Deaf Interpreter (CDI) (Relay interpreting)
- Communication Access Realtime Translation (CART)
- Code of Ethics

### The Challenges – in Alaska

- Serve individuals and communities across a vast geographical space
- Limited access via road systems or highways
- Weather-related travel disruptions
- Shortage of qualified in-state sign and spoken language interpreters
  - Only 2 certified Spanish interpreters
  - Alaska Native languages and Samoan not available on Language Link
  - Handful RID certified ASL interpreters
    - 1 Legal
Methods

- In-person
- Telephonic
- Video-Remote

Video Remote - ASL

ASL (on-demand and pre-scheduled):
- Last minute requests (e.g. arraignments or domestic violence petitions)
- Short hearings (e.g. Change of Plea, Status Hearings, Calendar Calls)
- Short hearings in more remote locations
Video Remote – Spoken Language

Spoken Language Interpreters (pre-scheduled)
- Civil and criminal trials lasting several days
- Longer hearings for which we need simultaneous interpreters (sentencing, mediation, Early Resolution, probate, guardianship)

Team interpreting - VRI
Video Remote Interpreting - Benefits

- able to provide simultaneous interpreting, even in remote areas.
- interpreters are visible on a screen in the courtroom, and they can see everyone in the courtroom.
Video Remote Interpreting

- Increased access to qualified (certified and registered) interpreters, especially in languages of lesser diffusion.
- Close to on-demand ASL interpreters (availability usually within an hour)
  - Allows deaf court users to resolve short, last minute hearings, even when on-site interpreters are unavailable.
  - Lowers the need to reschedule court proceedings.
- Allows for private and confidential VRI conversations, similar to in-person interpreting.
- Reduced cost – no travel and standby time
Consider pre-trial hearing on interpreter issues

- Opportunity to make sure interpreter and LEP understand each other
- Check interpreter qualifications
- Get everyone on the same page – attorneys
- Physical logistics regarding where to locate interpreter
- Discuss method and equipment
- Language Access Services Director can participate if helpful
Swear in interpreter

How to speak through an interpreter?

Speak
- directly to the LEP person
- at a normal pace
- in manageable chunks so interpreter can keep up

Maintain eye contact with the LEP, not the interpreter

https://www.wicourts.gov/services/judge/interpreter1.htm (see Judicial mannerisms that make interpreting difficult)
What happens if LEP person doesn’t understand?

- Not interpreter’s job to explain - Interpreter will interpret what is said, including a strange answer or “I don’t understand.”
- Judge or attorney need to recognize miscommunications and clear them up.
  - need to rephrase the question.
  - explain a concept that the interpreter will interpret.
  - observe the LEP person to see whether understands.

Respect interpreter’s role

Scope is **only to interpret**

Don’t ask

- to not interpret something
- to explain concepts
- to summarize what is said
- to make sure LEP person understands.

Don’t expect interpreter to help out or advocate.
What if an attorney or party brings interpreter?

- If interpreter has been scheduled, please use scheduled interpreter
  - Function as court interpreter
  - Attorney’s interpreter can be used for attorney-client communications
  - Court pays regardless of use
- If interpreter has not been scheduled
  - Use Language Link if short proceeding, or
  - Voir dire qualifications of attorney’s interpreter

Resources
- NCSC Language Access Services Section
  http://www.ncsc.org/languageaccess
- Resources for Program Managers
Questions / Resources

- Stacey Marz – smarz@akcourts.us
Strategic Plan for Language Access in the California Courts
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Letter from the Chief Justice of California

California’s incredible diversity is one of its greatest assets—it also presents great challenges—but challenges as significant as these also provide opportunities to thoughtfully consider the issues and craft an effective plan to address them.

The numbers tell the story of the access challenges facing Californians: approximately 40 percent of us speak a non-English language at home; there are more than 200 languages and dialects spoken; roughly 20 percent of us (nearly 7 million) have English language limitations.

To address this enormous linguistic challenge for our court system, the Joint Working Group for California’s Language Access Plan’s charge is to develop a comprehensive, statewide language access plan that will provide recommendations, guidance, and a consistent statewide approach to ensure language access for all of California’s limited English proficient (LEP) court users.

The Working Group is addressing one of my highest priorities for the judicial branch by looking at how we can provide full, meaningful, fair, and equal access to justice for all Californians. If individuals cannot understand what is happening in court, how to fill out legal forms, or how to find their way around the courthouse, there is no meaningful access. We need to identify the language barriers that litigants face every day in our courts and how we can better address those needs.

In August 2013, I announced my vision for improving access to justice for Californians, “Access 3D.” Access to our justice system must be examined through a framework that looks at equal access, physical access, and remote access. We ensure physical access by keeping courthouses and courtrooms open, well-maintained and accessible to persons with disabilities; we ensure remote access by providing online resources and electronic access to our court system; and we ensure equal access by making judicial proceedings and all related court contacts available and comprehensible to all. Efforts to enhance language access for LEP court users are a critical component of this Access 3D framework.

Access to the courts for all LEP individuals is critical not just to guarantee access to justice in our state, but to ensure the legitimacy of our system of justice and the trust and confidence of Californians in our court system.

Tani G. Cantil-Sakauye
Chief Justice of California
Judicial Council of California Members
(as of January 5, 2015)

Hon. Tani G. Cantil-Sakauye
Chief Justice of California and Chair of the Judicial Council

Hon. Marla O. Anderson
Presiding Judge of the Superior Court of California, County of Monterey

Hon. Judith Ashmann-Gerst
Associate Justice of the Court of Appeal Second Appellate District, Division Two

Hon. Brian John Back
Judge of the Superior Court of California, County of Ventura

Hon. Richard Bloom
Member of the California State Assembly

Mr. Mark G. Bonino
Attorney at Law

Hon. James R. Brandlin
Judge of the Superior Court of California, County of Los Angeles

Hon. Ming W. Chin
Associate Justice of the Supreme Court

Hon. David De Alba
Judge of the Superior Court of California, County of Sacramento

Hon. Emilie H. Elias
Judge of the Superior Court of California, County of Los Angeles

Mr. James P. Fox
Attorney at Law

Hon. Harry E. Hull, Jr.
Associate Justice of the Court of Appeal Third Appellate District

Ms. Donna D. Melby
Attorney at Law

Hon. Douglas P. Miller
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Hon. Gary Nadler
Judge of the Superior Court of California, County of Sonoma

Ms. Debra Elaine Pole
Attorney at Law

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Hon. David M. Rubin
Judge of the Superior Court of California, County of San Diego

Hon. Dean T. Stout
Assistant Presiding Judge of the Superior Court of California, County of Inyo

Hon. Martin J. Tangeman
Assistant Presiding Judge of the Superior Court of California, County of San Luis Obispo

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Commissioner of the Superior Court of California, County of Butte
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Presiding Judge of the Superior Court of California, County of Santa Barbara

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Presiding Judge of the Superior Court of California, County of Merced

Mr. Frank A. McGuire
Clerk of the California Supreme Court

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Presiding Judge of the Superior Court of California, County of San Bernardino

Hon. Kenneth K. So
Judge of the Superior Court of California, County of San Diego

Ms. Mary Beth Todd
Court Executive Officer
Superior Court of California, County of Sutter

Hon. Charles D. Wachob
Assistant Presiding Judge of the Superior Court of California, County of Placer

Hon. Joan P. Weber
Judge of the Superior Court of California, County of San Diego

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Administrative Director and Secretary to the Judicial Council
Joint Working Group for California’s Language Access Plan

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Associate Justice of the Court of Appeal, First Appellate District, Division Four
Member, Advisory Committee on Providing Access and Fairness

Hon. Manuel J. Covarrubias, Co-Chair
Judge of the Superior Court of California, County of Ventura
Member, Court Interpreters Advisory Panel

Hon. Steven K. Austin
Assistant Presiding Judge of the Superior Court of California, County of Contra Costa
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The Joint Working Group for California’s Language Access Plan affirms that equal access to justice for all is the cornerstone of our judicial process.

I. INTRODUCTION

Access to the courts for all Californians is critical to ensure the legitimacy of our system of justice and the trust and confidence of Californians in our courts. Without meaningful language access, Californians who speak limited English are effectively denied access to the very laws created to protect them.

The Strategic Plan for Language Access in the California Courts (“Language Access Plan”) is a foundational component of the judicial branch’s commitment to
addressing language access. It is the product of more than a year of research and policy development, and the gathering of critical input from stakeholders and justice partners. The plan sets forth (1) an extensive discussion of the multifaceted issues related to the expansion of language access, and (2) a comprehensive set of goals and recommendations delineating a consistent yet flexible statewide approach to the provision of language access, at no cost to court users.

The 75 recommendations in the plan enumerate the policies and operational changes that will need to take place to make comprehensive language access a reality in the California courts. In order to turn these recommendations and policies into a practical roadmap for courts, the plan recommends the immediate formation of a Language Access Implementation Task Force (name TBD, but referred to herein as “Implementation Task Force”). The Implementation Task Force would develop and recommend the methods and means for fully—and realistically—implementing the Language Access Plan in all 58 counties, and would coordinate with related advisory groups and Judicial Council staff on implementation efforts, as appropriate. The Implementation Task Force would also make best estimates as to the costs of implementation and the feasibility of the phasing process based upon resources available. The implementation process would include the monitoring and updating of the plan, in particular, as the trial courts provide information, feedback, suggestions and innovative solutions.
**Fundamental Issues for the Judicial Branch**

California is home to the most diverse population in the country. There are approximately 7 million limited English proficient (LEP) residents and potential court users speaking more than 200 languages and dispersed over a vast geographic area. The most commonly spoken languages vary widely both within and among counties; indigenous languages\(^1\) have become more common and also more visible, particularly in rural areas; and the influx of new immigrants brings with it emerging languages\(^2\) throughout the state. This richly diverse and dynamic population is one of our greatest assets, and a significant driver of the state’s economic and social growth and progress. It also means that the state’s institutions, including the judicial branch, must continually adapt to meet the needs of its constituents.

The diversity of California’s population is matched by the diversity among, and within, its 58 counties. California has urban counties and rural counties, large and small, and counties with big cities, small towns, and scarcely populated land each with its own superior court. Alpine County has 2 judges and 1 courthouse location, with no staff interpreters, and a total population of about 1,200. Los Angeles County, by contrast, has 477 authorized judges, 91 commissioners, and 26 referees.\(^3\) The Los Angeles court employs over 300 staff interpreters spread among its 600 courtrooms in 38 courthouses; they serve 10 million residents, spread across 4,800 square miles. In addition to the vast county differences, the state is split into four regions for purposes of collective bargaining with the interpreters’ union. This often results in variations in agreed-upon work rules and conditions for employee interpreters.

To meet the needs and demands created by this diversity, the California trial courts have a long history of developing creative solutions to address language access needs, particularly in the provision of highly trained certified and registered court interpreters. Currently there are more than 1,800 of these interpreters, providing 215,000 interpreter service days annually at a cost of over $92 million each year.\(^4\) In addition, courts have employed hundreds of highly skilled bilingual employees, utilized dozens of bilingual JusticeCorps volunteers in several court-

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1. Throughout this Language Access Plan, the term “indigenous languages” is used for minority languages that are native to a region and spoken by indigenous peoples. Many of these languages have limited or no written components. These indigenous languages present unique language access challenges because it is often difficult to find interpreters and language access providers who are able to speak both the indigenous language and English with enough proficiency for meaningful communication. Therefore, it is often necessary to provide relay interpreting, where the first interpreter renders the indigenous language into a more common foreign language (e.g., from one form of Mixteco to Spanish) and another interprets from the more common language to English (in our example, Spanish to English).

2. “Emerging languages” are those that are spoken by newly arrived immigrants who have not yet established themselves in significant enough numbers or for long enough periods of time to be as visible to service providers, census trackers, or other data collectors. They are varied and ever changing, as migration patterns shift.

3. Data as of June 2013.

4. Total statewide court interpreter expenditures incurred during 2013–2014 that are eligible to be reimbursed from the Trial Court Trust Fund (TCTF) Program 45.45 (court interpreter) amount to $92,471,280.
houses, and provided self-help assistance and other informational court services in multiple languages. Individual courts have also developed their own innovative programs to increase the provision of services in languages other than English. Many court forms have been translated, multilingual informational videos created, and collaborations with local community organizations formed to address language and cultural barriers.

While the efforts made to date have been substantial, many Californians still face significant obstacles to meaningful access to our justice system. The California courts also face unique challenges every day, particularly in courtrooms with high volume calendars in which the vast majority of litigants are self-represented (such as traffic, family law, and, of course, small claims, where parties must represent themselves). Courts must confront these challenges with limited resources, having endured severe budget cuts during the past several years that have crippled their ability to maintain adequate levels of service. Although some funding has been restored to the courts, the branch is not funded to the levels it was just a few years ago, much less to the level it must be to be able to provide all the services Californians need and expect in the resolution of their legal disputes.

While the provision of comprehensive language access across our system of justice will undoubtedly require additional resources and funding, the branch also understands that fundamental and systemic changes in our approach to language access, at the statewide and local levels, are both necessary and feasible. The Chief Justice recognized that developing a comprehensive statewide language access plan was a critical first step in addressing the needs of the state’s LEP population in a more systematic fashion. In June 2013, the Chief Justice appointed a Joint Working Group to develop this California courts’ Language Access Plan, with the intent that it set forth useable standards for the provision of language access services across the superior courts statewide, while allowing local courts to retain control over the allocation of their internal resources.

This plan acknowledges, through some of the recommendations, that many beneficial practices are already in place in courts around the state. These successful practices are being included as recommendations in this plan to show appreciation for emerging best practices and to highlight effective approaches that local trial courts have taken, on their own, to promote language accessibility. The intent of these recommendations is to provide, as much as possible, a blueprint for trial courts to follow and use as guidance as they expand language access to the public.

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5 See, for example, the California Courts Online Self-Help Center in English at [www.courts.ca.gov/selfhelp.htm](http://www.courts.ca.gov/selfhelp.htm) and in Spanish at [www.sucorte.ca.gov](http://www.sucorte.ca.gov); the JusticeCorps program detailed at [www.courts.ca.gov/justicecorps.htm](http://www.courts.ca.gov/justicecorps.htm).

6 Depending on local resources and regional bargaining agreements, court interpreters in California currently provide a variety of interpreter services for LEP court users, including simultaneous or consecutive interpretation of court proceedings, court-ordered programs for which an interpreter is required such as court-ordered psychiatric evaluations; interviews with defendants and witnesses; sight translation of court documents; probate investigations; mediations sessions and child-custody evaluations, or other interpreter services as may be required by the court. See also the University of California Hastings College of the Law’s study on Enhancing Language Access Services for LEP Court Users (2013), found at [www.courts.ca.gov/documents/jc-20130426-info3.pdf](http://www.courts.ca.gov/documents/jc-20130426-info3.pdf), discussing the various approaches by local courts throughout the state to providing language access.
“In developing the language access plan the Access to Justice Commission urges our group to put at the forefront the perspective of the non-English-speaking court user at all critical stages of the plan development. It is easy to listen to judges, to court administrators, interpreters, lawyers, and to other professionals. What is important is how what we do affects the lives of the people who come into court, hoping for justice without the language skills to navigate our system. What does that person who speaks little or no English need to get a fair shake?”

— Member, Joint Working Group for California’s Language Access Plan

they serve. The plan also recommends that the California Courts of Appeal and Supreme Court of California discuss and adopt applicable parts of the plan with any necessary modifications. This strategic plan is not, however, an operational or implementation plan. If this plan is approved, implementation, planning and oversight will begin in 2015.

Fundamental to California’s Language Access Plan is the principle that the plan’s implementation will be adequately funded so the expansion of language access services will take place without impairing other court services. The Language Access Plan recognizes that where resources are limited, where additional funding will take time to secure, or where implementing one recommendation can only occur after another is completed, the plan needs to provide for a phasing-in of its recommendations over time. The Implementation Task Force will be responsible for calculating implementation costs, creating implementation recommendations for the Judicial Council, and adjusting implementation based on feasibility assessments over time including the financial resources available.

In addition, is the intent of this plan that all of its recommendations be applied consistently across all 58 trial courts. To the extent that provisions in local bargaining agreements are in conflict with any recommendations contained in this plan, it is recommended that local agreements be modified or renegotiated as soon as practicable to be consistent with plan recommendations and to ensure that, at a general level, courts provide language access services for LEP persons that are consistent statewide. However, the drafters of the plan recognize that differences in local demographics, court operations and individual memoranda of understanding with court employees may constrain individual courts’ abilities to fully implement certain of the plan’s recommendations on the timeline proposed.
Summary of the Plan

California’s Language Access Plan proposes a comprehensive and systematic approach to expand and enhance language access in the California courts. While the plan allows for a large degree of flexibility for the state’s diverse courts and communities, it also provides baseline standards to ensure statewide consistency with federal and state law so that all Californians can expect language access services regardless of where they live within the state’s borders.

The Language Access Plan includes an assessment and prioritization of all of the points of contact between LEP court users and the courts. In this way, a greater level of skill and resources can be targeted at the most complex and important events, such as hearings, trials, and other court proceedings, while more flexible services can be provided at other points of contact, such as self-help centers and the clerk’s office. The plan also considers and addresses points of contact before LEP court users even arrive at the courthouse, since they may be discouraged from accessing the judicial system if they perceive, accurately or not, that their language needs will not be met. Targeting resource allocation to the most critical points of contact will also require improved data collection on the languages spoken in each county.

The plan also identifies and advocates for the use of cost-effective methods to enhance language access throughout the courthouse, such as multilingual self-help services and brochures, multilingual information on court websites (both spoken and written), remote language services for interactions with court staff, and translated court signage and legal forms. A significant focus is placed on the appropriate qualification and utilization of a variety of language access providers, from court interpreters to bilingual employees to trained volunteers, at the various points of contact that LEP court users have with our courts.

Additionally, the plan identifies the kinds of training needed for judicial officers, court administrators, and court staff on how to understand and address the needs of LEP court users, including education in cultural competence, the optimal methods of managing a court proceeding in which interpreting services are being provided, the provision of language access services throughout the court system, and state and local language access policies. Other subjects addressed in the plan

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7 Relevant authority includes Title VI of the Civil Rights Act of 1964 and its implementing regulations (42 U.S.C. § 2000d et seq.; 28 C.F.R. Part 42, Subpart C), the California Constitution, California Evidence Code section 756 (eff. 01/01/15), and California Government Code sections 68092.1 (eff. 01/01/15; see Appendix H for new statutes), 68560(e), and 7290 et seq. The plan also addresses issues identified by the U.S. Department of Justice in its investigation of the Judicial Council for compliance with Title VI regarding the provision of language access services in the California state courts.

8 The legal requirements relating to access for deaf or hard of hearing court users are governed by the Americans with Disabilities Act (ADA) and other relevant statutes. However, deaf or hard of hearing court users and their interpreters should be considered as part of any language access plan implementation whenever appropriate, by, for example, including deaf or hard of hearing court users and their interpreters on “I speak” cards or in centralized pilots. Provision of standards related to language access for deaf or hard of hearing court users will not be included in this plan since courts are already legally mandated to provide deaf or hard of hearing court users with disability and related language access (see ADA and section 504 of the Rehabilitation Act of 1973). Where access may not be provided to deaf or hard of hearing court users under the ADA, the courts will provide access as part of their compliance with this plan.
include the recruitment and training of bilingual staff and interpreters, and the formation of partnerships with community organizations serving LEP populations.

The branch is constantly aware of the need to build in efficiencies and cost savings. The plan therefore recommends a strategy for phasing in the expansion of spoken language interpreter services in all court matters consistent with new Evidence Code section 756, where existing resources prohibit immediate expansion to all cases; and it recommends the creation of scheduling protocols to ensure the most efficient use of interpreters. The plan also proposes the thoughtful and responsible deployment of technological solutions, such as appropriate use of video remote technology and multilingual audiovisual tools, which provide language access while ensuring due process and high quality language services. The recommendations in the plan also set the framework for identifying the additional funding that will be needed to enable the courts to meet the increased demand on court resources that will arise from the branch’s commitment to language access without sacrificing any other court services.

**Timeline of Recommendations**

This strategic plan outlines three phases of implementation. This is proposed because some of the recommendations in this Language Access Plan can be implemented immediately; others may require the creation of efficiencies in existing court operations and the more effective deployment of current resources. Other recommendations require changes in legislation and rules of court, or additional funding for the judicial branch. The Implementation Task Force will have the flexibility to adjust phasing of the recommendations based upon its ongoing review and monitoring of the progress of implementation and available resources.

To assist courts and all interested persons in understanding how the various recommendations contained in the Language Access Plan can be gradually phased in for implementation by the courts and the Judicial Council during the next five years (2015–2020), Appendix A groups all of the plan’s recommendations into one of three phases.

**PHASE 1:** These recommendations are urgent or should already be in place. Implementation of these recommendations should begin in year 1 (2015).

**PHASE 2:** These recommendations are critical, but less urgent or may require completion of Phase 1 tasks. Implementation of these recommendations may begin immediately, where practicable, and in any event should begin by years 2–3 (2016–2017).

**PHASE 3:** These recommendations are critical, but not urgent, or are complex and will require significant foundational steps, time, and resources to be completed by 2020. Implementation of these recommendations should begin immediately, where practicable, or immediately after the necessary foundational steps are in place.
Regardless of which phase a recommendation falls under, every recommendation in this plan should be put in place as soon as the resources can be secured and the necessary actions are taken for implementation. The provision of meaningful language access to all Californians who need it, and equal access to justice, are and should be considered a core court function. Courts should continue to provide all existing language access services even if the particular service appears in a later phase of this plan. Similarly, the proposed phase-in must allow for flexibility if the Implementation Task Force determines that different phasing is more appropriate to achieve the goal of comprehensive language access.

**The Planning Process**

The Joint Working Group’s effort to develop a comprehensive statewide language access plan began with the review of a large body of information, including language access plans of other states, the American Bar Association (ABA) Standards for Language Access in Courts, the California Federation of Interpreters’ position paper on video remote interpreting, prior reports on language access needs and solutions in California courts, and the National Center for State Courts’ Call to Action. Additional reports and materials were received over the course of the planning process. A complete list of the background information considered and utilized by the working group can be found in Appendix G. The working group also held three in-person meetings and numerous conference calls to debate ideas.

To complete the information-gathering process, the working group held meetings with court leaders and other stakeholders, held public hearings, and invited and received both written and oral public comment. This input included:
• Listening sessions with language access stakeholders, namely:
  • Independent interpreter organizations;
  • Legal services providers representing various communities throughout the state;
  • The California Federation of Interpreters; and
  • Presiding judges and court executive officers.

• Three public hearings (in San Francisco, Los Angeles, and Sacramento) with comments from 29 panelists providing input from local, statewide, national, health-care, court, education, and legislative perspectives. Audio for the three hearings was broadcast on the web and included closed captioning in English and Spanish. American Sign Language (ASL) and spoken language interpreters were provided for audience members and persons providing oral comment.

Panelists included:
  • Court executive officers representing the diversity of needs and challenges faced by different courts throughout the state;
  • Legal services organizations and community advocates representing client populations in large urban areas such as Los Angeles, in Asian-American Pacific Islander and Latino communities throughout California, and in rural communities with significant numbers of indigenous language speakers;
  • The president of the California State Bar, Assembly Member Ed Chau, and a representative from the California Department of Education;
  • The president and representatives of the largest organization representing court interpreters in California, the California Federation of Interpreters (CFI); and
  • A national expert from the National Center for State Courts, the director of the New Mexico Administrative Office of the Courts, and the Senior Director of National Diversity and Inclusion for Kaiser Foundation Health Plan, Inc.

During the public comment portion of the public hearings the working group heard extensive oral comments and received a significant body of written comments and prepared statements, including comments from LEP court users (some of whom spoke in their primary languages, with their comments interpreted into English), court interpreters, community representatives, legal services providers, and education providers.\(^9\)

Additionally, there was a public comment period of 60 days following the Judicial Council’s approval and release of the draft of the Language Access Plan.

The Joint Working Group would like to thank all commentators and also acknowledge that the U.S. Department of Justice, in conjunction with its investigation, has been extremely supportive and helpful throughout the working group’s planning process as it worked to develop the best possible Language Access Plan for the California courts.

\(^9\) See [www.courts.ca.gov/24466.htm](http://www.courts.ca.gov/24466.htm) for links to written public comments and prepared testimonies for the three public hearings.
**Key themes from stakeholder input:**

Stakeholders provided a wealth of information during the listening sessions and in the public hearing and comment process. In preparing this Language Access Plan, the Joint Working Group has studied and considered this thoughtful and invaluable information at length. Although the range of topics covered, the insights shared, and the experiences relayed were extensive, some salient themes surfaced throughout the planning process:

- Although California’s judicial branch is committed to providing full, meaningful, fair, and equal access to justice for all Californians, including limited English proficient litigants, much remains to be done, especially in the civil arena, to ensure all court users have meaningful access to the state’s courts.

- Any efforts to improve the provision of language access services must include a more comprehensive mechanism for collecting data on LEP communities and their potential need for court services. Traditional sources of demographic data underestimate the existing numbers of LEP residents in the state, in particular with regard to linguistically isolated communities, migrant workers, and speakers of indigenous languages. Similarly, these data sources do not adequately track emerging languages.

- LEP speakers who need to use the judicial system for a variety of civil issues—from child custody to restraining orders to evictions—are unable to meaningfully access court processes because of language barriers. In critical proceedings such as hearings and trials, LEP court users are often forced to resort to family members or friends to communicate with the court. These untrained interpreters are rarely equipped to relay the court’s communication accurately and completely to the LEP litigant, and vice versa. Failure to ensure proper communication can lead to the loss by LEP court users of important legal rights, an inability to access remedies, or basic misunderstandings and confusion.

- Language access must be provided at all critical or significant points of contact that LEP persons have with the court system. LEP parties are often unable to handle even the very first steps in seeking legal recourse, such as knowing what remedies or legal protections may be available and where to seek them out, knowing what legal procedures to follow, and understanding how to fill out court forms as well as how and where to file them. Language access must start before an LEP court user reaches the courthouse doors; it must begin with community outreach and education efforts, web-based access, and the utilization of ethnic media outlets to educate the public. And it must then be available upon entering the courthouse and throughout all components of court services, such as self-help centers, alternative dispute resolution services, and the clerks’ counters.

- Projections about the cost of expanding language access throughout all court proceedings and points of contact vary widely but are by and large unknown. There are questions about whether the existing pool of court interpreters who are certified or registered by the Judicial Council and available to work throughout the state is sufficient to meet the possible demand as services are expanded, with differing views regarding the existing capacity. Although it is difficult at this stage to estimate the cost of expanded access when including all attendant costs, from technology to interpreter deployment to translation to training and qualification of staff to improved courthouse signage, information can and must be collected to make rational projections.
• Technologies such as video remote interpreting (VRI), telephonic interpretation, web-based access, multilingual audiovisual tools, and others have an important role to play in the statewide provision of language access. However, courts must exercise care to ensure that the use of technology is appropriate for the setting involved, that safeguards are in place for ensuring access without deprivation of due process rights, and that high quality is maintained.

• The California judicial branch has seen a drastic reduction in funding in recent years. Although some funding has been restored, due to various factors this has not resulted in any net increase in the total funding for the branch. Consequently, courts throughout the state are still struggling to provide the most basic level of service to their communities. Expansion of language access services, though supported by all stakeholders, poses fiscal demands that must be satisfied by efficiencies in the provision of language services and, most importantly, by additional funding appropriated for that purpose and not by shifting already scarce resources from other court services.

• Any effort to ensure meaningful language access to the court system for all Californians must include partnerships with stakeholders. These stakeholders include: community-based providers like social services organizations, domestic violence advocates, mental health providers, and substance abuse treatment programs; justice partners such as legal services organizations, court interpreter organizations, district attorneys, public defenders, law enforcement, jails, probation departments, and administrative agencies; and other language access experts.

• The judicial branch should become more proactive in recruiting potential interpreters at the earliest stages of their education, particularly in high schools and community colleges. Courts should create partnerships with educational providers to develop a pipeline of potential interpreters and bilingual court employees.

• There is a critical need for training of judicial officers, court staff, and security personnel in (1) identifying and addressing the needs of court users at all points of contact with the court, (2) understanding distinct characteristics of the various ethnic communities that can ensure respectful treatment of LEP court users, (3) ensuring that interpreters are, in fact, certified or are properly provisionally qualified, and (4) conducting courtroom proceedings in a manner that facilitates the maximum quality of interpretation.

“Language access must be consistent and statewide. If we are to meet the enormous need, we must pool resources to fill in the gaps in the availability of qualified interpreters. We must do this by utilizing technology to expand language access beyond the courtroom and within and among courthouses and counties.”

— Chair, Access to Justice Commission
Relevant Judicial Branch Goals

California’s Language Access Plan effort supports Goal I of the Judicial Council’s most recent strategic plan—Access, Fairness, and Diversity—which sets forth that:

- All persons will have equal access to the courts and court proceedings and programs;
- Court procedures will be fair and understandable to court users; and
- Members of the judicial branch community will strive to understand and be responsive to the needs of court users from diverse cultural backgrounds.

The Language Access Plan also aligns with the most recent operational plan for the judicial branch, which identifies additional objectives in support of Goal I, including:

- Increase qualified interpreter services in court-ordered/court-operated proceedings and seek to expand services to additional court venues; and
- Increase the availability of language access services to all court users.

Structure of the Language Access Plan

The Language Access Plan identifies eight major goals around which the plan is organized. Each goal includes an issue description to (1) provide background on the problem/issue that the goal is intended to address, (2) discuss the relevant input received by the Joint Working Group during the public participation process, and (3) highlight California’s unique opportunities and challenges. The issue
descriptions contained within each of the eight goals inform the recommendations that are designed to help achieve that particular goal. The plan also includes appendices that provide more detailed information on plan components, such as guidelines for the provision of video remote interpreting and tools to assist in the delivery of language access services.

**Concepts Utilized Throughout the Language Access Plan**

The Language Access Plan uses certain terms or phrases with a very deliberate purpose and concrete meaning. To avoid confusion, here are the common concepts used throughout and the intended meaning for purposes of the Language Access Plan:

**Civil cases or proceedings:** Any non-criminal matter in the state courts, including civil limited and unlimited, family law, juvenile dependency, probate, small claims, mental competency, and others.

**Court proceedings:** Any civil or criminal proceedings presided over by a judicial officer, such as a judge, commissioner or temporary judge, or managed by officers of the court or their official designees, such as special masters, referees and arbitrators.

**Court-ordered, court-operated programs, services or events:** Any programs, services or events that are both ordered by the court AND operated or managed by the court. It does not include a program or activity that is operated or under the control of a third-party provider. It does include programs, such as Family Court Services orientation and mediation, or any other event directed by the judicial
officer and occurring in relation to a pending case (e.g., “day of court” mediations in family law or unlawful detainer matters, or settlement discussions directed to occur by the judicial officer).  

Language threshold: Several recommendations in the Language Access Plan provide for translation of written or audiovisual materials. Because the language needs and demographics vary significantly among California’s 58 counties, and within counties themselves, the Language Access Plan proposes a method for determining how many and which languages any materials should be translated into. The proposed general language threshold is: “In English and up to five other languages, based on local community needs assessed through collaboration with and information from justice partners, including legal services providers, community-based organizations and other entities working with LEP populations.” It is the Joint Working Group’s intent that the Implementation Task Force conduct a review of available data and, in consultation with experts, provide more specific guidelines to local courts regarding the number of languages, and population thresholds, for which they should provide translation.

Provisional qualification: The process courts must follow when no certified or registered interpreter is available to interpret, and the court needs to appoint someone else to interpret for a given proceeding. Provisional qualification is accomplished through a series of mandated steps, including a finding of good cause, and the completion of a Judicial Council form, as laid out in California Rule of Court 2.893, which delineates the procedure for provisionally qualifying someone to interpret in a criminal or juvenile proceeding.

Qualified interpreters:
(1) Certified and registered interpreters as credentialed by the Judicial Council and who are in compliance with the Professional Standards and Ethics for California Court Interpreters, and
(2) “Provisionally qualified” interpreters (noncertified and nonregistered) who are determined to be qualified on a provisional basis.

With respect to programs or services that may be court-ordered but are not operated or managed by the court (such as referrals to counseling or parenting classes), other court-related services (such as court-appointed guardians, custody evaluators who are not court staff, or forensic accountants), and non-mandatory programs such as voluntary mediation, this Language Access Plan recommends that judicial officers must determine that linguistically accessible services are available before LEP court users are ordered or referred to those services.

Since no rule of court exists at this time for civil proceedings, this plan recommends amending the rule of court for provisional qualification in criminal and juvenile proceedings to include civil proceedings, as well as interim requirements until the rule is amended. The two parts of the current process for the court to appoint a noncertified or nonregistered interpreter are discussed in greater detail in Goal 2: (1) provisional qualifications of a noncertified or nonregistered interpreter, and (2) unavailability of a certified or registered interpreter.
II. STRATEGIC GOALS AND POLICIES

Goal 1: Improve Early Identification of and Data Collection on Language Needs

Goal Statement
The Judicial Council will identify statewide language access needs of limited English proficient (LEP) Californians, and the courts will identify the specific language access needs within local communities, doing so as early as possible in court interactions with LEP Californians.

Issue Description
Stakeholders unanimously agreed that the failure to identify the language needs of LEP court users early enough in the court process causes ripple effects throughout the system. When the need for a court interpreter is not identified in advance of a court appearance, courts and litigants may be forced to rely on untrained interpreters, often family or friends of the litigant, to provide language services. As discussed in more depth in Goal 2, the use of untrained interpreters can have serious and potentially dangerous consequences.

As language access services are expanded into more types of cases, early identification of LEP court users will become even more critical. Early identification makes it possible for courts to schedule qualified interpreters efficiently when calendaring cases in the various courtrooms where they are needed. It similarly allows courts to assign bilingual staff more efficiently to appropriate areas within the courthouse, and to share court interpreters across counties through the cross-assignment process when staff interpreters are not available in one court but free in another. Early identification also reduces delays for the courts by minimizing the need to continue cases when the need for an interpreter becomes apparent too late in the process. Also, by allowing courts to address an LEP litigant’s legal matters without unnecessary delays, early identification increases court user satisfaction.

Early Identification of Language Needs

Issue Description
The identification of the language needs of LEP court users should occur through a number of mechanisms, from an LEP person’s self-identification to identification by court staff, justice partners, and judicial officers. While courts should encourage an individual’s self-identification as LEP, courts
should not rely on that exclusively. Some LEP court users may fail to request language access services because they may misjudge the level of proficiency required to communicate in court or be afraid of discrimination or bias.

Further, assessing the need for language services must occur throughout the life of the case. While providing information about language access at the filing of a case is critical, it is important to recognize and provide for the fact that an LEP person’s need for such services may precede the filing of a case or may arise after a court ruling. Ideally, courts should have a system for documenting the requests that are made and whether the request was met, including proceedings and events both in and out of court.

**Recommendations**

1. Courts will identify the language access needs for each LEP court user, including parties, witnesses, or other persons with a significant interest,\(^ {12}\) at the earliest possible point of contact with the LEP person. The language needs will be clearly and consistently documented in the case management system and/or any other case record or file, as appropriate given a court’s existing case information record system, and this capability should be included in any future system upgrades or system development. (Phase 1)

2. A court’s provision or denial of language services must be tracked in the court’s case information system, however appropriate given a court’s capabilities. Where current tracking of provision or denial is not possible, courts must make reasonable efforts to modify or update their systems to capture relevant data as soon as feasible. (Phases 1, 2)

3. Courts should establish protocols by which justice partners\(^ {13}\) can indicate to the court that an individual requires a spoken language interpreter at the earliest possible point of contact with the court system.\(^ {14}\) (Phase 1)

4. Courts will establish mechanisms\(^ {15}\) that invite LEP persons to self-identify as needing language access services upon contact with any part of the court system (using, for example, “I speak” cards [see page 49 for a sample card]). In the absence of self-identification, judicial officers and court staff must proactively seek to ascertain a court user’s language needs. (Phase 1)

5. Courts will inform court users about the availability of language access services at the earliest points of contact between court users and the court. The notice

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\(^ {12}\) “Persons with a significant interest” include persons with a significant interest or involvement in a case or with legal decision-making authority, or whose presence or participation in the matter is necessary or appropriate as determined by a judicial officer. Examples of persons who may have a significant interest include: victims; legal guardians or custodians of a minor involved in a case as a party, witness, or victim; and legal guardians or custodians of adults involved in a case as a party, witness, or victim.

\(^ {13}\) Justice partners include legal services providers, law enforcement agencies, public defenders, district attorneys, county and city jails, child protective services, domestic violence advocates and shelters, and others.

\(^ {14}\) Options to be explored by the Implementation Task Force may include development of a Judicial Council form, modifying all relevant Judicial Council forms, creating a form to be filed with all initial pleadings, or working with justice partners to develop the protocols.

\(^ {15}\) The Judicial Council’s Civil and Small Claims Advisory Committee is creating a fee waiver form for interpreter requests.
must include, where accurate and appropriate, that language access services are free. Courts should take into account that the need for language access services may occur earlier or later in the court process, so information about language services must be available throughout the duration of a case. Notices should be in English and up to five other languages based on local community needs assessed through collaboration with and information from justice partners, including legal services providers, community-based organizations, and other entities working with LEP populations. Notice must be provided to the public, justice partners, legal services agencies, community-based organizations, and other entities working with LEP populations.16 (Phase 1)

**DATA COLLECTION**

**Issue Description**

Assessing the number of LEP persons likely to seek out court services, and the frequency of contact of these LEP persons with the courts, will help provide LEP court users with improved access to court services. In order to determine the language access needs both in any given court’s community and statewide, the Judicial Council and individual courts should augment existing data collection methods. Currently, to plan for the provision of interpreter services, the Judicial Council is required to conduct a study of spoken language interpreter use in the trial courts, every five years. The next study is due to the Legislature in 2015.17 Key findings from the study published in 2010 covering the years 2004 through 2008 include the following:

- Courts provided more than 1 million service days18 of spoken language interpretation services in 147 languages;
- 17 languages accounted for 98.5% of all service days (see table, Appendix E);
- Spanish continued to be the most used language, representing 83% of all mandated service days in the state; and
- Statewide, the only significant changes in the number of service days by language were increases in Spanish (11%) and Mandarin (89%).

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16 For example, notices should be posted on the court’s website, on signage throughout the courthouse, at court information counters, in court brochures, in a document included with initial service of process, at court-community events, in public service notices and announcements in the media, including ethnic media, and in any embassies or consulates located in the county. To address low literacy populations and speakers of languages that do not have a written component, video and audio recordings should be developed to provide this notice.

17 To better inform future decisions regarding interpreter use for limited English proficient (LEP) court users in civil proceedings, the 2015 Language Need and Interpreter Use Study will also collect data and conduct analysis on interpretation needs in these areas. Findings and recommendations from this study will assist in the future designation of the languages to include in the certification program for court interpreters. An additional component of the study will explore use of interpreters in civil proceedings. Currently, there are court interpreter certification exams given for the following designated languages: American Sign Language, Arabic, Eastern Armenian, Cantonese, Khmer, Korean, Mandarin, Portuguese, Punjabi, Russian, Spanish, Tagalog, and Vietnamese. Farsi has been designated for certification, but is not yet certified. Even though Western Armenian and Japanese are certified languages, there is no bilingual interpreting exam presently available.

18 Service days in the 2010 study are defined as the sum of interpreter assignments including full days, half-days, and night sessions.
When engaging in these data collection activities and projecting language needs, courts should not rely exclusively on the numbers provided by the U.S. Census and American Community Survey (ACS). The type of detailed, local information that courts need to identify the language needs of their constituents may not be adequately captured by these more traditional methods of demographic data collection. Further, many ethnic and linguistic minorities and emerging LEP communities are underreported in these sources of data, as was commented by community-based organizations during the public hearings.

Organizations working with specific populations have collected their own data to identify areas where census data may not accurately reflect our state’s linguistic diversity. For example, California Rural Legal Assistance conducted a comprehensive study19 of migrant farm workers that provides useful information on indigenous languages spoken in different areas of our state. Other reliable sources of data that courts might contact to determine the unique needs of their communities are the California Department of Education, the Migration Policy Institute, and local welfare agencies that track the language needs of government assistance recipients at the local level. Engaging community-based agencies such as legal services agencies, refugee organizations, and community social services providers can provide local courts with a better understanding of the language needs of the

communities they serve. Partnering with agencies that serve LEP court users in the court’s community can also lead to the development of culturally appropriate and effective strategies for the early identification of LEP court users needing court services.

With regard to the provision of language access services, courts currently track and report the amount of money spent on interpreter services. To gauge overall need, courts should also track and report expenditures on other services such as translations and multilingual signage or videos. All of these data collection efforts will provide critically necessary information to support funding requests, and will help courts determine how best to deploy court interpreters and bilingual staff and equipment to maximize the effective and efficient provision of language services.

**Recommendations**

6. The Judicial Council and the courts will continue to expand and improve data collection on interpreter services, and expand language services cost reporting to include amounts spent on other language access services and tools such as translations, interpreter or language services coordination, bilingual pay differential for staff, and multilingual signage or technologies. This information is critical in supporting funding requests as the courts expand language access services into civil cases. (Phase 1)

7. The Judicial Council and the courts should collect data in order to anticipate the numbers and languages of likely LEP court users. Whenever data is collected, including for these purposes, the courts and the Judicial Council should look at other sources of data beyond the U.S. Census, such as school systems, health departments, county social services, and local community-based agencies. (Phase 2)
**Goal 2:** Provide Qualified Language Access Services in All Judicial Proceedings

**Goal Statement**

By 2017, and beginning immediately where resources permit, qualified interpreters will be provided in the California courts to LEP court users in all courtroom proceedings and, by 2020, in all court-ordered, court-operated events.

**Provision of Qualified Interpreters in Court Proceedings**

**Issue Description**

Court proceedings such as hearings and trials are arguably the most critical events during which a limited English proficient speaker will need high quality language assistance services to communicate with the participants in the proceeding. Existing law mandates that interpreters be provided by the court for parties, at no cost to them, for all criminal cases including felonies, misdemeanors, and infractions (including traffic cases). Similarly, interpreters must also be provided if the defendant in a criminal case is a juvenile and the case proceeds as a juvenile delinquency matter. In juvenile dependency cases, interpreters must be provided by the court if the court appoints an attorney for the minor or a parent and the appointment of the interpreter is necessary to ensure the effective assistance of counsel.

With regard to civil cases, however, California law regarding provision of interpreters has historically been quite complex. Until January 2015, state statutes and case law authorized or required the expenditure of court funds for in-courtroom interpreters only in certain civil case matters so courts, on a discretionary basis, have provided interpreters to parties only in proceedings involving domestic violence, ancillary family law matters, and elder or dependent adult abuse protective orders. For most civil matters, however, general statutes providing that parties are to pay for interpreters in civil actions arguably prohibited court funds from being spent for that purpose, or in a more permissive interpretation, only allowed court funds to be spent on needed interpreters when the parties are indigent. Effective January 1, 2015, however, Evidence Code section 756 went into effect, expressly authorizing courts to provide interpreters in civil matters, at no cost to the parties, with a prioritization by case type and preference within some priorities for indigent parties.

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20 Within the context of this plan, and consistent with Evidence Code section 756(d), the term “provided” (as “in qualified court interpreters will be provided”) means at no cost to the LEP court user and without cost recovery.

21 Cal. Const., art. I, § 14: “A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.” Government Code section 68092(a) provides that the court shall pay for interpreters’ fees in criminal cases.


23 Gov. Code, § 68092(b).
The passage of Evidence Code section 756 addresses many of the comments from stakeholders and the public—and the view of the Joint Working Group—that civil cases such as family law matters, evictions, guardianships, and conservatorships are critical to the lives of Californians. A large percentage of litigants in these types of cases, including LEP litigants, represent themselves in court and thus do not have the assistance of an attorney to explain the procedures or the law, or to help them present their case to a judicial officer. The use of untrained interpreters may lead to significant misunderstandings and a resulting lack of redress for LEP litigants, and is even more problematic in these cases where the parties are unrepresented. Their use can also cause confusion and slow the court process. Overall, relying on unqualified interpreters can result in serious and potentially dangerous consequences, such as necessary protective orders not being issued. Also challenging are situations when no interpreter (trained or untrained) can be found, and the matter has to be continued to a later date, causing monetary and resource losses for LEP court users and the courts. When justice is delayed, both litigants and the courts lose in the process.

Using a well-meaning but unqualified interpreter, who does not understand legal terminology or court procedures, and whose performance no one may be able to assess, can mask these miscommunications and errors, thus giving the appearance of meaningful access when none is in fact provided. Additionally, in an effort to communicate with LEP court users, judicial officers sometimes ask lawyers or advocates for these litigants to interpret for their clients or for witnesses, which creates significant conflicts of interest and ethical issues for these providers, while preventing them from properly focusing on the tasks for which they are present in the courtroom.

In many civil matters where fundamental interests are at stake, such as housing, personal safety, or the determination of a parental relationship, the cost to LEP litigants of retaining their own certified or registered interpreter (or the chance of being charged for interpreter services provided by the court after the case) can be prohibitive. It is for this reason that many of the stakeholders submitting spoken and written public comment emphasized the need for courts to provide interpreters free of cost to the LEP litigant. Some LEP litigants, particularly in more complex limited and unlimited civil matters, may have the financial means to pay for their own interpreter (even if not initially, possibly after a money judgment is issued in their favor). However, the Joint Working Group is cognizant of a potential chilling effect on LEP litigants, including their initial decisions whether to pursue a legal course of action, if they are required to pay for their own court interpreters. For this reason, it is the goal of this plan, and consistent with new Evidence Code section 756, that certified and registered interpreters be provided by courts without cost to the LEP court user.

Even when the right to an interpreter is recognized by law, or when an interpreter is allowed to be provided by the court at court expense, there may not always be a qualified interpreter available. When no certified or registered interpreter is available to interpret in criminal matters, the court is required to make specific findings before provisionally qualifying a proposed interpreter to interpret for
a given proceeding. This is accomplished through a series of mandated steps, including a finding of good cause, and the completion of a Judicial Council form, as laid out in rule 2.893 of the California Rules of Court. Because interpreters have generally not been provided in civil cases there is no official mechanism for qualifying noncertified or nonregistered court interpreters in such cases. Additionally, although a court user may be entitled to an interpreter, there is no designated process for them to waive the provision of an interpreter, should they wish to do so.

With respect to the qualification process itself, court certified and registered interpreters in California are credentialed by the Judicial Council, with testing, continuing education, and ethical requirements overseen by the Judicial Council’s Court Language Access Support Program (CLASP) unit. The speakers at the listening sessions and public hearings agreed that California is a leader in its credentialing of court interpreters. As Goal 5 states, the plan recommends that the existing standards for credentialing remain and, where appropriate, be further developed. Further discussion is provided below under the issue description in Goal 5.

24 Goal 8 addresses recommendations for statutory or rule changes that may be necessary to expand the use of interpreters in civil proceedings.
25 Goal 8 addresses a recommendation for development of a policy regarding guidelines for a waiver of interpreter services by an LEP court user. Recommendation 50 under Goal 6 addresses the necessary training that will be required for judicial officers and court staff to ensure understanding of the waiver requirements, including the appropriateness of waiver and any potential for misuse.
Recommendations

8. Qualified interpreters must be provided in the California courts to LEP court users in all court proceedings, including civil proceedings as prioritized in Evidence Code section 756 (see Appendix H), and including Family Court Services mediation. (Phases 1 and 2)

9. Pending amendment of California Rules of Court, rule 2.893, when good cause exists, a noncertified or nonregistered court interpreter may be appointed in a court proceeding in any matter, civil or criminal, only after he or she is determined to be qualified by following the procedures for provisional qualification. These procedures are currently set forth, for criminal and juvenile delinquency matters, in rule 2.893 (and, for civil matters, will be set forth once the existing rule of court is amended). (See Recommendation 50, on training for judicial officers and court staff regarding the provisional qualification procedures, and Recommendation 70, on amending rule 2.893 to include civil cases.) (Phases 1 and 2)

Provision of Court Interpreters in Court-Ordered, Court-Operated Programs, Services, or Events

Issue Description

Legal services providers, community members, court administrators, and justice partner representatives expressed concern that LEP litigants frequently find themselves in a court-ordered, court-operated program, service or event outside of a courtroom that is critical for compliance with court rulings or procedures. In these settings, court users are even less likely to obtain interpreter services, given the limited resources faced by many courts. For example, just as the court hearing on custody should be accessible to LEP litigants, Family Court Services mediation—a mandatory process for parents who are not in agreement about child custody or visitation issues—should similarly be fully available to LEP parents. During the public hearing process, legal services advocates and others criticized the common use of unqualified and sometimes entirely inappropriate interpreters—such as family, friends, or even opposing parties—for these events.

While recognizing that courts cannot be made responsible for providing language access services for programs that are not operated or managed by the court, it is common for judicial officers to order parties to participate in or complete outside programs or activities, and condition compliance with a court order on such participation or completion. These programs offer a benefit to participants (such as parenting classes, batterer intervention programs, or counseling) or may be critical to resolution of a case (such as mediation, or supervised visitation programs that allow for safe child visitation). When making court orders, courts should not create a situation for an LEP court user that conditions his or her compliance on participation in a program for which no language access exists. If resources are so

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27 As provided in Evidence Code section 756(g) (see Appendix H), the provision of interpreters in civil proceedings must not affect the provision of interpreter services in criminal, juvenile or other proceedings for which interpreters were previously mandated.
limited that interpreters or other appropriate modes of language access services are not available, courts should develop mechanisms for an LEP court user to comply with the court's order by participating in a comparable, yet linguistically accessible, program or activity, or by waiving participation for the LEP court user. This last alternative is least preferable as, presumably, these court programs and activities are critical for the proper resolution of a case. LEP persons should not be burdened with a less desirable alternative to resolve their court matters (for example, paying a fine rather than attending traffic school) because there are no linguistically accessible options available nor should an LEP individual be denied the benefit of the services otherwise deemed necessary. Recommendation 33 addresses the need for courts to make reasonable efforts to identify or enter into contracts with providers that can provide language access services.

Recommendations

10. Beginning immediately, as resources are available, but in any event no later than 2020, courts will provide qualified court interpreters in all court-ordered, court-operated programs, services and events, to all LEP litigants, witnesses, and persons with a significant interest in the case. (Phases 1, 2, and 3)

11. An LEP individual should not be ordered to participate in a court-ordered program if that program does not provide appropriate language accessible services. If a judicial officer does not order participation in services due to the
program’s lack of language capacity, the court should order the litigant to participate in an appropriate alternative program that provides language access services for the LEP court user. In making its findings and orders, the court should inquire if the program provides language access services to ensure the LEP court user’s ability to meet the requirements of the court. (Phase 2)

**USE OF TECHNOLOGY FOR PROVIDING ACCESS IN COURTROOM PROCEEDINGS**

**Issue Description**

In order to achieve the goal of universal provision of interpreters in judicial proceedings, the appropriate use of technology must be considered. From the use of various forms of remote interpreting (telephonic or video) to developing multilingual audiovisual material, technology will, by necessity, be part of any comprehensive solution to the problem of lack of language access in judicial proceedings.
The use of remote interpreters in courtroom proceedings can be particularly effective in expanding language access.

The quality of interpretation is of paramount importance and should never be compromised. Generally, an in-person interpreter is preferred over a remote interpreter but there are situations in which remote interpreting is appropriate, and can be used with greater efficiency. Remote interpreting, however, may only be used where it will allow LEP court users to fully and meaningfully participate in the proceedings.

Among the benefits of remote interpreting is the facilitation of prompt availability of language access for litigants by providing certified and registered interpreter services with less waiting time and fewer postponements; this saves both the court user’s and the court’s valuable time. In addition, having qualified interpreters more readily available through remote interpreting can decrease the use of less qualified interpreters, can decrease dismissals for failure to meet court deadlines, and can decrease the frequency of attorneys or parties waiving interpreter services or proceeding as if the LEP person is not present, in order to avoid delays. By decreasing interpreter travel time between venues and increasing the number of events being interpreted by individual interpreters, remote interpreting allows more LEP litigants to be served, in more areas, utilizing the same personnel and financial resources, thereby greatly expanding language access.

In 2010 and 2011, California conducted a six-month pilot of video remote interpreting (VRI) in American Sign Language in four courts. The purpose of the pilot was to test ASL VRI guidelines that had been prepared by the Court Interpreters Advisory Panel. Four remote interpreters provided services, and all stakeholders were included in the evaluation process. The evaluation showed improved access to court certified ASL interpreters, and high participant satisfaction. As a result of the pilot, the ASL VRI guidelines were successfully refined and completed. Subsequent to the completion of the pilot, use of VRI in ASL events has expanded to more than a dozen courts around the state. Although this pilot did not address some distinctly different issues that arise in remote interpretation of spoken language, it did establish that VRI can be used to provide meaningful language access in a variety of courtroom

“There is a need for a fundamental change in culture. Language access should be as integral and critical a part of court operations as keeping on the lights.”

— Legal Services Attorney
environments if done with appropriate controls and with equipment that meets minimum technology requirements.

Comments from the courts also noted that remote access is not just for interpreting; it is a means to provide a whole variety of services in places far away from our courthouses. For example, where satellite courts have been closed, or where jails are far away from courthouses, remote technology has allowed courts to continue to provide a level of service to those locations. Brief proceedings, such as arraignments, can also be done remotely, saving travel time and costs. It is important that courts, and the branch as a whole, integrate language access planning with information technology planning, to accommodate and anticipate all the differing capabilities expected of remote access technology for total bandwidth, infrastructure, equipment, and training.28

As explained by many in the listening sessions, there are also disadvantages to remote interpreting. Remote interpreting may be perceived as providing second-tier language access services and could, potentially, compromise the accuracy and precision of the interpretation. One study showed that interpreter accuracy and level of fatigue was affected when interpreters provided services remotely, particularly where the event exceeded 15 to 20 minutes in length.29 Additionally, remote interpreting can dilute the control an interpreter is able to exercise in ensuring accurate interpretation and removes the important visual context of the setting including, potentially, the nonverbal cues of both the LEP speaker and others in the courtroom. All of these are factors for consideration when remote interpreting is being used to facilitate language access in the courtroom.

Any introduction of remote interpreting in the courtroom will have to include, in advance, appropriate training and education for all court personnel who will be involved in the court proceedings. Judicial officers, interpreter coordinators, and other court staff will need to be familiar with the factors that make an event

28 The successful implementation of the recommendations contained in California’s Language Access Plan will require careful coordination with the related efforts of the Judicial Council Technology Committee, especially on the issues of ensuring the necessary infrastructure, equipment, training, and technical support for the use of remote interpreting.

appropriate for remote technologies, as well as with the technologies themselves, and with the potential drawbacks of using remote technology, so problems can be anticipated or resolved quickly, or the remote interpretation terminated. Judicial officers in particular will have to understand the remote interpretation process to ensure they are managing the courtroom and the proceedings appropriately. Suggested language for the judicial officer when considering objections related to remote interpreting is provided in Appendix C. Similarly, interpreters will have to be trained on the use of the technologies utilized by the court, as well as on the particular challenges that remote interpretation could present, such as the earlier onset of interpreter fatigue, an inability to adequately see or hear the participants, and the criticality of immediately reporting any impediment to performance or other ethical issues. Court staff must be trained and available to repair any technical problems with the equipment.

Language access can also be expanded by the use of multilingual audiovisual material; it is a simple use of technology that is relatable to all court users. For example, in some courtrooms where a particular type of case is heard (e.g., traffic, small claims, and AB 1058 governmental child support calendars), general introductory remarks that educate the litigants on some basic legal principles and procedures are often provided. For those courtrooms or calendars for which it makes sense, courts might develop a short multilingual video to communicate those introductory remarks to LEP persons. Some of these videos might also be made available on the court’s website to orient litigants to what will be expected of them in court before their court appearance. (These videos will also help to address a common request, expressed by legal services providers working with LEP populations, that the Language Access Plan include development of tools for serving low literacy populations and speakers of indigenous languages or non-written languages.) Alternatively, when videos are not available, a live interpreter who is offsite might be used via video equipment to provide interpretation of the judge’s general introductory remarks before a calendar is called.

**Recommendations**

12. The use of in-person, certified and registered court interpreters is preferred for court proceedings, but courts may consider the use of remote interpreting where it is appropriate for a particular event. Remote interpreting may only be used if it will allow LEP court users to fully and meaningfully participate in the proceedings. (Phase 1)

13. When using remote interpreting in the courtroom, the court must satisfy, to the extent feasible, the prerequisites, considerations, and guidelines for remote interpreting set forth in Appendix B. (Phase 1)

14. The Implementation Task Force will establish minimum technology requirements for remote interpreting which will be updated on an ongoing basis and which will include minimum requirements for both simultaneous and consecutive interpreting.30 (Phase 1)

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15. Courts using remote interpreting should strive to provide video, used in conjunction with enhanced audio equipment, for courtroom interpretations, rather than relying on telephonic interpreting. (Phase 1)

16. The Judicial Council should conduct a pilot project, in alignment with the Judicial Branch’s Tactical Plan for Technology 2014–2016. This pilot should, to the extent possible, collect relevant data on: due process issues, participant satisfaction, whether remote interpreting increases the use of certified and registered interpreters as opposed to provisionally qualified interpreters, the effectiveness of a variety of available technologies (for both consecutive and simultaneous interpretation), and a cost-benefit analysis. The Judicial Council should make clear that this pilot project would not preclude or prevent any court from proceeding on its own to deploy remote interpreting, so long as it allows LEP court users to fully and meaningfully participate in the proceedings. (Phase 1)

17. In order to maximize the use and availability of California’s highly skilled certified and registered interpreters, the Judicial Council should consider creating a pilot program through which certified and registered interpreters would be available to all courts on a short-notice basis to provide remote interpreting services. (Phase 2)

18. The Judicial Council should continue to create multilingual standardized videos for high-volume case types that lend themselves to generalized, not localized, legal information, and provide them to courts in the state’s top eight languages and captioned in other languages. (Phase 1)
**Other Considerations When Appointing Interpreters**

### Issue Description

#### Scheduling

Interpreter representatives in particular expressed concerns about the lack of understanding regarding the very challenging conditions that busy trial courtrooms present for interpreters. Interpreting is a highly specialized skill that requires a great degree of training and preparation. It is mentally taxing, and studies confirm that interpreting mistakes increase after 20 to 30 minutes, and an interpreter’s ability to self-monitor and self-correct correspondingly diminishes in this time. Court administrators and judicial officers should be mindful of this reality in scheduling interpreters for longer matters, in allowing for rest breaks, and in the overall management of the courtroom.

Calendar coordination is an important tool for appointing interpreters in an efficient manner. However, legal services providers and others have raised concerns that calendaring matters specifically for certain LEP populations in order to ensure the availability of interpreters can have the unintended consequence of allowing law enforcement agencies, such as Immigration and Customs Enforcement, to target LEP court users. Therefore, any efforts to maximize the use and availability of interpreters by identifying court proceedings where interpreters will be required must be done in a way that does not create unique risks for LEP court users, or have a chilling effect on their access to court services.

Additionally, Judicial Council staff assist the courts by providing calendar coordination of employee interpreters from other courts through a manual cross-assignment system. This system could be improved with automation and could be expanded to coordinate additional language access resources.

#### Misrepresentation of Credentials

Certified and registered interpreters also alerted the Joint Working Group to concerns about the misrepresentation by some interpreters of their credentials. For example, some interpreters used by the court claim to be certified or registered but provide false numbers or fail to provide their certified or registered interpreter number (as issued by the Judicial Council upon credentialing). Additionally, court staff and bench officers do not always verify that an interpreter has his or her interpreter oath on file with the court. These concerns are addressed, effective January 2015, under amended Government Code section 68561, in particular subsections (g) and (f), which require a finding on the record of the validity of an interpreter’s credentials before a proceeding. This plan therefore incorporates the new, statutorily required procedures and proposes training for judicial officers and court staff on those requirements (see Recommendations 19 and 50).

#### Role of Bilingual Staff

On the issue of appointing interpreters to court proceedings, stakeholders raised concerns about the use of court bilingual staff as interpreters. Bilingual staff play a critical role in providing language access in the courts and their appropriate use...
and qualifications are addressed in other areas of this plan. For purposes of Goal 2 (Provision of Qualified Language Access Services in All Judicial Proceedings), judicial officers and court staff should understand that certified and registered interpreters possess highly specialized skills in language and interpreting techniques that are required in courtroom proceedings, skills which bilingual staff do not usually possess. Additionally, placing bilingual staff in the position to act as interpreters may create ethical dilemmas for them as their roles vis-à-vis the litigant and the court process become different, and information they may have gathered as staff may now impede their ability to interpret impartially and objectively. Therefore, it is critical that if bilingual staff are ever to be appointed to interpret in court proceedings, all of the required steps for finding good cause and for provisional qualification be followed.

Friends and Family as “Interpreters”

As has been discussed earlier, the use of friends or family as interpreters can create serious issues concerning meaningful and accurate interpretation of proceedings. It should be noted here that, in addition to the absence of quality control, there are other factors that preclude the use of friends and family as interpreters in court proceedings: they are not neutral individuals, and so, they usually have an inherent conflict or bias; they may have a personal interest in misinterpreting what is being said; and, if minors, they may suffer emotionally from being put in “the middle” of conflict between or on behalf of their parents. It was the consensus of the stakeholders addressing this issue that minor children should never be used to interpret in court proceedings.

Recommendations

19. Effective January 2015, pursuant to Government Code section 68561(g) and (f), judicial officers, in conjunction with court administrative personnel, must ensure that the interpreters being appointed are qualified, properly represent their credentials on the record,31 and have filed with the court their interpreter oaths. (See Recommendation 50, which discusses training of judicial officers and court staff on these subjects.)32 (Phase 1)

20. The Judicial Council should expand the existing formal regional coordination system to improve efficiencies in interpreter scheduling for court proceedings and cross-assignments between courts throughout the state. (See Recommendation 30, addressing coordination for bilingual staff and interpreters for non-courtroom events.) (Phase 2)

31 See California Supreme Court Committee on Judicial Ethics Opinions (CJEO) Formal Opinion # 2013-002 (December 2013) at www.judicialethicsopinions.ca.gov/sites/default/files/CJEO_Formal_Opinion_2013-002_0.pdf for a determination of what constitutes the record when no court reporter or electronic recording is available.

32 While courts may use a bilingual person to communicate minor scheduling issues when no qualified interpreter is available, the record should reflect that no interpreter was present.
21. Courts should continue to develop methods for using interpreters more efficiently and effectively, including but not limited to calendar coordination. Courts should develop these systems in a way that does not have a chilling effect on LEP court users’ access to court services. (Phase 2)

22. Absent exigent circumstances, when appointing a noncertified, nonregistered interpreter, courts must not appoint persons with a conflict of interest or bias with respect to the matter. (Phase 1)

23. Minors will not be appointed to interpret in courtroom proceedings nor court-ordered and court-operated activities. (Phase 1)

24. Absent exigent circumstances, courts should avoid appointing bilingual court staff to interpret in courtroom proceedings; if the court does appoint staff, he or she must meet all of the provisional qualification requirements. (Phase 2)
Goal 3: Provide Language Access Services at All Points of Contact Outside Judicial Proceedings

Goal Statement
By 2020, courts will provide language access services at all points of contact in the California courts. Courts will provide notice to the public of available language services.

Issue Description
As described elsewhere in this plan, LEP court users’ language needs are not limited to the courtroom; the public’s need for language assistance extends to all points of contact. While courtroom proceedings are critical, and therefore require the highest quality of language access services, other events and points of contact in the courthouse can also have a significant impact on case outcomes, the ability to procedurally and substantively advance a case forward, or the ability to proceed expeditiously. A person’s ability to access the court system and seek legal redress or protection begins long before the LEP court user enters the courtroom to attend a hearing. Therefore, this Language Access Plan embraces the principle that it is the courts’ responsibility to provide language access throughout the continuum of court services, from the first time an individual tries to access the court’s website, or walks in the door of the courthouse, to posthearing events necessary to comply with court orders.

As reported by legal services providers and their clients at public hearings and in public comment, language barriers confront an LEP person from the moment he or she walks into a courthouse or even before, when trying to get information by phone or from the court’s website. From the most basic inability to communicate what language they speak to the challenges presented by English-only signs and instructions, this lack of services can leave court users aimlessly wandering around the courthouse until frustration leads them to abandon their efforts, no matter how critical their legal need. The inability to understand and fill out mandatory forms and the bewilderment created by legal terminology and court instructions set forth only in English—all while dealing with the stresses of legal problems or even personal safety—have left all too many LEP legal services clients, self-help center users, and community members in a state of legal paralysis.

Experts and others who spoke at the various public hearings agreed that many of these points of contact do not require the skills of a qualified court interpreter. Many of the needs of thousands of LEP court users can be most appropriately addressed with appropriate language services from qualified bilingual staff. It was suggested that courts should explore different strategies
for maximizing the use of bilingual staff to make more services available. Other tools can be made available at major points of contact to help improve access; for example, the ready availability of “I speak” cards (like the sample on page 49) at all points of contact can help LEP court users indicate to staff what language they speak.

Translated materials such as referrals, informational brochures, and instructions can help communicate important information, such as how to prepare forms and how to file and serve them. Remote interpreting via telephone or video can also help staff at counters or self-help centers to provide linguistically competent services. Multilingual signage (discussed in detail under Goal 4), can also help LEP court users feel less lost and more able to negotiate the complex environment of the courthouse. Multilingual audiovisual material (for example, kiosks with touchscreen computers that can display visual and audio information in multiple languages) can also expand language access by instructing LEP court users what forms they may need or where they must go within the courthouse.

As was pointed out during the public hearings and listening sessions by court administrators, judicial officers, and other stakeholders, in order to rely on bilingual staff, it will be vital for courts to take proactive steps to recruit and train bilingual individuals to serve at the more critical junctures, for example, where domestic violence form packets are disseminated (and explained). Where
recruitment is challenging, educational providers should be enlisted to help identify potential sources for outreach and hiring by the court; they might also become partners in the training of these staff. In addition, bilingual staff should receive enhanced compensation for using their language skills. When facing budgetary obstacles to enhance language access, community volunteers whose language skills have been vetted can be a valuable resource to increase services. During the public hearings, the Joint Working Group learned that the Department of Education issues a “Seal of Biliteracy” to high school students in certain districts who pass a proficiency exam. Tapping into these and other sources of trained bilingual community members can significantly increase the court’s ability to serve its constituents in a culturally competent manner. At the core, it is vital that there be appropriate screening, monitoring, supervision, and training of staff and volunteers to ensure the quality and competency of the services provided.

Recommendations

25. The court in each county will designate an office or person that serves as a language access resource for all court users, as well as court staff and judicial officers. This person or persons should be able to: describe all the services the court provides and what services it does not provide, access and disseminate all of the court’s multilingual written information as requested, and help LEP court users and court staff locate court language access resources. (Phase 1)

26. Courts should identify which points of contact are most critical for LEP court users, and, whenever possible, should place qualified bilingual staff at these locations. (See Recommendation 47, which discusses possible standards for the appropriate qualification level of bilingual staff at these locations.) (Phase 1)

27. All court staff who engage with the public will have access to language assistance tools, such as translated materials and resources, multi-language glossaries and “I speak” cards, to determine a court user’s native language, direct him or her to the designated location for language services, and/or provide the LEP individual with brochures, instructions, or other information in the appropriate language. (Phase 2)

28. Courts should strive to recruit bilingual staff fluent in the languages most common in that county. In order to increase the bilingual applicant pool, courts should conduct outreach to educational providers in the community, such as local high schools, community colleges, and universities, to promote the career opportunities available to bilingual individuals in the courts. (Phase 1)

29. Courts will develop written protocols or procedures to ensure LEP court users obtain adequate language access services where bilingual staff are not available. For example, the court’s interpreter coordinator could be on call to identify which interpreters or staff are available and appropriate to provide services in the clerk’s office or self-help center. Additionally, the use of remote technologies such as telephone access to bilingual staff persons in another location or remote interpreting could be instituted. (Phase 2)
We have litigants who are not able to file paperwork, like domestic violence requests, because court staff only speak English and [the litigants] did not understand what they were being asked to do or court staff asked them to return with an interpreter. Many return to our office with their unfiled papers and we either have to file it for them or have them go back to the courthouse, sometimes multiple times. Many likely give up, feeling frustrated and humiliated.”

— Legal Services Attorney

30. The Judicial Council should consider adopting policies that promote sharing of bilingual staff and certified and registered court interpreters among courts, using remote technologies, for language assistance outside of court proceedings. (Phase 2)

31. The courts and the Judicial Council should consider a pilot to implement the use of remote interpreter services for counter help and at self-help centers, incorporating different solutions, including court-paid cloud-based fee-for-service models or a court/centralized bank of bilingual professionals. (Phase 2)

32. The courts should consider a pilot to implement inter-court, remote attendance at workshops, trainings, or “information nights” conducted in non-English languages using a variety of equipment, including telephone, video-conferencing (WebEx, Skype), or other technologies. (Phase 2)

33. In matters with LEP court users, courts must determine that court-appointed professionals, such as psychologists, mediators, and guardians, can provide linguistically accessible services before ordering or referring LEP court users to those professionals. Where no such language capability exists, courts should make reasonable efforts to identify or enter into contracts with providers able to offer such language capabilities, either as bilingual professionals who can provide the service directly in another language or via qualified interpreters. (Phase 2)

34. Courts should consider the use of bilingual volunteers to provide language access services at points of contact other than court proceedings, where appropriate. Bilingual volunteers and interns must be properly trained and supervised. (Phase 1)
As an alternative for traditional information dissemination, the Judicial Council should consider creating pilot programs to implement the use of language access kiosks in lobbies or other public waiting areas to provide a variety of information electronically, such as on a computer or tablet platform. This information should be in English and up to five other languages based on local community needs assessed through collaboration with and information from justice partners, including legal services providers, community-based organizations, and other entities working with LEP populations. At a minimum, all such materials should be available in English and Spanish. (Phase 3)
Goal 4: Provide High Quality Multilingual Translation and Signage

Goal Statement

The Judicial Council, assisted by the courts, will identify best practices and resources for the highest quality of document translation and court signage in all appropriate languages.

Issue Description

Accurate and effective translation services are essential to ensure that documents and court signage commonly accessible to the public are available to limited-English speakers in their native languages. It is important to recognize, however, that not all languages have a written component, and some LEP persons may also have literacy challenges in their native language. Any strategies to provide translated materials should consider the manner of delivery of these materials to account for these factors, such as creating video and/or audio of the information otherwise available in writing. Video- and audio-based information will also benefit English speakers who have low literacy or who prefer to receive information through mechanisms other than written materials.

The California Courts Online Self-Help Center, for example, provides hundreds of pages of information for court users in English and Spanish, but also incorporates videos on issues such as mediation in small claims, unlawful detainer, and civil harassment cases in English, Spanish, and Russian, as well as English/Spanish videos on issues pertaining to the child custody, juvenile delinquency, and juvenile dependency processes. The Online Self-Help Center also has audio recordings of the most common domestic violence information sheets in English and Spanish and instructional videos for completion of common court forms, such as divorce petitions and responses, fee waivers, and domestic violence restraining orders.

While the statewide self-help website provides generalized information, stakeholders pointed out that local courts have no consistency in the translated information on their websites. Most courts only provide information on local procedures in English and do not have local forms available in other languages. Some provide links to the statewide website, but others do not. When translations are provided, legal services providers and their clients report inconsistencies in quality, with translation errors rendering some of the information legally incorrect and thus unusable.

With respect to Judicial Council forms, the Judicial Council has translated the most critical domestic violence forms into Spanish, Chinese, Korean, and Vietnamese, and most of the key family law forms and information sheets into Spanish. The Joint Working Group received comments from legal services providers asking why all forms in a “set” (e.g., all family law forms) are not

33 In English at www.courts.ca.gov/selfhelp.htm and in Spanish at www.sucorte.ca.gov.
translated, and urged the group to include in the Language Access Plan a recommendation that more forms be translated, particularly for conservatorships and guardianships, which are highly technical.

Court administrators and legal services providers alike recognized the significant costs associated with translations, but agreed that efficiencies can be built into the system, such as through better statewide coordination of translations so that general information may be translated at the state level for use by all courts. Court forms, juror information, and general educational material (in written or audio/video form) can be centrally translated and provided to courts for any necessary local adaptation. This approach can also incorporate quality control mechanisms to ensure that the translations are performed by competent and qualified translators with experience with court and legal translation and certification from the American Translators Association (ATA). Where appropriate, translator qualification may also be established by the translator’s experience or education, such as a degree or certificate from an accredited university in the United States or the equivalent from another country in translation or linguistic studies.

In the meantime, existing tools can be used immediately to improve language access. While providing written translations of individual court orders may not always be feasible, it is fundamental to our judicial system that all court users understand the court orders that are issued. To this end, and where Judicial Council forms exist, courtrooms should have translated versions of these order forms (for information only) to provide to LEP parties, who can then look at their English court order side by side with the translated form in order to understand and comply with the order.

Easy-to-understand signage is also essential to help LEP court users navigate the courthouse and ensure they receive appropriate services. At the San Francisco public hearing, one expert testified that access starts with wayfinding, which requires the use of clear and intuitive visual cues to minimize confusion and assist all persons who enter a building. It is accomplished through the strategic and immediate visual location of common important public spaces: information desks, elevators, stairs, and restrooms. Wayfinding is then supplemented by appropriate signage. Static signage materials (printed materials or signs) can be augmented by dynamic or electronic signage, which allows courts to more easily update information provided to court users in multiple languages, similar to digital signs in airports. A suggestion was made at the public hearings for courts to create virtual courthouse tours on the web, which will enable court users to navigate a virtual courthouse prior to their actual visit. A similar tool could be created for smartphones, tablet computers, and other mobile devices. These important navigational tools can help to remove confusion and language access barriers, and reduce the apprehension that many court users may have about going to an unfamiliar courthouse.
“At the San Francisco public hearing, an expert presented that access starts with wayfinding, which requires the use of clear and intuitive visual cues to minimize confusion and assist all persons who enter a building. It is accomplished through the strategic and immediate visual location of common important public spaces: information desks, elevators, stairs, and restrooms. Wayfinding is then supplemented by appropriate signage. Static signage materials (printed materials or signs) can be augmented by dynamic or electronic signage, which allows courts to more easily update information provided to court users in multiple languages, similar to digital signs in airports.”

— Court Construction Expert
36. The Judicial Council will create a translation committee to develop and formalize a translation protocol for Judicial Council translations of forms, written materials, and audiovisual tools. The committee should collaborate with interpreter organizations and courts to develop a legal glossary in all certified languages, taking into account regional differences, to maintain consistency in the translation of legal terms. The committee’s responsibilities will also include identifying qualifications for translators, and the prioritization, coordination, and oversight of the translation of materials. The qualification of translators should include a requirement to have a court or legal specialization and be accredited by the American Translators Association (ATA), or to have been determined qualified to provide the translations based on experience, education, and references. Once the Judicial Council’s translation protocol is established, individual courts should establish similar quality control and translation procedures for local forms, informational materials, recordings, and videos aimed at providing information to the public. Local court website information should use similarly qualified translators. Courts are encouraged to partner with local community organizations to accomplish this recommendation. (Phase 1)

37. The Judicial Council staff will work with courts to provide samples and templates of multilingual information for court users that are applicable on a statewide basis and adaptable for local use. (Phase 1)

38. The Judicial Council’s staff will post on the California Courts website written translations of forms and informational and educational materials for the public as they become available and will send notice to the courts of their availability so that courts can link to these postings from their own websites. (Phase 1)

39. The staff of the Judicial Council should assist courts by providing plain-language translations of the most common and relevant signs likely to be used in a courthouse, and provide guidance on the use of internationally recognized icons, symbols, and displays to limit the need for text and, therefore, translation. Where more localized signage is required, courts should have all public signs in English and translated in up to five other languages based on local community needs assessed through collaboration with and information from justice partners, including legal services providers, community-based organizations, and other entities working with LEP populations. At a minimum, all such materials should be available in English and Spanish. (Phase 2)

40. Courts will provide sight translation of court orders and should consider providing written translations of those orders to LEP persons when needed. At a minimum, courts should provide the translated version of the relevant Judicial Council form to help litigants compare their specific court order to the translated template form. (Phase 1)

41. The Judicial Council, partnering with courts, should ensure that new courthouse construction efforts, as well as redesign of existing courthouse space, are undertaken with consideration for making courthouses more easily navigable by all LEP persons. (Phase 2)

42. The Judicial Council’s staff will provide information to courts interested in better wayfinding strategies, multilingual (static and dynamic) signage, and other design strategies that focus on assisting LEP court users. (Phase 2)
Goal 5: Expand High Quality Language Access Through the Recruitment and Training of Language Access Providers

Goal Statement
The courts and the Judicial Council will ensure that all providers of language access services deliver high quality services. Courts and the Judicial Council will establish proficiency standards for bilingual staff and volunteers appropriate to the service being delivered, offer ongoing training for all language services providers, and proactively recruit persons interested in becoming interpreters or bilingual court staff.

Issue Description
Proficiency Standards
Court-certified and registered interpreters in California are credentialed by the Judicial Council, with testing, continuing education, and ethical requirements overseen by the council’s staff in the Court Language Access Support Program (CLASP) unit. The speakers during the listening sessions and public hearings agreed that California has been and continues to be a leader in credentialing of its court interpreters, and this plan recommends that such high standards continue and be built upon. Some interpreters raised concerns that the current examination process that adopts the testing standards set by the Consortium for Language Access in the Courts’ Certification Test may have lowered the qualifications required of new interpreters. After consideration and research, the Joint Working Group, advised by the Judicial Council’s Court Interpreters Advisory Panel, decided that, at this time, the testing and certification procedures remain appropriate and ensure that only the most qualified interpreters are able to pass and become certified or registered.

As interpreters are deployed in more and more civil cases, all stakeholders agreed that systematic training in the legal terminology used and procedural steps followed in civil case types would be beneficial for those interpreters who have not had experience in the civil arena. Similarly, as remote interpreting is gradually phased in for the expansion of language access, training will be necessary for interpreters and court personnel alike with regard to the technology and the optimum manner of using such equipment.

As stated in Goal 2, the court should provide qualified interpreters for all court proceedings. However, the majority of interactions LEP court users have with the court system will be outside the courtroom and will be handled by bilingual staff or volunteers. Therefore, courts must ensure that the individuals assigned to communicate with the LEP public be qualified and trained.
As legal services providers, their clients, and many others commented during the public hearings and listening sessions—and as detailed in the discussion of Goal 3—LEP court users must be able to obtain accurate and complete information throughout their dealings with the court system. Stakeholders all agree that different points of contact with the public, by their nature, involve different levels of interaction between staff and an LEP court user. For example, a bilingual court clerk working the cashier window will need to be able to carry out basic monetary transactions in another language with an LEP court user and perhaps provide some standardized information on policies and procedures for paying fines. A bilingual staff person at a self-help center, on the other hand, will have to be able to communicate completely, almost with native-like fluency with an LEP court user needing assistance in understanding court procedures and in preparing forms. The self-help staff person must be able to understand nuanced conversations and questions, provide technical information using the correct legal terminology (in all relevant languages), and be precise in their use of language. A bilingual staff person at the filing counter in the clerk’s office may not need to be proficient in writing in another language, but a bilingual family law facilitator may have to write instructions in another language or translate documents.

Many courts have internal procedures for determining the bilingual abilities of court staff, from new hires to existing staff. There is currently no uniform procedure for courts to test language proficiencies, but courts wishing to examine their existing policies or establish a standard for hires may take advantage of the Oral Proficiency Exam (OPE), currently used by the staff of the Judicial Council’s Court Language Access Support Program (CLASP) unit to credential most registered interpreters. The OPE is a speaking-ability test that uses the guidelines established by the American Council on the Teaching of Foreign Languages (ACTFL) to provide scores that correlate with a given level of language proficiency. Courts can look at the ACTFL guidelines to adapt them to the court setting and determine what OPE scores are appropriate for the different possible points of contact between LEP court users and bilingual staff. The Joint Working Group reviewed the different levels and determined that ACTFL’s “intermediate mid” should be the minimum proficiency required for persons designated as bilingual staff, while allowing courts to exercise their discretion as to the circumstances or points of contact when a higher or lower level of proficiency may be required.

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36 An additional resource courts may want to consider when assessing the proficiency of bilingual staff is the Interagency Language Roundtable’s skill description for interpreter performance. The ILR is a nonfunded federal interagency organization established for the coordination and sharing of information about language-related activities at the federal level. The skill descriptions, located at [www.govilr.org/Skills/InterpretationSLDsapproved.htm](http://www.govilr.org/Skills/InterpretationSLDsapproved.htm), provide a rating system for assessing the language abilities of interpreters in government settings, and may be of guidance for courts in assessing bilingual staff who do not need the higher specialization of interpreters but may need similar language skills.
Various legal services providers and LEP court users have observed that court staff and written materials sometimes use different translated words or phrases to refer to the same legal or technical term. Bilingual staff and volunteers must be trained in legal terminology so that terms are used consistently by all persons having contact with the public. The Judicial Council and the courts should therefore collaborate on an agreed-upon glossary of legal terms. This glossary should take into account differences in usage due to the country of origin and linguistic background of the LEP communities served by a given court’s community.

“Do not think for a second that interpreting is easy. It is by far the hardest, most challenging, and most rewarding of the activities that I do. In many ways, we interpreters are our own worst enemies because sometimes we do our jobs so well that nobody notices.”

— Court Interpreter

While court interpreters and bilingual staff are the primary language access providers in day-to-day interactions with the court, translators who translate written material from one language to another are also key providers. Translators may translate court forms, exhibits, court signs, websites, scripts for video or other audiovisual tools, etc. The language skills required for qualified translation are unique, different from those required for interpretation, and much more advanced than those required of bilingual staff. Though many court interpreters are also qualified translators, not all are. Certified and registered court interpreters are not tested on their written skills in the non-English language, and only the American Translators Association (ATA) provides certification in translation, though not specific to the law or the court system. Therefore, it is critical that courts use competent, qualified translators for providing language access through any medium that requires written content.

Recruitment

While training and qualification of existing resources is critical, many participants in the public hearings and listening sessions pointed out the shortages throughout the state in qualified language access providers. To begin to address this gap between the supply and demand for language services providers, the Judicial Council and local courts should pursue strategies to enhance the recruitment of individuals who wish to seek a career as language access providers for the court, whether as certified and registered interpreters or as bilingual staff. Some interpreters voiced the belief that California has enough court interpreters to provide court hearing interpretation in most civil matters and court-mandated services (at least in Spanish, the most common language in our state other than English). However, all agree it is nevertheless vital to continue recruitment efforts so there will continue to be an adequate number of interpreters in future years.
The total number of certified and registered interpreters has increased to over 1,800 after a significant drop in the year 2000 when there were only 1,108 total interpreters. However, the total number of Spanish-certified court interpreters today (1,342) is still lower than it was in 1995, when there were 1,536 Spanish-certified court interpreters.\textsuperscript{37} The passage rate for certification examinations is low,\textsuperscript{38} and many individuals give up on the process of becoming certified or registered due to the cost of repeated exams. Court partnerships with educational institutions, including community colleges and state universities, are essential to promote the better preparation of prospective interpreters since they are uniquely placed to train students to pass the certification and registration exams. Similarly, partners such as public defenders, district attorneys, and legal services providers can offer internship opportunities to prospective interpreters to expose them to, and prepare them for, a career in legal interpreting.

Education providers can also play a critical role in assisting courts in identifying bilingual Californians who may want to pursue a career in public service by working in the court system, and in helping to build the language skills of these prospective public servants. In fact, many community colleges and universities

\textsuperscript{37} See 2000 Language Need and Interpreter Use Study, Table 3.6, at p. 3.13, available upon request.
\textsuperscript{38} Between July 2010 and June 2012, the exam pass rate for bilingual interpreting exams was approximately 10.8%.
throughout the state are concentrating efforts to train bilingual students to serve as language services providers in the government and medical sectors. Courts and the legal system as a whole would greatly benefit from tapping into these resources. Even at the high school level, and earlier, schools can partner with their local courts to provide information and education to children about the benefits of building on language skills to improve opportunities for growth and employment after high school. Courts should include schools, colleges, and universities in court-community events where students have an opportunity to observe court professionals, from interpreters to bilingual court staff to judicial officers, as a complement to both civics education and career exploration.

Community-based organizations too can be powerful collaborators with courts in the recruitment of bilingual persons to work for the courts. They have insights into the barriers to education and employment for members of their communities, awareness of existing job training and skill-development programs, and the ability to help courts identify untapped resources for recruitment and training of prospective bilingual court employees. Internships and volunteer opportunities in the courts, under the supervision, guidance, and support of educational providers and community-based organizations, can be an avenue for recruitment of future court language service providers.

### Recommendations

43. Courts, the Judicial Council, and the Court Interpreters Advisory Panel (CIAP) will ensure that all interpreters providing language access services to limited English proficient court users are qualified and competent. Existing standards for qualifications should remain in effect and will be reviewed regularly by the CIAP. (Phase 1)

44. The online statewide orientation program will continue to be available to facilitate orientation training for new interpreters working in the courts. (Phase 1)

45. The Judicial Council and the courts should work with interpreter organizations and educational providers (including the California community college and state university systems) to examine ways to better prepare prospective interpreters to pass the credentialing examination. These efforts should include:
   - Partnering to develop possible exam preparation courses and tests, and
   - Creating internship and mentorship opportunities in the courts and in related legal settings (such as work with legal services providers or other legal professionals) to help train and prepare prospective interpreters in all legal areas. (Phase 1)

46. The Judicial Council, interpreter organizations, and educational groups should collaborate to create training programs for those who will be interpreting in civil cases and those who will be providing remote interpreting. (Phase 1)

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39 This orientation is currently required for new interpreters prior to enrollment but is available to anyone, including interpreters for whom registered status is not applicable (e.g., deaf interpreters and indigenous language interpreters).
47. Courts must ensure that bilingual staff providing information to LEP court users are proficient in the languages in which they communicate. All staff designated as bilingual staff by courts must at a minimum meet standards corresponding to “intermediate mid” as defined under the American Council on the Teaching of Foreign Languages guidelines. (See Appendix F.) The existing Oral Proficiency Exam available through the Judicial Council’s Court Language Access Support Program (CLASP) unit may be used by courts to establish foreign-language proficiency of staff. Courts should not rely on self-evaluation by bilingual staff in determining their language proficiency. (Phase 1)

48. Beyond the specified minimum, the Judicial Council staff will work with the courts to (a) identify standards of language proficiency for specific points of public contact within the courthouse, and (b) develop and implement an online training for bilingual staff. (Phase 1)

49. The Judicial Council staff will work with educational providers, community-based organizations, and interpreter organizations to identify recruitment strategies, including consideration of market conditions, to encourage bilingual individuals to pursue the interpreting profession or employment opportunities in the courts as bilingual staff. (Phase 2)

**Goal Statement**
Judicial officers, court administrators, and court staff will receive training on language access policies, procedures, and standards, so they can respond consistently and effectively to the needs of LEP court users, while providing culturally competent language access services.

**Issue Description**
Throughout the planning process—from input during listening sessions to oral and written comments during the public hearings—stakeholders reiterated their concerns about the need for appropriate training of court staff and judicial officers. Judges and court administrators expressed concern with respect to their own lack of training in how to determine whether a noncertified or nonregistered interpreter is capable of providing competent language access services. Legal services providers reported a lack of knowledge on the part of court staff regarding more specialized language needs, such as an awareness of the diversity of languages spoken within a given county, the varieties of indigenous languages, and tools for identifying the preferred language for an LEP court user. There were also inconsistencies in the method for provisionally qualifying noncertified or nonregistered interpreters, and in the awareness of when, if ever, it is appropriate to ask attorneys or advocates to interpret for their clients. Finally, advocates expressed concern over the courts’ referrals of LEP parties to court-appointed professionals who may or may not be linguistically accessible or culturally competent. (Recommendation 33 provides mechanisms to ensure courts contract with providers who provide services accessible to and by LEP persons.)

Interpreters expressed concerns about a general misunderstanding among court staff, judicial officers, and even other participants in the court process (including attorneys) of the interpreter’s role and ethical constraints. Similarly, interpreters described a lack of awareness of the highly specialized skills required for court interpreting, the mental and physical toll of interpreting for periods longer than 30 minutes, the challenges fast-paced, crowded courtrooms pose for the interpreter, and ways to improve communication and courtroom management to optimize the task of an interpreter.

Language access stakeholders also expressed concern that court staff may not be aware of language access policies for their courts, an issue amplified by the lack of consistency among and even within courts. The absence or perceived absence of clear guidelines at the local and state level can cause confusion for court administrators and staff, thus highlighting the critical need for ongoing trainings on existing policies and on the statewide policies to be established after adoption of this Language Access Plan. Training on policies must also include information and...
“The plan must address training and education, not only for court staff but also judicial officers, to understand the complexities of interpreting, and to appreciate that the skill of interpreting does not just consist of knowing two languages.”

—Court Interpreter, Sacramento public hearing
tools for court staff and judicial officers that can be used to identify an individual’s need for language services and properly documenting the language services need, even when unable to provide the services.

Any training for court staff and judicial officers should address, as well, the challenges faced by court interpreters when performing their jobs. Courtroom personnel and bench officers must understand the importance of effective courtroom management, the need to control the speed of the proceeding, the interpreter’s ethical obligations to assess and report impediments to his or her performance, and the mental toll that interpreting takes on even the most qualified and seasoned interpreter.

**Recommendations**

50. Judicial officers, including temporary judges, court administrators, and court staff will receive training regarding the judicial branch’s language access policies and requirements as delineated in this Language Access Plan, as well as the policies and procedures of their individual courts. Courts should schedule additional training when policies are updated or changed. These trainings should include:

- Optimal methods for managing court proceedings involving interpreters, including an understanding of the mental exertion and concentration required for interpreting, the challenges of interpreter fatigue, the need to control rapid rates of speech and dialogue, and consideration of team interpreting where appropriate;

- The interpreter’s ethical duty to clarify issues during interpretation and to report impediments to performance;

- Required procedures for the appointment and use of a provisionally qualified interpreter and for an LEP court user’s waiver, if requested, of interpreter services;

- Legal requirements for establishing, on the record, an interpreter’s credentials;

- Available technologies and minimum technical and operational standards for providing remote interpreting; and

- Working with LEP court users in a culturally competent manner.

The staff of the Judicial Council will develop curricula for trainings, as well as resource manuals that address all training components, and distribute them to all courts for adaptation to local needs. (Phase 1)

51. Information on local and statewide language access resources, training and educational components identified throughout this plan, glossaries, signage, and other tools for providing language access should be readily available to all court staff through individual courts’ intranets. (Phases 2 and 3)

52. Judicial Council staff should develop bench cards that summarize salient language access policies and procedures and available resources to assist bench officers in addressing language issues that arise in the courtroom, including policies related to remote interpreting. (Phase 1)

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40 See footnote 31 above.
Goal 7: Conduct Outreach to Communities Regarding Language Access Services

**Goal Statement**

The Judicial Council and the courts will undertake comprehensive outreach to, and engage in partnership with, LEP communities and the organizations that serve them.

**Issue Description**

The role of courts is to serve their communities by providing a process for resolving disputes. Educating the community about court services is one of the ways by which the courts instill trust and confidence in the legal system. As legal services providers and LEP participants commented during the three public hearings, many LEP individuals do not come to the courthouse for legal help because they mistrust courts, misunderstand the role of the court system, and lack knowledge of their legal rights and what the court can do for them. They also believe, often for good reason, that they will not be able to communicate effectively in their language.

Engaging the community through outreach is critical to establishing the legitimacy of the court system and creating respect for the institution—and by extension—for the orders and decisions it makes. This must include outreach to LEP communities to explain that the court is there to serve them and is linguistically accessible to them. Additionally, ongoing outreach efforts, at both the state and local levels, provide the best means for securing community input on language access needs. Establishing mechanisms to receive community feedback regarding the effectiveness, or lack thereof, of the court’s language access services is a key component to ensuring community trust and quality control of the court’s services. (Goal 8 addresses complaint mechanisms and related systems to manage and oversee language access policies at the state and local levels.)

These outreach efforts must be multifaceted. Courts can leverage existing community resources to notify their constituents of language access services as well as court services as a whole. To do this, courts can ensure information and notices are disseminated to community-based organizations, legal services providers, bar associations, and others and can use ethnic media and local news sources in outreach efforts. Outreach may also include the use of multilingual audiovisual tools to provide general information about language access services, court procedures, and available resources, such as self-help centers. Video and audio technologies are efficient and effective ways to reach potential LEP court users at large.

The oral and written comments submitted to the working group emphasized the need for collaboration and partnerships. Closely working with community-based organizations and providers, such as social services, legal services providers, faith-based organizations, job training programs, adult school programs, and elementary, middle, and high schools, is the most effective way for courts to reach LEP
“It is important in developing a language access plan to focus on the particular needs of the community served by a court, and to go out and interact with the community and find out what its specific needs are.”

—Member, Joint Working Group for California’s Language Access Plan
populations that have traditionally avoided the courts. These collaborative efforts can also help courts identify community needs and community resources and can help courts improve the quality of their language access services and their responsiveness to their communities. They can also help courts target more isolated LEP communities that are not normally reached through more traditional outreach mechanisms. Justice partners and community-based organizations can help distribute information, educate the public, and even provide community space and language access for court-community events and informational and educational clinics about court services such as self-help centers or alternative dispute resolution programs.

As was discussed in Goal 5, outreach can also be effective in any effort to develop a pipeline of language access providers. Courts, in their outreach to community-based organizations and educational institutions, can engage bilingual community members by (a) offering potential employment opportunities and a meaningful chance to help their communities, (b) providing opportunities for participation in the court as trained volunteers to learn about the justice system and to gain experience and job skills, and (c) encouraging these community members to invest the time and resources required to study and prepare to become a certified or registered court interpreter. (Goal 5 provides a specific recommendation for these collaborations to increase the pool of qualified language access providers throughout the court system.)

**Recommendations**

53. Courts should strengthen existing relationships and create new relationships with local community-based organizations, including social services providers, legal services organizations, government agencies, and minority bar associations to gather feedback to improve court services for LEP court users and disseminate court information and education throughout the community. (Phase 3)

54. To maximize both access and efficiency, multilingual audio and/or video recordings should be used as part of the outreach efforts by courts to provide important general information and answers to frequently asked questions. (Phase 3)

55. Courts should collaborate with local media and leverage the resources of media outlets, including ethnic media that communicate with their consumers in their language, as a means of disseminating information throughout the community about language access services, the court process, and available court resources. (Phase 3)
**Goal 8:** Identify Systems, Funding, and Legislation Necessary for Plan Implementation and Language Access Management

**Goal Statement**

In order to complete the systematic expansion of language access services, the Judicial Council will (1) secure adequate funding that does not result in a reduction of other court services; (2) propose appropriate changes to the law, both statutory amendments and changes to the rules of court; and (3) develop systems for implementing the Language Access Plan, for monitoring the provision of language access services, and for maintaining the highest quality of language services.

**Increased Funding**

**Issue Description**

As was discussed at the outset of this plan, the California judicial branch has seen significant funding cutbacks in past years forcing courts to close courtrooms and courthouses, cut hours of operations, lay off staff, and decrease or eliminate services altogether. Although a small amount of court funding was restored in fiscal year 2014–2015, it was partially offset by the imposition of other financial obligations on the branch and a reduction in court revenues. Accordingly, courts throughout the state still struggle to meet their court users’ most basic needs. For example, the presiding judge of Riverside County reported that residents of Needles—many of whom are low income, LEP individuals—must now travel 200 miles to reach the nearest courthouse. It is therefore imperative that there be increased funding for the judicial branch, and that any funding provided by the Legislature for increasing language access not be at the expense of other branch funding. Basic, ongoing funding from the Legislature is essential and critical for effective implementation of the Language Access Plan.

However, there are other opportunities for funding for individual courts, in particular for projects designed to address the needs of low-income or LEP communities, especially in the areas of domestic violence and elder or dependent adult abuse. Some grant possibilities in recent years have included funding for innovative initiatives to use technology to expand access to the judicial system, partnership grants with legal services providers funded by the Equal Access Fund, pilot projects addressing particular needs of a court’s communities, and State Bar grants for one-time discrete projects. Grant funding may have limitations since it often provides resources for one-time projects or needs, and may not be available for ongoing operational costs necessary to keep a project running beyond the original grant period. However, grant funding can also be an important resource for certain projects in the expansion of language access and the Judicial Council should support efforts at the local level to apply for relevant funding opportunities.
**Recommendations**

56. The judicial branch will advocate for sufficient funding to provide comprehensive language access services. The funding requests should reflect the incremental phasing-in of the Language Access Plan, and should seek to ensure that requests do not jeopardize funding for other court services or operations. (Phase 1)

57. Funding requests for comprehensive language access services should be premised on the best available data that identifies the resources necessary to implement the recommendations of this Language Access Plan. This may include information being gathered in connection with the recent Judicial Council decision to expand the use of Program 45.45 funds for civil cases where parties are indigent; information being gathered for the 2015 Language Need and Interpreter Use Report; and information that can be extrapolated from the Resource Assessment Study (which looks at court staff workload), as well as other court records (e.g., self-help center records regarding LEP court users). (Phase 1)

58. Judicial Council staff will pursue appropriate funding opportunities from federal, state, or nonprofit entities, such as the National Center for State Courts, which are particularly suitable for one-time projects, for example, translation of documents or production of videos. (Phase 1)

59. Courts should pursue appropriate funding opportunities at the national, state, or local level to support the provision of language access services. Courts should seek, for example, one-time or ongoing grants from public interest foundations, state or local bar associations, and federal, state, or local governments. (Phase 1)

**Language Access Plan Management**

**Issue Description**

Stakeholders participating throughout the planning process agreed that, in order to ensure the success of a statewide language access plan, it is necessary to create systems for implementing the plan, for compliance and monitoring its effects on language access statewide, and for tracking the need for ongoing adjustments and improvements. Participants in the court system, from legal services providers to interpreters to court users themselves, emphasized the need for quality control measures, including mechanisms for making and resolving complaints about all aspects of the courts’ language access services.

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41 The Legislature provides funding for interpreter services to the courts in a special item of the judicial branch budget (Program 45.45 of the Trial Court Trust Fund). At its public meeting on January 23, 2014, the Judicial Council approved recommendations that authorize reimbursement from Program 45.45 to include costs for all appearances in domestic violence cases, family law cases in which there is a domestic violence issue, and elder abuse cases, as well as interpreters for indigent parties in civil cases. At its public meeting on December 12, 2014, the council modified the action, approving expenditure of these funds consistent with the priorities and preferences set forth in AB 1657.
The Judicial Council’s Court Language Access Support Program (CLASP) unit and the statewide Language Access Coordinator will be instrumental in providing centralized management of the Language Access Plan and in being available as a resource to local courts needing technical assistance or support to implement the provisions of this Language Access Plan as well as develop local procedures and policies. CLASP, in conjunction with other Judicial Council staff working on language access issues, can coordinate the sharing of existing language access materials developed by providers and courts throughout the state and nationally, and can coordinate efforts for developing further statewide materials (which local courts can then adapt to their unique needs). Because LEP court users may have language access needs for appellate matters (for example, needing assistance at the counter or understanding forms or procedures), this plan also recommends that the California Courts of Appeal and Supreme Court of California discuss and adopt applicable parts of the plan with necessary modifications.

A multifaceted complaint procedure is also essential to ensure the quality of the language access services delivered. Development of such a procedure must include, among other considerations, conferring with union representatives and impacted service providers to ensure the creation of a complaint system that will be respected by all who either provide or receive services. All participants in the court system, including LEP court users, attorneys, legal services providers, community-based organizations, interpreters, judicial officers, and other justice partners, must be able to register complaints if a court fails to provide adequate language access services, or if the services provided are of poor quality, whether
the service involves bilingual staff, written translation, or interpreter employees or contractors. Any complaint procedure must be available to all, consistent and transparent, with procedures and forms, and should be utilized in a way that protects LEP court users or other interested persons from actual or perceived negative repercussions either to them personally or to the outcome of their case.

Complainants should be able to file their complaints confidentially, and advocates and attorneys should be allowed to register complaints or concerns on behalf of their LEP clients. Similarly, court staff, administrators, judges, subordinate judicial officers, and interpreters must be able to file a complaint regarding serious problems or concerns with the quality of interpretation provided by a given interpreter (whether this interpreter is a court employee, independent contractor, certified, registered, or provisionally qualified).

The confidentiality of complaint processes should be broadly communicated to all court users. In addition, information about the complaint process and any forms should be available in English and up to 5 other languages, based on local community needs assessed through collaboration with and information from justice partners, including legal services providers, community-based organizations, and other entities working with LEP populations. Where not available in a certain language, the court should ensure the availability of bilingual staff or an interpreter to assist the LEP court user in completing the complaint form and to explain the written procedures.

**Recommendations**

60. The Judicial Council will create a Language Access Implementation Task Force (name TBD) to develop an implementation plan for presentation to the council. The Implementation Task Force membership should include representatives of the key stakeholders in the provision of language access services in the courts, including, but not limited to, judicial officers, court administrators, court interpreters, legal services providers, and attorneys that commonly work with LEP court users. As part of its charge, the task force will identify the costs associated with implementing the LAP recommendations. The Implementation Task Force will coordinate with related advisory groups and Judicial Council staff on implementation, and will have the flexibility to monitor and adjust implementation plans based on feasibility and available resources. (Phase 1)
61. The Implementation Task Force will establish the necessary systems for monitoring compliance with this Language Access Plan. This will include oversight of the plan’s effects on language access statewide and at the individual court level, and assessing the need for ongoing adjustments and improvements to the plan. (Phase 1)

62. The Implementation Task Force will develop a single form, available statewide, on which to register a complaint about the provision of, or the failure to provide, language access. This form should be as simple, streamlined, and user-friendly as possible. The form will be available in both hard copy at the courthouse and online, and will be capable of being completed electronically or downloaded for printing and completion in writing. The complaints will also serve as a mechanism to monitor concerns related to language access at the local or statewide level. The form should be used as part of multiple processes identified in the following recommendations of this plan. (Phase 1)

63. Individual courts will develop a process by which LEP court users, their advocates and attorneys, or other interested persons may file a complaint about the court’s provision of, or failure to provide, appropriate language access services, including issues related to locally produced translations. Local courts may choose to model their local procedures after those developed as part of the implementation process. Complaints must be filed with the court at issue and reported to the Judicial Council to assist in the ongoing monitoring of the overall implementation and success of the Language Access Plan. (Phase 1)

64. The Judicial Council, together with stakeholders, will develop a process by which the quality and accuracy of an interpreter’s skills and adherence to ethical requirements can be reviewed. This process will allow for appropriate remedial action, where required, to ensure certified and registered interpreters meet all qualification standards. Development of the process should include determination of whether California Rule of Court 2.891 (regarding periodic review of court interpreter skills and professional conduct) should be amended, repealed, or remain in place. Once the review process is created, information regarding how it can be initiated must be clearly communicated to court staff, judicial officers, attorneys, and in plain language to court users (e.g., LEP persons and justice partners). (Phase 2)

65. The translation committee (as described in Recommendation 36), in consultation with the Implementation Task Force, will develop a process to address complaints about the quality of Judicial Council–approved translations, including translation of Judicial Council forms, the California Courts Online Self-Help Center, and other Judicial Council–issued publications and information. (Phase 3)

66. The Judicial Council should create a statewide repository of language access resources, whether existing or to be developed, that includes translated materials, audiovisual tools, and other materials identified in this plan in order to assist courts in efforts to expand language access. (Phase 1)

67. The California Courts of Appeal and the Supreme Court of California should discuss and adopt applicable parts of this Language Access Plan with necessary modifications. (Phase 1)
Necessary Court Rules, Forms, and Legislation for Plan Implementation

Issue Description

Legislative action to amend, delete, or add statutory language, and Judicial Council action to create or revise court forms or rules of court, will be necessary to fully and effectively implement the recommendations contained in this Language Access Plan. Such actions should include clarification of existing statutes, the amendment of the existing rule of court for provisional qualification of interpreters in civil cases, and the development of a policy for an LEP court user’s ability to request a waiver of interpreter services.

During the public hearings and listening sessions, court administrators described the difficulties that certain aspects of the Trial Court Interpreter Employment and Labor Relations Act pose for courts in their efforts to efficiently schedule interpreters. Of particular concern was Government Code section 71802, which limits individual courts from using a particular independent contractor more than 100 days per calendar year, and also requires that courts offer independent contractors who have been appointed more than 45 court days in the same year the opportunity to apply for employment. Court administrators expressed concern that adding additional civil case types that require an interpreter will cause courts to reach the 100-day limit for individual independent court interpreter contractors more quickly, making them unavailable to meet the court’s future needs within that year, while also forcing independent contractors to accept opportunities in counties outside their geographic area of choice. Administrators also raised concerns about the inefficiencies of requiring that interpreter coordinators be certified or registered interpreters to be funded from interpreter funding, which then limits the time that the credentialed coordinator can provide interpreting services. Where interpreter resources are tight, the policy of using a credentialed interpreter for administrative tasks, thus removing him or her from the courtroom, should be revisited.

In addition to the recommendations listed below, the Joint Working Group recognizes that additional rules, statute, or form changes may be necessary to implement the recommendations contained in this plan.

Recommendations

68. To ensure ongoing and effective implementation of the LAP, the Implementation Task Force will evaluate, on an ongoing basis, the need for new statutes or rules or modifications of existing rules and statutes. (Phases 2 and 3)

69. The Judicial Council should establish procedures and guidelines for determining “good cause” to appoint non-credentialed court interpreters in civil matters. (Phase 1)

70. The Judicial Council should amend rule of court 2.893 to address the appointment of non-credentialed interpreters in civil proceedings. (Phase 1)
71. The Judicial Council should sponsor legislation to amend Government Code section 68560.5(a) to include small claims proceedings in the definition of court proceedings for which qualified interpreters must be provided. (Phase 2)

72. The Judicial Council should sponsor legislation to amend Code of Civil Procedure section 116.550 dealing with small claims actions to reflect that interpreters in small claims cases should, as with other matters, be certified or registered, or provisionally qualified where a credentialed interpreter is not available. (Phase 2)

73. The Judicial Council should update the interpreter-related court forms (INT-100-INFO, INT-110, INT-120, and INT-200) as necessary to be consistent with this plan. (Phase 2)

74. The Implementation Task Force should evaluate existing law, including a study of any negative impacts of the Trial Court Interpreter Employment and Labor Relations Act on the provision of appropriate language access services. The evaluation should include, but not be limited to, whether any modifications should be proposed for existing requirements and limitations on hiring independent contractors beyond a specified number of days. (Phase 2)

75. The Implementation Task Force will develop a policy addressing an LEP court user’s request of a waiver of the services of an interpreter. The policy will identify standards to ensure that any waiver is knowing, intelligent, and voluntary; is made after the person has consulted with counsel; and is approved by the appropriate judicial officer, exercising his or her discretion. The policy will address any other factors necessary to ensure the waiver is appropriate, including: determining whether an interpreter is necessary to ensure the waiver is made knowingly; ensuring that the waiver is entered on the record, or in writing if there is no official record of the proceedings; and requiring that a party may request at any time, or the court may make on its own motion, an order vacating the waiver and appointing an interpreter for all further proceedings. The policy shall reflect the expectation that waivers will rarely be invoked in light of access to free interpreter services and the Implementation Task Force will track waiver usage to assist in identifying any necessary changes to policy. (Phase 1)

42 See footnote 31 above.
Appendix A: Phase-In of Recommendations

PHASE 1: These recommendations are urgent or should already be in place. Implementation of these recommendations should begin in year 1 (2015).

1. **Language access needs identification.** Courts will identify the language access needs for each LEP court user, including parties, witnesses, or other persons with a significant interest, at the earliest possible point of contact with the LEP person. The language needs will be clearly and consistently documented in the case management system and/or any other case record or file, as appropriate given a court’s existing case information record system, and this capability should be included in any future system upgrades or system development. (Phase 1)

2. **Requests for language services.** A court’s provision or denial of language services must be tracked in the court’s case information system, however appropriate given a court’s capabilities. Where current tracking of provision or denial is not possible, courts must make reasonable efforts to modify or update their systems to capture relevant data as soon as feasible. (Phases 1, 2)

3. **Protocol for justice partners to communicate language needs.** Courts should establish protocols by which justice partners can indicate to the court that an individual requires a spoken language interpreter at the earliest possible point of contact with the court system. (Phase 1)

4. **Mechanisms for LEP court users to self-identify.** Courts will establish mechanisms that invite LEP persons to self-identify as needing language access services upon contact with any part of the court system (using, for example, “I speak” cards [see page 49 for a sample card]). In the absence of self-identification, judicial officers and court staff must proactively seek to ascertain a court user’s language needs. (Phase 1)

5. **Information for court users about availability of language access services.** Courts will inform court users about the availability of language access services at the earliest points of contact between court users and the court. The notice must include, where accurate and appropriate, that language access services are free. Courts should take into account that the need for language access services may occur earlier or later in the court process, so information about language services must be available throughout the duration of a case. Notices should be in English and up to five other languages based on local community needs assessed through collaboration with and information from justice partners, including legal services providers, community-based organizations, and other entities working with LEP populations. Notice must be provided to the public, justice partners, legal services agencies, community-based organizations, and other entities working with LEP populations. (Phase 1)

6. **Expansion of language services cost reporting.** The Judicial Council and the courts will continue to expand and improve data collection on interpreter services, and expand language services cost reporting to include amounts
spent on other language access services and tools such as translations, interpreter or language services coordination, bilingual pay differential for staff, and multilingual signage or technologies. This information is critical in supporting funding requests as the courts expand language access services into civil cases. (Phase 1)

8. **Expansion of court interpreters to all civil proceedings.** Qualified interpreters must be provided in the California courts to LEP court users in all court proceedings, including civil proceedings as prioritized in Evidence Code section 756 (see Appendix H), and including Family Court Services mediation. (Phases 1 and 2)

9. **Provisional qualification requirements.** Pending amendment of California Rules of Court, rule 2.893, when good cause exists, a noncertified or nonregistered court interpreter may be appointed in a court proceeding in any matter, civil or criminal, only after he or she is determined to be qualified by following the procedures for provisional qualification. These procedures are currently set forth, for criminal and juvenile delinquency matters, in rule 2.893 (and, for civil matters, will be set forth once the existing rule of court is amended). (See Recommendation 50, on training for judicial officers and court staff regarding the provisional qualification procedures, and Recommendation 70, on amending rule 2.893 to include civil cases.) (Phases 1 and 2)

10. **Provision of qualified interpreters in all court-ordered/court-operated proceedings.** Beginning immediately, as resources are available, but in any event no later than 2020, courts will provide qualified court interpreters in all court-ordered, court-operated programs, services and events, to all LEP litigants, witnesses, and persons with a significant interest in the case. (Phases 1, 2, and 3)

12. **Preference for in-person interpreters.** The use of in-person, certified and registered court interpreters is preferred for court proceedings, but courts may consider the use of remote interpreting where it is appropriate for a particular event. Remote interpreting may only be used if it will allow LEP court users to fully and meaningfully participate in the proceedings. (Phase 1)

13. **Remote interpreting in the courtroom.** When using remote interpreting in the courtroom, the court must satisfy, to the extent feasible, the prerequisites, considerations and guidelines for remote interpreting set forth in Appendix B. (Phase 1)

14. **Remote interpreting minimum technology requirements.** The Implementation Task Force will establish minimum technology requirements for remote interpreting which will be updated on an ongoing basis and which will include minimum requirements for both simultaneous and consecutive interpreting. (Phase 1)

15. **Use of video for remote interpreting.** Courts using remote interpreting should strive to provide video, used in conjunction with enhanced audio equipment, for courtroom interpretations, rather than relying on telephonic interpreting. (Phase 1)
16. **Pilot for video remote interpreting.** The Judicial Council should conduct a pilot project, in alignment with the Judicial Branch’s Tactical Plan for Technology 2014–2016. This pilot should, to the extent possible, collect relevant data on: due process issues, participant satisfaction, whether remote interpreting increases the use of certified and registered interpreters as opposed to provisionally qualified interpreters, the effectiveness of a variety of available technologies (for both consecutive and simultaneous interpretation), and a cost-benefit analysis. The Judicial Council should make clear that this pilot project would not preclude or prevent any court from proceeding on its own to deploy remote interpreting, so long as it allows LEP court users to fully and meaningfully participate in the proceedings. (Phase 1)

18. **Creation of multilingual standardized videos.** The Judicial Council should continue to create multilingual standardized videos for high-volume case types that lend themselves to generalized, not localized, legal information, and provide them to courts in the state’s top eight languages and captioned in other languages. (Phase 1)

19. **Verifying credentials of interpreters.** Effective January 2015, pursuant to Government Code section 68561(g) and (f), judicial officers, in conjunction with court administrative personnel, must ensure that the interpreters being appointed are qualified, properly represent their credentials on the record, and have filed with the court their interpreter oaths. (See Recommendation 50, which discusses training of judicial officers and court staff on these subjects.) (Phase 1)

22. **Avoiding conflicts of interest.** Absent exigent circumstances, when appointing a noncertified, nonregistered interpreter, courts must not appoint persons with a conflict of interest or bias with respect to the matter. (Phase 1)

23. **Appointment of minors to interpret.** Minors will not be appointed to interpret in courtroom proceedings nor court-ordered and court-operated activities. (Phase 1)

25. **Designation of language access office or representative.** The court in each county will designate an office or person that serves as a language access resource for all court users, as well as court staff and judicial officers. This person or persons should be able to: describe all the services the court provides and what services it does not provide, access and disseminate all of the court’s multilingual written information as requested, and help LEP court users and court staff locate court language access resources. (Phase 1)

26. **Identification of critical points of contact.** Courts should identify which points of contact are most critical for LEP court users, and, whenever possible, should place qualified bilingual staff at these locations. (See Recommendation 47, which discusses possible standards for the appropriate qualification level of bilingual staff at these locations.) (Phase 1)

28. **Recruitment of bilingual staff.** Courts should strive to recruit bilingual staff fluent in the languages most common in that county. In order to increase the bilingual applicant pool, courts should conduct outreach to educational
providers in the community, such as local high schools, community colleges, and universities, to promote the career opportunities available to bilingual individuals in the courts. (Phase 1)

34. **Use of bilingual volunteers.** Courts should consider the use of bilingual volunteers to provide language access services at points of contact other than court proceedings, where appropriate. Bilingual volunteers and interns must be properly trained and supervised. (Phase 1)

36. **Establishment of translation committee.** The Judicial Council will create a translation committee to develop and formalize a translation protocol for Judicial Council translations of forms, written materials, and audiovisual tools. The committee should collaborate with interpreter organizations and courts to develop a legal glossary in all certified languages, taking into account regional differences, to maintain consistency in the translation of legal terms. The committee’s responsibilities will also include identifying qualifications for translators, and the prioritization, coordination, and oversight of the translation of materials. The qualification of translators should include a requirement to have a court or legal specialization and be accredited by the American Translators Association (ATA), or to have been determined qualified to provide the translations based on experience, education, and references. Once the Judicial Council’s translation protocol is established, individual courts should establish similar quality control and translation procedures for local forms, informational materials, recordings, and videos aimed at providing information to the public. Local court website information should use similarly qualified translators. Courts are encouraged to partner with local community organizations to accomplish this recommendation. (Phase 1)

37. **Statewide multilingual samples and templates.** The Judicial Council staff will work with courts to provide samples and templates of multilingual information for court users that are applicable on a statewide basis and adaptable for local use. (Phase 1)

38. **Posting of translations on web.** The Judicial Council’s staff will post on the California Courts website written translations of forms and informational and educational materials for the public as they become available and will send notice to the courts of their availability so that courts can link to these postings from their own websites. (Phase 1)

40. **Translation of court orders.** Courts will provide sight translation of court orders and should consider providing written translations of those orders to LEP persons when needed. At a minimum, courts should provide the translated version of the relevant Judicial Council form to help litigants compare their specific court order to the translated template form. (Phase 1)

43. **Standards for qualifications of interpreters.** Courts, the Judicial Council, and the Court Interpreters Advisory Panel (CIAP) will ensure that all interpreters providing language access services to limited English proficient court users are qualified and competent. Existing standards for qualifications should remain in effect and will be reviewed regularly by the CIAP. (Phase 1)
44. **Online orientation for new interpreters.** The online statewide orientation program will continue to be available to facilitate orientation training for new interpreters working in the courts. (Phase 1)

45. **Training for prospective interpreters.** The Judicial Council and the courts should work with interpreter organizations and educational providers (including the California community college and state university systems) to examine ways to better prepare prospective interpreters to pass the credentialing examination. These efforts should include:
   - Partnering to develop possible exam preparation courses and tests, and
   - Creating internship and mentorship opportunities in the courts and in related legal settings (such as work with legal services providers or other legal professionals) to help train and prepare prospective interpreters in all legal areas. (Phase 1)

46. **Training for interpreters on civil cases and remote interpreting.** The Judicial Council, interpreter organizations, and educational groups should collaborate to create training programs for those who will be interpreting in civil cases and those who will be providing remote interpreting. (Phase 1)

47. **Language proficiency standards for bilingual staff.** Courts must ensure that bilingual staff providing information to LEP court users are proficient in the languages in which they communicate. All staff designated as bilingual staff by courts must at a minimum meet standards corresponding to “intermediate mid” as defined under the American Council on the Teaching of Foreign Languages guidelines. (See Appendix F.) The existing Oral Proficiency Exam available through the Judicial Council’s Court Language Access Support Program (CLASP) unit may be used by courts to establish foreign-language proficiency of staff. Courts should not rely on self-evaluation by bilingual staff in determining their language proficiency. (Phase 1)

48. **Standards and online training for bilingual staff.** Beyond the specified minimum, the Judicial Council staff will work with the courts to (a) identify standards of language proficiency for specific points of public contact within the courthouse, and (b) develop and implement an online training for bilingual staff. (Phase 1)

50. **Judicial branch training regarding Language Access Plan.** Judicial officers, including temporary judges, court administrators, and court staff will receive training regarding the judicial branch’s language access policies and requirements as delineated in this Language Access Plan, as well as the policies and procedures of their individual courts. Courts should schedule additional training when policies are updated or changed. These trainings should include:
   - Optimal methods for managing court proceedings involving interpreters, including an understanding of the mental exertion and concentration required for interpreting, the challenges of interpreter fatigue, the need to control rapid rates of speech and dialogue, and consideration of team interpreting where appropriate;
• The interpreter’s ethical duty to clarify issues during interpretation and to report impediments to performance;
• Required procedures for the appointment and use of a provisionally qualified interpreter and for an LEP court user’s waiver, if requested, of interpreter services;
• Legal requirements for establishing, on the record, an interpreter’s credentials;
• Available technologies and minimum technical and operational standards for providing remote interpreting; and
• Working with LEP court users in a culturally competent manner.

The staff of the Judicial Council will develop curricula for trainings, as well as resource manuals that address all training components, and distribute them to all courts for adaptation to local needs. (Phase 1)

52. Benchcards on language access. Judicial Council staff should develop bench cards that summarize salient language access policies and procedures and available resources to assist bench officers in addressing language issues that arise in the courtroom, including policies related to remote interpreting. (Phase 1)

56. Advocacy for sufficient funding. The judicial branch will advocate for sufficient funding to provide comprehensive language access services. The funding requests should reflect the incremental phasing-in of the Language Access Plan, and should seek to ensure that requests do not jeopardize funding for other court services or operations. (Phase 1)

57. Use of data for funding requests. Funding requests for comprehensive language access services should be premised on the best available data that identifies the resources necessary to implement the recommendations of this Language Access Plan. This may include information being gathered in connection with the recent Judicial Council decision to expand the use of Program 45.45 funds for civil cases where parties are indigent; information being gathered for the 2015 Language Need and Interpreter Use Report; and information that can be extrapolated from the Resource Assessment Study (which looks at court staff workload), as well as other court records (e.g., self-help center records regarding LEP court users). (Phase 1)

58. Pursuit by the Judicial Council of other funding opportunities. Judicial Council staff will pursue appropriate funding opportunities from federal, state, or nonprofit entities such as the National Center for State Courts, which are particularly suitable for one-time projects, for example, translation of documents or production of videos. (Phase 1)

59. Pursuit by courts of other funding opportunities. Courts should pursue appropriate funding opportunities at the national, state, or local level to support the provision of language access services. Courts should seek, for example, one-time or ongoing grants from public interest foundations, state or local bar associations, federal, state, or local governments, and others. (Phase 1)
60. **Language Access Implementation Task Force.** The Judicial Council will create a Language Access Implementation Task Force (name TBD) to develop an implementation plan for presentation to the council. The Implementation Task Force membership should include representatives of the key stakeholders in the provision of language access services in the courts, including, but not limited to, judicial officers, court administrators, court interpreters, legal services providers, and attorneys that commonly work with LEP court users. As part of its charge, the task force will identify the costs associated with implementing the LAP recommendations. The Implementation Task Force will coordinate with related advisory groups and Judicial Council staff on implementation, and will have the flexibility to monitor and adjust implementation plans based on feasibility and available resources. (Phase 1)

61. **Compliance and monitoring system.** The Implementation Task Force will establish the necessary systems for monitoring compliance with this Language Access Plan. This will include oversight of the plan’s effects on language access statewide and at the individual court level, and assessing the need for ongoing adjustments and improvements to the plan. (Phase 1)

62. **Single complaint form.** The Implementation Task Force will develop a single form, available statewide, on which to register a complaint about the provision of, or the failure to provide, language access. This form should be as simple, streamlined, and user-friendly as possible. The form will be available in both hard copy at the courthouse and online, and will be capable of being completed electronically or downloaded for printing and completion in writing. The complaints will also serve as a mechanism to monitor concerns related to language access at the local or statewide level. The form should be used as part of multiple processes identified in the following recommendations of this plan. (Phase 1)

63. **Complaints at local level regarding language access services.** Individual courts will develop a process by which LEP court users, their advocates and attorneys, or other interested persons may file a complaint about the court’s provision of, or failure to provide, appropriate language access services, including issues related to locally produced translations. Local courts may choose to model their local procedures after those developed as part of the implementation process. Complaints must be filed with the court at issue and reported to the Judicial Council to assist in the ongoing monitoring of the overall implementation and success of the Language Access Plan. (Phase 1)

66. **Statewide repository of language access resources.** The Judicial Council should create a statewide repository of language access resources, whether existing or to be developed, that includes translated materials, audiovisual tools, and other materials identified in this plan in order to assist courts in efforts to expand language access. (Phase 1)

67. **Adoption of plan by the California Courts of Appeal and California Supreme Court.** The California Courts of Appeal and the Supreme Court of California should discuss and adopt applicable parts of this Language Access Plan with necessary modifications. (Phase 1)
69. **Procedures and guidelines for good cause.** The Judicial Council should establish procedures and guidelines for determining “good cause” to appoint non-credentialed court interpreters in civil matters. (Phase 1)

70. **Amend rule of court for appointment of interpreters in civil proceedings.** The Judicial Council should amend rule of court 2.893 to address the appointment of non-credentialed interpreters in civil proceedings. (Phase 1)

75. **Policy regarding waiver of interpreter.** The Implementation Task Force will develop a policy addressing an LEP court user’s request of a waiver of the services of an interpreter. The policy will identify standards to ensure that any waiver is knowing, intelligent, and voluntary; is made after the person has consulted with counsel; and is approved by the appropriate judicial officer, exercising his or her discretion. The policy will address any other factors necessary to ensure the waiver is appropriate, including: determining whether an interpreter is necessary to ensure the waiver is made knowingly; ensuring that the waiver is entered on the record, or in writing if there is no official record of the proceedings; and requiring that a party may request at any time, or the court may make on its own motion, an order vacating the waiver and appointing an interpreter for all further proceedings. The policy shall reflect the expectation that waivers will rarely be invoked in light of access to free interpreter services and the Implementation Task Force will track waiver usage to assist in identifying any necessary changes to policy. (Phase 1)
PHASE 2: These recommendations are critical, but less urgent or may require completion of Phase 1 tasks. Implementation of these recommendations may begin immediately, where practicable, and in any event should begin by years 2–3 (2016–2017).

2. Requests for language services. A court’s provision or denial of language services must be tracked in the court’s case information system, however appropriate given a court’s capabilities. Where current tracking of provision or denial is not possible, courts must make reasonable efforts to modify or update their systems to capture relevant data as soon as feasible. (Phases 1, 2)

7. Review of other data beyond the U.S. Census. The Judicial Council and the courts should collect data in order to anticipate the numbers and languages of likely LEP court users. Whenever data is collected, including for these purposes, the courts and the Judicial Council should look at other sources of data beyond the U.S. Census, such as school systems, health departments, county social services, and local community-based agencies. (Phase 2)

8. Expansion of court interpreters to all civil proceedings. Qualified interpreters must be provided in the California courts to LEP court users in all court proceedings, including civil proceedings as prioritized in Evidence Code section 756 (see Appendix H), and including Family Court Services mediation. (Phases 1 and 2)

9. Provisional qualification requirements. Pending amendment of California Rules of Court, rule 2.893, when good cause exists, a noncertified or nonregistered court interpreter may be appointed in a court proceeding in any matter, civil or criminal, only after he or she is determined to be qualified by following the procedures for provisional qualification. These procedures are currently set forth, for criminal and juvenile delinquency matters, in rule 2.893 (and, for civil matters, will be set forth once the existing rule of court is amended). (See Recommendation 50, on training for judicial officers and court staff regarding the provisional qualification procedures, and Recommendation 70, on amending rule 2.893 to include civil cases.) (Phases 1 and 2)

10. Provision of qualified interpreters in all court-ordered/court-operated proceedings. Beginning immediately, as resources are available, but in any event no later than 2020, courts will provide qualified court interpreters in all court-ordered, court-operated programs, services and events, to all LEP litigants, witnesses, and persons with a significant interest in the case. (Phases 1, 2, and 3)

11. Consideration of language accessibility of service providers in making court orders. An LEP individual should not be ordered to participate in a court ordered program if that program does not provide appropriate language accessible services. If a judicial officer does not order participation in services due to the program’s lack of language capacity, the court should order the litigant
to participate in an appropriate alternative program that provides language access services for the LEP court user. In making its findings and orders, the court should inquire if the program provides language access services to ensure the LEP court user's ability to meet the requirements of the court. (Phase 2)

17. **Pilot for central pool of remote interpreters.** In order to maximize the use and availability of California’s highly skilled certified and registered interpreters, the Judicial Council should consider creating a pilot program through which certified and registered interpreters would be available to all courts on a short-notice basis to provide remote interpreting services. (Phase 2)

20. **Expansion of regional coordination system.** The Judicial Council should expand the existing formal regional coordination system to improve efficiencies in interpreter scheduling for court proceedings and cross-assignments between courts throughout the state. (See Recommendation 30, addressing coordination for bilingual staff and interpreters for non-courtroom events.) (Phase 2)

21. **Methods for calendaring and coordination of court interpreters.** Courts should continue to develop methods for using interpreters more efficiently and effectively, including but not limited to calendar coordination. Courts should develop these systems in a way that does not have a chilling effect on LEP court users’ access to court services. (Phase 2)

24. **Appointment of bilingual staff.** Absent exigent circumstances, courts should avoid appointing bilingual court staff to interpret in courtroom proceedings; if the court does appoint staff, he or she must meet all of the provisional qualification requirements. (Phase 2)

27. **Provision of language access tools to court personnel.** All court staff who engage with the public will have access to language assistance tools, such as translated materials and resources, multi-language glossaries and “I speak” cards, to determine a court user’s native language, direct him or her to the designated location for language services, and/or provide the LEP individual with brochures, instructions, or other information in the appropriate language. (Phase 2)

29. **Development of protocols for where bilingual staff are not available.** Courts will develop written protocols or procedures to ensure LEP court users obtain adequate language access services where bilingual staff are not available. For example, the court’s interpreter coordinator could be on call to identify which interpreters or staff are available and appropriate to provide services in the clerk’s office or self-help center. Additionally, the use of remote technologies such as telephone access to bilingual staff persons in another location or remote interpreting could be instituted. (Phase 2)

30. **Policies that promote sharing of bilingual staff and interpreters among courts.** The Judicial Council should consider adopting policies that promote sharing of bilingual staff and certified and registered court interpreters among courts, using remote technologies, for language assistance outside of court proceedings. (Phase 2)
31. **Pilot for remote assistance at counters and in self-help centers.** The courts and the Judicial Council should consider a pilot to implement the use of remote interpreter services for counter help and at self-help centers, incorporating different solutions, including court-paid cloud-based fee-for-service models or a court/centralized bank of bilingual professionals. (Phase 2)

32. **Pilot for remote assistance for workshops.** The courts should consider a pilot to implement inter-court, remote attendance at workshops, trainings, or “information nights” conducted in non-English languages using a variety of equipment, including telephone, video-conferencing (WebEx, Skype), or other technologies. (Phase 2)

33. **Qualifications of court-appointed professionals.** In matters with LEP court users, courts must determine that court-appointed professionals, such as psychologists, mediators, and guardians, can provide linguistically accessible services before ordering or referring LEP court users to those professionals. Where no such language capability exists, courts should make reasonable efforts to identify or enter into contracts with providers able to offer such language capabilities, either as bilingual professionals who can provide the service directly in another language or via qualified interpreters. (Phase 2)

39. **Signage throughout courthouse.** The staff of the Judicial Council should assist courts by providing plain-language translations of the most common and relevant signs likely to be used in a courthouse, and provide guidance on the use of internationally recognized icons, symbols, and displays to limit the need for text and, therefore, translation. Where more localized signage is required, courts should have all public signs in English and translated in up to five other languages based on local community needs assessed through collaboration with and information from justice partners, including legal services providers, community-based organizations, and other entities working with LEP populations. At a minimum, all such materials should be available in English and Spanish. (Phase 2)

41. **Accessible courthouses.** The Judicial Council, partnering with courts, should ensure that new courthouse construction efforts, as well as redesign of existing courthouse space, are undertaken with consideration for making courthouses more easily navigable by all LEP persons. (Phase 2)

42. **Wayfinding strategies.** The Judicial Council’s staff will provide information to courts interested in better wayfinding strategies, multilingual (static and dynamic) signage, and other design strategies that focus on assisting LEP court users. (Phase 2)

49. **Recruitment strategies for language access providers.** The Judicial Council staff will work with educational providers, community-based organizations, and interpreter organizations to identify recruitment strategies, including consideration of market conditions, to encourage bilingual individuals to pursue the interpreting profession or employment opportunities in the courts as bilingual staff. (Phase 2)
51. **Language access resources on intranet.** Information on local and statewide language access resources, training and educational components identified throughout this plan, glossaries, signage, and other tools for providing language access should be readily available to all court staff through individual courts’ intranets. (Phases 2 and 3)

64. **Complaints regarding court interpreters.** The Judicial Council, together with stakeholders, will develop a process by which the quality and accuracy of an interpreter’s skills and adherence to ethical requirements can be reviewed. This process will allow for appropriate remedial action, where required, to ensure certified and registered interpreters meet all qualification standards. Development of the process should include determination of whether California Rule of Court 2.891 (regarding periodic review of court interpreter skills and professional conduct) should be amended, repealed, or remain in place. Once the review process is created, information regarding how it can be initiated must be clearly communicated to court staff, judicial officers, attorneys, and in plain language to court users (e.g., LEP persons and justice partners). (Phase 2)

68. **Implementation Task Force to evaluate need for updates to rules and statutes.** To ensure ongoing and effective implementation of the LAP, the Implementation Task Force will evaluate, on an ongoing basis, the need for new statutes or rules or modifications of existing rules and statutes. (Phases 2 and 3)

71. **Legislation to delete exception for small claims proceedings.** The Judicial Council should sponsor legislation to amend Government Code section 68560.5(a) to include small claims proceedings in the definition of court proceedings for which qualified interpreters must be provided. (Phase 2)

72. **Legislation to require credentialed interpreters for small claims.** The Judicial Council should sponsor legislation to amend Code of Civil Procedure section 116.550 dealing with small claims actions to reflect that interpreters in small claims cases should, as with other matters, be certified or registered, or provisionally qualified where a credentialed interpreter is not available. (Phase 2)

73. **Updating of interpreter-related forms.** The Judicial Council should update the interpreter-related court forms (INT-100-INFO, INT-110, INT-120, and INT-200) as necessary to be consistent with this plan. (Phase 2)

74. **Evaluation of Trial Court Interpreter Employment and Labor Relations Act.** The Implementation Task Force should evaluate existing law, including a study of any negative impacts of the Trial Court Interpreter Employment and Labor Relations Act on the provision of appropriate language access services. The evaluation should include, but not be limited to, whether any modifications should be proposed for existing requirements and limitations on hiring independent contractors beyond a specified number of days. (Phase 2)
PHASE 3: These recommendations are critical, but not urgent, or are complex and will require significant foundational steps, time, and resources to be completed by 2020. Implementation of these recommendations should begin immediately, where practicable, or immediately after the necessary foundational steps are in place.

10. Provision of qualified interpreters in all court-ordered/court-operated proceedings. Beginning immediately, as resources are available, but in any event no later than 2020, courts will provide qualified court interpreters in all court-ordered, court-operated programs, services and events, to all LEP litigants, witnesses, and persons with a significant interest in the case. (Phase 1, 2, and 3)

35. Pilot programs for language access kiosks. As an alternative for traditional information dissemination, the Judicial Council should consider creating pilot programs to implement the use of language access kiosks in lobbies or other public waiting areas to provide a variety of information electronically, such as on a computer or tablet platform. This information should be in English and up to five other languages based on local community needs assessed through collaboration with and information from justice partners, including legal services providers, community-based organizations, and other entities working with LEP populations. At a minimum, all such materials should be available in English and Spanish. (Phase 3)

51. Language access resources on intranet. Information on local and statewide language access resources, training and educational components identified throughout this plan, glossaries, signage, and other tools for providing language access should be readily available to all court staff through individual courts’ intranets. (Phases 2 and 3)

53. Partnerships to disseminate information. Courts should strengthen existing relationships and create new relationships with local community-based organizations, including social services providers, legal services organizations, government agencies, and minority bar associations to gather feedback to improve court services for LEP court users and disseminate court information and education throughout the community. (Phase 3)

54. Multilingual audio or video recordings to inform public. To maximize both access and efficiency, multilingual audio and/or video recordings should be used as part of the outreach efforts by courts to provide important general information and answers to frequently asked questions. (Phase 3)

55. Collaboration with media. Courts should collaborate with local media and leverage the resources of media outlets, including ethnic media that communicate with their consumers in their language, as a means of disseminating information throughout the community about language access services, the court process, and available court resources. (Phase 3)
65. **Complaints regarding statewide translations.** The translation committee (as described in Recommendation 36), in consultation with the Implementation Task Force, will develop a process to address complaints about the quality of Judicial Council–approved translations, including translation of Judicial Council forms, the California Courts Online Self-Help Center, and other Judicial Council–issued publications and information. (Phase 3)

68. **Implementation Task Force to evaluate need for updates to rules and statutes.** To ensure ongoing and effective implementation of the LAP, the Implementation Task Force will evaluate, on an ongoing basis, the need for new statutes or rules or modifications of existing rules and statutes. (Phases 2 and 3)
Appendix B: Prerequisities, Considerations, and Guidelines for Remote Interpreting in Court Proceedings

Before a court begins using remote interpreting (RI) they must meet certain prerequisites that are outlined below. Additionally, prior to selecting RI for a particular courtroom event the court must consider, at minimum, the following specific factors for determining the appropriateness of RI. When utilizing RI for a courtroom event the court must adhere to the guidelines below.

Prerequisites

A. Minimum Technology Requirements for Remote Interpreting:

Prior to instituting RI in any proceeding the court should ensure that it has the equipment and technology to provide high quality communications. (Until the Implementation Task Force has established technology minimums for RI, as required under Recommendation 14, Appendix D should be consulted on an interim basis.)

B. Training:

Prior to instituting RI in a proceeding, the court should ensure that all persons who will be involved in the RI event have adequate training in the use of the equipment, in interpreting protocols, and in interactions with LEP persons.

Considerations for determining appropriateness of RI for court event

Not all courtroom proceedings are appropriate for RI. The initial analysis for determining whether a court proceeding is appropriate for RI will most likely be made by the interpreter coordinator who may choose to consult with the interpreter being considered for the assignment. Courtroom proceedings that are lengthy, complex, or involve more than simple evidence are not typically appropriate for RI. Additionally, the interpreter coordinator or the judicial officer or both should consider all of the following before deciding to use RI:

- The anticipated length and complexity of the event, including complexity of the communications involved;
- The relative convenience or inconvenience to the court user;
- Whether the matter is uncontested;
- Whether the proceeding is of an immediate nature, such as arraignments for in-custody defendants, bail reductions, and temporary restraining orders;
- Whether the LEP party is present in the courtroom;
- The number of court users planned to receive interpretation from the same interpreter during the event;
- The efficient deployment of court resources;

This appendix contains suggested guidelines based on current best practices and, as such, should be subject to updating and revision to accommodate advances in technology that will help ensure quality communication with LEP court users.
Whether the LEP party requires a relay interpreter, e.g., where there is an interpreter for an indigenous language who relays the interpretation in Spanish. (The need for a relay interpreter does not preclude the use of RI, but might necessitate the presence of at least one of the interpreters in the courtroom.)

**Guidelines for using RI in a court proceeding**

1. **Need to Interrupt or Clarify, and Suspend and Reschedule**
   When using RI the court should consult with the interpreter to determine how best to facilitate interruptions or clarifications that may be needed. The court should suspend and reschedule a matter if, for technology or other reasons, RI is not facilitating effective communication, or if the interpreter finds the communications to be ineffective.

2. **VRI and RI Challenges**
   The court shall be mindful of the particular challenges involved in remote interpreting, including increased fatigue and stress; events involving remote interpreting should have shorter sessions and more frequent breaks.

3. **Participants Who Must Have Access**
   The remote interpreter’s voice must be heard clearly throughout the court room, and the interpreter must be able to hear all participants.

4. **Visual/Auditory Issues, Confidentiality, and Modes of Interpreting**
   Video remote interpreting (VRI) is generally preferred over other methods of remote interpreting that do not provide visual cues, such as telephonic interpreting. However, there will be situations where VRI is not possible or is not necessary. (See Appendix D for visual/auditory issues and requirements for confidentiality that must be considered and accounted for when implementing RI.)

5. **Documents and Other Information**
   The court shall ensure the availability of technology to communicate written information to the interpreter including a copy of exhibits being introduced, as well as information after a proceeding, such as an order, so the interpreter can provide sight translation to the LEP individual if needed.

6. **Professional Standards and Ethics**
   The same rules for using qualified interpreters apply to assignments using RI. It is the intent of this language access plan to expand the availability of certified and registered interpreters through the use of RI. All interpreters performing RI should be familiar with, and are bound by, the same professional standards and ethics as onsite court interpreters.\(^{44}\)

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\(^{44}\) The requirements for provisionally qualifying an interpreter can be found in Government Code section 68651(c) and California Rules of Court, rule 2.893.
7. Data Collection

(a) Courts using RI in the courtroom should monitor the effectiveness of their technology and equipment, and the satisfaction of participants.

(b) For purposes of supporting funding requests, courts should track the benefits and resource savings resulting from RI on an ongoing basis (e.g., increased certified/registered interpreter availability to assist with additional events due to the use of RI, and any cost savings).
Appendix C: Suggested Language for the Judicial Officer When Considering Objections Related to Remote Interpreting

We will have a court certified/registered ___ (insert language) ____________ interpreter help us with these proceedings.

The interpreter is at a remote location and will appear in court via video- (or audio-) conference. Please remember to speak slowly and clearly and not speak at the same time as each other.

Do parties and counsel have any objections to the interpreter participating by remote interpreting for today’s proceedings?

[Judge rules on objections, if any, or assists in resolving concerns.]

If proceeding with VRI:

Parties and counsel had no objections to the use of remote interpreting, so the court will proceed with today’s hearing.

[or]

Parties and counsel objected to the use of remote interpreting, but the court has overruled those objections, so the court will proceed with today’s hearing.

If not proceeding with VRI:

Parties and counsel objected to the use of remote interpreting. The court will not continue with today’s hearing at this time and will reset this matter for a qualified (insert language) ____________ language interpreter to be available in person.

Suggested Language to Include in the Minutes:

Interpreter (name) ________________ is present by video remote conferencing and sworn to interpret (insert language) ________________ language for (name) ____________________. Sworn oath on file with the Superior Court of California, County of ____________________.
Appendix D: Visual/Auditory Issues, Confidentiality, and Modes of Interpreting When Working Remotely

1. A clear view of the LEP court user is more important than a view of every speaker; although cameras on all stakeholders may be beneficial, it may not be essential. A speakerphone is not recommended unless it accommodates the other requirements of this appendix, including the ability to be part of a solution to allow for simultaneous interpreting when needed.

2. To ensure the opportunity for confidential attorney-client conferencing, the attorney should have available an individual handset, headset, or in-the-ear communication device to speak with and listen to the interpreter.

3. Interpreting in the courtroom regularly involves both simultaneous and consecutive modes of interpreting. This can be achieved in a variety of ways using existing and emerging technologies. In longer matters, failure to have a technical solution that can accommodate simultaneous interpreting will result in delays of court time and may cause frustration with remote interpreting. Courts should use a technical solution that will allow for simultaneous interpreting. However, there may be proceedings (for example, very short matters) in which consecutive interpreting is adequate to ensure language access.

4. Recognizing that courts may implement very different technical solutions for RI, it is critical that prior to the start of an interpreted event all parties, judicial officers, court staff, and officers of the court (including attorneys and interpreters) know how to allow for confidential conferencing when needed.

5. All participants, including the LEP party and the interpreters, need to check microphone and/or camera clarity before beginning interpretation.

6. Both RI interpreters and courts should have technical support readily available.

7. Clear, concise operating instructions should be posted with the RI equipment.

Note: There are different and other visual considerations, including visual confidentiality, if using VRI with American Sign Language (ASL). Please see www.courts.ca.gov/documents/CIP-ASL-VRI-Guidelines.pdf for a complete discussion of using VRI with ASL-interpreted events.
### Appendix E: Top 17 Languages Accounting for 98.5% of All Service Days for 2004–2008

<table>
<thead>
<tr>
<th>Rank</th>
<th>Language</th>
<th>Service Days (Avg. per year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Spanish</td>
<td>167,744</td>
</tr>
<tr>
<td>2</td>
<td>Vietnamese</td>
<td>6,968</td>
</tr>
<tr>
<td>3</td>
<td>Korean</td>
<td>3,687</td>
</tr>
<tr>
<td>4</td>
<td>Mandarin</td>
<td>3,143</td>
</tr>
<tr>
<td>5</td>
<td>Russian</td>
<td>2,753</td>
</tr>
<tr>
<td>6</td>
<td>Eastern Armenian</td>
<td>2,493</td>
</tr>
<tr>
<td>7</td>
<td>Cantonese</td>
<td>2,117</td>
</tr>
<tr>
<td>8</td>
<td>Punjabi</td>
<td>2,083</td>
</tr>
<tr>
<td>9</td>
<td>Farsi</td>
<td>1,760</td>
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<tr>
<td>10</td>
<td>Tagalog</td>
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<td>Hmong</td>
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<td>Khmer</td>
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<tr>
<td>17</td>
<td>Portuguese</td>
<td>328</td>
</tr>
</tbody>
</table>

Note: This table is adapted from Table 1 of the 2010 Language Need and Interpreter Use Study. American Sign Language is the second-most used language in the state, with 37,335 total service days, but was covered in Appendix Table 2.5 of the 2010 study.

The 2010 Language Need and Interpreter Use Study can be found at: [www.courts.ca.gov/documents/language-interpreterneed-10.pdf](http://www.courts.ca.gov/documents/language-interpreterneed-10.pdf)
Appendix F: Minimum Proficiency Level for Designation of Staff as Bilingual

As used by the Oral Proficiency Exam, and based on the definitions (reproduced below) provided by the American Council on the Teaching of Foreign Languages, courts must establish a proficiency level of “Intermediate Mid” as the minimum standard for designating staff as bilingual for purposes of California’s Language Access Plan. Courts may wish to select a higher standard depending on the position being filled.

**Intermediate Mid**

Speakers at the Intermediate Mid sublevel are able to handle successfully a variety of uncomplicated communicative tasks in straightforward social situations. Conversation is generally limited to those predictable and concrete exchanges necessary for survival in the target culture. These include personal information related to self, family, home, daily activities, interests and personal preferences, as well as physical and social needs, such as food, shopping, travel, and lodging.

Intermediate Mid speakers tend to function reactively, for example, by responding to direct questions or requests for information. However, they are capable of asking a variety of questions when necessary to obtain simple information to satisfy basic needs, such as directions, prices, and services. When called on to perform functions or handle topics at the Advanced level, they provide some information but have difficulty linking ideas, manipulating time and aspect, and using communicative strategies, such as circumlocution.

Intermediate Mid speakers are able to express personal meaning by creating with the language, in part by combining and recombining known elements and conversational input to produce responses typically consisting of sentences and strings of sentences. Their speech may contain pauses, reformulations, and self-corrections as they search for adequate vocabulary and appropriate language forms to express themselves. In spite of the limitations in their vocabulary and/or pronunciation and/or grammar and/or syntax, Intermediate Mid speakers are generally understood by sympathetic interlocutors accustomed to dealing with non-natives.

Overall, Intermediate Mid speakers are at ease when performing Intermediate-level tasks and do so with significant quantity and quality of Intermediate level language.

**Intermediate High**

Intermediate High speakers are able to converse with ease and confidence when dealing with the routine tasks and social situations of the Intermediate level. They are able to handle successfully uncomplicated tasks and social situations requiring an exchange of basic information related to their work, school, recreation, particular interests, and areas of competence.
Intermediate High speakers can handle a substantial number of tasks associated with the Advanced level, but they are unable to sustain performance of all of these tasks all of the time. Intermediate High speakers can narrate and describe in all major time frames using connected discourse of paragraph length, but not all the time. Typically, when Intermediate High speakers attempt to perform Advanced-level tasks, their speech exhibits one or more features of breakdown, such as the failure to carry out fully the narration or description in the appropriate major time frame, an inability to maintain paragraph-length discourse, or a reduction in breadth and appropriateness of vocabulary.

Intermediate High speakers can generally be understood by native speakers unaccustomed to dealing with non-natives, although interference from another language may be evident (e.g., use of code-switching, false cognates, literal translations), and a pattern of gaps in communication may occur.

**Advanced Low**

Speakers at the Advanced Low sublevel are able to handle a variety of communicative tasks. They are able to participate in most informal and some formal conversations on topics related to school, home, and leisure activities. They can also speak about some topics related to employment, current events, and matters of public and community interest. Advanced Low speakers demonstrate the ability to narrate and describe in the major time frames of past, present, and future in paragraph-length discourse with some control of aspect. In these narrations and descriptions, Advanced Low speakers combine and link sentences into connected discourse of paragraph length, although these narrations and descriptions tend to be handled separately rather than interwoven. They can handle appropriately the essential linguistic challenges presented by a complication or an unexpected turn of events. Responses produced by Advanced Low speakers are typically not longer than a single paragraph. The speaker’s dominant language may be evident in the use of false cognates, literal translations, or the oral paragraph structure of that language. At times their discourse may be minimal for the level, marked by an irregular flow, and containing noticeable self-correction. More generally, the performance of Advanced Low speakers tends to be uneven. Advanced Low speech is typically marked by a certain grammatical roughness (e.g., inconsistent control of verb endings), but the overall performance of the Advanced-level tasks is sustained, albeit minimally. The vocabulary of Advanced Low speakers often lacks specificity. Nevertheless, Advanced Low speakers are able to use communicative strategies such as rephrasing and circumlocution. Advanced Low speakers contribute to the conversation with sufficient accuracy, clarity, and precision to convey their intended message without misrepresentation or confusion. Their speech can be understood by native speakers unaccustomed to dealing with non-natives, even though this may require some repetition or restatement. When attempting to perform functions or handle topics associated with the Superior level, the linguistic quality and quantity of their speech will deteriorate significantly.
Appendix G: Resource List

Web links for the resources listed in this appendix are current as of April 2015. If a web link does not direct you to the resource, please contact the issuing organization for a current link to the resource or for a copy of the document.


Kaiser Permanente, Qualified Bilingual Staff Model & Program at http://kpqbs.org, and


Neighborhood Legal Services of Los Angeles County, Justice Silenced: The Harms Suffered by Litigants Denied Access in Los Angeles Superior Courts (Mar. 2014)

Registry of Interpreters for the Deaf (RID), Standard Practice Papers, at www.rid.org/about-interpreting/standard-practice-papers/

The California Court’s Online Self-Help Center, in English at www.courts.ca.gov/selfhelp.htm, and in Spanish (Centro de ayuda en linea) at www.sucorte.ca.gov

The JusticeCorps program detailed at www.courts.ca.gov/justicecorps.htm


Written public comments and prepared presentations for the three public hearings held in February and March 2014 regarding language access, at www.courts.ca.gov/24466.htm

Demographic data for California’s English Learner population, available at http://data1.cde.ca.gov/dataquest

State Seal of Biliteracy, available at www.cde.ca.gov/sp/le/er/sealofbiliteracy.asp

California Court Interpreters Program, also known as the Court Language Access Support Program (CLASP), at www.courts.ca.gov/programs-interpreters.htm

"Interpreter Orientation: Working in the California Courts." This online course is also available to current interpreters for continuing education credit, at www.courts.ca.gov/21714.htm

The California Court Interpreters Program has commissioned various studies and reports related to its testing program, other testing programs, and other related issues, available at www.courts.ca.gov/2686.htm


Council of Language Access Coordinators, “Remote Interpreting Guide for Courts and Court Staff” (draft, June 2014)

Information regarding the Oral Proficiency Exam (OPE) available at www.prometric.com/en-us /clients/California/Pages/CA-COURT-ORAL-PROFICIENCY-EXAM.aspx


Interagency Language Roundtable’s skill descriptions for interpreter performance, at www.govt lr.org/Skills/InterpretationSLDsapproved.htm


American Bar Association (ABA) Language Access website: www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/language_access.html


Limited English Proficiency, a federal interagency website, at www.lep.gov


LEP.gov State Court–specific Resources: www.lep.gov/resources/resources.html#SC

**Reporting and Complaint Processes in Other States**

Wisconsin: www.wicourts.gov/services/public/interpretercomplaint.htm

Tennessee: www.tsc.state.tn.us/sites/default/files/docs/grievance_discipline_process_april_2012.pdf

http://www.rid.org/ethics/file-a-complaint/

Ohio: www.supremecourt.ohio.gov/JCS/interpreterSvcs/default.asp

North Carolina: www.nccourts.org/Surveys/LA/languageaccess.htm


Nebraska: http://supremecourt.ne.gov/sites/supremecourt.ne.gov/files/reports/courts/language-access-plan.pdf (see Appendix 20)

Arkansas: https://courts.arkansas.gov/sites/default/files/tree/Arkansas%20LEP%20Plan.pdf (pp. 15–16)

Alaska: www.law.state.ak.us/pdf/criminal/LanguageAccessPlan.pdf (pp. 19–20)


**Training Tools From Other States**

Ohio: www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=140618

Minnesota: www.mncourts.gov/?page=4347
Appendix H: Evid. Code, § 756 and Gov. Code, § 68092.1

Section 756 is added to the Evidence Code, to read:

756.

(a) To the extent required by other state or federal laws, the Judicial Council shall reimburse courts for court interpreter services provided in civil actions and proceedings to any party who is present in court and who does not proficiently speak or understand the English language for the purpose of interpreting the proceedings in a language the party understands, and assisting communications between the party, his or her attorney, and the court.

(b) If sufficient funds are not appropriated to provide an interpreter to every party that meets the standard of eligibility, court interpreter services in civil cases reimbursed by the Judicial Council, pursuant to subdivision (a), shall be prioritized by case type by each court in the following order:

1. Actions and proceedings under Division 10 (commencing with Section 6200) of the Family Code, actions or proceedings under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code) in which a protective order has been granted or is being sought pursuant to Section 6221 of the Family Code, and actions and proceedings for dissolution or nullity of marriage or legal separation of the parties in which a protective order has been granted or is being sought pursuant to Section 6221 of the Family Code; actions and proceedings under subdivision (w) of Section 527.6 of the Code of Civil Procedure; and actions and proceedings for physical abuse or neglect under the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code).

2. Actions and proceedings relating to unlawful detainer.

3. Actions and proceedings to terminate parental rights.

4. Actions and proceedings relating to conservatorship or guardianship, including the appointment or termination of a probate guardian or conservator.

5. Actions and proceedings by a parent to obtain sole legal or physical custody of a child or rights to visitation.

6. All other actions and proceedings under Section 527.6 of the Code of Civil Procedure or the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code).

7. All other actions and proceedings related to family law.

8. All other civil actions or proceedings.
(c) (1) If funds are not available to provide an interpreter to every party that meets the standard of eligibility, preference shall be given for parties proceeding in forma pauperis pursuant to Section 68631 of the Government Code in any civil action or proceeding described in paragraph (3), (4), (5), (6), (7), or (8) of subdivision (b).

(2) Courts may provide an interpreter to a party outside the priority order listed in subdivision (b) when a qualified interpreter is present and available at the court location and no higher priority action that meets the standard of eligibility described in subdivision (a) is taking place at that location during the period of time for which the interpreter has already been compensated.

(d) A party shall not be charged a fee for the provision of a court interpreter.

(e) In seeking reimbursement for court interpreter services, the court shall identify to the Judicial Council the case types for which the interpretation to be reimbursed was provided. Courts shall regularly certify that in providing the interpreter services, they have complied with the priorities and preferences set forth in subdivisions (b) and (c), which shall be subject to review by the Judicial Council.

(f) This section shall not be construed to alter, limit, or negate any right to an interpreter in a civil action or proceeding otherwise provided by state or federal law, or the right to an interpreter in criminal, traffic, or other infraction, juvenile, or mental competency actions or proceedings.

(g) This section shall not result in a reduction in staffing or compromise the quality of interpreting services in criminal, juvenile, or other types of matters in which interpreters are provided.

Section 68092.1 is added to the Government Code, to read:

68092.1.  
(a) The Legislature finds and declares that it is imperative that courts provide interpreters to all parties who require one, and that both the legislative and judicial branches of government continue in their joint commitment to carry out this shared goal.

(b) Notwithstanding Section 26806 or 68092, or any other law, a court may provide an interpreter in any civil action or proceeding at no cost to the parties, regardless of the income of the parties. However, until sufficient funds are appropriated to provide an interpreter to every party who needs one, interpreters shall initially be provided in accordance with the priorities set forth in Section 756 of the Evidence Code.
Interpreters

Office of Language Access

The Colorado Judicial Branch is committed to providing court users with meaningful access to the courts at no cost, regardless of the language they speak.

The Office of Language Access (OLA) provides access to the courts for limited English proficient (LEP) individuals through interpreter services in more than 120 languages, and through translations and other bilingual resources. The OLA also administers the interpreter certification and credentialing program, and provides training on best practices and working with language professionals.

How can we help you?

- I need to access a court form. Self Help/Forms
- I am looking for an interpreter. Need an Interpreter?
- I would like to become an approved interpreter. Interpreter Candidates
- I am an active and approved Colorado Judicial Department Interpreter. Active Interpreters
- I am looking for a language access policy or directive. Court Resources

For more information, you may contact us.
Interpreters

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How can we help you?

- I need to access a court form. [Self Help/Forms]
- I am looking for an interpreter. [Need an Interpreter?]
- I would like to become an approved interpreter. [Interpreter Candidates]
- I am an active and approved Colorado Judicial Department Interpreter. [Active Interpreters]
- I am looking for a language access policy or directive. [Court Resources]

For more information, you may [contact us].
Canon 1: Accuracy and Completeness
Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and without explanation.

Canon 2: Representation of Qualifications
Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.

Canon 3: Impartiality and Avoidance of Conflict of Interest
Interpreters shall be impartial, unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.

Canon 4: Professional Demeanor
Interpreters shall conduct themselves in a manner consistent with the dignity of the court and shall be as unobtrusive as possible.

Canon 5: Confidentiality
Interpreters shall keep confidential all matters interpreted and all conversations overheard between counsel and client. Interpreters should not discuss a case pending before the court.

Canon 6: Restriction of Public Comment
Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential.

Canon 7: Scope of Practice
Interpreters shall limit themselves to interpreting and translating, and shall not give legal advice, express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter.

Canon 8: Assessing and Reporting Impediments to Performance
Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the appropriate judicial authority.

Canon 9: Duty to Report Ethical Violations
Interpreters shall report to the proper authority any effort to impede their compliance with any law, any provision of this code, or any other official policy governing court interpreting and legal translating.

Canon 10: Professional Development
Interpreters shall continually improve their skills and knowledge, and advance the profession through activities such as professional training and education, and interaction with colleagues and specialists in related fields.
WHAT DOES IT MEAN TO BE A CERTIFIED LINGUIST?

WHAT THIS SHOULD MEAN:

- Certification documentation should indicate: the certifying or assessment body (e.g., NCSC, NAJIT, FCIP, ILR), any subject area expertise (e.g., medical, conference, or court/legal), the proficiency level (e.g., master, novice, or a number score indicating proficiency), and specific language combination(s) assessed (e.g., Spanish/English).
- Interpreter scored passing marks on assessments in speaking, listening, and/or interpretation performance in the target language(s) and English.
- Interpreter maintains valid certification through continued work training, and/or continuing education credits.
- Interpreter completed a requisite number of hours interpreting.

WHAT THIS SHOULD MEAN:

- Certification documentation should indicate: the certifying or assessment body (e.g., NCSC, ATA, NAJIT, ILR), any subject area expertise (e.g., medical, conference, or court/legal), the proficiency level (e.g., master, novice, or a number score indicating proficiency), and the specific language combination(s) assessed by translation testing and the direction of translation permitted (e.g., Spanish→English, English→Spanish).
- Translator scored passing marks on assessments in reading, writing, and/or translation performance in the target language(s) and English.
- Translator maintains valid certification through continued work training, and/or continuing education credits.
- Translator demonstrated mastery of English grammar and usage in addition to grammar and usage in the target language.

BEWARE – NOT ALL CERTIFICATIONS ARE THE SAME:

If You Don’t Ask, “Certified” Could Mean:

- The linguist received his/her certification years earlier, and has not maintained the certification or his/her language skills.
- The linguist is a practicing interpreter and translator, but is only certified in one skill (e.g., translation, but not interpretation).
- The linguist is certified in one field (e.g., medical), but is not certified to provide language services in the required field (e.g., legal).
- The linguist is not certified, but is instead “registered,” “licensed,” or “qualified” by the certifying body through a less rigorous process.
- The translator is certified in only one language direction (Spanish→English), and is not certified to translate in the other (English→Spanish).
- The linguist received his/her certification, without training or prior experience, from an online open-book exam (or other unsuitable assessment).
- The linguist received an inadequate certification that did not assess the necessary skills (e.g., the “certified translator” was never assessed in reading).

QUESTIONS TO ASK A CERTIFIED LINGUIST:

- Are you a certified translator? Interpreter? Or both?
- What did your certification process entail?
- Which certifying authority or organization granted the certification?
- In which language(s) or language combination(s) are you certified?
- Are there any limitations to your certification?
- How much experience do you have interpreting/translation?
- Are you required to maintain your certification with experience or continuing education?

QUESTIONS TO ASK YOUR LANGUAGE SERVICES VENDOR:

- What baseline qualifications do you require your linguists to have?
- How often do you assess your linguists or vet their work?
- How do you determine whether a linguist is qualified for a job?
- Do you keep records of client complaints?
- How do you address client complaints?
- How do you verify your linguists have and maintain certification?
- What remedy do you offer clients if a linguist makes an error?
- What happens to a linguist if he/she has made substantial errors?
Session 9
Managing Conflicts

Kristine Van Dorsten, Senior Education Developer,
Center for Judicial Education and Research,
Judicial Council of California

Tuesday, July 31st, 2018
1:30 p.m. – 4:30 p.m.
Catalina Ballroom
Kristine Van Dorsten is a Senior Education Developer with the California Judicial Council’s Center for Judicial Education and Research where she works primarily on leadership projects. Ms. Van Dorsten designs, develops and teaches numerous trainings for court leadership and conducts training interventions for court staff based on needs. Her background has included many years of direct service for Children Services and the courts as an investigator and mediator, as well as management positions within these systems. She is a licensed social worker in the State of Ohio, and holds professional coaching certifications for working with individuals and organizational teams. Ms. Van Dorsten is also an authorized facilitator of the Team Diagnostic Assessment and a certified facilitator of the EQ-i 2.0 assessment.
(In the even that Ms. Van Dorsten’s materials are not available prior to the meeting, they will be made available immediately following the annual meeting)
Tom Weber has worked for the State of Michigan’s Emergency Management and Homeland Security Division within the Department of State Police since 2011. Mr. Weber manages the state’s State and Local Planning Unit, which maintains the state’s Continuity of Operations plan. Since 2014, Mr. Weber has also served as the agency’s State Voluntary Agency Liaison. He graduated from Iowa State University with a Bachelor of Science Degree in Community and Regional Planning in 1987 and worked in the urban planning environment for both public agencies and private consulting firms for over 10 years.

After working in the non-profit sector as a Business and Operations Manager in Seattle, Mr. Weber returned to the Midwest and planning, leading to his current position with the Michigan State Police in emergency management. Mr. Weber’s work includes the preparation of the state’s Emergency Management, Recovery, Hazard Mitigation, and Continuity of Operations Plans and serving as the state’s Voluntary Agency Liaison when communities respond to and recover from disasters such as flooding or the Flint Water Crisis.
Session 11
COOP Panel Discussion

Carol Anne Harley, Clerk,
Texas Court of Appeals, Ninth District

Christopher A. Prine, Clerk,
Texas Court of Appeals, Fourteenth District

Lonn Weissblum, Clerk,
Florida Fourth District Court of Appeals

Wednesday, August 1st, 2018
10:00 a.m. – 11:00 a.m.
Catalina Ballroom
**Carol Anne Harley** was born in Beaumont, TX and grew up in Port Neches, TX. She then attended Texas A & M University where she received a Bachelor of Science Degree in 1982. She is a die-heart Aggie and member of many organizations affiliated with the university.

Carol Anne was the Executive Director of the Jefferson County Bar Association for 10 years, during which time assisted in the establishment of the Jefferson County Pro Bono Program.

In 1995, Carol Anne was appointed as Clerk of the Court, of the Ninth Court of Appeals. She is currently serving her sixth four-year term. She serves on the Texas Appeals Management and E-File System (TAMES) Governance Committee and is a voting member of the Centralized Accounting and Payroll/Personnel System (CAPPS) Steering Committee.
Christopher A. Prine was appointed as the Clerk of the Court for the Fourteenth Court of Appeals in August 2008. On January 1, 2013, Mr. Prine was appointed to also serve as the Clerk of the Court for the First Court of Appeals. After law school, Mr. Prine served as a briefing attorney at the 14th Court of Appeals and in 1998 he served as a chambers attorney at the 1st Court of Appeals. Mr. Prine's private practice focused on insurance defense and probate and estate litigation. Mr. Prine received his B.A. degree from the University of Texas at Austin, and his J.D. from South Texas College of Law.
Lonn Weissblum was appointed Clerk of Florida’s Fourth District Court of Appeal, located in West Palm Beach, Florida, effective April 7, 2014. Before becoming the Clerk of the Court, Mr. Weissblum served as a career staff attorney to the Honorable Jonathan D. Gerber of Florida’s Fourth District Court of Appeal. Mr. Weissblum also served as a staff attorney to the Honorable David L. Levy of Florida’s Third District Court of Appeal, and was in private practice. Mr. Weissblum received his B.A. in Psychology with Highest Honors from the University of North Carolina at Chapel Hill in 1997, and his J.D. with Honors from the University of Florida in 2001. Mr. Weissblum is currently a member of the Florida Courts Commission on District Court of Appeal Performance and Accountability and the Florida Courts Technology Commission.
Session 12
What’s Bugging You?

Patricia L. Bennett, Clerk,
Wyoming Supreme Court

Laura Thielmeier Roy, Clerk,
Missouri Court of Appeals, Eastern District

Wednesday, August 1st, 2018
2:45 p.m. – 3:45 p.m.
Catalina Ballroom
The Missouri Court of Appeals Eastern District en banc appointed Laura Roy as Clerk effective January 1, 2001.

She received her Bachelor of Journalism (News Editorial) degree in 1985 and her Juris Doctor degree in 1988 from the University of Missouri-Columbia. After graduation she served as a law clerk to the late Hon. Almon H. Maus, Missouri Court of Appeals, Southern District. She moved to St. Charles, Missouri and was the Assistant County Counselor for St. Charles County for two years prior to becoming Assistant Staff Counsel for the Missouri Court of Appeals Eastern District in 1991. She is a member of the Missouri Bar, the Bar Association of Metropolitan St. Louis and the National Conference of Appellate Court Clerks. She has served on various NCACC committees, including the Executive Committee, and has chaired the Public Relations Committee and the Awards Committee. She is the current Vice-President of the NCACC. She has been on the Board of Directors for the Center for Autism Education, and is a former trustee and past-President of the Missouri Family Trust, now known as the Midwest Special Needs Trust.

She resides in St. Charles, Missouri, with her husband and their son, Andrew.
Patty Bennett is currently serving as the Clerk of the Wyoming Supreme Court. Prior to her appointment as Clerk of the Supreme Court, Patty operated a private practice with her husband Michael in Rawlins, Wyoming. In her private practice, Ms. Bennett focused primarily on criminal defense and family law. Ms. Bennett also worked a multitude of cases, including both trial and appellate cases, as a contract public defender and represented civil indigent clients. Patty received her undergraduate degree from San Diego State University. Later she earned a MPA and a JD from the University of Wyoming. In 2014, Ms. Bennett retired from the Wyoming Army National Guard where she served in several assignments before completing her military career as a Judge Advocate.
Session 13

E-Briefing from Both Sides of the Bench

The Honorable Robyn Ridler Aoyagi, Judge, Oregon Court of Appeals

Blake Hawthorne, Clerk, Supreme Court of Texas

Thursday, August 2\textsuperscript{nd}, 2018

8:30 a.m. – 9:30 a.m.

Catalina Ballroom
The Honorable Robyn Ridler Aoyagi was appointed to the Oregon Court of Appeals in July 2017. Prior to joining the court, Judge Aoyagi was a partner at Tonkon Torp LLP in Portland, Oregon, where her practice focused on appellate law and trial court motions practice. During her seventeen years in private practice, Judge Aoyagi worked in a wide variety of subject matters and is especially familiar with complex civil litigation. Judge Aoyagi previously worked as a judicial clerk to the Honorable John Steadman, District of Columbia Court of Appeals, from 1999 to 2000.

Judge Aoyagi was born in Seattle and raised in New Mexico. She received her B.A. from Tufts University (1995) and her J.D. from Harvard Law School (1999).

While in practice, Judge Aoyagi served on the Oregon State Bar Appellate Section Executive Committee for five years, including as its Chair in 2015. She was twice elected to the Oregon State Bar House of Delegates. She also served on the Executive Board of the American Bar Association’s Council of Appellate Lawyers (CAL) from January 2015 until her judicial appointment. During her time on the CAL Board, Judge Aoyagi chaired a project that culminated in a report, "The Leap from E-Filing to E-Briefing: Recommendations and Options for Appellate Courts to Improve the Functionality and Readability of E-Briefs," which the ABA published in 2017.
Blake A. Hawthorne is the Clerk of the Supreme Court of Texas. The Supreme Court of Texas appointed Blake to a four-year term as the Clerk of the Supreme Court of Texas on August 1, 2006. The Court has reappointed him twice as Clerk of the Court. Prior to his appointment to Clerk of the Court, Blake served the Court as the Staff Attorney for Original Proceedings. Before joining the Court, he was an Assistant Attorney General for the State of Texas and an associate in the law firms of Wiley, Rein & Fielding in Washington, D.C. and Jackson Walker in Fort Worth, Texas.

Blake graduated *magna cum laude* from Tulane University with a degree in Anthropology and Spanish in 1992. The faculty of the Anthropology Department awarded him the Robert Wauchope Award as the most outstanding graduate that year. While a student at Tulane, he spent his junior year abroad studying at La Universidad Complutense in Madrid, Spain. Blake graduated with honors from the University of Texas School of Law in 1996. He is Board Certified—Civil Appellate Law by the Texas Board of Legal Specialization.

Blake is a member of the Texas Judicial Committee on Information Technology (JCIT) and serves as the Chair of the Electronic Filing Subcommittee. He served as President of the National Conference of Appellate Court Clerks and Chair of the Austin Bar Association Appellate Section.

Blake is a native Texan, who was born in Austin, Texas. He is married to another native Texan and Austinite, Wendy Harvel, who is an administrative law judge with the State Office of Administrative Hearings. They have two daughters - Sophie and Eva.

In his free time, he enjoys photography, traveling, learning foreign languages, and building furniture.
The Leap from E-Filing to E-Briefing

Recommendations and Options for Appellate Courts to Improve the Functionality and Readability of E-Briefs

2017
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Introduction: The evolution from e-filing to e-briefing

In the past two decades, a substantial shift has occurred in our nation’s appellate courts with respect to how documents are filed and read. The federal judiciary led the way on this technological journey with its approval of PACER (Public Access to Court Electronic Records) in 1988 and adoption of CM/ECF (Case Management/ Electronic Case Files) in the 1990s. Electronic filing or “e-filing” is now mandatory in all federal courts and many state courts. Between 2010 and 2014 alone, the number of state appellate courts that require or permit e-filing more than doubled from 15 to 33 states. While substantial variations remain among courts as to the specifics of e-filing, the fundamental concept of e-filing has become widely accepted.

Four principal drivers underlie the move from paper filing to e-filing. First, e-filing and electronic dockets increase transparency and public access to the judicial system. Second, e-filing reduces administrative costs for courts and parties, including filing, processing, and storage costs. Third, e-filing makes it possible for judges, court staff, and parties to access briefs and supporting material on tablets and other highly portable electronic devices. Fourth, judges, court staff, attorneys, and clients live in a world that is increasingly electronically based, and they expect the judicial system to evolve to fit into that world, even if the evolution is relatively slow and cautious.

Given the benefits of e-filing and its sheer momentum in recent years, it is likely that all or nearly all jurisdictions will have appellate e-filing within the decade. That begs the question: what next?

The basic technology of e-filing has been developed. Judges and court staff are increasingly comfortable with the idea of reading and annotating briefs and other filings electronically. Many courts now issue tablets to appellate judges as a matter of course. Attorneys also are more proficient in using computer software to prepare briefs.
These changes have laid the foundation for the next leap forward: from briefs that are filed electronically but otherwise functionally identical to traditional paper briefs (e-filing) to *truly electronic briefs* that not only are filed electronically but offer internal and external functionality that paper briefs lack (e-briefing). This is the next frontier—making e-briefs *better* than paper briefs. Briefs that are not only more accessible, portable, and storable than paper briefs, but actually better to read and use than paper briefs.

This report focuses on e-briefing, not e-filing.\(^1\) It identifies and discusses issues that have a significant impact on the functionality and readability of e-briefs. If a strong consensus has emerged on an issue, a *recommendation* is made and explained. If no consensus exists or an issue is more a matter of preference, then *options* are presented, including pros and cons.

The aim of this report is not to tell individual courts what to do, but rather to provide information about ways to make e-briefs more functional, more readable, and more helpful to judges and court staff who read them, often with collateral benefits for parties and their attorneys. Different jurisdictions will have different timelines, resources, perspectives, and preferences as they move from e-filing to true e-briefing. In the same vein, someone reading this report in Texas—a jurisdiction on the forefront of e-briefing—likely will have a very different perspective from someone reading it in a jurisdiction that has adopted e-filing only recently.

Please use this report to start or continue the conversation in your jurisdiction about how to make e-briefs better.

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Chapter 1:
Tablets and annotation software

1. **Recommendation:** When adopting electronic filing, think ahead and plan for how judges and staff will access documents.

   A potential pitfall when adopting e-filing is to focus on the filing mechanism (how parties will e-file documents) and the court’s storage system (how the court will store e-filed documents) without giving adequate consideration to the user end (how judges and staff will work in an electronic environment). Without careful planning, judges and staff may find themselves continuing to work in paper, even when documents are filed electronically, because they cannot readily access the case materials on their tablets or other electronic devices.

   Thinking ahead to how judges and staff will access and work with documents, and ensuring a functional electronic work environment, is a critical foundation for the transition to e-briefing. One good example is the Fifth Circuit, which uses an iPad application that integrates with its case management system and automatically synchronizes all of the judges’ cases, memoranda, and drafts to their iPads.

2. **Recommendation:** When deciding which electronic reading platforms to provide to judges, consider the differences among devices (e.g., desktop computers, laptops, and tablets) as relevant to readability and functionality.

   The readability and functionality of an e-brief are closely linked to the hardware and software on which it is read. In the transition to e-briefing, it is important for courts to consider the pros and cons of different reading platforms, especially tablets, in selecting technology for judicial use. Similarly, different annotation programs offer different benefits with respect to ease of use, functionality, speed, and other features.
Standardization is a related issue. Different readers may have different preferences, and courts must decide to what extent they will accommodate individual preferences in hardware and software. For example, some courts supply whichever device or annotation software each judge requests. This maximizes individual comfort but may create challenges regarding technical support and training. Other courts issue a standard tablet with standard annotation software to every judge. This simplifies technical support and training but may engender greater resistance from individual judges who do not like the chosen standards. There is no one right answer. Generally speaking, however, some standardization makes it easier to provide good support and training, which in turn is important for reader satisfaction as discussed in the next recommendation.

3. **Recommendation:** Recognize that the ability to annotate in a satisfactory manner may be a key factor in judicial acceptance of e-briefs. Provide appropriate annotation software and adequate training on that software.

Regardless of an individual jurisdiction’s approach, it is important to provide adequate training and support to judges and court staff who read briefs electronically, especially on tablets. Lack of understanding and familiarity with the features of particular devices or particular annotation software, and the resulting inability to read and annotate briefs in a satisfactory and efficient manner, is a source of potentially severe frustration when working with e-briefs.

4. **Recommendation:** Share information with other courts about what e-briefing hardware and software the court has adopted. Also, publicize on the court’s website (or elsewhere) how judges and staff read briefs.

Information about how briefs are read in different appellate courts often is not readily available. Knowing which systems, devices, and software other courts have adopted is especially useful to courts that are new to e-briefing, need to understand their options, and may want
to speak with other courts about their decision-making processes or experiences with particular hardware or software. This information should be more readily available.

Similarly, knowing what devices judges will be using to read briefs is helpful to attorneys who want to optimize the appearance and functionality of their briefs. If an attorney knows that all of a court’s judges use iPads to read briefs, then the attorney is more likely to file a brief that is optimized for reading on an iPad, even if it would not look as good on paper. Conversely, if an attorney knows that some judges are reading on iPads but that others are still reading on paper, then the attorney may be more likely to file a brief with more traditional formatting. Publicizing this information is recommended, particularly as attorneys become more sophisticated about e-briefing.

The following table summarizes the tablets and annotation software that appellate courts are currently issuing to judges and, in some courts, staff attorneys. This information was obtained from the courts, and it is court-specific, not judge-specific. Some judges may not use a tablet even if one is provided, while others may purchase a tablet out of pocket if the court does not provide one. As this information is inherently prone to becoming outdated, it is intended only to show current usage and trends. “None” means that the court does not issue tablets to judges. “Unknown” means that the court either did not return calls for this information or, in a few cases, declined to provide it—which itself demonstrates how difficult it can be for filers to learn how judges are reading and interacting with their e-filed briefs.
**Tablets and annotation software issued to judges in federal and state appellate courts, 2016**

### Federal Appellate Courts

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Chapter 2: Pro se litigants

Chapters 3 through 6 of this report provide recommendations and options for courts seeking to transition from e-filing to true e-briefing. One issue that must be considered with respect to any new court requirement is the effect on pro se litigants and the extent, if any, to which pro se litigants will be exempted from the requirement. The following recommendation applies to Chapters 3 through 6.

Exceptions for pro se litigants

Recommendation: Decide whether and to what extent pro se litigants will be exempted from any new e-filing or e-briefing requirement.

The extent to which pro se litigants should be exempted from court rules and requirements is an individualized decision that each court must make based on its own assessment of the relative benefit to the court and burden to pro se litigants. The recommendations and options in this report focus on represented parties, so pro se exemptions may not be discussed in individual sections. However, it is assumed that they will be considered and addressed before any new requirement is actually adopted.
Chapter 3: 
File formatting

The format of an e-brief significantly impacts how readers see it. It also determines the extent, if any, to which a reader is able to modify the brief’s visual appearance, copy from its text, and make certain types of annotations.

Searchable PDF (official court record)

1. **Recommendation:** Require that all documents be filed in PDF format. The filed PDF should be designated as the official court record.

The official court record should be in a fixed format. Among fixed format options, PDF (Portable Document Format) is the most common, is easy to generate, and has good annotation options for courts that do not purchase annotation software. All or nearly all courts that require or allow e-filing have adopted PDF as the required format. *See* NCACC, *E-Filing in State Appellate Courts: An Updated Appraisal* at 4-5 (2014), http://www.appellatecourtclerks.org/publications-reports/docs/NCACC_E-Filing_White_PaperSeptember2014.pdf.

An “archival” version of PDF exists called PDF/A. PDF/A is based on the International Organization for Standardization’s ISO 19005 and imposes certain restrictions to avoid dead links and otherwise ensure that a brief will appear exactly the same for all of time. For example, PDF/A prohibits external links, video, audio, and encryption, and it requires embedded fonts. The federal courts intend to transition to PDF/A. https://www.pacer.gov/announcements/general/pdfa.html. At least one state, California, prohibits filing documents in PDF/A format. http://www.courts.ca.gov/24590.htm.

PDF/A is incompatible with certain e-brief functionalities. For example, it would be contradictory to require or allow hyperlinking to the external trial court record or Westlaw, but require filing in PDF/A,
because PDF/A does not permit external links. Similarly, it would be contradictory to encourage embedding key video or audio evidence in appellate briefs, but require filing in PDF/A, because PDF/A does not permit video or audio content.

On the whole, this report recommends allowing external links and audio-video content in appellate briefs—with certain significant restrictions that substantially address the same concerns as PDF/A—which is effectively a recommendation against PDF/A. However, some courts have already adopted PDF/A, and others may decide to do so because they believe that the benefit of using PDF/A for court filings outweighs the loss of certain capabilities for e-briefs. The point is that if PDF/A is required instead of PDF then the court should ensure that its other requirements are consistent with PDF/A.

2. Recommendation: Require that briefs and motions be converted to PDF rather than scanned to PDF.

There are two ways to create a PDF. One is to scan a paper document on a commercial copier or stand-alone scanner. The other is to convert the document to PDF electronically, either within the word processing program itself (such as Microsoft Word) or using PDF conversion software.

Converted PDFs are greatly superior to scanned PDFs. A converted PDF is more legible than a scanned PDF. A converted PDF is fully text searchable, whereas scanned PDFs vary greatly in text searchability. A converted PDF also allows for retention of bookmarks and hyperlinks generated in the word processing program, whereas a scanned PDF does not. See, e.g., Attorney Guide to Hyperlinking in the Federal Courts, http://federalcourthouseyperlinking.org/attorney-guide-to-hyperlinking, at 30 (Word version) or 28 (WordPerfect version).

When a jurisdiction first adopts e-filing, filers may not be familiar with the difference between a scanned PDF and a converted PDF. This may result in the receipt of a large number of scanned PDFs.
Education and strict enforcement are the best ways to achieve compliance after imposing a requirement for converted PDFs.

Requiring converted PDFs (instead of scanned PDFs) is not burdensome on litigants, once litigants understand the requirement exists. It is easy to convert a word processing document to PDF. In fact, it is easier than scanning the document to PDF, which requires separate equipment. To convert a word processing document to PDF, the filer need only “Save as PDF” in the word processing program. (The option to “Print to PDF” also creates a converted PDF but may cause loss of bookmarks.)

If PDF/A is required, most word processors also include an option to save as PDF/A, sometimes labeled “ISO 19005-1 compliant.” In addition to the free option of saving to PDF/A from the word processor, the conversion may be done in paid software, such as Adobe Acrobat Pro (but not the free Acrobat Standard).²

3. **Recommendation:** Require that appendices be scanned to PDF with OCR text searchability, or, if feasible, compiled using natively converted PDFs if available.

An appendix is, by definition, a compilation of existing materials. Some materials included in an appendix may be available to the filer as native files that can be converted directly to PDF. Other materials may be available only as paper copies, in which case scanning them to PDF with optical character recognition (OCR) is the only way to make them text searchable.

In setting filing requirements for appendices, at a minimum, courts should require that appendices be scanned to PDF with OCR so that they are text searchable. Using this method, the filer compiles the

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² For Mac users, note that an issue exists regarding loss of hyperlinks when converting Word documents into PDF from Word. Fortunately, Microsoft appears to have fixed this issue in Word 2016 for Mac.
appendix as a paper document, and then scans the entire appendix to PDF with OCR on a commercial copier or other device.

Modern OCR is typically fairly reliable when run on high quality scans. However, text searchability may be very poor if a document has been copied multiple times, contains handwriting, or otherwise is difficult for the OCR software to “read” accurately. Accordingly, it is worthwhile to train and periodically remind judges and court staff of the limitations of scanned PDFs.

If a court wants to maximize text searchability of appendices, then requiring a more tailored approach to compiling appendices may be warranted. Rather than scanning the entire appendix as a paper document, the court may require or encourage filers to compile any appendix from the best available PDF for each item in the appendix. Using this method, the filer assembles the appendix electronically, using native file conversions if available, otherwise using paper scans with OCR, and combining all the individual PDFs into a single PDF for filing. This approach is more time-consuming than scanning the entire appendix as one PDF with OCR. Whether it is worth requiring or encouraging it likely depends on the court’s satisfaction level with OCR scanning. If a court wants maximum text searchability of appendices, it may be desirable to do so.

4. Option: Require that the appendix be filed with the brief as a single PDF.

Filing the brief and appendix together as a single PDF facilitates the use of bookmarks and internal hyperlinks to provide automated links between citations in the brief and key record materials. The benefits of bookmarks are discussed in Chapter 4, and the benefits of hyperlinks are discussed in Chapter 5.

In courts where filers cannot hyperlink directly to the electronic trial court record, internal hyperlinking to an appendix of key record documents may be the most desirable alternative, and filing the brief and appendix together as a single PDF is a necessary predicate to
creating such hyperlinks. If bookmarking and/or internal hyperlinking to the record appendix is permissive rather than mandatory, then it is only necessary to permit the brief and appendix to be filed together as a single PDF. However, some courts may find it desirable to impose a uniform standard that requires filing a single PDF, even if bookmarking and hyperlinking are themselves permissive. In either scenario, it is possible the court may need to increase file size limits.

5. **Recommendation:** Provide a reasonable time period for filers to correct formatting deficiencies.

Courts that adopt e-filing must decide how to deal with deficient documents.

Rejecting the filing outright is harsh and arguably unfair if the rejection notice is not immediate and does not give the filer time to refile before the due date. The risk of rejection may cause filers extreme stress, and motion practice related to late filings after an initial rejection may be burdensome on the court.

The better practice is to issue a deficiency notice that specifies the deficiency and provides a reasonable period, such as 3, 5, or 7 days, to refile to correct it. If possible, the notice should be issued at the same time as or in lieu of rejection. For example, when appellate e-filing began in Oregon, the software automatically “rejected” filings in an incorrect format, and then a court clerk later sent a deficiency notice giving the filer a specified period to correct. In response to the anxiety that “rejection” caused e-filers, especially less experienced e-filers, the courts eventually changed the software. All filings are now “accepted,” and deficiencies are addressed through deficiency notices.

The deficiency notice also should specify the effect of the deficiency on the due date for any responsive filing. For example, if a court rule provides that an Answering Brief is due 30 days after the filing of the Opening Brief, and the court issues a deficiency notice for the Opening Brief in a given case, the deficiency notice should clarify when the 30-day clock for the Answering Brief begins running.
Non-fixed format file (optional secondary filing)

1. **Option:** In addition to the PDF of record, allow parties to file an optional second copy of filings in a non-fixed file format. If the e-filing system only accepts PDFs, specify the means of transmitting the second file to the court.

   PDF is the best choice for the official court record. PDFs were invented in the early 1990s to allow the creation of an exact electronic replica of a paper document. Because PDF is a fixed format, it provides a nearly unimpeachable “original” of what was filed, and it ensures that everyone has access to an identical copy of every filing.

   At the same time, the fact is that non-fixed file formats offer some significant advantages over PDFs. The advantages of non-fixed file formats to the courts, counsel, and the public include the following.

   *Customized viewing.* A major advantage of a non-fixed file format is that it allows readers to tailor how the display of a document to their individual reading preferences. This includes using different settings on different devices if desired. A person’s preferred settings likely will vary among a 20” computer monitor, a 10” tablet screen, and a 5” smartphone screen—all of which may be used to read a particular document at different times. Some of the display features that may be customized in a non-fixed format document are:

   - font type (e.g., Century, Book Antiqua, Times New Roman)
   - font size (e.g., 12 point, 14 point)
   - line spacing (e.g., single spaced, 1.5 spaced, double spaced)
   - margins (e.g., 0.5", 1", 1.5")

   *Ability to copy and paste.* The static nature of PDFs complicates the use of automated processes. A common example relevant directly to judges and court staff is the ability to copy and paste accurately from a PDF. PDF software may interpret the end of a line as the end of a paragraph and insert “pseudo paragraphs” at each line break. Any
line numbering also will be picked up when copying and pasting. As a result, someone who copies and pastes from a PDF, while drafting an opinion for example, may have to edit the copied text significantly before it accurately reflects the original. By contrast, it is easy to copy and paste from non-fixed file formats.

**More accessible documents.** Automated processes do not work well on PDFs. Public interest groups, third-party service providers, and others who seek to make legal content readily available online have difficulty processing PDF documents for wider distribution. Machines that conduct big-data analysis also have difficulty parsing PDFs for statistical analysis. By contrast, documents in a universal non-fixed file format, such as HTML, are much easier to process and make accessible. This allows wider distribution of information about cases, which benefits courts, attorneys, and clients by making the legal system more transparent. *See, e.g.*, the Free Access to Law Movement, [http://www.fatlm.org](http://www.fatlm.org); Cornell’s Legal Information Institute, [https://www.law.cornell.edu](https://www.law.cornell.edu); Harvard’s Open Law Project, [http://cyber.law.harvard.edu/openlaw](http://cyber.law.harvard.edu/openlaw); Public.Resource.Org, [https://public.resource.org](https://public.resource.org); the Free Law Project, [https://free.law](https://free.law); and the Center for Computer-Assisted Legal Instruction [http://www.cali.org](http://www.cali.org).

Given these advantages, it is recommended that courts require parties to file a PDF of every filing as the official court record, but consider allowing parties to file an optional second non-fixed file format version as well. The procedure for transmitting the non-fixed format version to the court and other parties will need to be specified, particularly in courts in which the e-filing system accepts only PDFs. For example, the court might require that the non-fixed format version be emailed to a specified court email address, with all other parties in the case copied (cc’d) on that email, within two hours of the official PDF filing. For service, it would be simplest if all filers were required to have an email address on file with the court, but, if necessary, conventional service could be made using a CD or thumb drive.
If parties are permitted to file a secondary copy of a filing in a non-fixed file format, the court should specify which non-fixed file formats it will accept. Taking into account cost and access, the most attractive non-fixed file formats are HTML, DOCX, and RTF, each of which is discussed in the following sections. Other formats, such as e-book formats, are less accessible to the public, may be closed systems rather than open standards, and currently offer nominal benefits over more common formats.

2. **Option:** Allow HTML as a permissible format for optional non-fixed format filings.

   HTML is a proven format that has existed for more than 20 years. It is most commonly associated with the Internet. As a non-fixed file format, HTML permits text wrapping to fit any screen. HTML eliminates page breaks, which are unnatural and unnecessary when reading on screen. HTML allows the reader to adjust nearly every aspect of the reading experience, including font size, font type, line spacing, margins, etc. One expert has concluded that an HTML file is 300% more usable than a PDF file when reading on screen. Jakob Nielsen, *Avoid PDF for On-Screen Reading*, Nielsen Norman Group (Jun. 21, 2001), [https://www.nngroup.com/articles/avoid-pdf-for-on-screen-reading](https://www.nngroup.com/articles/avoid-pdf-for-on-screen-reading).

   HTML is universal and ubiquitous, so virtually anyone with word processing software will be able to save as HTML, and HTML files are readable on virtually every tablet and electronic device. In some word processing software, conversion to HTML may modify the appearance of text or images relative to the native file or the PDF. Such conversion issues are of minimal import and are in the nature of using an adaptive format. By analogy, webpages written in HTML rarely look identical to any two Internet users, because appearance depends on the reader’s device (e.g., monitor, table, or phone), browser (e.g., Safari, Internet Explorer, Chrome, or Firefox), and operating system (e.g., Mac, PC, iOS, or Android). HTML conversion is not intended to replicate the static view of a PDF.
One potential issue with HTML-formatted briefs, which court rules or guidelines may need to address, is that HTML-formatted briefs containing images, graphics, or other multimedia features may not present as a single file for upload. It may be necessary to submit them on a thumb drive or via a secure download link provided by the filer.

3. **Option**: Allow DOCX (Microsoft Word) and RTF (rich text format) as permissible formats for optional non-fixed format filings.

DOCX and RTF are the two most common word processing formats. Like HTML, they allow readers to customize the viewing experience, including font type, font size, line spacing, and margins, in order to suit individual preferences and particular devices. Like HTML, DOCX and RTF are much more accessible (for those with disabilities) and machine-readable (for data analysis) than PDF.

A distinct advantage of DOCX and RTF over HTML is that most e-filers are more familiar with (and therefore more comfortable with) DOCX and RTF than HTML.

DOCX is the most common file format used by attorneys to create briefs. Most attorneys use Microsoft Word, and all versions of Microsoft Word since 2007 save documents in the DOCX format by default. As such, most attorneys who file documents in appellate courts already have a DOCX version of their brief. Less common word processing programs like WordPerfect and LibreOffice do not save automatically to DOCX format but offer the option to “Save as DOCX” and thus allow for easy conversion.

As for RTF, the RTF format is nearly 30 years old and relatively well known. It was created to enable document interoperability between programs and is supported by every major word processor.

That said, DOCX and RTF are not as truly universal as HTML. Because HTML is the Internet’s backbone, it can be read on any
electronic device. By comparison, although DOCX and RTF are extremely common, some devices might not be able to read them.

Finally, metadata may be an issue with native word processing files. For example, if an attorney uses Word’s “Track Changes” feature while drafting a brief, the native file may include metadata that reveals omitted language or attorney or client commentary on an earlier draft. This is less of an issue in HTML format, which either does not retain metadata or makes it more obvious upon conversion. Accordingly, if DOCX or RTF filings are permitted, the court should remind attorneys to strip any privileged or work product content out of the file, such as by using Word’s built-in “Document Inspector” feature or similar third-party products. See, e.g., Microsoft, Remove hidden data and personal information by inspecting documents, 

**Visual images embedded in briefs**

*Recommendation:* Adopt rules or guidelines for embedding visual images, such as videos, photos, and maps, in briefs.

It is often said that a picture is worth a thousand words. A well-chosen graphic, photograph, chart, map, video, or other multi-media object can communicate important information and improve reading comprehension. Visuals also break up blocks of text, enhancing the overall reading experience. For a general discussion of the benefits of visuals in appellate briefs, see Robert Dubose, *Briefing Visually*, presentation at University of Texas School of Law 26th Annual Conference on State and Federal Appeals (Jun. 9-10, 2016), 
https://utcle.org/elibrary/download/a/38574/p/1.
Embedding images is fairly simple and is a standard feature in most software used to create e-briefs, including Word, WordPerfect, Open Office, and PDF creation software.

The following are some issues to consider in deciding whether to prohibit, allow, or encourage the use of embedded images in briefs.

First, embedded images increase file size, so file size limits necessarily limit the extent to which visual images can be embedded in a given filing.

Second, the “word count” tool in word processing software does not capture words contained in an embedded visual image. The simplest solution to this issue is to require filers to manually count and add any words contained in an embedded visual image to the brief’s word count. The court should consider whether to include or exclude words spoken in an embedded video from that requirement.

Third, the court may wish to prohibit certain types of embedded images. Images and videos that are not in the trial court record generally should not be embedded. It also may be appropriate to prohibit videos of witness testimony, except in the rare case that the appellate court is permitted to assess credibility (which is never in many jurisdictions). Videos of witness testimony are particularly susceptible to word count abuse and increase file size without substantial benefit to the court. This is in contrast to embedding visuals and videos that are themselves key evidence—which may be very helpful to the court—such as a police dash-cam video, an accident scene photo, a graphic demonstrating how certain technology works, or a photo of property in dispute.

Fourth, most fixed visual images (such as photos) display reliably across different reading platforms. However, some videos may not display properly on some devices, depending on the particular hardware and software. Courts should be aware of this issue and provide guidelines or rules for embedded video files.
Chapter 4:  
Readability

The visual dynamics of reading on screen are different from reading on paper. Most existing court rules regarding fonts, line spacing, and other formatting requirements are based on historic typesetting practices. These rules often produce briefs that look much better on paper than on screen. Even when most or all of a court’s judges are reading briefs on tablets, parties often must file briefs that are ill-suited to screen reading. This has a negative effect on reading and comprehension. It also may cause readers to conclude erroneously that reading on an electronic device is inherently inferior to reading on paper and that little can be done about it. While some subset of readers may always prefer paper over screens, proper formatting of an e-brief can make a substantial difference in the reading experience.

The following recommendations emphasize improving readability on electronic devices, including desktop monitors, laptops, and tablets. At the same time, many of these recommendations also are beneficial when reading on paper and reflect readability research of general application that has emerged in recent decades.

Note that this report—i.e., the report that you are reading at this very moment—follows all of the recommendations in this chapter.

Word limits versus page limits

Recommendation: Impose word limits, instead of page limits, for briefs.

Many courts that once imposed page limits for briefs have switched to word limits. Word limits are superior from a readability standpoint in that they allow filers the flexibility to improve the visual appearance of a brief even if it results in a longer overall page length. Font size, font choice, line spacing, extra spacing before headings, and frequency of headings are all examples of formatting choices that may make a
brief more readable without changing the content. In other words, better formatting may change the page length, but not the word count. Courts concerned with improving the readability of e-briefs may want to switch from page limits to word limits, if they have not already.

**Text density (line spacing, margins, and alignment)**

1. **Recommendation:** Consider the relationships among text density, readability, and annotatability when updating court rules regarding document formatting.

   Many courts have rules specifying minimum line spacing and margins for briefs and other filings. All or nearly all of these rules were adopted with paper briefs in mind and should be revisited as courts move to e-briefs.

   In that process, it is important to consider the effect of text density on readability and annotatability. Margins and line spacing have a significant effect on text density, i.e., the amount of text versus white space present in a reading area. Text density in turn has a significant effect on readability and annotatability. Generally speaking, when reading on a smaller screen such as a tablet, denser text is more readable—up to a point. At the same time, the optimal text density for reading may be too dense for optimal annotation, whether by stylus or pop-up text boxes.

   Individual courts will need to strike their own balance between readability and annotatability, taking into account the screen size of devices provided by the court, the annotation software provided by the court, and how judges use the annotation software. For example, on the last point, if the primary annotation method is highlighting, then setting margins and line spacing for optimal text density may be fine. However, if the primary annotation method is text boxes, then larger margins may be helpful, depending on how the text boxes display. Or, if the primary annotation method is handwritten e-notes with a stylus, then larger margins and wider spacing may be desirable.
The next two options focus on optimal readability of fixed format PDFs read on tablets. Individual jurisdictions may wish to adopt greater line spacing and/or larger margins to improve annotatability, depending on hardware and software considerations and usage.

2. **Option:** Require 1.2x line spacing in filings. Allow extra space before headings and between paragraphs.

Most appellate courts currently require briefs to be “double spaced.” Double spacing is not ideal for reading on screen.

When courts began accepting typewritten briefs in the 1970s, they required double spacing because single spacing on a typewriter produced dense blocks of monospaced text that were very difficult to read. Typewriters offered only two type sizes—pica (10 characters per inch) and elite (12 characters per inch). The type was monospaced. And double spacing was the only alternative to very tight single spacing. Today, it is difficult to replicate how challenging it was to read single spaced monospaced text produced on a typewriter. “Single spacing” in computer word processing software is less dense than “single spacing” was on typewriters, and modern proportional fonts are far more readable than monospaced typewritten fonts were.

In terms of readability, ideal line spacing is closer to single spacing than double spacing. In Word and WordPerfect, setting line spacing at 1.2x approximates two points of leading between each line of text, which is the standard for professionally published books and scholarly journals, as well as United States Supreme Court briefs. See Sup. Ct. R. 33(1)(b). By contrast, “double spacing” in Word and WordPerfect is equivalent to 2.23x spacing, which is almost twice the professional standard. MATTHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS, at 137-38 (2d ed., O’Connor 2015). A modern “double spaced” brief has about half as much text per page as a 1.2x spaced brief, which results in a large amount of white space and necessitates twice as many swipes (page turns) to read the brief. Each page swipe disrupts reading and requires refocusing of the eyes.
Of course, even though experts suggest that 1.2x to 1.3x line spacing is optimal for readability, some courts may determine that greater line spacing is desirable and decide after experimentation to require 1.4x or 1.6x or 2.0x line spacing. Whatever the ultimate decision, line spacing should be considered as part of the discussion of e-brief requirements because it has a significant impact on readability.

Line spacing requirements also should be adopted hand in hand with margin requirements. If adequate margins are required (such as the 1.5” margins discussed in this report), then denser line spacing will improve reading and comprehension, while large margins will provide white space for readers to use when annotating the brief.

Finally, if denser line spacing is adopted, additional spacing before headings and between paragraphs should be allowed or encouraged. “Chunking” information in electronic documents makes them easier to read and improves comprehension. Robert Dubose, Legal Writing for the Rewired Brain: Persuading Readers in a Digital World, presentation at 2016 ABA Mid-Year Meeting (2016) (“Rewired Brain”). The use of frequent headings, with additional white space before them, helps readers understand the organization of the brief, allows for meaningful bookmarks, and helps focus the reader’s attention. Solid blocks of text are more difficult to read on screen than on paper. The natural tendency when reading on screen is to read in an “F” pattern—i.e., focus on the text at the top, middle, and left side of a document and skim the text located outside that area. Jakob Nielsen, F-Shaped Pattern for Reading Web Content, Nielsen Norman Group (Apr. 17, 2006), https://www.nngroup.com/articles/f-shaped-pattern-reading-web-content. Headings and leading sentences, especially when set off by white space, focus and help keep readers’ attention.

3. **Option:** Require 1.5" margins on all sides.

While an 8½” by 11” page is a reasonable size for a reference book, it is actually rather large for a lengthy legal brief intended to be read in a single sitting. The economy and convenience of using standard
letter-sized paper—and thus avoiding the complexities of booklet format, such as laying out signatures, trimming pages, and saddle stitching the booklet—justifies such an oversized page. See U.S. Government Printing Office Style Manual (30th ed. 2008). However, the largeness of the page should be considered in setting margins.

For a document with text in 12-point Century Schoolbook, the use of 1.5" margins produces a page containing 37 lines with an average of 66 characters per line, which is nearly “ideal” by typography standards. Robert Bringhurst, The Elements of Typographic Style, at 26 § 2.1.2, 39 § 2.2.3 (4th ed., Hartley & Marks 2012). The number of characters per line is an important factor for readability. Butterick, Typography for Lawyers, at 141. Wider margins also allow additional room for notations, both on paper and in most annotation software.

The typewriter standard of 1" margins on all four edges of the page results in excessive line lengths that reduce legibility and are especially difficult to view on mobile devices. See Ruth Ann Robbins, Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents, 2 J. Ass’n Legal Writing Directors 122-23 (2004) (“Painting with Print”).

4. **Option: Require left alignment of text.**

Left aligned text is easier to read than justified text. Robbins, Painting with Print, at 130-31. Justification creates uneven spacing between letters and words, thus requiring constant visual adjustments and increasing eye strain, whereas left-aligned text uses the spacing of the font itself.

Readers accustomed to justified text in legal briefs may resist left alignment initially due to a subjective perception that it looks less professional. However, upon switching to left alignment, most readers quickly lose that perception. Some jurisdictions have overcome the historic habit of justification entirely, such as Oregon where left aligned text is the norm in state and federal court filings.
Font and font size

1. Recommendation: Require use of a proportional font for body text that is easily legible on both paper and screens.

Font choice is an issue that courts should consider as part of any formatting discussion related to e-briefing. Certain fonts are more readable than others, and the use of more readable fonts improves the reading experience both on paper and on screen. Existing court rules sometimes impede the use of more readable fonts. See Robbins, Painting with Print, at 108, 135-50 (collecting rules).

Monospaced fonts, such as Courier, resemble the output from a typewriter and should be avoided. Proportional fonts generally are more readable than monospaced fonts. See Robbins, Painting with Print, at 120-21; Requirements and Suggestions for Typography in Briefs and Other Papers, Practitioner’s Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, at 132, http://www.ca7.uscourts.gov/forms/Handbook.pdf (“Seventh Circuit Suggestions”).

It is debatable which proportional fonts are the “most” readable. This report uses Century Schoolbook, which, along with its sister fonts New Century Schoolbook and Century Expanded, is recognized as among the most legible and readable fonts. See, e.g., Butterick, Typography for Lawyers, at 78-80; Seventh Circuit Suggestions, at 1325. These fonts are familiar to attorneys who practice in the United States Supreme Court. See Sup. Ct. Rule 33.1(b).

Any discussion of fonts would be incomplete without addressing Times New Roman. Times New Roman, a proportional font created in 1929 for the London Times newspaper, was the default font for virtually everything in the early era of computers. Because it was so ubiquitous, it remains the most common font cited in appellate rules and used in appellate briefs. Butterick, Typography for Lawyers, at 119. In recent years, Times New Roman has become somewhat
controversial, with some people staunchly defending it while others
excoriate it with passion. At least some of the disdain for Times New
Roman has more to do with it being “boring” than its readability—
which may be a problem for a job resume but not so much a court
filing. Nonetheless, it is worth at least considering allowing or
encouraging the use of fonts other than Times New Roman in e-briefs.
As Matthew Butterick puts it, today, “Times New Roman is not a font
choice so much as the absence of a font choice, like the blackness of
deep space is not a color.” *Id.* “It’s not that Times New Roman is a bad
font. It’s just that you can and should do better.” *Id.*

In 2007, Microsoft abandoned Times New Roman as its default font
and changed to Calibri. According to a manager involved in that
decision, the primary reason for the default font change was to improve
screen readability. Digital consumption was growing, and Microsoft
recognized that more and more documents would be read only on
screen, so a better font for screen reading was warranted. Joe Friend,
*Why Did Microsoft Change the Default Font to Calibri*, FORBES (Dec.
18, 2013), [http://www.forbes.com/sites/quora/2013/12/18/why-did-

In determining which fonts the court will accept, note that sans
serif fonts (which are blockier) were once considered better for e-
reading than serif fonts (which have flourishes on the letters) because
low pixel density made serifs difficult to render. However, advances in
screen resolution have eliminated that issue. Century Schoolbook,
New Century Schoolbook, and Century Expanded are all serif fonts.
(For comparison purposes, in case you’re curious, this sentence is in Arial,
which is a sans serif font.)

Finally, courts may consider requiring filers to embed fonts in their
documents to avoid any risk of font substitution. Font substitution
occurs when the font used in a document is not loaded in the reader’s
PDF viewer, in which case the PDF viewer substitutes a different font.
Minor substitutions may be annoying, while significant substitutions
may make a document unintelligible. Embedding fonts is fairly easy.
For example, in Microsoft Word 2010, it is done by clicking “File,” then “Options,” then “Save,” then “Embed Fonts in File.” Embedding fonts increases file size but ensures that documents are readable. PDF/A automatically embeds fonts, so courts that require filings to be in PDF/A format need not separately require the embedding of fonts.

2. **Recommendation:** Consider requiring 12 or 13 point for body text.

Over the years, many courts have changed their rules to require 14 point font instead of 12 point font. *See, e.g.*, Fed. R. App. P. 32(a)(5). The most commonly cited reason is that it is easier on the eyes.

Readability experts tend to recommend using a smaller font size, typically 12 point, which is the standard for professionally printed publications. With a larger font, such as 14 point, less text fits on each page, more swipes (page turns) are necessary to read the document, and content is more dispersed. Keeping text together usually is better for comprehension. *See, e.g.*, Robbins, *Painting with Print*, at 86-89 (recommending 12 point).

At the same time, there appears to be substantial support among judges for requiring 14 point, including in e-briefs. As such, rather than recommend a particular font size, it is recommended only that courts seriously consider font size as part of the larger discussion regarding text density and readability.

In thinking about font size, many people automatically visualize Times New Roman. However, it is important to understand that different fonts look different in different font sizes. For example, Century Schoolbook is wider than Times New Roman, so 13 point Century Schoolbook looks similar to 14 point Times New Roman in terms of size, while 14 point Century Schoolbook is noticeably larger to the eye than 14 point Times New Roman. Again, it depends on the font.
Illustration:

The quick brown fox jumped over the gate in 12 point Times New Roman.
The quick brown fox jumped over the gate in 12 point Century Schoolbook.
The quick brown fox jumped over the gate in 13 point Times New Roman.
The quick brown fox jumped over the gate in 13 point Century Schoolbook.
The quick brown fox jumped over the gate in 14 point Times New Roman.
The quick brown fox jumped over the gate in 14 point Century Schoolbook.

Thus, if a court decides to change the font(s) that it requires or encourages for use in briefs, it also should consider font size and may find that 12 point or 13 point is a better choice for the selected font(s).

3. **Recommendation:** Require footnotes to be in the same font and font size as the body text.

Some courts permit footnotes to be in a smaller font size than the body text. In order to improve readability, footnotes should be in the same font size as the body text. Requiring the same font size also may discourage excessively long footnotes.

4. **Recommendation:** Allow headings to be in a different and larger font than the text.

Allowing headings to be in a larger font size and/or different font than the text helps headings stand out, which is useful because they organize the brief and provide visual cues for both paper and screen readers. See Robbins, *Painting with Print*, at 127, 133; BUTTERICK, *TYPOGRAPHY FOR LAWYERS*, at 90-91, 109-10. For example, if the text is
in 12 point, then allowing 13 point or 14 point for headings will make the headings more prominent. Using a different font for headings—preferably a highly legible sans serif fonts such as Arial, Candara, or Helvetica—also makes the headings more prominent. Some courts already permit headings to be in larger sans serif font. See, e.g., Fed. R. App. P. 32(a)(5).

5. **Recommendation:** Encourage the use of “curly” or “smart” quotation marks and apostrophes rather than "straight" quotation marks and apostrophes.

Most experts agree that curly quotation marks and apostrophes are better for readability than straight quotation marks and apostrophes. See, e.g., SEVENTH CIRCUIT SUGGESTIONS, at 1335; BUTTERICK, TYPOGRAPHY FOR LAWYERS, at 38-40. Curly quotation marks and apostrophes are available as a default setting in most word processing programs. Some manual correction may be necessary, such as when copying text from documents that use straight quotation marks and apostrophes or when using tick marks for measurements.

**Emphasis**

1. **Recommendation:** Encourage use of boldface and italics for emphasis. Discourage use of underlining.

Emphasis is an effective tool when used well. In terms of readability, most experts prefer **boldface** and **italics**, and they strongly disfavor **underlining**. See, e.g., Robbins, *Painting with Print*, at 118-19; BUTTERICK, TYPOGRAPHY FOR LAWYERS, at 81-82.

The choice between **boldface** and **italics** may be a matter of subjective preference. Some experts prefer boldface because it does not slow down reading, while italics do. See Robbins, *Painting with Print*, at 118-19. However, when emphasis is used sparingly, a writer may want to slow down reading for a few words, and some courts expressly prefer italics. See, e.g., SEVENTH CIRCUIT SUGGESTIONS, at 133.
It is widely agreed, however, that underlining should be avoided. Underlining disrupts letters that fall below the line (called descenders), such as the letters g, j, and y, which makes them less legible and therefore more difficult to read. SEVENTH CIRCUIT SUGGESTIONS, at 5; Robbins, Painting with Print, at 118; BUTTERICK, TYPOGRAPHY FOR LAWYERS, at 74-75. This includes case names, which should be italicized rather than underlined to make them easier to read.

The one exception regarding underlining is hyperlinks, for which underlining is the accepted standard and should be allowed. BUTTERICK, TYPOGRAPHY FOR LAWYERS, at 81-82.

2. **Recommendation**: Discourage use of all capital letters.

TYPOGRAPHY EXPERTS AND COMMENTATORS RECOMMEND AGAINST THE USE OF ALL CAPITAL LETTERS. STUDIES SHOW THAT THE USE OF ALL CAPITAL LETTERS SLOWS DOWN READING AND THAT MOST READERS FIND ALL CAPITAL LETTERS MORE DIFFICULT TO READ THAN LOWER CASE TYPE. See, e.g., SEVENTH CIRCUIT SUGGESTIONS, at 6; Painting with Print, at 133; Dubose, Rewired Brain, at 17.

This includes “SMALL CAPS,” which should be used only for legal citations as required by The Bluebook, *e.g.*, book titles.

3. **Recommendation**: Discourage use of title case (and all initial capitals) in headings.

While Title Case Is Not as Bothersome When Used Well in Short Headings, the Difference Is More Pronounced When Headings Are Longer or when Authors are Inconsistent about which Words are Capitalized. In Recent Years, There Has Been a Move Away From Title Case and Toward Sentence Case, Which Appears to Be Driven by Digital Publications. See Bryan Garner, The Winning Brief 431, 437 (Oxford Univ. Press 3d ed. 2014).

Sentence case is easier to read, including in headings.
Chapter 5: Internal navigation

Navigating an e-brief is different from navigating a paper brief. The physicality of paper documents gives readers a natural sense of place that is lacking in electronic documents. See Ferris Jabr, The Reading Brain in the Digital Age: The Science of Papers Versus Screens, SCIENTIFIC AMERICAN (Apr. 11, 2013). It therefore is much easier to move around in a paper document without losing one’s place than it is in an electronic document.

Internal navigation tools address this issue and make it easier to navigate e-briefs.

Page or paragraph numbering

1. Recommendation: If page numbering is used, require a single pagination scheme that starts on the first page of the document.

Currently, legal briefs are often paginated so that the page identified as page “1” is the first page of the substantive text, not the first page of the document. A typical example is a brief in which the cover or caption page has no page number, the table of contents and table of authorities have Roman numeral page numbering (i, ii, iii,...), and the body has Arabic numeral page numbering (1, 2, 3,...).

When a brief using this type of pagination is converted to PDF for e-filing, the Arabic page numbers used in the substantive part of the brief do not correlate to the PDF page numbers. For example, a page may be identified in the footer as page “15” but actually be page 21 of the whole document. Page 21 is the page number that will display in the PDF reader and that will be needed to jump to that page, yet page 15 is what it will say in the footer and in references in the table of contents and authorities. Using a different page number in the footer thus makes it more difficult to navigate within the PDF.
This unnecessary obstacle to internal navigation can be avoided by requiring a single run of pagination for the entire brief. The use of Arabic numbers that begin on the first page of the document and continue until the last page is recommended.

Courts that impose page limits instead of word limits may need to provide instructions to filers on this issue to avoid confusion. The separate pagination of cover pages and tables likely originated with page limits, as those sections are typically excluded from the page count. As discussed elsewhere in this report, word limits are generally better than page limits in facilitating improved formatting and readability of e-briefs.

2. **Option: Consider requiring paragraph numbering instead of or in addition to page numbering, especially for documents that will be filed in multiple formats.**

Paragraph numbering refers to the use of consecutive numbers at the beginning of each paragraph of the document. There are two main arguments for using paragraph numbering in e-briefs. First, when reading on a screen smaller than 8.5" x 11", paragraph numbering eliminates the need to scroll to find the page number. Second, when a document is filed in a non-fixed format, the page numbering changes with individual reader settings, so paragraph numbering provides a consistent reference point for everyone to use. Accordingly, courts may wish to consider requiring paragraph numbering instead of or in addition to page numbering, especially if briefs are filed both in PDF and a non-fixed file format such as HTML, DOCX, or RTF.³

³ If a brief is filed in multiple formats, the pagination scheme should be the same in every version. In other words, a single brief should be drafted, using whatever pagination scheme is desired, and then that single brief should be saved into any and all appropriate formats for filing. In order to have different pagination schemes in different file formats, the filer would have to draft multiple briefs, which is undesirable for many reasons, including that it would make cross-reference between the versions difficult or impossible.
For numbering paragraphs in appellate briefs, Arabic numbering (1, 2, 3,...) is superior to decimal numbering (e.g., 1, 1.1, 1.2,...). Arabic numbering is simple to use, can be set to update automatically in modern word processing systems, and is relatively easy to ignore. By comparison, decimal numbering is more complicated to create and thus prone to errors and inconsistencies, resists automatic updating, and can be distracting due to its length and variability. While decimal paragraph numbering does convey information about a document’s organization, which may be useful to some readers, its multiple disadvantages outweigh that potential benefit.

Finally, note that some readers dislike paragraph numbering because it creates visual clutter. Moreover, that clutter is in a place where the reader’s eye naturally gravitates: on the left side of the page and at the beginnings of paragraphs. That said, readers can learn to ignore paragraph numbering if the benefits are worth it. For example, paragraph numbering is common in complaints, answers, and requests for production, where the benefit of having the paragraph numbering for reference outweighs the disadvantage of having it when reading. Some courts may conclude the same for e-briefs, especially in connection with non-fixed file formats.

**Bookmarks and internal hyperlinks**

1. **Recommendation**: Encourage or require bookmarks so that readers may see an outline of the brief in a side panel and jump to a particular section.

   A bookmark is a link that appears in the “Bookmarks” panel of most PDF-reader software. The “Bookmarks” panel usually appears to the side of the document or as a pop-up window in PDF-reader software. If the bookmarks correspond to the section titles and headings of a brief, readers can immediately see an outline of the brief and use the links to jump to particular sections of the brief without scrolling or entering page numbers.
When drafting a brief, the author can nest the bookmarks so that subheadings appear beneath headings in the “Bookmarks” panel. In some software, including Adobe PDF-reading software, the nested bookmarks can be collapsed (hidden) or expanded (displayed) by clicking a triangle or plus sign to the left of the bookmark. This allows the reader to customize the level of detail shown in the panel. The reader also can shorten or otherwise edit the description of the bookmarked locations in the PDF.

It is easy to create bookmarks using the “Styles” feature in Microsoft Word. Word’s default “Headings” style may be modified to satisfy court requirements or suit personal preference by right-clicking on any style appearing in the Style Gallery and selecting “Modify.” Using “Headings” style for section titles and subsection headings allows the author to generate a table of contents (with Word’s “Table of Contents” menu option) and a bookmarked PDF file (with an option given when saving to PDF) with very few mouse clicks. While drafting and revising a brief, Word’s “Navigation Pane” may be used to display items corresponding to the “Headings” style in a side panel. Those items will appear in the “Navigation Pane” in a manner similar to how they will appear in a “Bookmarks” panel in a PDF file.

Bookmarks also may be added manually. The process usually is simple, although it may be tedious for longer documents. In Adobe Acrobat, it is accomplished by clicking on a page and choosing “Add Bookmark.” Other PDF-creation software has similar capabilities. Manual bookmarks may be necessary when compiling an appendix of record excerpts.

Readers may add, edit, or delete bookmarks if their software allows that option. For example, a given reader may want to bookmark a certain passage or key appendix document. The ability of readers to add, edit, or delete bookmarks is a useful tool, but it may warrant taking certain steps, such as: (1) maintaining a read-only copy of the brief so that the original bookmarks remain available; (2) not
considering bookmarks to be part of the substantive content of the brief; and (3) treating bookmarks as a supplement to, not a substitute for, the table of contents in the brief.


2. **Recommendation:** Encourage internal hyperlinking within briefs.

When internal hyperlinks are used, the reader is able to move from one part of the brief to another by clicking on an object on the page. For example, if a page contains an internal cross-reference such as “infra Section IV,” the reader can click on a hyperlink to go directly to Section IV. It also is possible to add more creative hyperlinks, such as including a “Back to TOC” hyperlink on each page of a brief so that the reader can always get back to the Table of Contents easily.

While internal hyperlinks are helpful, it is recommended that they be encouraged, not required, at this time. The advantages of internal hyperlinks are mitigated by the ability to achieve similar results using PDF bookmarks (as discussed in the previous recommendation) and by the ability to navigate with page numbers in most PDF software.
Chapter 6: Hyperlinks to legal authorities, record materials, and the Internet

External versus internal hyperlinks

A hyperlink is a feature in an electronic document that allows the reader to jump to another place with only a mouse click.

*Internal hyperlinking* means that the hyperlink leads to another place in the same electronic file. A single file may contain multiple individual documents. For example, numerous documents may be combined into a record appendix that is then combined with a legal brief to create a single PDF for filing with the court.

*External hyperlinking* means that the hyperlink leads somewhere outside the confines of the file in which the hyperlink appears. For example, a brief may contain a hyperlink to a document in PACER, in which case clicking on the hyperlink takes the reader out of the brief and into the PACER system.

The materials cited in appellate briefs that are most attractive for hyperlinking are the *trial court record* and *legal authorities*. Having immediate access to the trial court record when reading briefs helps appellate judges ensure that record citations are accurate and fairly reflect the evidence. Rather than having to find a document in a stack of boxes that may be stored in someone else’s office or a central file room, a mere mouse click is all that is needed to check the accuracy of a party’s reference to the record. Similarly, hyperlinking to legal citations allows judges to look at a cited authority immediately after reading the argument for which it is cited.

This chapter discusses different ways to accomplish hyperlinking. Using hyperlinks, the entire universe of a case can be connected, which is one way to make e-briefs better than paper briefs.
Hyperlinking of legal and record citations by the court

In the last few years, a handful of courts have adopted software that scans every brief filed with the court and automatically generates hyperlinks to the trial court record and/or to Westlaw or LEXIS. The court itself generates the hyperlinks with this software, not the filers. Local rules mandate the citation format that filers must use, in order to ensure that the software recognizes the cites and creates accurate links. For example, Fifth Circuit filers must use the format “ROA.123” for record citations, which the software reads and knows to generate a hyperlink to page 123 of the record on appeal. As long as citations are in the correct format, the software does all the work.

The Fifth Circuit is the pioneer in automatic hyperlinking software for appellate courts. The software it uses, which Ken Russo created in 2013, has attracted national attention and is incorporated into the next generation of CM/ECF. It appears that this software will be more widely adopted in the federal appellate system over the next two years.

Currently, Texas appears to be the only state using software to add hyperlinks to appellate briefs after they are filed. The Texas software, which is limited to legal citations, was developed in consultation with Ken Russo and Lyle Cayce. Practical considerations, including budget issues, suggest that state courts will be slower than federal courts in adopting automatic hyperlinking software. Collaboration between different states and court systems, however, could speed adoption.

Software that adds hyperlinks after a brief is filed is a nearly optimal solution to providing reliable hyperlinks to the trial court record and legal citations, especially since it treats all filers equally. Until and unless such software is available in a given court, however, it may be desirable to require or encourage filers to hyperlink citations, so that the court may enjoy the benefits of hyperlinks. The following series of recommendations and options address hyperlinks added by filers, rather than the court itself.
Hyperlinking of legal citations by filers

Hyperlinked legal citations provide a convenient way for judges, court staff, and attorneys to have immediate access to legal authorities cited in an e-brief. The following recommendations and options are intended for courts that do not have software that automatically generates Westlaw or LEXIS hyperlinks after a brief is filed.

1. **Recommendation:** Regardless of hyperlinking, require standard legal citation form.

   Any hyperlinked citations should be in the same format as if they were not hyperlinked. It may be tempting for filers to use very short forms for hyperlinked material, such as *Smith v. Jones* instead of *Smith v. Jones, 123 Mich 456 (2005)*. This should be prohibited.

   Standard legal citations provide jurisdiction, year, and publication information, which should be available to readers in the text without having to follow a hyperlink. More importantly, using standard legal citation form ensures that readers will be able to locate the cited material even if the hyperlink fails.

   Filers should continue to use standard legal citation form, regardless of hyperlinking.

2. **Option:** Encourage or require hyperlinking of legal citations to Westlaw or LEXIS.

   Westlaw and LEXIS are the most common legal research platforms and allow for highly reliable hyperlinks. Courts may encourage or require filers to hyperlink their legal citations to Westlaw or LEXIS. If the court subscribes to one service only, the court should provide that information to filers, as hyperlinks need to link to a service to which the court has access. At this time, the process of creating hyperlinks to Westlaw or LEXIS is not sufficiently uniform, simple, and inexpensive to warrant making it mandatory, but it may be in the future. In the meantime, encouraging hyperlinking may be desirable.
3. **Option:** Allow hyperlinking of legal citations to free legal research websites.

Some filers will not have access to Westlaw or LEXIS. To broaden access, courts may wish to allow hyperlinking to alternative free legal research websites, such as Casemaker, Fastcase, Google Scholar, Legal Information Institute, and the U.S. Government Publishing Office.

The risk of links not working is higher with free websites, but, to the extent a hyperlink is dead by the time a reader tries to use it, then the reader may simply access the document through Westlaw or LEXIS, using the standard citation information provided in the brief.

Some filers may cite something that is not a proper legal authority, but that problem exists regardless of whether there is a hyperlink. A reader is not required to click the hyperlink any more than a reader is required to look at something improper in an appendix or track down improperly cited material.

A more significant issue is if a website provides an outdated or inaccurate version of otherwise appropriate legal authority. No ready solution exists for that problem, except to caution judges and court staff to rely on Westlaw or LEXIS when actually preparing opinions. If this becomes a serious problem, it may be necessary for the court to stop allowing parties to hyperlink to free legal research websites.

4. **Option:** Encourage or require hyperlinking of legal citations to key authorities contained in an appendix to the brief.

An alternative way to give judges, court staff, and opposing counsel immediate access to legal authorities cited in a brief is to encourage or require the filing of an appendix of key legal authorities with the brief. An appendix of all cited legal authorities would be impractical, as the benefit would be outweighed by the burden on litigants and the resulting file size. However, an appendix of key legal authorities, selected by the filer and with a specified page limit, is feasible.
The main advantages of an appendix are that it does not require reliable Internet access (as hyperlinks to Westlaw and LEXIS do) and it is always present with the brief. Another potential advantage is that the court could choose to allow filers to highlight key passages of the legal authorities to expedite the court’s focus and legal analysis.

If an appendix of key legal authorities is filed, it should be filed with the brief as a single PDF in order to allow internal hyperlinking. This can be done by merging the PDF of the brief and the PDF of the appendix into a single PDF for filing. Requiring a single PDF may necessitate a change in the court’s file size limitations for e-filing. At a minimum, the file size limit must be considered before adopting any appendix requirements. Filing the appendix separately creates serious challenges for hyperlinking the brief to the appendix, so increasing file size (if necessary) is the most practical solution if existing file size limitations would interfere with filing a single PDF containing both the brief and the appendix.

Hyperlinking of record citations by filers

Hyperlinking to the trial court record can be very helpful to readers, in that it allows immediate access to cited record materials. From the reader’s perspective, hyperlinks to the record may be especially helpful because finding a cited item in the record can take longer than calling up a legal authority in Westlaw or LEXIS.

1. Recommendation: Require normal record citation form, regardless of hyperlinking.

Any hyperlinked citations should be in the same format as if they were not hyperlinked. Some attorneys may be tempted to use shorthand citations due to the existence of a hyperlink, such as 2003 Contract instead of McLean Dec. filed 3/10/14, Ex. 3 (2003 contract). This should be prohibited.
In many cases, standard record citations contain information that is useful for the reader to have readily at hand, without having to follow a hyperlink. More importantly, using standard record citation form ensures that readers will be able to locate the cited material in the trial court record even if the hyperlink fails.

Filers should continue to use standard record citation form, regardless of hyperlinking.

2. **Option: Encourage or require hyperlinking of key record cites to an appendix to the brief.**

The easiest way to give judges, court staff, and opposing counsel immediate access to key record materials cited in a brief is to require filing an appendix of key record materials with the brief. Internal hyperlinks then can be used to connect the brief and appendix, as long as the brief and appendix are filed together as a single PDF.

Requiring the filing of a single PDF may necessitate increasing file size limits in a court’s e-filing system, but it is necessary for internal hyperlinking. Even with higher file size limits, some files may exceed the limit, which may be addressed by rule. For example, Texas Rule of Appellate Procedure 9.4 provides that the brief “must be combined with any appendix into one computer file, unless that file would exceed the size limit prescribed by the electronic filing manager.”

The advantage of hyperlinking to an appendix is that it is fairly simple as a technical matter. It also is likely the only option when the trial court record exists only in paper. The obvious disadvantage is that hyperlinks will be limited to those record materials that filers select as key. Another disadvantage is that hyperlinks will be limited to the materials contained in the specific appendix to that brief. In other words, if a key document is included in the appendix filed with an opening brief, it typically would not be included in appendices to later briefs. In order to generate hyperlinks to that document in an answering brief or reply brief, however, it would be necessary to refile the same document in an appendix to the later brief as well.
3. **Option:** Encourage or require hyperlinking of record citations directly to the trial court record in the trial court system (*e.g.*, PACER).

There are several advantages to hyperlinking to the actual trial court record, stored externally, rather than an appendix compiled by the filer. Those advantages include:

- **Immediate access to entire record and complete documents.** Unlike hyperlinking to an appendix, hyperlinking to an externally stored trial court record allows hyperlinking of every record citation. It also provides immediate access to entire documents. Instead of only selected documents and excerpted pages, the reader can jump to every record item cited and, if desired, look at the entire document or exhibit.

- **No effect on file size.** Most courts impose a maximum file size for e-filings. Hyperlinking to an external trial court record has no effect on the file size of the brief, whereas filing an appendix necessarily increases file size because the brief and appendix need to be filed together to permit internal hyperlinking.

- **May avoid or limit cost of preparing an appendix.** Preparing an appendix can be time consuming. If record hyperlinking is done in lieu of an appendix, then filers may avoid the cost of preparing an appendix altogether. For example, the Arizona Court of Appeals, Division Two, does not allow parties in civil cases to file an appendix, except for good cause, because all record citations must be hyperlinked to the electronic record provided by the appellate court.

As long as the trial court record is stored electronically, not in paper, it should be possible to hyperlink to it in many or most systems. The exact procedure will vary by system. For example, in the federal system, filers may hyperlink directly to PACER. Detailed instructions for adding hyperlinks to PACER, both in Word and WordPerfect, are

Given the value of record hyperlinks, courts should consider requiring them, at least for represented parties, as soon as two conditions are met: (1) trial court records are stored electronically; and (2) the appellate court is able to provide clear instructions for creating record hyperlinks in a manner that is reliable and not unduly complex or burdensome.

To the extent some attorneys may resist learning to hyperlink to the record, it should be noted that legal assistants and staff may be trained to add record hyperlinks. Also, automation software tools exist, especially to link to PACER. The most widely available at present are: (1) a Microsoft Word add-on called “LinkBuilder”; (2) a Westlaw tool included in Westlaw’s “Drafting Assistant”; and (3) a LEXIS tool called “Shepard’s BriefLink.”

Before encouraging or requiring hyperlinks to the record, courts should test to ensure that a court log-in system does not break the links. For example, if an appellate judge clicks on a record hyperlink in a brief, receives a prompt asking for system log-in credentials, provides them, and then is taken to the court docket instead of the hyperlinked document, the hyperlink will be useless.

If parties are hyperlinking directly to the trial court system, system changes also may cause problems with links in existing filed briefs. For example, a change of e-filing vendors or a system update that changes target addresses could cause existing hyperlinks in briefs filed before that event to fail. Avoidable changes that break links should be avoided, while unavoidable changes should be addressed as proactively as possible to minimize disruption and dead links. This may involve coordination between courts.
4. **Option:** Encourage or require hyperlinking of record citations to a copy of the trial court record maintained by the appellate court.

Another option to facilitate record hyperlinking is for the appellate court to maintain its own copy of the trial court record, available online to judges, court staff, and all parties. For example, the Arizona Court of Appeals, Division Two, provides a copy of the trial court record and requires parties to hyperlink their record citations to it. The court’s website provides detailed instructions for creating the hyperlinks automatically. *See Arizona Court of Appeals, Division Two, Hyperlink Instructions, https://www.appeals2.az.gov/e-filer/welcome.cfm* (click on “Inserting Hyperlinks to the Electronic Record”).

Hyperlinking to an externally stored record has the same advantages over hyperlinking to an appendix regardless of which court system is storing the record to which hyperlinks are generated. Those advantages are discussed in the preceding section.

Keeping a copy of the trial court record in the appellate court’s system for use in hyperlinking may be more technically feasible than hyperlinking directly to the trial court’s system, depending on the system. Storing the record in the appellate court’s system also may provide appellate judges and court staff with easier and more reliable access to the record than accessing the trial court’s system, if they are different systems, and avoids the risk of dead links due to system changes at the trial court level.

The downside is storage requirements. This may be alleviated somewhat by establishing protocols for deleting the appellate court’s “extra” copy of the trial court record at a specified point in time after the final resolution of the appeal. This will result in the hyperlinks going dead, but that should not matter because the brief contains the actual record citations for reference in perpetuity and the hyperlinks are meant only for convenience while the appeal is pending.
Hyperlinking to the Internet by filers

Recommendation: Prohibit hyperlinking to the Internet, except expressly authorized sites (e.g., Westlaw, LEXIS, PACER). Require that any material cited as available on the Internet be included in an appendix to the brief.

At the appellate level, there are limited circumstances in which hyperlinking to material on the Internet is appropriate. For the most part, filers should only be hyperlinking to the trial court record and legal authorities.

The main exception, which occurs infrequently, is when relevant material appropriate for judicial notice (under normal judicial notice rules) is available online. See Robert Dubose, Can I Cite Wikipedia? Legal and Ethical Considerations for Appellate Lawyers Citing Facts Outside the Record in the Age of the Internet, presentation at State Bar of Texas’ Advanced Civil Appellate Practice Course, September 8-9, 2011, www.texasbarcle.com/Materials/Events/10351/136070.pdf. In such cases, a copy of the hyperlinked web page should be included in an appendix to the brief in order to create a permanent record. Without a hard copy on file, the cited material may become entirely unavailable if a website is taken down or its content moved or changed.

Hyperlinks in the “brief of record”

Recommendation: Allow parties to submit a hyperlinked brief as the brief of record.

A few states require that the brief of record not contain hyperlinks but allow a copy with hyperlinks to be provided to the court separately for internal use. In jurisdictions that require the brief of record to be filed in PDF/A, such an approach may be the only way to receive a hyperlinked brief.
In general, however, it is preferable to allow a party to file a single brief with hyperlinks as the brief of record. Preparing two briefs—one with hyperlinks and one without hyperlinks—is burdensome and creates a disincentive to hyperlinking. (Note that this is different than saving the same brief in two different file formats, such as PDF and DOCX, which is easy and takes only a few seconds. There is no easy way to automatically remove or kill hyperlinks when saving a brief to PDF.)

If external hyperlinks are limited to legal authorities and/or the trial court record, and filers are required to use standard citation forms regardless of hyperlinks, then there is little downside to having hyperlinks in the PDF brief of record. The limited materials that may be hyperlinked are not of a nature that they should ever go dead or pose a security risk. Because standard citation forms are used and hyperlinks merely provide a convenience to the court, it would not matter even if the links did go dead. As for security, in most court systems, only individual users reading a downloaded copy of the PDF would be in a position to click on a link, in which case it does not matter whether they are viewing a copy of the brief of record or a separately provided version with hyperlinks. The security risk is the same either way. The benefits of requiring a hyperlink-free brief of record are dubious at best, although necessary if PDF/A is mandated.
Chapter 7: Best practices for implementation

As of 2016, few jurisdictions have made significant changes to their court rules to address the shift to e-filing and e-briefs. The Federal Rules of Appellate Procedure provide detailed instructions for paper filings but defer to individual circuits to adopt local rules regarding e-filing. See Fed. R. App. P. 25(a)(2)(D). Many state court rules are similarly silent. Having rules that focus on paper filings, and in some cases apply only to paper filings, is confusing when e-filing is mandatory for most filers. Similarly, keeping rules adopted in the typewriter era, when nearly all briefs are now created on computers, may prevent parties from filing briefs that are well-suited to screens. As long as court rules continue to be based on briefs filed and read on paper, tension will remain between following the prescribed rules and producing optimal e-briefs.

At the same time, the reality is that implementing new rules and practices has inherent challenges. Rulemaking procedures can be lengthy and involved, and technology may change faster than formal court rules can keep up. It therefore may be helpful to consider various options for making the transition to e-filing and e-briefing.

Rulemaking

For jurisdictions that want to update and modernize their procedural rules to address e-filing and e-briefing, the following jurisdictions have the most detailed rules regarding e-filing (although not necessarily e-briefing) and may be useful for reference:

- United States Court of Appeals for the Fifth Circuit
- Alabama
- Arizona
- California
- Florida

Some states have created committees to establish technology standards for the entire state. For example, the Texas legislature and Texas Supreme Court created a Judicial Committee on Information Technology to establish technology standards for the entire state. Those standards have since been incorporated into the Texas Rules of Appellate Procedure.

**Interim rules, administrative orders, and public announcements**

Most appellate court rules are outdated with respect to modern technology, so changes are necessary. In theory, a court could conduct a global review of its existing rules, amend those rules to make e-filing the norm and paper filing the exception (instead of the other way around), and adopt new rules to improve the functionality and readability of e-briefs received by the court.
In practice, however, an immediate and complete overhaul of a court’s rules may be unrealistic or even undesirable. Implementation of electronic procedures in a particular court system is often tentative, gradual, and idiosyncratic, featuring incremental and interim solutions as courts and judges transition from a paper-only environment to a paperless environment. This may be due to resistance by judges, court staff, or attorneys, budgetary limitations, technological challenges, or other obstacles. Even different appellate courts in the same state may face different challenges, depending on their technology personnel, legacy systems, and culture.

The traditionally lengthy and cumbersome process of rulemaking also is at odds with the pace of technological change. Courts are understandably wary when the modern technological environment permits (or even demands) previously unanticipated innovations or adaptations.

Instead of conventional rulemaking, courts may opt for nimbler alternatives, which are more suitable to trial and error, as they seek to address e-filing and e-briefing developments. This may include implementing administrative orders, adopting interim rules, or even making public announcements through the court’s website or via emails to registered e-filers or members of the bar. In that process, a court may abrogate or suspend existing rules in whole or part.

The following are some examples of appellate courts using alternatives to formal rulemaking to implement changes to practice related to e-filing and e-briefing.

- In 2012, the Arizona Supreme Court abrogated and reserved Arizona Supreme Court Rule 124, governing “Electronic Filing, Delivery and Service of Documents,” on the ground that its “current language” had become “obsolete.” Ariz. S. Ct. Order No. R-11-0012 (Sep. 1, 2011). It then issued an administrative order, available on the court’s website, which governed electronic filing, delivery, and service of documents until a new
Rule 124 was adopted. Note that Arizona also has amended its civil appellate rules to address electronic filing, delivery, and service, which is an example of using a combination of administrative orders and formal rulemaking.


- In 2014, the Michigan Supreme Court issued an administrative order authorizing Michigan appellate courts to implement e-filing and e-service. Michigan Supreme Court, Administrative Order No. 2014-23 (Nov. 2014).


**Phased introduction**

Whatever method the court chooses, it may be helpful to introduce change gradually.

*Pilot projects.* A pilot project may be a good way to test options and work out kinks in a new e-filing system. Attorneys, firms, or agencies that are experienced litigants and are willing to provide meaningful
feedback may be recruited by the court to try the new system on a volunteer basis.

**Voluntary-to-mandatory rollout.** When a new procedure is ready for official rollout, one common way of phasing the rollout is to make the new procedure voluntary in the first phase; mandatory for attorneys, but not *pro se* parties, in the second phase; and then mandatory for all filers, subject to any permanent exceptions, in the third phase.

**Court by court rollout.** A rollout method that is often used in state courts is rollout by court, which may be used in conjunction with the voluntary-to-mandatory rollout strategy. Rollout by court may follow a top down strategy, beginning with the state supreme court (which usually has the smallest case load and most experienced bar), then expanding to the intermediate appellate court, and finishing with the trial courts. Alternatively, the rollout may follow a bottom up strategy, starting with the trial courts and then expanding to the appellate courts. Under either strategy, if there are multiple courts at a particular level—*i.e.*, multiple intermediate appellate court divisions or multiple trial courts—it may be desirable to phase those courts based on caseload, technological savvy of court staff, or other considerations.

**Case type rollout.** New procedures also may be introduced by case type, *e.g.*, civil, criminal, administrative, juvenile, etc. The percentage of the docket consumed by each case type, the typical nature and size of records for that case type, the frequency of sealed documents in the record, and like considerations may drive the order of phasing.

**Training and Education**

Implementing new technology in appellate courts often requires extensive training for everyone involved. Changes to existing rules that follow the same format as existing rules—such as changes in mandatory font size, line spacing, margins, and the like—are typically easier to absorb. More fundamental changes, however, such as the change from paper filing to e-filing, often require judges, court staff,
and attorneys to learn new skills. The same is true of new tools such as hyperlinking and bookmarking.

Without adequate training and education, frustration is inevitable, and dissatisfaction with new procedures is likely.

With regard to e-briefing in particular (as opposed to e-filing), the court may find it helpful to make it clear to attorneys that judges are now reading on screen and educate filers proactively about how to make their briefs better for that reality. This may include guides and video tutorials posted on the court’s website, as well as live training presented through the courts, bar programs, and private CLE providers. Information should address not only what briefs must or can include but how to achieve optimal results efficiently. Educating attorneys is most effective if the bar understands how appellate judges and court staff will read and interact with their briefs in an electronic environment.

Judges, judicial clerks, staff attorneys, and court staff also should be trained about e-briefs. For example, including bookmarks and hyperlinks in a brief is a fruitless exercise if readers do not understand how to use them. Similarly, optimizing a brief for reading on screen is pointless, and even may be counterproductive, if inadequate training leads readers to print it rather than read it on screen. Training regarding annotation software is especially important in the transition to paperless courts.

Appellate courts are feeling their way forward in the e-briefing era, as they seek to adopt and improve e-filing and e-briefing procedures and technology. This process is aided when courts share with one another their experiences and knowledge of features, implementation methods, training materials, and other resources. Establishing a central clearinghouse for information and training material on these subjects would be a worthy endeavor.
Appendix:
Key authorities and additional resources


Mary Beth Beazley, Writing (And Reading) Appellate Briefs In The Digital Age, 15 J. APP. PRAC. & PROCESS 47 (Spring 2014).


Robert Dubose, Legal Writing for the Rewired Brain: Persuading Readers in a Digital World, presentation at ABA 2016 Mid-Year Meeting. For the entire book, see ROBERT DUBOSE, LEGAL WRITING FOR THE REWIRED BRAIN: PERSUADING READERS IN A PAPERLESS WORLD (Texas Lawyer 2010).


R. Lainie Wilson Harris, *Ready or Not Here We E-Come: Remaining Persuasive Amidst the Shift Towards Electronic Filing*, 12 Legal Comm. & Rhetoric: JALWD 83 (Fall 2015).


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