
IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2009
No. 18

RUNGRUDEE NONCEEYA,
APPELLANT,

vs.

LONE STAR STEAKHOUSE
APPELLEE.

On Writ of Certiorari to the Court of Special Appeals of Maryland

**BRIEF OF ASIAN PACIFIC AMERICAN LEGAL RESOURCE CENTER, CASA
DE MARYLAND, AND THE MARYLAND LEGAL AID BUREAU, INC. AS
AMICI CURIAE IN SUPPORT OF APPELLANT**

Nadia J. Firozvi
Parag Rajendra Khandhar
Asian Pacific American Legal Resource Center
1600 K Street, NW Mezzanine Level
Washington, DC 20006
(202) 393-3572

Counsel for *Amici Curiae*

May 28, 2009

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTERESTS OF AMICI	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. LIMITED ENGLISH PROFICIENT LITIGANTS OFTEN FACE INSURMOUNTABLE OBSTACLES THAT PREVENT THEM FROM ACCESSING COURTS.....	5
A. Limited English Proficient Individuals Lack the Ability to Fully Participate in Court Proceedings Without the Assistance of Interpreters or Translation.....	5
B. Definitions of Limited English Proficiency.....	7
C. Differences Between Written and Oral English Proficiency: Reading and Writing are Not the Same as Listening and Speaking.....	11
D. LEP Individuals, Language Access, and the Legal System: The Importance of Qualified Language Access.....	13
II. ESTABLISHED FEDERAL AND MARYLAND LAW RECOGNIZES THE CRITICAL NEEDS OF LIMITED ENGLISH PROFICIENT LITIGANT.....	16
A. Federal Law Mandates State Courts to Provide Interpretation and Translation for LEP Civil Litigants.....	16
B. Maryland Law Recognizes and Expands Upon the Federal Guidance Concerning Language Access Within Courts by Providing for Equal Access and Full Participation, Beyond Meaningful Access.....	19
III. FULL PARTICIPATION IS NOT POSSIBLE WITHOUT HAVING ACCESS TO AN INTERPRETER AT A DEPOSITION.....	23
A. Depositions Are Within The Scope Of Civil Proceedings.....	23
B. Importance of Interpretation at Depositions.....	24

CONCLUSION25

TABLE OF AUTHORITIES

CASES

Lau v. Nichols 414 U.S. 563 (1974).....17

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. §2000d-2000d-7 (2008).....16

Exec. Order No. 13166, 65 Fed. Reg. 50,121 (August 16, 2001).....17

MD. R. CTS. J. AND ATTYS. Rule 16-819.....19, 20, 21, 22

MD. CODE ANN., STATE GOV'T § 10-1102(c) (2002).....6, 8

MD. CODE ANN., CTS. & JUD. PROC §9-114 (2002).....19, 20, 21

Volume no. 29 MD REG.1265 (July 12, 2002).....21

MD. R. RCP. CIR. CT. R. 2-41123

OTHER AUTHORITIES

Kathryn Alfisi, *Language Barriers to Justice*, WASHINGTON LAWYER MAGAZINE, (April 2009) available at http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/April_2009/language_barriers.cfm.....10

Dr. Janet Bauer, *Speaking of Culture: Immigrants in the American Legal System*, in IMMIGRANTS IN COURTS, (Joanne I. Moore, ed, 1999).....9

Nina Bernstein, *Language Barrier Called Health Hazard in E.R.*, N.Y. TIMES April 21, 2005.....6

Frank Johnson, *Being Bilingual is Not Enough*, American Translators Association Chronicle, July 2008, available at http://www.atanet.org/chronicle/feature_article_july2008.php.....12

Department of Justice, Civil Rights Division, Coordination and Review Section, Letter to Indiana Courts, (February 2009) <i>available at</i> http://www.lep.gov/whats_new/IndianaCourtsLetterfromMAF2009.pdf	18
Website of Federal Interagency Working Group, http://www.LEP.gov	7, 8
Website of Maryland Department of Juvenile Services, <i>available at</i> http://www.djs.state.md.us/lep_data.html	5
MD. DEPT OF LEGISLATIVE SERV., <i>International Immigration, The Impact on Maryland Communities</i> , (2008).	6
Website of National Language Access Advocates Network (NLAAN) http://www.probono.net/nlaan	7
New York Immigration Coalition, <i>LEP Comments Submitted to the Department of Health and Human Services</i> , <i>available at</i> http://www.thenyic.org/templates/documentFinder.asp?did=198	6
Purdue University Oral Proficiency Program FAQ, <i>available at</i> http://www.purdue.edu/OEPP/FAQ.html	12
Tai Van Ta, <i>Vietnamese Immigrants in American Courts</i> , in <i>IMMIGRANTS IN COURTS</i> , (Joanne I. Moore, ed, 1999).....	13

STATEMENTS OF INTEREST OF *AMICI*

Asian Pacific American Legal Resource Center (“APALRC”): The Asian Pacific American Legal Resource Center (APALRC) was established in 1998 as a nonprofit organization that advances the legal and civil rights of low income and limited English proficient Asian immigrants in Maryland, Virginia, and the District of Columbia through direct services, education, and advocacy. The APALRC operates a multilingual legal helpline and works predominantly with immigrant clients who speak more than a dozen languages. The APALRC has also trained more than 50 bilingual community interpreters who speak more than 15 languages to assist with non-court legal proceedings such as intake, interviews, and negotiations. In addition, the APALRC was a lead convener of the D.C. Language Access Coalition, which drafted and supported the passage of the District of Columbia’s Language Access Act, widely recognized as one of the most comprehensive in the nation. APALRC staff attorneys advise local and state agencies about local and Federal language access obligations and opportunities. The APALRC has a clear interest in the present case because of its unique expertise with language access and LEP populations. The APALRC’s deep experience with interpretation and legal proceedings reveals that LEP individuals must have equal access to justice during all legal proceedings.

CASA de Maryland (“CASA”): The mission of CASA de Maryland (“CASA”) is to improve the quality of life and social and economic well-being of the Latino and immigrant communities living in Maryland. CASA facilitates the self-employment, organization and mobilization of the Latino and immigrant community to gain full

participation in the larger society. CASA achieves these goals through programs in education, legal services, social services, housing, employment, and health. Our legal program serves largely low-income immigrants in matters ranging from employment to housing and civil rights. The overwhelming majority of the individuals that we serve are limited English proficient and require the services of an interpreter in a formal legal setting. We believe that having interpreters at all stages of legal proceedings is essential to achieving the full participation of Maryland's immigrant community in the justice system, and that immigrant voices must be heard throughout the justice system to prevent further abuse and exploitation.

The Maryland Legal Aid Bureau, Inc. (“Legal Aid”): is a non-profit law firm that provides legal services to low-income Maryland residents from thirteen offices located throughout the state. Legal Aid provides assistance to more than 60,000 individuals annually. Its advocates address the legal needs of low-income persons regarding their most fundamental necessities, including obtaining needed healthcare and public benefits, preventing foreclosures, recovering unpaid wages, restoring utilities, preventing wage garnishments, preventing unlawful evictions, and improving substandard and dangerous housing conditions. The clients whom Legal Aid represents in the wide variety of aforementioned matters include citizens, lawful permanent residents, refugees, asylees, and agricultural workers admitted to the U.S. on agricultural visas, including those with limited English proficiency. Ensuring equal access to all stages of the legal process is critical to all of Legal Aid's clients. Legal Aid frequently represents individuals at all stages of Maryland court and administrative processes, including those

who (regardless of citizenship or other immigration status) encounter barriers to justice such as inadequate language access.

SUMMARY OF ARGUMENT

The primary issue in this case is whether limited English proficient (LEP) litigants are entitled to interpreters at depositions. Although access to courts, and particularly to interpreters in civil legal proceedings, has often been elusive for LEP individuals, Federal law and Maryland statutory law specifically recognize the critical needs of LEP litigants in court. Federal law mandates that state courts that receive federal financial assistance must make interpreters available such that LEP litigants can meaningfully access their services. The State of Maryland's language access provisions go further by requiring that LEP litigants must be able to fully participate in all court proceedings. This must necessarily include all civil legal proceedings, including discovery proceedings, in which an LEP litigant is asked whether she needs an interpreter.

ARGUMENT

I. LIMITED ENGLISH PROFICIENT LITIGANTS OFTEN FACE INSURMOUNTABLE OBSTACLES THAT PREVENT THEM FROM ACCESSING COURTS

A. Limited English Proficient Individuals Lack the Ability to Fully Participate in Court Proceedings Without the Assistance of Interpreters or Translation

Since well before American independence, and certainly after that time, immigrants and refugees have come to this country from every corner of the globe and from every possible social and economic stratum. Whether they have come in search of freedom from persecution, or for education, work, or other opportunities, they all seek a better life for themselves and their families.

While immigrants historically settled in the largest port cities on either coast, in recent years, there has been significant direct migration to mid-Atlantic, Southern, and Southwestern states. With its top-rated academic and research institutions, thriving cities, robust agricultural and maritime trades, and generally welcoming approach toward immigrants and refugees, Maryland has become a favored destination for immigrants to settle, work, and raise their families, especially over the past 20 years.

While many immigrants enter Maryland with some familiarity with the English language, few have had formal training in English, and most are less than proficient in the language. The Maryland Department of Legislative Services Office of Policy Analysis 2008 International Immigration report states that the foreign-born population in

Maryland in 2006 was close to 700,000 individuals.¹ The report states that nearly 300,000 Maryland residents are considered limited English proficient (LEP).² In Montgomery County alone, one (1) in seven (7) county residents are LEP.³

The State of Maryland defines an LEP individual as a person with “the inability to adequately understand or express oneself in the spoken or written English language.”⁴ LEP individuals need not be foreign-born—for example, the Maryland Department of Juvenile Services recognizes that “a LEP individual includes persons born in other countries, children of immigrants born in the United States, other non-English or limited English proficient persons born in the United States, including Native Americans.”⁵

While health and legal systems are difficult to understand for most laypeople, navigating even the most basic services and systems for LEP Marylanders can be particularly daunting and nearly impossible without language access. In urgent and critical matters such as health and legal issues, whether an LEP individual has equal access may impact the person’s livelihood, liberty, and even her life.⁶

¹ MD. DEPT OF LEGISLATIVE SERV., *International Immigration, The Impact on Maryland Communities*, 13 (2008).

² *Id.* at 16.

³ *Id.*

⁴ MD. CODE ANN., STATE GOV’T § 10-1102(C) (2002).

⁵ Website of Maryland Department of Juvenile Services, *available at* http://www.djs.state.md.us/lep_data.html (last visited May 26, 2009).

⁶ See Nina Bernstein, *Language Barrier Called Health Hazard in E.R.*, N.Y. TIMES April 21, 2005 *available at* <http://query.nytimes.com/gst/fullpage.html?res=9A0DEEDD1731F932A15757C0A9639C8B63&sec=&spon=&pagewanted=1> (discussing an example of a pregnant LEP woman in a Staten Island hospital who was pressured by doctors speaking only in English to sign an emergency surgery consent form in English. The LEP woman thought she was having emergency surgery to save her baby, however, when she awoke after the

“Language access” is the general term used for the affirmative provision of language services such as interpretation (various methods to provide verbal /oral information) and translation (various written methods to provide written information) to ensure at least meaningful access for LEP individuals to critical services and programs in the United States.⁷

B. Definitions of Limited English Proficiency

1. Federal Definition of LEP

The Federal Interagency Working Group on Limited English Proficiency (“The Working Group”) was created to help coordinate agency and government-wide efforts to ensure that LEP individuals have “meaningful access”⁸ to important federal and federally assisted programs.”⁹ The Working Group, with representatives from more than 35 Federal agencies, defines LEP as:

Individuals who do not speak English as their primary language and who have a *limited ability to read, speak, write, or understand English* can be limited English proficient, or "LEP." These individuals may be entitled to

operation she discovered that she was not pregnant and sterile). *See also*, New York Immigration Coalition, *LEP Comments Submitted to the Department of Health and Human Services*, available at <http://www.thenyic.org/templates/documentFinder.asp?did=198>, (discussing another example of a pregnant LEP woman who understood that her baby was placed properly and that surgery was needed to adjust the baby’s placement. One month later, she discovered that she was no longer pregnant because the doctor had performed an abortion).

⁷ *See generally*, Website of National Language Access Advocates Network (NLAAN), available at <http://www.probono.net/nlaan> (last visited May 22, 2009) (provides more detailed resources and historical information on language access in the United States).

⁸ The notion of “meaningful access” will be discussed in more detail *infra*.

⁹ *See generally* Website of Federal Interagency Working Group, available at <http://www.lep.gov/iwglep.htm> (last visited on May 19, 2009).

language assistance with respect to a particular type of service, benefit, or encounter.¹⁰

Although this definition is specific enough to identify most LEP individuals, it does not clearly outline the parameters for “limited ability,” which lends itself to different interpretations. For example, when analyzing Census data that has been collected and reported concerning the question “how well do you speak English,” should agencies aggregate only responses of “not well” and “not at all” to identify LEP individuals? On the other hand, should they include anything other than “very well”? Agencies and other stakeholders continually use different methods.

2. Maryland Definition of LEP

In 2002, the Maryland state legislature provided public policy guidance concerning language access and LEP residents:

The General Assembly finds that the inability to speak, understand, or read the English language is a barrier that prevents access to public services provided by State departments, agencies, and programs, and that the public services available through these entities are essential to the welfare of Maryland residents. It is the policy of the State that State departments, agencies, and programs shall provide equal access to public services for individuals with limited English proficiency.¹¹

Maryland State Annotated Code defines “equal access” as “to be informed of, participate in, and benefit from public services offered by a State department, agency, or program, *at a level equal to English proficient individuals.*”¹²

¹⁰ See Website of Federal Interagency Working Group, <http://www.LEP.gov/faqs/faqs.html> (last visited on May 19, 2009) (emphasis added).

¹¹ MD. CODE ANN., STATE GOV'T. § 10-1101 (2002).

¹² See *id.* at § 10-1102(b) (emphasis added).

3. Unreliability of English Proficiency Self-Assessment

Despite a generally accepted definition of limited English proficiency, precise identification of the LEP population through self-assessment is difficult, because they sometimes overestimate or “round up” their English language ability in self-assessments.¹³ While there is no conclusive explanation for the phenomenon of higher self-reporting of English ability by non-native speakers, pride (particularly for college-educated respondents) and shame (of accented or less-than-fluent English) are significant for many communities.

Most immigrants are acutely conscious of their status as outsiders in American life: their customs often do not comport neatly with mainstream American cultural norms and their life experiences often involve trauma, loss, and severed ties to home.¹⁴ In addition, heavily accented or limited English ability often carries a stigma of foreignness and not belonging in the United States. As a result, immigrants and other LEP individuals often feel ashamed and apologetic for their limited-English proficiency. For example, at the APALRC, where more than 85% of the clients are LEP, clients often apologize multiple times to attorneys and other staff for their limited English proficiency, even with an interpreter present. Other service providers offer similar anecdotes, with case handlers reassuring clients that it is acceptable for clients to speak in their native

¹³ This information is based on individual clients that the APALRC has represented or callers with whom the APALRC has worked.

¹⁴ See generally Dr. Janet Bauer, *Speaking of Culture: Immigrants in the American Legal System*, in IMMIGRANTS IN COURTS 8 – 28 (Joanne I. Moore, ed, 1999).

language and that case-handlers are happy to slow down or to explain complicated and unfamiliar terms.

Unfortunately, these basic accommodations are scarce in mainstream settings, with LEP individuals expected to keep up or be left behind, even in critical settings like health and legal services. LEP individuals also fear that English speakers may impute incorrect assumptions about the individuals' intelligence or level of education from the individuals' difficulty in expressing or understanding spoken English. As a result, rather than further highlighting perceived foreignness, LEP individuals often nod, stay silent, or simply agree when confronted with unfamiliar words or contexts in English rather than asking for clarification or language assistance. In social settings, this behavior is generally acceptable and less noteworthy. In a legal context, however, where slight variations in responses or silences can suggest something different or even opposite to what is intended or true, this behavior can be disastrous.¹⁵

In addition to the challenges presented by self-assessment, experts have called into question the effectiveness of the most accepted testing practices of English language

¹⁵See Kathryn Alfisi, *Language Barriers to Justice*, WASHINGTON LAWYER MAGAZINE (April 2009) available at http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/April_2009/language_barriers.cfm (last visited May 26, 2009) (discussing an example in 2008 of a Korean speaking LEP individual who was arrested in Virginia pursuant to a warrant issued in the District of Columbia. The LEP man asked for an interpreter several times by saying phrases like, "I need Korea." He was not given an interpreter, and was incarcerated for four days in Virginia before the police transferred him to the Metropolitan Police Department (MPD) in D.C. The LEP man asked for an interpreter again but MPD never provided him with one. He spent four hours at the MPD before the precinct supervisor discovered that the warrant was no longer valid and that the LEP man should never have been arrested to begin with).

ability.¹⁶ As a partial explanation, experts have documented significant variation between the written and oral English proficiency of non-native speakers, with no clear predictive relationship between the two.

C. Differences Between Written and Oral English Proficiency: Reading and Writing are Not the Same as Listening and Speaking

1. Written and Oral English Proficiency Require Different Language Skills

Researchers in language education and linguistics largely agree that proficiency in written English comprehension and composition (“reading” and “writing”) requires different language skills from oral comprehension and composition (“listening” and “speaking”).¹⁷ Experts further separate “receptive” (reading and listening) skills from “expressive” (writing and speaking) skills, emphasizing that while each of the four components are highly interrelated, they may “develop independently of one another.”¹⁸

Gottlieb and Hamayan write:

[I]t is possible for a child to develop oral proficiency in English as a second language (ESL) outside of school without having any exposure to written English. Similarly, it is possible to have learned English as a foreign language in the home country primarily through literacy,

¹⁶ See Lisa Pray, *How Well Do Commonly Used Language Instruments Measure English Oral –Language Proficiency*, 29 BILINGUAL RES. J. 387, 388 (2005) (discussing the surprising unexpected results when the researchers administered three instruments (including the IDEA Proficiency Test (IPT) and the Language Assessment Scales-Oral) used to test proficiency in English Language Learners (ELLs) to native English speakers: only 87% scored as “fluent English speakers” on the IPT. This was surprising because if the test is accurate, 100% of native English speakers should score as “fluent English speakers.” The article states a native speaker receiving a result of non-fluent is “essentially the same as obtaining a false negative” and suggests that the testing methodology may be flawed).

¹⁷ See Margo Gottlieb & Else Hamayan, *Assessing Oral and Written Language Proficiency in English Language Learners*, Ch. 3, (Crown Press 2006).

¹⁸ *Id.*

without having had much exposure to or practice with spoken English.”¹⁹

Most American academic institutions recognize the gap between oral and written proficiency in prospective students and faculty.²⁰

Furthermore, while an English language learner may have studied or developed English language skills in one or more of the four components, experts also recognize that English proficiency varies based on the context of the communication. The language proficiency required in an informal social setting may be easier to achieve than that needed to fully participate in formal settings with specialized vocabulary and content that is “cognitively demanding” such as when medical or legal information is conveyed or exchanged.²¹

¹⁹ *Id.* (emphasis added).

²⁰ See generally, Purdue University Oral Proficiency Program FAQ, available at <http://www.purdue.edu/OEPP/FAQ.html> (last visited, May 20, 2009) Even though American academic institutions require the Test of English as a Foreign Language (TOEFL) for prospective foreign students, many require supplemental testing of the student’s oral English ability. For foreign-born graduate assistant applicants, even a degree from an American university does not exempt them from an oral English proficiency assessment if they wish to instruct students. In fact, most American universities even require the oral proficiency assessment of foreign-born professors who are extremely well-qualified in their subject area and even in written English, to ensure that they can communicate effectively in spoken English.

²¹ See Margo Gottlieb & Else Hamayan, *Assessing Oral and Written Language Proficiency in English Language Learners*, Ch. 3, (Crown Press 2006). See also, Frank Johnson, *Being Bilingual is Not Enough*, American Translators Association Chronicle, July 2008, available at http://www.atanet.org/chronicle/feature_article_july2008.php (last visited May 26, 2009) (discussing the importance of level of bilingualism for interpreters working in special contexts: “Interpreters work in specific contexts and use specific vocabularies whose meanings and usage change from context to context, both between subject areas (medical, legal, etc.) and within subject areas (folk medicine, advanced cancer treatment, etc.). The specific advantage the interpreting student with a higher level of bilingualism has over a lower-level student is that the higher-level student

D. LEP Individuals, Language Access, and the Legal System: The Importance of Qualified Language Access

1. Language Access in the Legal Context: Understanding Technical and Specialized Language

Legal information and processes are highly specialized and often very technical. The systems are often difficult to understand for most laypeople, even if they are native English speakers who have grown up in the United States. But for LEP Marylanders, particularly first-generation immigrants, trying to navigate even the most basic services and systems can be daunting, demoralizing, and dangerous.

In addition to the technical language and unfamiliar systems that are nearly impossible to understand without qualified language access, there may be cultural or other contexts that can interfere with comprehension of critical information by LEP and immigrant individuals.²² In urgent and critical legal matters, the outcome of a case concerning a person's property, liberty, and even her life may turn upon whether an LEP individual had equal access to information through an interpreter.

can more readily acquire necessary vocabulary and cultural understanding. That acquisition is more of a struggle for the lower-level student." This is also true for individual litigants with a basic level of bilingualism involved in legal proceedings: they may not have the ability to "readily acquire the necessary vocabulary and cultural understanding" within the highly specialized context of a legal proceeding).

²² See Tai Van Ta, *Vietnamese Immigrants in American Courts*, in IMMIGRANTS IN COURTS 140 – 157 (Joanne I. Moore, ed, 1999). (discussing cultural contexts that can affect how LEP and foreign-born individuals perceive and are perceived, particularly in legal contexts. For example, in Vietnam, bowed heads or prostration to the ground show respect. However, in America, avoiding eye contact and indirectness can be construed as shyness or guilt. In Middle Eastern cultures, a nod to the side means "yes," whereas this would mean "no" in North American culture).

2. Consequences for LEP Individuals Without Language Access

Examples below illustrate the importance of language access and qualified interpreters in ensuring equal access for LEP individuals in legal proceedings.

In Prince George's County, an elderly woman who understood only a little English received a Notice to Vacate from the property manager of the Section-8 project-based building where she lived.²³ The notice was in English, which the LEP woman was unable to read. When she received a summons from the district court, she thought it was a credit-card advertisement and did not appear in court. A default judgment was entered against her and the property manager then informed her that she was to be evicted. When the property manager spoke with her, she did not recognize the English word "court," but did recognize the word "sue," and determined that something had gone wrong. She then, fortunately, found her way to a legal services agency where she received assistance, but only after going through a harrowing and confusing experience where she almost lost her home.

In another case, a low-income Chinese-speaking LEP man was rushed to the hospital in Montgomery County, MD and his wife gave the registrar their health insurance card.²⁴ The LEP man had emergency surgery and was hospitalized for four days. Doctors and hospital staff spoke primarily to the LEP man's brother, who spoke some English. Months later, the LEP man and wife start receiving bills totaling nearly \$7,000, which they did not expect because of the insurance coverage. The hospital

²³ This example was provided for this amicus brief with the authorization of the Maryland Legal Aid Bureau.

²⁴ This information is based on an individual client that the APALRC represented.

billing department had no record that the man was insured. The hospital refused to take the insurance card, but offered to reduce the bill by 95% based on economic hardship, which the client accepted. But the legal department had already sued the LEP man in Montgomery County circuit court. The client's attorney helped him to settle with the hospital for a payment schedule of \$70 a month for 6 months, but only after the client endured months of additional stress before finding someone to assist him.

These two examples provide just a glimpse of the severe harm to LEP individuals, if there is inadequate language access, in violation of statutory and other provisions. Additionally, they provide insight into why an LEP individual must be able to access and fully participate in legal proceedings. Full participation of LEP individuals in legal proceedings is essential not only for the LEP individuals, but it also allows courts to administer justice effectively. Without adequate interpreters, the court may not have the full array of facts and responses before it, limiting its ability to fairly adjudicate an outcome.²⁵ In addition, parties may not be able to comply with particular orders or timetables, once the court issues a decision. These examples illustrate how access to qualified interpreters and other language access provisions is essential to ensure that all Maryland residents have equal access to justice.

²⁵ See One Hundred Fifty-First Report of the Standing Committee on Rules of Practice and Procedure, Maryland Register Vol. 29, Issue 16 at 1265, July 12, 2002.

II. ESTABLISHED FEDERAL AND MARYLAND LAW RECOGNIZES THE CRITICAL NEEDS OF LIMITED ENGLISH PROFICIENT LITIGANTS

A. Federal law mandates state courts to provide interpretation and translation for LEP civil litigants.

The idea of providing LEP litigants meaningful access to courts is neither a surprising, nor a new, idea. Language access in the courts stems from the 1964 Civil Rights Act.²⁶ President John F. Kennedy explained that the justification behind the Civil Rights Act is “simple justice.” He stated that:

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, state, and local governments is prohibited by the Constitution. But indirect discrimination, through the use of federal funds is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.²⁷

This calls on courts also to prevent violations within their own institutional framework. Thus, Title VI of the 1964 Civil Rights Act mandates that state courts receiving federal financial assistance must comply with Title VI, which prohibits discrimination on the basis of race, color, and national origin.²⁸ Title VI specifically states that “[n]o person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving federal funding.”²⁹ The Supreme

²⁶ 42 U.S.C. §§2000d - 2000d-7 (2008).

²⁷ U.S. Department of Justice, Civil Rights Division, Title VI Legal Manual, January 11, 2001.

²⁸ 42 U.S.C. §2000d (2008).

²⁹ *Id.*

Court in *Lau v. Nichols*,³⁰ also interpreted Title VI as prohibiting discrimination based on LEP status, specifically under the rubric of national origin, when ordering public schools in California to provide education for all students regardless of language spoken.³¹

Additionally, in 2000 President Bill Clinton issued Executive Order 13166, Improving Access to Services for Persons With Limited English Proficiency.³² The Order directs federal agencies and recipients of federal funding to “ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964.”³³ The Order calls upon each federal agency to:

Examine the services it provides and develop and implement a system by which LEP persons can *meaningfully access* those services consistent with, and without unduly burdening, the fundamental mission of the agency. Each federal agency shall also work to ensure that recipients of Federal financial assistance (recipients) provide *meaningful access* to their LEP applicants and beneficiaries.³⁴

While there is no direct definition of “meaningful access,” in 2002, the Department of Justice (DOJ) issued policy guidance entitled, “Enforcement of Title VI of the Civil Rights Act 1964 – National Origin Discrimination Against Persons With Limited English Proficiency,” to assist federal agencies in complying with Title VI.³⁵ The policy

³⁰ *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

³¹ *Id.*

³² Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (August 16, 2000).

³³ *Id.*

³⁴ *Id.* (emphasis added).

³⁵ Enforcement of Title VI of the Civil Rights Act 1964-National Origin Discrimination Against Persons With Limited English Proficiency 67 Fed. Reg. 41,455 (Dep’t Justice, 2002), available at <http://www.usdoj.gov/crt/cor/Pubs/lepqa.php> (last visited, May 23, 2009).

guidance, for example, lays out a four-factor test to determine whether interpreters must be provided.

Among the factors to be considered in determining what constitutes reasonable steps to ensure meaningful access are: (1) the number or proportion of LEP persons in the eligible service population; (2) the frequency with which LEP individuals come into contact with the program; (3) the importance of the service provided by the program; and (4) the resources available to the recipient.³⁶

The Policy Guidance is also used as an instructive aid for the Department of Justice. For example, in February of 2009, the Coordination and Review Section of the Civil Rights Division of the Department of Justice (DOJ) drafted a letter to the Indiana Supreme Court in reference to *Arrieta v. State*, No. 10S05-0704-CR-139 (Ind. 2008), where the Indiana Supreme Court ruled that LEP defendants were not entitled to interpreters at the court's expense, unless they were indigent.³⁷ The DOJ reiterated to the Indiana Supreme Court that courts that receive federal financial assistance must comply with Title VI and its implementing regulations, and that it considered charging LEP parties for costs of interpreters to be inappropriate.³⁸ Thus, Federal LEP guidelines offer a basement-level foundation upon which states and local jurisdictions can and have added protections that are more robust.

³⁶ *Id.*

³⁷ Department of Justice, Civil Rights Division, Coordination and Review Section, Letter to Indiana Courts, (February 2009) *available at* http://www.lep.gov/whats_new/IndianaCourtsLetterfromMAF2009.pdf (last visited May 23, 2009).

³⁸ *Id.*

B. Maryland Law Recognizes and Expands Upon the Federal Guidance Concerning Language Access Within Courts by Providing for Equal Access and Full Participation, Beyond Meaningful Access.

As a recipient of federal financial assistance, Maryland's judicial system is obligated to abide by the provisions of Title VI and Executive Order 13166. Maryland courts, however, have taken on measures to ensure that LEP individuals have more than simply meaningful access to court services. In doing so, Maryland has become a leader among the many states by providing language access to LEP litigants as both a constitutional and statutory obligation through Maryland Rule 16-819 and Maryland Courts and Judicial Proceedings, §9-114.³⁹

Pursuant to Maryland Rule 16-819, courts in Maryland "shall appoint" an interpreter when a party or witness "does not understand English well enough to participate fully in the proceedings and to assist counsel," or "does not speak English well enough to be understood by counsel, the court, and the jury."⁴⁰ This Rule places a compulsory obligation on the court to appoint an interpreter, either by request or *sua sponte*, and the Rule also recognizes that without such an interpreter, LEP litigants and witnesses cannot "fully" participate in proceedings, and full participation is seen as essential.⁴¹ Therefore, Maryland courts meet their Title VI obligations through the framework of Rule 16-819, and the courts have exceeded that baseline by recognizing as

³⁹ MD. R. CTS. J. AND ATTYS. Rule 16-819; MD. CODE ANN., CTS. & JUD. PROC §9-114 (2002).

⁴⁰ MD. R. CTS. J. AND ATTYS. Rule 16-819(c)(2)(A).

⁴¹ *Id.*

a matter of law that beyond *meaningful access*, LEP litigants and witnesses must be able to *fully participate* in legal proceedings.

This statement ensuring full participation is further strengthened by the definition of “interpreter” outlined in the Rule and by the fact that the rule stipulates that qualified interpreters should be used when available. An interpreter is defined as “an adult who has the ability to render a *complete* and accurate interpretation or sight translation without altering, omitting or adding anything to what is stated or written and without explanation.”⁴² An interpreter must be able to provide a complete interpretation in order to allow an LEP litigant to fully participate in the proceedings.

Additionally, if the court determines that an interpreter is needed, “the court shall make a diligent effort to obtain the services of a certified interpreter.”⁴³ If neither a certified interpreter nor an interpreter eligible for certification is available, only then may a court use a non-certified, non-eligible interpreter.⁴⁴ Before the court appoints non-certified interpreters, court personnel must conduct a voir dire to assess the interpreter’s experience with interpreting, level of education, and fluency of English and other languages.⁴⁵ Moreover, the Maryland Judicial Conference Advisory Committee on Interpreters recommended the adoption of a Code of Conduct for interpreters intended to “ensure, to the extent possible, that persons who have limited proficiency in the English

⁴² *Id.* at (a)(2) (emphasis added).

⁴³ *Id.* at (d)(1).

⁴⁴ *Id.*

⁴⁵ MD. R. CTS. J. AND ATTYS. Rule 16-819 (d)(2).

language . . . enjoy equal access to justice as similarly situated persons for whom no such communication barrier exists.”⁴⁶

In addition to federal constitutional protections, Maryland has also adopted a statutory obligation providing interpreters in civil proceedings as well. Md. Code Ann., Cts. & Jud. Proc § 9-114 states:

If a party or witness is deaf or cannot readily understand or communicate the spoken English language, any party may apply to the court for the appointment of a qualified interpreter to assist that person. Upon the application of any party or witness who is deaf the court shall appoint a qualified interpreter to assist that person. The court shall maintain a directory of interpreters for manual communication and/or oral interpretation of deaf persons.⁴⁷

Thus, Maryland law seeks to ensure that all LEP individuals receive interpreters in civil proceedings and has clear guidelines for provision of an interpreter whenever requested or by court appointment.

The trial court’s role in interpreter appointment is clear. Rule 16-819 regulates and standardizes a process to ensure that LEP litigants have access to qualified interpreters during all civil and criminal legal proceedings. The process outlined recognizes at least two separate pathways for LEP individuals to acquire an interpreter. First, the LEP individual can request the services of an interpreter. Second, the court has the authority to appoint an interpreter *sua sponte* to ensure full participation of the LEP individual.⁴⁸

⁴⁶ Volume no. 29 MD REG.1265 (July 12, 2002).

⁴⁷ MD. CODE ANN., CTS. & JUD. PROC § 9-114 (2002).

⁴⁸ MD. R. CTS. J. AND ATTYS. Rule 16-819 (d)(2).

If a party requests an interpreter, or self-assesses herself as LEP, the court shall appoint an interpreter. Alternatively, if a party incorrectly self-assesses herself as more proficient in English than she actually is, and ultimately does not speak English well enough to be understood by counsel, the court, or jury, the court “shall examine a party or witness on the record,”⁴⁹ with questions relating to “(i) identification; (ii) active vocabulary in vernacular English; and (iii) the court proceedings.”⁵⁰ By establishing these two pathways, the Court of Appeals Standing Committee on Rules of Practice and Procedure considered and recognized that some LEP litigants might self-assess their English proficiency incorrectly.

If the rule did not grant the court the ability—or more accurately the obligation—to appoint interpreters, the ultimate outcome of a case might rest upon an LEP individual’s incorrect self-assessment of her English proficiency. While an LEP individual may be able to manage daily interactions adequately with “social English,” she may not know that the English used in legal proceedings is very different. Legal English is particularly technical, replete with terms of art, verbal procedural shortcuts, and other words with highly specific meanings that are unfamiliar to even native English speakers. As a result, an LEP individual asked at the beginning of any legal proceeding whether she is in need of an interpreter may not know the full scope of proficiency required to fully participate and have access that is equivalent to a native English speaker. Without adequate context about the nature of a legal proceeding, and without the court’s ability to

⁴⁹ *Id.* at (c)(2)(A).

⁵⁰ *Id.* at (c)(2)(B).

appoint an interpreter *sua sponte*, an LEP litigant, particularly a *pro se* litigant, could assume “social English” would be enough.

It is clear that through Maryland’s constitutional and statutory provisions, LEP litigants must be provided with the means to have equal access to all civil proceedings. In this way, the State of Maryland has affirmed its belief in full participation of LEP individuals through the provision of qualified interpreters in all proceedings.

III. FULL PARTICIPATION IS NOT POSSIBLE WITHOUT HAVING ACCESS TO AN INTERPRETER AT A DEPOSITION

A. Depositions Are Within the Scope of Civil Proceedings

In the legal context, every question and answer has the potential of being a critical piece of a case or proceeding. Depositions essentially serve a legal function because witness testimony that is given under oath is to be used by the Court.⁵¹ Depositions commence with the deponent taking the same oath that one would take in Court if the testimony were given before a judge or jury. Additionally, a court reporter is present both to administer that oath and also to create a precise stenographic record of all that is said during the deposition. These statements are then published and provided to the parties in a lawsuit.

Depositions and other proceedings can form the foundation for impeachment of a party or witness during trial, or present facts upon which the case may turn. Ideally, all parties and witnesses should understand the *legal* significance of questions asked and potential answers. For represented parties, that is the role of their lawyer: to explain legal

⁵¹ MD. R. RCP. CIR. CT. R. 2-411

process, context, and significance of specific statements and actions to her client in plain English.

However, *pro se* LEP litigants without the benefit of counsel would be entirely dependent on an interpreter for those plain English descriptions. Within the scope of a deposition, the presence of an interpreter would ensure that at a minimum, an LEP litigant would at least understand the questions being asked of her, if not the legal significance of those questions.

B. Importance of Interpretation at Depositions

While the ideal of all parties and witnesses having access to counsel in civil proceedings remains aspirational, in the very least, parties must understand what is being asked of them so that they can answer truthfully and consistently during all stages of a civil proceeding. Therefore, when a party is LEP, it is critical in each instance when that party is asked to respond on the record, that the party has access to interpretation and/or translations if she has self-assessed, or the court has assessed *sua sponte*, that she needs language assistance.

As discussed above, this must necessarily include when an LEP individual is being deposed. In addition, this must include when an LEP individual is asked whether she needs an interpreter at any time during any proceeding. In accordance with the intent of Federal and Maryland law, if an LEP person is asked whether she needs an interpreter, that question and any related explanation should be interpreted in the LEP individual's native language before a negative response should be accepted.

The State of Maryland has been ahead of many of its fellow states by recognizing and expanding its language access provisions to ensure that its growing immigrant and LEP community has equal access to services and programs. In accordance with the spirit and letter of these laws, Maryland courts must ensure that LEP litigants are provided interpreters at all proceedings, including discovery proceedings, to provide LEP litigants with the opportunity to fully participate and have equal access to justice.

CONCLUSION

For the aforementioned reasons, this Court should hold that interpreters are required at depositions for LEP litigants and that waivers of interpreters cannot be ascertained without an interpreter present. Accordingly, *amici* urge this Court to vacate the order of the circuit court and remand the case for a new trial.

Respectfully submitted,

Nadia J. Firozvi
Asian Pacific American Legal Resource Center
1600 K St., NW
Mezzanine Level
Washington, DC 20006
(202) 393-3572

Parag Rajendra Khandhar
Asian Pacific American Legal Resource Center
1600 K St, NW
Mezzanine Level
Washington, DC 20006
(202) 393-3572

Counsel for *Amici Curiae*

May 28, 2009

RULE 8-112 (c) STATEMENT

This Brief was prepared using 13 point Times New Roman with double spacing in the text and one line spacing in footnotes. Md. Rules 8-112(c) and 8-504(a)(8).

CERTIFICATE OF SERVICE

We hereby certify that on this 28th day of May, 2009, a copy of the foregoing

Amicus Curiae Brief was mailed via first class mail, postage prepaid to:

Niti Crupiti
11501 Georgia Avenue
Suite 404
Wheaton, MD 20902

C. Matthew Hill
Public Justice Center
One North Charles Street, Suite 200
Baltimore, MD 21201

Attorneys for Appellant, Rungrudee Nonceeya

Robert P. Floyd, III
Constangy, Brooks & Smith, LLO
4100 Monument Corner Drive
Suite 520
Fairfax, VA 20132

Attorney for Appellee, Lone Star Steakhouse

Nadia J. Firozvi

Parag Rajendra Khandhar