

A Report on Interpreter Services in the Vermont Courts

**Sub-Committee on Court Interpreters
Committee on Fairness and Equal Access
to Justice
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Executive Summary

The Vermont Court system's method of identifying and providing spoken language interpreters is inadequate to provide equal access to justice for persons with limited English proficiency and must be remedied.

Vermont's Growing Linguistic Diversity and Its Courts

Vermont is becoming increasingly diverse. The number of people who entered the United States from another country and made their home in Vermont more than doubled between the 1990 census and the 2000 census. People who do not speak, hear, or understand English are appearing more and more often in court as litigants and witnesses, yet the state court system has no written protocol for identifying and hiring foreign language interpreters or interpreters for the Deaf or hard of hearing. Court clerks are compelled to use a variety of strategies to find someone to interpret and are not always successful in finding an appropriately qualified person. With respect to foreign language interpreters, the problem is difficult to solve because qualified interpreters are not available locally and resources to hire interpreters and to use telephone language services are limited. Interpreters for the Deaf or hard of hearing are more readily available because Vermont has an excellent interpreter referral system for the Deaf and several ASL interpreters specifically certified to work in legal settings.

Consequences of Failure to Address the Issue

Access to justice is seriously diminished when courts use unqualified interpreters or no interpreters at all. Communication is poor, testimony is omitted or summarized, the record is incomplete, and ethical issues go unnoticed. An incorrect interpretation can make nonsense of an otherwise conscientious court proceeding. There is no value to a court reporter's verbatim transcript if it contains an erroneous account of the words of the non-English speaking person. It is also ineffective to work through a nonprofessional interpreter who may interpret slowly or incompletely, need things repeated, or allow misunderstandings to continue until the line of questioning must be started again. Unnecessary appeals and dismissals may follow. Misunderstandings not recognized or resolved could lead to miscarriages of justice. Lack of good interpreting services discourages persons with limited English proficiency from using the courts to meet their obligations and resolve their disputes. The lack of equal access may violate state and federal law.

The Subcommittee's Recommendations:

- Establish policies that clarify that all court users, either with limited English proficiency, or who are Deaf and/or hard of hearing, have effective communication with the court;
- Amend court rules to ensure that court users with limited English proficiency have access to qualified court interpreters.
- Ensure that all limited English proficiency and Deaf and/or hard of hearing parties, witnesses, jurors and other court users have access to qualified spoken language and/or sign interpreters, telephone interpretation services or auxiliary aids at state expense while in the courtroom;
- Ensure that sign language interpreters, auxiliary aids, spoken language interpreters or telephone interpretation services are available for interactions at the window and over the telephone;
- Provide access to sign language interpreters, auxiliary aids, spoken language interpreters or telephone interpretation services for out-of-court proceedings ordered by judges, such as court-ordered psychological exams, mediation, case manager conferences, interactions with the Guardian Ad Litem system and other programs required by the Family Court.

Implement a basic program to improve the qualifications of spoken language interpreters. The program has four components:

1. Interpreter training programs covering court terminology and procedure, ethics, and interpreting skills;
2. A statewide registry of interpreter services and individual interpreters, telephone numbers, languages, and qualifications, to assist courts in locating and appointing interpreters;
3. A code of professional responsibility for interpreters to provide guidance on the proper role of the interpreter and avoidance of common problems; and
4. Education for judges, court staff, and attorneys on best practices for appointing and using interpreters in court and communicating with non-English speakers.

Introduction: Vermont Supreme Court's Committee on Fairness and Equal Access to Justice

On May 3, 1995 the Vermont Supreme Court established, by Charge and Designation, the Committee on Fairness and Equal Access to Justice. As stated by the Court, the Committee's purpose is:

To ensure fairness, equal access to justice, and effective implementation of stated policies in the Judicial Branch against discrimination on the basis of race, sex, religion, nation origin, disability, age, sexual orientation, or socioeconomic status...

The Committee was charged with:

1. Monitoring fairness, access to justice and the existence of bias in the Vermont Judicial Branch and making appropriate recommendations to the Supreme Court, including recommendations for a readily accessible grievance system to address concerns;
2. Advising management on programs and protocols for education and training efforts to assure equal access to the courts and to promote cultural diversity in the Judicial Branch; and
3. Making other appropriate recommendations from time to time to the Supreme Court and the Court Administrator for actions to ensure fairness and equal access to justice in the courts.

Associate Justice Denise R. Johnson was appointed Chair of the Committee. The Committee's work, for the first six years focused on issues of race in the criminal justice system and cognitive interpreting for persons with disabilities. During that time, the Committee received anecdotal evidence of increasing problems in the courts with interpreting for those persons for whom English was not their first language. Unlike states with more diverse populations, such problems, if they existed in the past, were not of sufficient number to compel attention. In 2000 the Vermont Refugee Resettlement Program, a non-profit organization that provides services to refugees and immigrants, set up an Interpreter Task Force whose mission was the advancement of appropriate methods of meeting the communication needs of Vermonters with limited English proficiency

(LEP).¹ The Task Force brought to the attention of the Court the increasing numbers of Vermonters finding themselves involved in the judicial system without the ability to understand the proceedings and without an interpreter qualified to give them the understanding that they need. Noting increasing concern for the equal access to justice of those with limited English proficiency, the Committee on Fairness and Equal Access to Justice undertook an investigation of the problem in Vermont.

The Sub-Committee on Court Interpreters:

In March of 2001 Justice Johnson appointed a sub-committee of the Equal Access to Justice Committee to investigate how the court system serves those Vermonters for whom English is not their first language. Because American Sign Language (ASL) is a language separate from English, the Sub-committee was asked to include services for Deaf and hard of hearing people in its investigation.² The Sub-committee was chosen to provide several areas of expertise. Among the members is a Russian interpreter who provides court interpreter services; an American Sign Language interpreter who has a legal specialist certificate; an Assistant Attorney General, two attorneys who specialize in poverty law and victims' rights; a judge; an investigator for the Human Rights Commission; a training director for the court system; an attorney working as a legislative advocate; and a staff member of the Vermont Refugee Resettlement Program who coordinated interpreting, translating and ESL services. Justice Johnson acts as an ex-officio member of the Sub-committee.

The Interpreter Sub-committee was charged with determining how the Vermont court system provides access to justice to persons with limited English proficiency and to make recommendations to

¹ Persons with limited English proficiency are defined by the U.S. Department of Justice as "individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English." (See U.S. Department of Justice Guidance at <http://www.usdoj.gov/crt/cor/lep/DOJFinLEPFRJun182002.htm>)

² Many Deaf people use American Sign Language (ASL) as their primary means of communication, although some can also read and write English. American Sign Language is a different language from English, with its own grammar and syntax.

Hard of hearing persons are those with sufficient hearing loss such that they need interpreters, assistive listening devices, transcripts, hand-written notes, or some other means of communication to take in what is happening in court. Many hard of hearing persons have lost some or all of their hearing as adults and may have English as their first or only language, but their need for communication access is the same.

correct deficiencies. What the Interpreter Sub-committee found, as well as its recommendations, are reported below.

Sub-Committee Members:

Sheila Reed, Esq., Legislative and Community Advocacy Coordinator, Vermont Children's Forum, Chair

Jon Bourgo, former Interpreter Services Coordinator, Vermont Refugee Resettlement Program

Hon. Brian Burgess, Administrative Judge, Vermont Trial Courts

Martha Csala, Esq., Assistant Attorney General, Vermont Attorney General's Office

Hon. Denise Johnson, Associate Justice, Vermont Supreme Court

Robin Lunge, Esq., former Staff Attorney, Vermont Legal Aid

Jane Miller, Russian Language Interpreter

Catharine Rachlin, Judicial Educator, Vermont Court Administrator's Office

Karen Richards, Esq., Poverty Law Project Director, Vermont Legal Aid

Tracey Tsugawa, Investigator, Vermont Human Rights Commission

Barb Walker, Interpreter for the Deaf, SC:L

Chapter One: The Nature of the Problem

A Mexican farm worker faced a DUI arraignment in a Vermont court. He was reported to be an immigrant illegally within the U.S. and on a federal INS detainer to be deported because of the charge. He spoke no English and the law enforcement officers holding him were under pressure to get him back to jail so that he could be turned over to the INS. The judge, desperate for an interpreter, brought in a Nicaraguan working in maintenance at the courthouse. It became quickly apparent that the maintenance worker did not understand the words he was being asked to interpret. The defense attorney objected and the judge reluctantly stopped the arraignment to find another Spanish speaker.

(Anecdote provided by a Vermont attorney)

A. Increasing Population in Vermont with Limited English Proficiency (LEP).

The Interpreter Sub-committee began by looking at the most recent census numbers. Not surprisingly, Vermont is indeed becoming more diverse. The number of people who entered the United States from another country and made their home in Vermont more than doubled between the 1990 census and the 2000 census.³ In 2000 there were over 3,500 more Vermonters than in 1990 who speak a language other than English at home.⁴ Of that group 27% report that they speak English less than “very well,” up from 24% in 1990. Statistics show increases in the populations of Spanish speakers, Asian or Pacific Island language speakers and Indo-European speakers.⁵ The Vermont Refugee Resettlement Program filled 109 interpreter assignments in Vermont Courts between July 2001 and July 2002. The majority of the requests were in Chittenden County for speakers of

³ From 3,387 persons in 1990 to 8,217 persons in 2000: U.S. Census Bureau, DP -2. Social Characteristics: 1990 and Table DP-2. Profile of Selected Social Characteristics: 2000; Geographic area: Vermont.

⁴ From 30,409 persons in 1990 to 34,075 persons in 2000: Id

⁵ Id.

Serbo-Croatian, Vietnamese, French, Russian, Spanish and Albanian.⁶ If recent census data indicates a trend, the number of people needing interpreters can be expected to increase every year for the foreseeable future.

B. The Interpreter Sub-committee's Investigation and Work.

Members of the Sub-committee reached out to interested persons throughout the state. A meeting was held with the Vermont Association of the Deaf to help determine the experience of Deaf and hard of hearing citizens who find themselves in the court system. Sub-committee members contacted several professional organizations and a number of attorney groups with questions about their experiences and concerns. Court clerks from throughout the state were interviewed with questions about current practices.

In addition to reaching out to interested individuals and organizations for information, the Sub-committee modified, and sent out for comment, two model codes and a terminology guide on interpreters provided by the National Center for State Courts. The documents included, a Code of Professional Responsibility for Interpreters in the Vermont Judiciary (Appendix 6), a Judges' Guide to Standards for Interpreted Proceedings (Appendix 7), and a guide to Interpreting Terminology (Appendix 8). The documents were sent in August 2002, to spoken and sign language interpreters, Deaf people, judicial officers, court managers, Human Services Board Hearing Officers, the Interpreter Task Force, the Vermont Refugee Resettlement Program, the Defender General, the Deputy Defender General, the Organization of States' Attorneys and Sheriffs, and other interested persons. The recipients were asked to comment if desired, with the goal in mind of adopting the model codes as Vermont court policy. The Sub-committee received two negative responses from professionals who felt that the current system is adequate. Several others responded with positive comments and encouraged the Sub-committee to work toward implementing the models as policy.

C. What the Sub-committee Learned about Interpreting.

1. Skills needed for court interpreting.

⁶ See Appendix 1 for details.

It is a common misconception that anyone proficient in two languages can interpret. In fact, interpreting requires a complex set of skills, all of which must be exercised simultaneously. The interpreter must listen, understand, store words and word order, search for the right concepts and words in the second language, reconstruct the message in the second language, and speak and monitor his or her own output, all while listening for the next chunk of dialogue to process. Professional interpreters practice memory skills to break messages into chunks, and use special techniques for remembering names and the order of events.

Courtroom work is a particularly difficult kind of interpreting. It is highly procedural, it moves quickly, and it employs its own dense specialized vocabulary, along with Latin phrases and government acronyms. The results often turn on the nuances of a written document, an exchange of words, or a party's intent. At the same time, testimony often involves street talk and slang in two languages, and a great deal of emotion may be conveyed in a few words. Even professional interpreters who perform well in community settings may be unqualified for the rigors of legal interpreting

2. Recognizing when an interpreter is needed.

Without training, it is difficult for judges and clerks of court to assess a party's language abilities. Techniques in common use, such as asking simple yes/no questions or asking if the person uses English at work or in social settings seriously underestimate the level of language skill needed to cope in court. Basic conversational skills are not enough to waive the right to counsel, to understand the implications of a guilty plea, or to undergo cross-examination. In addition, the person may come from a country that has no such thing as "rights," or may speak a language where answering a question "yes" means only "Yes, I acknowledge your question." Without a trained interpreter to convey the legal concepts at issue, and to pass on the accurate meaning of any response, there is potential for serious substantive misunderstanding.

3. Understanding how to work with interpreters.

A judge in a criminal trial instructed the attorneys to address their questions to the "translator" stating that the translator would then talk to the witness and tell the attorneys what the witness said.

(Anecdote provided by an interpreter)

If judges and/or attorneys do not understand how to work with an interpreter, it interferes with the orderly presentation of evidence in the courtroom and may compromise the record. To create an accurate record, the attorneys and judge should always address the witness directly and the interpreters should always refer to themselves in the third person. Judges must ensure that parties and attorneys speak in an orderly fashion so as to allow interpreters time to properly and accurately interpret witness testimony and the questions and comments of attorneys. The fact that interpreted proceedings take much longer may be frustrating for judges and attorneys. Simultaneous interpretation may seem disruptive and consecutive interpreting may be viewed as time-consuming or annoying. Nonetheless, when using an interpreter, the pace of the proceedings must be adjusted so that the interpreter has adequate time to interpret everything that is said in the courtroom. This ensures that the record will accurately reflect who is speaking at any given time and that non-English speaking participants will have a clear understanding of what transpires during courtroom proceedings. More detailed information about how to work with an interpreter in the courtroom is included in Appendix 6, the *Judge's Guide to Standards for Interpreted Proceedings*.

One party in a child support hearing had an attorney who hired an interpreter. The other party was not represented and had no interpreter. Rather than suspend the proceedings, the judge told the interpreter to interpret for both parties. The interpreter explained that he had been hired to interpret for a client and did not feel that he could do what the court asked. The judge asked the attorney present to allow the interpreter to interpret for both parties. The attorney reluctantly agreed. During the proceedings, the parties began speaking at the same time and the judge chastised the interpreter for not interpreting word by word what was being said. The interpreter explained that it was not possible to interpret simultaneously for two people who are talking at the same time.

(Anecdote provided by Vermont Refugee Resettlement Program)

4. Consequences of using under-qualified interpreters or failing to use interpreters when needed .

Access to justice is seriously diminished when courts use unqualified interpreters or no interpreters at all. Communication is poor, testimony is omitted or summarized, the record is incomplete, and ethical issues go unnoticed. An incorrect interpretation can make nonsense of an otherwise conscientious court proceeding. There is no value to a court reporter's verbatim transcript if it contains an erroneous account of the words of the non-English speaking person. It is also ineffective to work through a nonprofessional interpreter who may interpret slowly or incompletely, need things repeated, or allow misunderstandings to continue until the line of questioning must be started again. Unnecessary appeals and dismissals may follow. Misunderstandings are not recognized or resolved leading to possible miscarriages of justice. Lack of good interpreting services discourages persons with limited English proficiency from using the courts to meet their obligations and resolve their disputes.

A Vietnamese client (U.S. citizen) who had been in this country for several years seemed to speak English well and refused my offer to have an interpreter present. I explained the State's offer and he indicated that he wanted to accept it. We did the change of plea on the record and he went off to probation. Two weeks later he called me to say he hadn't understood that this meant the charge would be on his permanent record. I think this was a result of his not having an adequate understanding of the U.S. court system and probably saying he understood more than he really did.

(Anecdote provided by a Vermont defense attorney)

Too often, courts use relatives, friends, police officers, social workers, or even fellow prisoners as interpreters. These interpreters usually serve without inquiry into their training, their accuracy, or their understanding of their role. Conflict of interest is a particular problem in these instances. An untrained interpreter with connections to the party may be tempted to offer advice, make unauthorized decisions for the party, summarize the testimony, or soften the testimony so as not to offend the judge or the party. All this may occur without the knowledge of the judge or the parties.

During a case manager conference in Vermont Family Court, a non-English speaking husband in a divorce case cursed at his wife in their native language. Both the husband and the wife had lay interpreters with them. The court had no official interpreter. Because they were untrained in legal interpreting, neither interpreter spoke up and interpreted the husband's intimidating language that had been directed at the wife in an official court setting. The attorney for the wife only learned of the language after the hearing. The husband's behavior was not noted and left unchallenged by the court.

(Anecdote provided by a Vermont attorney)

D. The Vermont Judiciary – Current Practices:

There is no written protocol for identifying and hiring foreign language interpreters or interpreters for the Deaf or hard of hearing. Each of Vermont's fourteen counties, with their superior, probate, family and district courts, follows its own practices and finds interpreters wherever they can. Some courts make more efforts than others to fill the need.

With respect to foreign language interpreters, the ad hoc system does not work well in identifying appropriate interpreters because in many languages interpreters are not available. Resources are so limited that the court clerk may be forced to use a variety of strategies to find someone depending on the court's location. The interpreter chosen may be a relative, community member or college student pulled in by a quick telephone call. Furthermore, in civil matters, for the most part, the court does not provide spoken language interpreters; LEP litigants must provide and pay for their own interpreters, when they can, to fully participate in court proceedings. Again, the interpreters who appear voluntarily are usually relatives and friends.

The ad hoc method works better with respect to interpreters for the Deaf or hard of hearing because Vermont has an excellent interpreter referral system for the Deaf and several ASL interpreters specifically certified to work in legal settings. Court managers make every effort to use interpreters with the legal specialist certificates, including out-of-state interpreters. If they cannot find a legal specialist or, as an alternative, a certified generalist interpreter, they generally reschedule (see Appendix 3 for an outline of training and certification requirements for interpreters for the Deaf and hard of hearing).

A call came to the Court Administrator's Office for help in finding a Mongolian interpreter for a case in Chittenden County. E-mail was sent to all district, family and superior courts and to the Vermont Refugee Resettlement Program seeking assistance. The responses suggested were 1) a woman who owns a Mongolian restaurant in South Burlington "as long as it isn't anything too complicated;" 2) a man who lived in Mongolia for a few years and now works with the Vermont World Trade Office; 3) a family who had a Mongolian exchange student a few years ago; or 4) a woman married to a Mongolian but who "probably isn't with him anymore." None of the persons suggested was trained in the specialized skills of an interpreter nor did they have knowledge of court procedures or the specialized vocabulary used in court. Most of them had a very limited capacity to speak Mongolian.

It was impossible to assess the magnitude of the problem of an inadequate foreign language interpreter service for the Vermont Judiciary.⁷ There is no system set up to record statistics on the number of times clerks receive requests for interpreters or find themselves with a person appearing in court who needs an interpreter. One clerk stated that she would appreciate having 'a list to work from' when looking for interpreters.⁸ Only one county has any sort of written protocol and that consists of a one-page outline from the current sitting judge. Moreover, there has been no assessment of the impact on judicial outcomes in cases involving limited English proficient persons where interpreters were not provided for court proceedings.

E. Conclusions and Recommendations:

The Court system's method of identifying and providing spoken language interpreters is inadequate to provide equal access to justice for persons with limited English proficiency and must be remedied. With a few exceptions, persons chosen to interpret are untrained in interpreting, do not understand court procedures, and may not understand legal concepts. Moreover, court staff, attorneys, and judges need additional training on identifying, choosing and working with qualified interpreters so that the standard for interpreters is elevated beyond the very low standard that currently exists.

The Vermont judiciary allocates \$28,000 per fiscal year to cover interpreter services. Because of a lack of data, it is impossible to predict the cost of providing the proposed training and improvements

⁷ The Sub-committee learned that the Vermont Federal District Court also has no formal system for provision of court interpreters for those with limited English proficiency.

⁸ A registry of spoken and sign language interpreters and interpreter referral services currently available anywhere in the state is listed on the Judiciary website. This registry does not include the qualifications of the interpreters nor make any recommendations about their use.

for interpreter services recommended herein. Without question significant additional resources and strong leadership from the Supreme Court will be necessary.

Recommendations:

The Interpreter Sub-committee recommends that the Vermont Supreme Court do the following:

- Establish policies that clarify that all court users, either with limited English proficiency, or who are Deaf and/or hard of hearing, have effective communication with the court;
- Amend court rules to ensure that court users with limited English proficiency have access to qualified court interpreters (see Chapter 3, “Changes to the Rules of Court”)⁹;
- Ensure that all limited English proficiency and Deaf and/or hard of hearing parties, witnesses, jurors and other court users have access to qualified spoken language and/or sign interpreters, telephone interpretation services or auxiliary aids at state expense while in the courtroom;
- Ensure that sign language interpreters, auxiliary aids, spoken language interpreters or telephone interpretation services are available for interactions at the window and over the telephone;
- Provide access to sign language interpreters, auxiliary aids, spoken language interpreters or telephone interpretation services for out-of-court proceedings ordered by judges, such as court-ordered psychological exams, mediation, case manager conferences, interactions with the Guardian Ad Litem system and other programs required by the Family Court.¹⁰

The Sub-committee also proposes a basic program to improve the qualifications of spoken language interpreters. This program follows a model developed by the National Center for State Courts¹¹

⁹ Access to qualified interpreters can include phone interpretation services.

¹⁰ These programs include the special programs ordered as part of the Family Court Project administered in several counties.

¹¹ The National Center for State Courts (NCSC) and a consortium of states are working collaboratively on the development of certification tests and procedures for assessing and improving the language skills of court interpreters. Consortium

and successfully implemented in other states. The program has four components:

1. Interpreter training programs covering court terminology and procedure, ethics, and interpreting skills (see Appendix 2 for details of proposed training and registration of LEP Interpreters);
2. A statewide registry of interpreter services and individual interpreters, telephone numbers, languages, and qualifications, to assist courts in locating and appointing interpreters;
3. A code of professional responsibility for interpreters to provide guidance on the proper role of the interpreter and avoidance of common problems (see Appendix 6 for proposed code); and
4. Education for judges, court staff, and attorneys on best practices for appointing and using interpreters in court and communicating with non-English speakers (see Appendix 4 for details of proposed training for judges and others who work in the judicial system).

The recommendations above are a first step. In the near future The Sub-committee believes that it is extremely important to establish and fund a testing program for certification of spoken language interpreters consistent with the certification required for American Sign Language interpreters, and a specialized legal certificate for spoken language interpreters who work in the court system.

member states share training materials and a bank of interpreter tests in eleven languages.

Vermont has looked into the possibility of joining the NCSC consortium. Initial cost for small states is \$15,000.00. As a consortium member, Vermont would have access to language testing and interpreter certification materials and the consortium would administer and score language proficiency tests for people interested in interpreting in Vermont. However, the consortium does not provide certified interpreters for use by member states. Since our numbers are small and our resources limited, the Sub-committee concluded that at the present time the cost of consortium membership outweighs the benefits.

Chapter Two: Legal Considerations

This chapter reviews the current laws relating to the provision of interpreters and the committee's legal analysis supporting the recommendations, which follow in Chapter Three.¹²

A. Accommodations to the Deaf or hard of hearing

The Americans with Disabilities Act, 42 U.S.C. §12131-12134, and the Vermont Public Accommodations Act, 9 V.S.A. §4500 -4508, both prohibit discrimination against people with disabilities in the court system. Under the ADA and Vermont law, state courts are required to provide auxiliary aids, including qualified sign language interpreters, to ensure effective communication with Deaf and hard of hearing individuals. 28 C.F.R. §35.160(a); 35.160(b)(1); 9 V.S.A. §4502(c)(6).¹³

Vermont law requires the provision of a qualified interpreter to hearing impaired persons who are parties or witnesses in state court proceedings. 1 V.S.A. §331 -338. In criminal proceedings, the rules provide that the costs of the interpreter shall be paid by the State. In civil proceedings, the court may order that the costs "be paid by a party, as justice may require, or it may order that the costs be paid by the state." Id. §335. Title 1 V.S.A. §332 expressly requires the provision of an interpreter to any hearing impaired individual participating in a state proceeding, either as a party or a witness.

¹² Justice Johnson and Judge Brian Burgess, both members of the Sub-committee, endorse the policy position of the report, but decline to take a position on the Sub-committee's legal analysis in this section, as the issue of the State's legal obligations has not been resolved and present issues that may come before them as members of the Judiciary.

¹³ In determining what type of auxiliary aid to furnish, the court must give primary consideration to the disabled individual's choice of an auxiliary aid. 28 C.F.R. §35.160(b)(2). When the public entity does not follow the request of the individual with a disability, it has the burden to prove that another effective means of communication was offered. 28 C.F.R. Part 35 App. A, Subpart E §35.160(b)(1). The alternative accommodation offered must be equally effective. Petersen v. Hastings Public Schools, 831 F. Supp. 742, 753 (D. Neb. 1993). If a less effective means of communication were allowed the overriding purpose of the ADA -- to end discrimination against people with disabilities -- would be slighted. Id.

B. Provision of Spoken Language Interpreters

Vermont court rules largely dictate current practice in the provision of interpreter services for limited English speakers. In criminal cases, our rules provide that “[t]he court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds as provided by law for costs of prosecution.” V.R.Cr.P. 28. Although the Vermont rule is phrased in the permissive “may appoint,” there is a strong argument that the right to spoken language interpretive services for defendants in criminal proceedings at state expense is a necessary due process protection. See, e.g., United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973); Commonwealth v. Pana, 364 A.2d 895 (Mass. 1976); Tehrani v. State, 764 So.2d 895, 898 (Fla. Dist. Ct. App. 2000). Rule 28 also applies to juvenile delinquency proceedings under V.R.F.P. 1(a).

Currently, Vermont law does not require the provision of interpreters in civil cases by the Superior, Family and Probate courts. Under V.R.C.P. 43(f), “[t]he court may appoint an interpreter of its own selection and may fix the interpreter’s reasonable compensation. The compensation shall be paid by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.” The civil rule applies to unmanageable children (CHINS) and termination of parental rights (TPR) proceedings in the Family Court, see V.R.F.P. 2(a)(1), 3(a), as well as abuse-prevention proceedings under V.R.F.P. 9(a)(1). Probate Rule 43(e) allows the court to appoint an interpreter, but is silent on whether the court or the litigants will pay the expense.

There is a growing consensus nationally that LEP civil court users should be provided with spoken language interpreters.¹⁴ Some

¹⁴ The National Center for State Courts has developed Trial Court Performance Standards for Access. Standard 1.3 states “[a]ll who appear before the court are given the opportunity to participate effectively without undue hardship or inconvenience.” The commentary to this Standard shows that the authors had language interpreters and access for individuals with disabilities in mind when writing the standard:

Standard 1.3 focuses on how a trial court accommodates all participants in its proceedings, especially those who have language difficulties, mental impairments, or physical handicaps. Accommodations made by the court for impaired or handicapped individuals include the provision of interpreters for the Deaf and special courtroom arrangements or equipment for blind and speech-impaired litigants. See State Court Rules for Language Interpreters

jurisdictions have mandated court-provided interpreters in civil proceedings¹⁵ and at least two State courts have issued reports recommending provision of interpreters in civil matters at no cost to court users.¹⁶ In the federal courts, the Court Interpreter's Act of 1978 requires spoken language interpreters in any civil proceeding in which the United States is the plaintiff, including all bankruptcy cases. The American Bar Association adopted a resolution in 1997 recommending "all courts be provided with qualified language interpreters in order that parties and witnesses with no or limited command of English...may fully and fairly participate in court proceedings." ABA Resolution, Rep. No 109 (adopted Aug. 1997).

Because the Vermont court system receives federal funds, an argument could be made that the failure to provide qualified spoken language interpreters to LEP court users contravenes federal civil rights laws. In 1964, the United States Congress enacted several pieces of key civil rights legislation, including Section 601 of Title VI of the Civil Rights Act, 42 U.S.C. §2000d, which provides:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

The 9th Circuit has recognized, as national origin discrimination, failure to accommodate foreign-language speakers, which has a discriminatory impact on a discrete segment of the population. Gutierrez v. Municipal Court of S.E. Judicial District, 838 F.2d 1031 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989). In Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court held that the failure to accommodate the remedial language needs of non-English speakers constitutes discrimination on the basis of national origin under Title VI. As a result of this decision, school districts are required to provide

Memorandum available at: <http://www.ncsc.dni.us/is/MEMOS/S99-1242.htm>

¹⁵ Cal. Code Civ. Proc. §116.550; Ind. Code Ann. §34-1-14-3 (1998); KS ST §60-243, 75-4351(c) (2000); 5 M.R.S.A. §51; Mass. Ann. Laws Ch. 221, §92 (2001); Minn. State. §546.42 (1996); Ohio Rev. Code 2311.14; Or. Rev. Code §45.273 et seq (1996); Utah Code of Judicial Admin. Rule 3-306 §12(A); Va. Code Ann. §8.01-384.1:1 and Wash. Rev. Code §2.43.02 (1996).

¹⁶ "Improving Interpretation in Wisconsin's Courts" October 2000, available at http://www.courts.state.wi.us/circuit/pdf/Interpreter_Report.pdf; "Final Report" of the PA Supreme Court Committee on Racial & Gender Bias in the Justice System, available at <http://www.courts.state.pa.us/Index/supreme/BiasReport.htm>.

remedial language instruction to non-English and limited English students in order to ensure equal access to the educational opportunities provided by the district. The rationale of the Gutierrez and Lau decisions may apply equally to other types of services offered by programs or entities that receive federal financial assistance.

The State of Vermont judiciary, and more specifically the Supreme Court, receives federal funds through the U.S. Department of Justice (DOJ) and therefore are classified as a program receiving federal financial assistance.¹⁷ See 42 U.S.C. §2000d-4a(1)(A) (defining “program or activity” broadly to include “[a]ll of the operations of ... a department, agency, special purpose district, or other instrumentality of a state or of a local government . . . any part of which is extended federal financial assistance”); Thomlinson v. City of Omaha, 63 F.3d 786, 789 (8th Cir. 1995) (noting that definition of program or activity under Title VI “is inclusive,” and could for example, include all of the operations of a mayor’s office where certain city departments or agencies receive federal funds).

Pursuant to Executive Order 13166, 65 F.R. 50121 (Aug. 16, 2000), all federal departments and agencies were required to promulgate policy guidance to improve access of LEP persons to federally funded services. The DOJ has adopted a final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibitions Against National Origin Discrimination Affecting Limited English Proficient Persons, otherwise known as the DOJ Recipient LEP Guidance [hereinafter the DOJ Guidance].¹⁸ In assessing a recipient’s obligations with regard to the provision of interpreter services and translated materials, the DOJ Guidance recommends a balancing of four factors: (1) the number and proportion of LEP persons likely to be encountered; (2) the frequency of that contact; (3) the nature and importance of the service provided by the program to people’s lives; and (4) the resources available to the recipient and costs. The Sub-committee has reviewed and considered the DOJ Guidance in making its recommendations, including these factors. Regardless of whether each factor is relevant to the Vermont experience, or is legally binding, the Sub-committee recommends the full availability of interpreters in Vermont courts.

¹⁷ Information posted on the website <http://www.statejustice.org/maps/usamap.htm>, indicates that the Vermont Supreme Court has received grants of approximately \$372,000 through the U.S. Department of Justice from 1989 to the present, with \$43,045 received in 2001.

¹⁸ The DOJ Guidance can be obtained at:
<http://www.usdoj.gov/crt/cor/lep/DOJFinLEPFRJun182002.htm>

Vermont state law also prohibits a place of public accommodation from refusing, withholding from, or denying to a person any of the accommodations, advantages, facilities and privileges of the place of public accommodation based on race, creed, color, national origin, marital status, sex or sexual orientation. 9 V.S.A. §4502. Application of the Lau v. Nichols decision and Title VI concepts to this State statute may yield a similar conclusion -- that failure to provide interpreters has a disparate impact on individuals based on their national origin and denies them the privilege of using the court system to resolve their criminal and civil legal problems.

LEP court users also may be entitled to the protection of Article 7 of the Vermont Constitution, the Common Benefits Clause. The Vermont Supreme Court has stated, "statutory exclusions from publicly-conferred benefits and protections must be 'premised on an appropriate and overriding public interest.'" Baker v. State, 170 Vt. 194, 206 (1999). In Baker, the court identified several steps to follow when a statute is challenged under Article 7. First, the group disadvantaged by the law must be defined. Id. at 213. Second, the government's purpose in creating a classification that excludes some members of the community must be determined. Id. Finally, whether that classification is "reasonably necessary to accomplish the State's claimed objectives" must be ascertained. Id. at 214. Applying these criteria to the current provision of LEP services may yield the conclusion that our current rules are constitutionally deficient.

Vermont law recognizes that civil cases can involve significant due process issues. For instance, the Court has recognized a right to counsel in CHINS and TPR proceedings because the fundamental right to parent one's children is at risk. See, e.g., In re T.R. & L.C., 163 Vt. 596, 598 (1994). In child support enforcement cases, due process requires the appointment of an attorney at state expense where incarceration is at issue. Choinier v. Brooks, 163 Vt. 625 (1995). In both of these types of cases, appointment of an attorney for an LEP individual would be meaningless if an interpreter was not also appointed. If the individual is unable to communicate accurately and effectively with both court and counsel, the appointment of counsel will not safeguard the fundamental interests at stake. In addition, the Court has required "meaningful access" to the relief from abuse process. State v. Mott, 166 Vt. 188, 192-93 (1997). An LEP individual cannot have meaningful access to the process without a qualified interpreter to assist in presenting the evidence.

Although case law has recognized the important interests at stake in a small subsection of civil cases, other civil cases (as noted) also present fundamental issues. Cases where an LEP defendant is summoned to court, such as in eviction cases, raise serious questions about fundamental fairness where interpreter services are not provided by the court. Both sides of the proceeding should be able to understand and participate in the court process equally and without regard to English language ability. Cases solely involving claims for monetary damages were also discussed by the Sub-committee, which concluded that the consequences were sufficiently significant, and the demand for interpreter services sufficiently limited, that the principle of providing equal access should be applied without exception.

The Americans with Disabilities Act requires equal access in communication so that disabled persons may fully participate in court proceedings and protect their rights. 42 U.S.C. §12131-12134. The Sub-committee recommends that speakers of foreign languages should be accorded equivalent access. The purpose of the interpreter is to ensure the accountability and fairness of the court proceeding, and that is a fundamental cost of government services to be borne by all.

Ensuring that all court users are able to communicate with judges, jurors, and court staff is a basic precondition to providing equal access to justice and the judicial process. LEP individuals are often unable to present the merits of their cases or understand the court's expectations and orders without the availability of interpretation services. These services are therefore essential to ensuring fairness and justice.

Non-criminal proceedings may adjudicate critical interests such as protection from abuse; child custody, support and divorce; dependency, termination of parental rights and adoption; eviction and housing or health code enforcement; mortgage foreclosure; and eligibility for unemployment compensation, worker's compensation, mortgage assistance and welfare benefits. Even basic lawsuits for damages may present potentially life-altering issues involving financial security, property, and assets. In addition, some civil orders may result in criminal charges if violated, such as relief from abuse orders. Finally, a growing number of parties are representing themselves in court; if they also appear without an interpreter, the misunderstandings and frustrations can be exponential. Although judges currently have the statutory authority to appoint interpreters at state expense, most courts do so infrequently in civil and family cases.

Chapter 3. Changes to the Rules of Court

The Sub-committee recommends that the Vermont Supreme Court make the following changes to the rules of court:

A. Amend V.R.E. 604, V.R.C.P. 43(f), V.R.Cr.P. 28, V.R.P.P. 43(e), and add a new Rule for Family Proceedings, to require qualified interpreters whenever possible.

The Sub-committee recommends to the Supreme Court that Rule 604 of the Vermont Rules of Evidence be amended to set forth procedures for trial courts to follow when providing a court interpreter. Vermont Rule of Evidence 604 now reads:

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

The only requirement in the court rules regarding qualification of interpreters is a cross-reference to the qualification of expert witnesses, found in V.R.E. 702. The Sub-committee believes that tying Rule 604 to Rule 702 does not make sense for two reasons. First, while interpreters' qualifications need to be explored by the courts, interpreters are not expert witnesses, nor should their expertise be tested by the same rules. Second, interpreters have very specific qualification criteria that apply to them because of the unique job that they perform. The Sub-committee believes that Rule 604 should contain specific provisions concerning qualification of interpreters rather than making the reference to expert witness qualification.

The rule, as amended, should start with the presumption that the court will use a qualified interpreter if one is available in the language needed. This ensures that the interpreter will have the language skills, legal knowledge, and understanding of the code of ethics necessary to provide adequate services to the court and to protect the rights of the person with limited English proficiency. The rule should require the courts to make diligent efforts to find a qualified interpreter appropriate for the nature of the proceeding. For example, the rule should recognize that certain kinds of proceedings, such as trials, couldn't be undertaken without a qualified interpreter

present, even if that requires the court to hire a non-local interpreter. On the other hand, an arraignment or other short proceeding might be facilitated through the use of a telephone interpreter if the court is unable to find a qualified local interpreter for reasons summarized on the record. In deciding between these alternatives, the court should consider the seriousness of the case, the nature and duration of the proceeding, and the need for timeliness.

V.R.E. 604 should be further amended to be consistent with H-79, a bill passed by the 2004 Legislature. The bill, which adds a section at Title 1 V.S.A.sec.339, prohibits an interpreter from disclosing or testifying to a communication made by a person to an interpreter in his or her capacity as an interpreter for a hearing impaired person or any information obtained by virtue of serving in the capacity of an interpreter. The bill provides for a study committee to review the efficacy of including communications made by persons who lack proficiency in English (see Appendix 5 for full text of bill as passed). Protections against disclosure are important for several reasons.

Interpreters are bound by a code of ethics that prohibits publicly discussing, reporting or offering an opinion concerning a matter in which they are engaged, whether or not the information is otherwise privileged or confidential. Violation of confidentiality can be a basis for revocation of a person's certification. This is so whether or not the individual is subpoenaed to testify. Thus an interpreter who is called as a witness is placed in the untenable position of either violating the code of ethics and risking loss of certification or refusing to testify after being subpoenaed. As a result, interpreters are reluctant, and sometimes unwilling, to take calls in situations that are likely to end up in a court proceeding, such as domestic violence police calls or SRS investigations.

Moreover, in purely practical terms, good interpreters make bad witnesses. Interpreting accurately demands great concentration and exercise of short-term memory, which means that the interpreter's focus is on providing an accurate interpretation *at that moment in time*. (See Chapter One, Section C (1) for a more in depth description of these skills). All of the energy goes into the moment, which means that it is next to impossible after the fact, to remember exactly what was said.

Finally V.R.E. 604 should be amended to make clear that use of an interpreter in the course of an otherwise privileged communication

does not waive the privilege. Such language already exists for Interpreters of the Deaf and Hard of Hearing. See 1 V.S.A. §334. This same protection should apply to interpreters of spoken languages.

The Sub-committee recommends that Rule 43(f) of the Vermont Rules of Civil Procedure and Rule 28 of the Vermont Rules of Criminal Procedure also be amended to reference V.R.E. 604, as amended, to assure that all superior and district court judges appoint only qualified interpreters. In addition, Rule 43(e) of the Vermont Rules of Probate Procedure should be amended, not only to reference V.R.E. 604, as amended, but also to broaden the rule to include the appointment of interpreters for people with limited English proficiency. (V.R.P.P. 43(e) currently provides only for the appointment of interpreters for people with “hearing disorders or other communications disabilities.”) Finally, the Sub-committee recommends a new Rule for Family Proceedings concerning the selection and appointment of interpreters in family court proceedings.

All of the above rules should be amended or written to make clear that the appointment of an interpreter for persons with limited English proficiency is mandatory as opposed to permissive. For the reasons stated in Chapter Two, Legal Considerations, the Sub-committee recommends that the rules specify that the cost of the interpreter services shall be paid by the state.

B. Implement an Interpreter Code of Professional Responsibility

A Code of Professional Responsibility for Court Interpreters (Appendix 5) is attached to this report. Interpreters, judges, and attorneys are often unaware of the proper role of the court interpreter and the professional responsibilities it demands. The purpose of the Code of Ethics is to articulate a core set of principles to guide the conduct of a court interpreter and to educate judges in the level of conduct to be expected. The Code addresses accuracy and completeness, representation of interpreter qualifications, impartiality and conflict of interest, professional demeanor, confidentiality and restriction of public comment, limitations on giving legal and other advice, communicating interpreter limitations to the judge, reporting ethical violations, and professional skills development.

The Code of Ethics will serve as a basis for education and training. Interpreters who appear on the State’s roster of registered

interpreters will be required to sign an affidavit agreeing to abide by the interpreter Code of Ethics.