

September 29, 2014

Joint Working Group for California's Language Access Plan
Judicial Council of California
LAP@jud.ca.gov

Re: Comment on Draft Strategic Plan for Language Access in the California Courts
dated July 29, 2014

These comments supplement our April 15, 2014 comments submitted during the public comment period.

Chief Justice Tani G. Cantil-Sakauye has identified language access as one of her highest priorities, and tasked the LAP Working Group with developing a comprehensive, statewide Language Access Plan (LAP). The Chief Justice describes the purpose of the plan is to provide "a consistent statewide approach" that ensures "full, meaningful, fair, and equal access to justice for all Californians."

We commend the Chief Justice for her commitment to language access and the working group for the quality and scope of this work. We want to acknowledge as a starting point that we are in agreement with and supportive of many aspects of the plan and that many of the recommendations are sound and will be useful and practical as the Judicial Council and courts move to improve and expand language access in the California court system.

We strongly support the need for a consistent, statewide approach, and our comments are aimed at strengthening the plan toward that end. Our focus in these comments is on areas that we submit need adjustment, and changes that will make the plan effective and ensure that language access services are meaningful and consistently available throughout the court system.

1. Consistent, statewide, and mandatory standards are needed to achieve the goals of the LAP.

Providing comprehensive, consistent and meaningful language access is a complex and demanding goal. It is unrealistic to expect local courts to prioritize and implement this plan absent clear and mandatory guidelines and timelines. The bottom line is that things get done when it's clear to all concerned that they have to get done. Achieving consistent and high quality services will require consistent standards and a shared commitment to those standards from the local courts, the Judicial Council and the legislature.

We recommend a general revision throughout the document so that the LAP discusses what courts "shall" or "will" do rather than stating what they "should consider" or "should" accomplish. We also recommend that the Judicial Council adopt rules of court to support and strengthen the plan by making it enforceable and making the courts' responsibilities unambiguous.

Making language access standards mandatory will provide the clear guidance that judges and court staff need to ensure implementation is effective. It was gratifying to hear this expressed in the public comments and listening sessions by a few court administrators, who stated administrators and judicial officers need clear rules to follow, and recognized their job actually will be easier if the LAP requires compliance and provides clear guidelines that courts must follow.

Many judges, administrators and management personnel in local courts understandably do not have the expertise and knowledge needed to implement comprehensive and effective language access services or to correct long-standing practices that are contrary to the goals of the LAP. Historically, without clear mandates, courts have not prioritized language access when faced with competing challenges.

The current state of affairs, as reported in public comment and listening sessions, demonstrates that local discretion results in varying degrees of access and quality of service, and has allowed practices that deny language access to LEP court users to continue, with great variation from county to county and even within a county. Providing discretion to local courts and making the plan a set of guidelines rather than requirements will predictably result in uneven implementation and in some courts failing to adequately prioritize language access.

Establishing language access standards as requirements in the statewide LAP, with corresponding rules of court, will ensure language access goals are met. This will also provide the momentum required to get necessary support and resources courts will need, and ensure the level of attention and urgency that will be needed to go from good intentions on language access to actual provision of full and meaningful access to LEP court users to the broadest extent possible.

2. Phase in by 2020 and Introductory Discussion

We are concerned with the five-year time frame for the phased-in implementation and we would submit that a three-year process is feasible. We also find the discussion of the plan and the challenges posed in the introduction (section a) to be somewhat counterproductive.

The Department of Justice notified the state courts in 2010 that Title VI of the Civil Rights Act of 1964 requires courts receiving federal funding to provide competent interpreters in all court proceedings and to provide language access services at all points of contact. Lack of funding, or fear of impacts on competing needs is not a valid reason to continue violating the civil rights of Limited-English Proficient Californians whose rights are at risk as they seek justice in the courts system.

Courts have delayed this process too long already in favor of other priorities. Courts should be directed to continue covering all case types they have been covering, to begin immediately providing services in as many additional case types as possible, and to document unmet needs and obstacles to full compliance.

A priority list for case types should be provided as a guide, but local courts should be directed to do as much as they can without delay. We believe that by taking this approach, many courts will discover they are able to cover all civil cases in a much shorter time frame.

See CFI public comments dated April 15, 2014 (pp. 5-9) for facts and discussion supporting our suggestion that courts can do more with existing resources and that the concerns about funding and the supply of interpreters do not justify delays in the implementation of changes.

We also recommend a revision of the introductory section (a) and the beginning of section (b) of the plan to communicate a more proactive and less qualified commitment to achieving the goal of full and meaningful access (pp. 8-11).

The very first sentence of the introduction's *Summary of the Plan*, section (b) communicates a tentative posture toward the plan goals:

California's Language Access Plan proposes a measured, incremental process to expand and enhance language access [...]. (p. 11)

This sentence and the discussion of challenges that precedes it in section (a) do not communicate a sense of necessity and commitment to achieve the plan goals. These sections should be revised to shift the focus to the diversity of the state's population, the impacts on communities and the judicial branch of not providing access, and the importance of implementing a comprehensive and effective language access plan to protect fundamental rights and fairness in our judicial branch.

We would also recommend adding some discussion of the Department of Justice investigation and Title VI requirements to the introduction as factors that support a strong commitment to the plan. Finally, we suggest it may also be helpful to add information about historical public support for language access as necessary to ensure the fair administration of justice in California.

3. Discussion of Funding and Challenges to Expansion

We are concerned with the focus in the LAP document, starting with the introduction and continuing in sections throughout, on the challenges posed by expansion and the repeated suggestion that the goal of providing language access is in competition with other needs and priorities in the courts. Following are a number of excerpts to illustrate:

Courts must confront these challenges with limited resources, having endured severe budget cuts during the past several years that have crippled their ability to maintain adequate levels of service, much less increase language access services to meet the growing need.
(Emphasis added, p.9)

Fundamental to California's Language Access Plan is the principle that the plan's implementation will be adequately funded so the expansion of language access services will take place without impairing other court services. (Emphasis added, p.11)

The recommendations in the plan also set the framework for identifying the additional funding that will be needed to enable the courts to meet the increased demand on court resources that will arise from the branch's commitment to language access without sacrificing any other court services. (Emphasis added, p. 14)

Expansion of language services [...] poses fiscal demands that must be satisfied by efficiencies in the provision of language services and, most importantly, by additional funding appropriated for that purpose and not by shifting already scarce resources from other court services. (Emphasis added, p.18)

In order to complete the systematic expansion of language access services, the Judicial Council will (1) secure adequate funding that does not result in a reduction of other court services [...]. (Emphasis, added p. 73)

The repeated framing of funding concerns in this way creates the impression that providing language access, as required by law, poses a threat to other court services. While this is an understandable and valid concern, the point should be made once, and should not color every mention of funding needs. We recommend reducing this emphasis by deleting the underlined text above.

This narrative, the idea that providing language access takes away from other court needs and priorities, does not contribute to achieving the LAP goals. This way of thinking has long led courts to defer language access needs. The result that we have commented on many times is that LEP parties continue to be denied access to the courts even when funds and interpreters are available.

Moreover, this framing invites doubt about the feasibility of the goals, and may be used to justify continuing delays in reaching the goals of the LAP. This focus could also be perceived by stakeholders and other interested parties as a lack of commitment to carry out the goals of the plan. This narrative does not convey confidence in the plan, or urgency for legislators to provide additional funding or for courts to implement changes.

The purpose of the LAP is to identify how courts will expand and improve language access. We urge the LAP working group and the Judicial Council to reject the perspective that qualifies the commitment to language access by focusing on challenges and the need to avoid impacts on other court needs. This line of thinking has kept language access too low on the list of priorities and failed to ensure the courts are fully accessible to LEP court users. The LAP should mark a clear departure from this way of thinking.

We appreciated the public comments of legal aid providers who said that, despite their own funding challenges and deficits, they have come to treat language access as something that is simply not optional. It is as fundamental as paying the electric bill. It must be done or the operation is not functional and not serving its purpose. This is the adjustment in thinking that is crucial if the courts are to achieve the goals of the plan and satisfy the requirements of Title VI, and the LAP should reflect this attitude.

The courts should seek increased funding for interpreter services because this is an area the legislature has not cut and has historically been sympathetic to funding. The need to comply with Title VI and the actual expansion of services as required by law make a compelling case for new funding.

We note the LAP document emphasizes in numerous comments that courts have suffered cuts and funding deficits, without mentioning that the budget for interpreter services has not been cut, or that the courts have had surpluses in the interpreter budget for nearly a decade and chose for many years to divert those funds to other priorities. See CFI Public Comments dated April 15, 2014, p. 5 for more detail.

The first quote above (p. 9 in the LAP) likewise gives the impression that there has been a shortage of funding for language access services, which is not the case in terms of the interpreter budget. The LAP document thus gives the inaccurate impression that there has been a chronic shortage of funding to provide language access. This should be corrected.

The LAP describes the intent of the plan is to "set forth useable standards for the provision of language access services across the superior courts statewide, *while allowing local courts to retain a measure of control over the allocation of their internal resources and the terms of their labor agreements.*" (Emphasis added, p. 11)

Interpreter services are funded through a distinct line item (Program 45:45) in the judicial branch budget that is specifically allocated by the legislature and restricted for reimbursement of interpreter services. This budget can thus be clearly distinguished from other court needs and operations. The plan does not mention that the interpreter services budget is not part of the individual courts' operating budgets, but is funded on a reimbursement basis from the statewide fund. This should be clarified so that it does not give the impression that all language access services will have to be paid from local court budgets.

Perhaps all language access improvement costs should be funded on a reimbursement basis, and the plan should recommend that the Judicial Council establish a separate budget item for support of language access initiatives in the branch, in addition to Program 45:45 that funds interpreter services. The council could fund a new budget item through general funds, modernization and improvement funds, new funding from the legislature, and grants sought for this purpose. This would avoid courts seeing the costs for language access as competing with other demands within their local operating budgets. Courts could develop local plans for necessary changes and improvements and apply for grants from the Judicial Council. The Judicial Council could also develop centralized projects to provide language access support to all the courts in areas where a centralized approach would create efficiencies and consistent quality, such as training, informational materials and kiosks, and translations.

4. Include and involve interpreters and their organizations as partners in language access management and the implementation of the plan.

We appreciate the fact that the working group included interpreters and that a consultant to the working group is an interpreter and attorney. We also commend the working group for the inclusive nature of the process, including public hearings and listening sessions with stakeholders.

At the same time, we note that in three public hearings discussing many aspects of language access, there was only one interpreter among the approximately 29 panelists invited to participate (the fourth bullet point on page 16 should be corrected to remove “and representatives”). This illustrates what we see as an ongoing challenge: the system does not fully appreciate the value of our expertise or see interpreters as key contributors in the process of identifying solutions and realizing language access goals.

The LAP does not recognize the role interpreters can play, beyond the courtroom, in the expansion and improvement of language access. It does not include recommendations to integrate the expertise of interpreters to develop language access solutions and implement and manage language access services.

The plan does recognize the high level of expertise required to interpret in court proceedings and strongly promotes the use of certified interpreters. Beyond that, however, the LAP primarily recommends seeking alternative methods of delivering language access outside of courtrooms, rather than recommending broadening the areas in which certified interpreters can contribute to language access in the court system.

Interpreters' expertise can be applied, however, to meet a number of other needs identified in the language access plan, including:

- training judges and other court staff on working with interpreters and language access generally;
- language specific training for bilingual staff;
- translation work (by those interpreters with appropriate qualifications);
- remote interpreting for services and points of contact outside of court proceedings;
- managing and administering interpreter services;
- implementing the language access plan;
- work with the Judicial Council to develop agreed-upon glossaries of legal terms;
- mentoring and supervising interns in formal training programs; and
- development of best practices and efficiencies.

Although not all certified interpreters are trained translators, many are, as noted in the draft plan. The LAP should recommend that courts develop interpreter/translator positions, and hire or promote properly qualified individuals to those positions.

More fully utilizing the services and expertise of the existing workforce of trained professionals would create efficiencies and better use of existing resources, in keeping with the goal of limiting the need for new funding.

5. Language Access Outside of Courtrooms: the role of bilingual staff, interpreters, and volunteers

Goal III. Provide Language Access Services at All Points of Contact Outside Judicial Proceedings. (p.45-51) and Goal V: Expand High Quality Language Access Through the Recruitment and Training of Language Access Providers. (p. 58-66)

Although the plan includes recommendations to use certified and registered staff interpreters for some out-of-court interpreting (recommendations 28 and 29), the focus of the overall discussion and

recommendations is on using alternatives to professional interpreters for contacts outside of court proceedings, such as self help centers and public counters.

The court should provide qualified interpreters for all court proceedings. However, a majority of interactions LEP court users have with the courtroom will be outside the courtroom and will be handled by bilingual staff or volunteers. (p. 59)

We do not believe this approach is in keeping with the LAP goal of providing consistently available and competent services to LAP court users. While we agree that volunteer programs can be helpful as supplemental services where available, we do not think this is a practical or realistic solution to provide consistent services that are *reliably* available.

Volunteer programs by their very nature rely on whoever volunteers (choice of languages will be limited) and when these individuals are available. While the Justice Corps program has reportedly been successful in providing language access at self-help centers, the program is currently in place only in San Diego, Los Angeles and the Bay Area. This model will not be practical for courts statewide and does not provide a *regularly available* resource in all languages required.

The plan also notes the importance of ensuring volunteers are competent:

At the core, it is vital that there be appropriate screening, monitoring, supervision, and training of staff and volunteers to ensure the quality and competency of the services provided. (p. 48)

The resources needed to recruit, train and manage volunteers on a court-by-court basis, as would be necessary to ensure adequate quality of assistance, would be better spent to provide in-house services. A combination of bilingual staff and in-person and remote staff interpreters will better ensure reliably available, quality services, and can be managed and deployed with greater predictability and potential efficiencies.

Given the volume of need for language access in California, we suggest that less emphasis should be placed on using volunteers, and the focus should instead be on integrating staff interpreters and bilingual employees into a systematic and institutional approach to ensuring courts statewide are accessible to LEP court users. This could be accomplished at a modest cost by having staff interpreters available to provide remote interpreting statewide for out-of court needs (recommendation 30). We also recommend that language access at self-help centers should be provided on-call by in-person staff interpreters in the top five languages that a court serves, and remotely in other languages.

Court personnel should be trained to understand the range of options for providing language access in a variety of situations (from the metal detector to traffic windows to self-help) and should know how to seek assistance depending on the language and communication need. In addition to providing more reliable language access, a systematic plan for these services would yield greater efficiencies as well, and would not require as many resources or as much administration at the local court level.

6. Use of Family Members and Friends

Goal II: Provide Language Access in all Judicial Proceedings
D. Considerations when appointing interpreters (page 40-45)

We strongly oppose the recommendation related to use of family members and friends in court proceedings (17, p. 43). The last paragraph of the issue discussion does a good job of describing the reasons family members should not be used (p. 43). Elsewhere the LAP describes family members and

friends as “unqualified” and “entirely inappropriate” interpreters (p. 35). Recommendation 17 is not consistent with the goals of the LAP and would appear to condone the use of family members and friends. See additional concerns and recommended revision below in Section 13: Additional Comments on Specific Recommendations.

7. Mentoring

Mentoring programs are recommended in the plan as a recruitment method (recommendation 45). CFI agrees that mentoring programs should be implemented as a training and recruitment tool for individuals seriously preparing for certification and a career in interpreting. Participants should be selected and screened based on standardized criteria. They should receive formal training, and should have opportunities for observation and increasing levels of practice with careful supervision and feedback.

Mentoring programs should not be used to fill basic language access needs in the court system or as a source of free labor. Language access services need to be of predictable quality and regularly available; mentoring and volunteer programs are not suited to provide the necessary level of reliability and service.

In our experience, courts have not implemented appropriate training programs, but instead have sought to put “interns” to work as free labor covering in-court proceedings in civil matters, without appropriate training, mentoring and supervision by a certified interpreter. We are receptive to working with the courts to establish appropriate mentoring programs with the features described above, for the purpose of increasing the ability of prospective interpreters to become certified and increase the pool of qualified interpreters.

8. Recruitment

Goal V: Expand High Quality Language Access Through the Recruitment and Training of Language Access Providers (pp. 58-66)

The California Federation of Interpreters agrees that recruitment is necessary to ensure that adequate numbers of interpreters are available in future years. We also agree with recommendations to recruit more bilingual employees and place these employees at key points of contact where they can serve as a valuable resource.

The draft plan mentions CFI’s position on interpreter availability in a manner that is oversimplified and out of context (at p. 62, Recruitment, paragraph 1). We request that this be revised. As written, the plan could give the false impression that we do not think recruitment is necessary.

To clarify our position, we recognize there is a shortage of interpreters in some languages and in some geographic areas. The focus of our analysis on interpreter availability (see April 15, 2014 Public comments, pp. 3-5) is that the shortage of interpreters has been steadily improving as the employment system has created greater job opportunities and benefits, and the use of non-certified, non-registered interpreters has declined significantly. We have expressed the concern that the shortage of interpreters has tended to be overstated and assumed, and not based on an analysis of actual numbers, changes over time, or the marketplace of supply and demand by language. We have also made the point that this perception of a persistent, generalized shortage is not conducive to sound policy-making, and should not be used as an excuse for replacing in-person interpreters with remote interpreters.

While we are in general agreement with the recommendations in the plan for recruitment, we note that completely absent from the recommendations is any mention of the need to provide attractive job opportunities and a career path for interpreters in order to attract skilled individuals to this work.

In 2000 the Judicial Council included in its strategic planning the goal of increasing interpreter pay to match the federal rate (currently 37% higher for the same work). Once the employment system was put into place in 2003, interpreter salaries were subject to collective bargaining, with the Judicial Council setting rates for contract interpreters. In the past decade interpreter pay has lagged, however, and the council should renew the goal of increasing pay to federal levels.

The regional collective bargaining process has proven to be impractical, expensive and unproductive. Parties on all sides of the process have expressed dissatisfaction with regional bargaining. It has not been a forum for making collaborative improvements in language access services. For example, proposals from both sides of the table to expand services to include translation work, or to make the cross assignment system more functional, have not yielded results and have been tabled. Additionally, the courts have not created promotional opportunities or implemented salary steps for interpreters, changes that would help the courts to attract and retain highly skilled interpreters.

The LAP should include additional recommendations to:

- Improve interpreter compensation for independent contractors and employees, using the federal per diem rate and salary levels as a point of comparison;
- Conduct a salary study of the interpreter market place in California, and the level of education, skills and training required to achieve certification.
- Establish higher pay levels for languages that are in high demand with a limited supply of interpreters.
- Establish full time regional positions, including mandatory cross assignments as allowed under Govt. Code 71810(c), at a higher salary in languages that are in high demand with a limited supply of interpreters.

9. Video Remote Interpreting

Goal II: Provide Language Access in All Judicial Proceedings, Section C: Use of Technology for Providing Access in Courtroom Proceedings (p. 36) & Appendices B and D

We agree with the following objective in the plan with regard to technology:

Technologies such as video remote interpreting (VRI), telephonic interpretation, web-based access, multilingual audiovisual tools, and others have an important role to play in the statewide provision of language access. However, court must exercise care to ensure that the use of technology is appropriate for the setting involved, that safeguards are in place for ensuring access without deprivation of due process rights, and that high quality is maintained. (Emphasis added, p. 19-20)

The overall message on remote interpreting in the LAP does not support the intent of the underlined text, however. The draft LAP provides far too much discretion for use of video remote interpreting and experimentation by local courts, and does not adequately define appropriate use of VRI. It does not adequately safeguard LEP rights.

The LAP should recommend that the Judicial Council adopt statewide, mandatory standards for VRI, with stakeholder input and participation, prior to implementation of VRI use. The LAP should also recommend that VRI use for court proceedings be tested in a pilot program and subject to rigorous review before it is expanded for broader use.

These standards must include:

- strong minimum technology requirements that provide for high quality audio and video and adequate bandwidth;
- an unambiguous preference and priority for providing in-person interpreters;
- clearly defined limitations on the proceedings and circumstances appropriate for remote interpreting, limited to matters where providing competent language access is otherwise impossible.

The recommendations also do not state explicitly the intent that VRI be provided using staff interpreters primarily. A statement or recommendation should be added to ensure courts understand that interpreter services using VRI are subject to all provisions of the Interpreter Act and the regional MOUs.

As written, the appendices and recommendations on VRI in the draft LAP are grossly inadequate to ensure careful and responsible implementation of VRI and will not safeguard LEP rights by ensuring VRI use is appropriately limited.

Proceeding in this fashion will allow misuse of VRI and will not advance the fundamental goals of the LAP, nor is this approach in keeping with the Department of Justice's strong suggestion that VRI be implemented responsibly in consultation with interpreter organizations. Moreover, this approach risks repeating mistakes that have led to harsh criticism of the judicial branch for failing to effectively manage technology needs and moving ahead with ineffective technology initiatives that waste resources and delay more appropriate solutions.

The discussion of remote interpreting in courtroom proceedings does not provide a balanced description of the pros and cons of remote interpreting. Consistently, statements about the perceived benefits of remote interpreting are stated as factual and definite, whereas statements about perceived harms or limitations are described as opinions that may or many not be valid. For example:

PRO: The use of remote interpreters in courtroom proceedings can be particularly effective in expanding language access. Among the benefits of remote interpreting are the fact that remote interpreting facilitates the prompt availability of language access for litigants by providing certified and registered interpreter services with less waiting time and fewer postponements, saving both the court user's and the court's valuable time. In addition, having qualified interpreters more readily available through remote interpreting can decrease dismissals for failure to meet court deadlines and decrease the frequency of attorneys or parties waiving interpreter services or proceeding as if the LEP person is no present, in order to avoid delays. By decreasing interpreter travel time between venues and increasing the number of events being interpreted by individual interpreters, remote interpreting allows more LEP litigants to be served, in more areas, with the same interpreter and financial resources, thereby greatly expanding language access. [...] Short proceedings like arraignments can also be done remotely, saving travel time and costs. (Emphasis added, pp. 36-37).

The benefits described in the above passage are theoretical and to our knowledge there is no empirical evidence or study to back up these statements, yet they are expressed as factual, and in the most positive terms. There is no evidence that there is an actual problem with dismissals in criminal matters due to a lack of interpreters, or a basis for the predicted efficiencies.

The potential downsides to remote interpreting, on the other hand, are expressed as opinions help by some that may or may not be valid. For example:

CON: *On the other hand, as explained by many in the listening session, there are disadvantages to remote interpreting as well. Remote interpreting may be perceived, accurately or not, as providing second-tier language access services while also potentially compromising the accuracy and precision of the interpretation. Some studies have shown that interpreter accuracy and level of fatigue is affected when providing services remotely, particularly where an event exceeds 15-20 minutes in length. Additionally, remote interpreting can dilute the control an interpreter is able to exercise in ensuring accurate interpretation and removes the important visual context of the setting and, potentially, the nonverbal cues of both the LEP speaker and others in the courtroom. All of these are factors for consideration when remote interpreting is being used to facilitate language access in the courtroom. All these are factors for consideration when remote interpreting is being used to facilitate language access in the courtroom (pp 37-38).*

There is empirical evidence that remote interpreting has serious limitations and can adversely impact access. We are not aware of empirical evidence that supports the great efficiencies the LAP forecasts as facts, and we are not aware of validated research to support the position that VRI provides access equal to the use of in-person interpretation *without compromising participation and communication needs of LEP court users.* As discussed in our April 15, 2014 public comments (pp. 10-13) VRI has not been adequately tested or proven to provide language access at the level required to protect LEP rights.

Given these uncertainties, courts should not experiment with VRI with cost savings in mind. Standards for VRI must ensure that it is used only in unusual circumstances when providing a competent interpreter is otherwise impossible. Standards for VRI use typically include a clear preference and priority for in-person interpreters, with remote interpreting being used only in circumstances where an in-person interpreter is not available. The LAP discussion of VRI and recommendations are weak on this point and should be strengthened.

The assumptions in the benefits portion of the discussion also do not take into account the fact that- using currently available technology- remote interpreting must generally be done in the consecutive mode. The assumptions also do not take into account potential delays and logistical issues associated with trying to use remote interpreters and still provide a range of services inside and outside of courtrooms during proceedings, nor impediments to the same level and ease of attorney-client confidential communications, and case preparation and processing that occurs in hallways and lock ups.

We are very concerned that the incomplete analysis in the LAP, and the unrealistic and positive spin on remote interpreting benefits, will have the effect of encouraging VRI use to cut costs, without due consideration for the risks to due process and the decrease in quality of access that LEP court users will receive.

We recommend a revision to the discussion at pages 36-38 to provide a more balanced and neutral description of perspectives on VRI use and the potential role of remote interpretation in providing language access. Projections of efficiencies that are not based on specific data or studies should be removed or stated as theoretical rather than factual, and VRI should not be couched as a solution to a problem that has not in fact occurred with any significant frequency as implied (i.e. a significant number of dismissals that could be decreased).

We suggest the following revisions to address these issues:

The use of remote interpreters in courtroom proceedings can be particularly effective ~~in expanding language access~~ for accessing the services of qualified interpreters when such services would otherwise not be available. Proponents of remote interpreting also cite other potential ~~Among the benefits of remote interpreting are the fact that remote interpreting facilitates~~ including, the prompt availability of language access for litigants by providing certified and registered interpreter services with less waiting time and

fewer postponements, ~~saving both the court user's and the court's valuable time.~~ In addition, having qualified interpreters more readily available through remote interpreting ~~can decrease dismissals for failure to meet court deadlines and~~ may decrease the frequency of attorneys or parties waiving interpreter services or proceeding as if the LEP person is not present, in order to avoid delays. By decreasing interpreter travel time between venues and increasing the number of events being interpreted by individual interpreters, remote interpreting has the potential to allow more LEP litigants to be served, in more areas, with the same interpreter and financial resources, thereby greatly expanding language access. [...] Short proceedings like arraignments can also be done remotely, saving travel time and costs. [...]

CON: On the other hand, as explained by many in the listening sessions, there are disadvantages to remote interpreting as well. Remote interpreting ~~may be~~ is perceived by many, accurately or not, as providing second-tier language access services while also potentially compromising the accuracy and ~~precision~~ completeness of the interpretation. ~~Some~~ Studies have shown that interpreter accuracy and level of fatigue is affected when providing services remotely, particularly where an event exceeds 15-20 minutes in length. Additionally, remote interpreting can dilute the control an interpreter is able to exercise in ensuring accurate interpretation and removes the important visual context of the setting and, potentially, the nonverbal cues of both the LEP speaker and others in the courtroom. Proponents of prioritizing in-person interpreting also cite the lack of empirical evidence that VRI adequately protects LEP court user's language access throughout the proceedings, the potential risks to LEP rights, and the need for more information about how remote interpreting affects communications and LEP participation in court proceedings. All these are factors for consideration when determining whether remote interpreting is being used appropriate to facilitate language access in the courtroom.

We provide further comments on specific recommendations and the appendices in Section 13 below.

See also: CFI Public Comments, April 15, 2014 (p. 10-13); and
CFI letter re: Region 3 VRI system, September 25, 2014

10. Court Rules, Forms, and Legislation for Plan Implementation

a. Recommendation to consider changes to the Interpreter Act.

The contracting out limitations in the Interpreter Act allow significant use of contractors and should not be changed. These restrictions support the employment system. If the courts have difficulty attracting and retaining enough interpreters this can better be addressed by creating a career path for young interpreters and improving working conditions and pay.

We do not agree that the 100-day rule (limiting contractor use to 100 days per calendar per county) has a negative impact on courts' access to certified interpreters. In languages other than Spanish this is not an issue because the volume of work is such that contract interpreters will rarely hit that limit. Individual contractors can work in multiple counties and work full time for the courts by working in only three counties (241 work days per year). Moreover, a contractor who works 100 days in a single trial court is working nearly 50% time. These individuals do not have to stop working for the trial court; they have the option instead, under the law, to become as-needed employees and continue working in a manner that is very similar to contracting. They can continue working only as available, and the courts are not obligated to use them if there is not work. This flexibility in the employment system makes this a non-issue.

The courts have not raised this as a problem in collective bargaining. To the extent that there is a demonstrable problem with this limitation that affects the courts ability to access needed interpreters, however, the courts could seek relief on this issue in collective bargaining.

b. The Good Cause Clause, G.C. Section 68561(c)

CFI's position is that only certified and registered interpreters should be used in court proceedings, and courts should strive to recruit and retain sufficient interpreters to make the good cause clause unnecessary. The good cause clause should be an exception rarely used and strictly followed. The good cause clause instead has been used as a huge loophole that has allowed courts to get by without making adequate investments in recruitment, training and improved management and coordination of interpreter services.

We are not aware of any other example in the courts where qualified professionals are routinely replaced with individuals who lack minimum qualifications established by law. Considering the very sensitive work that interpreters perform, and the legal and ethical issues at stake, the goal of all concerned should be to eliminate the good cause clause that allows appointment of less qualified interpreters.

In our experience, the good cause clause and related rules and procedures are not being followed in most courts that appoint non-certified interpreters. Courts routinely appoint unqualified interpreters without making findings or a record as required by existing rules and procedures. It is common for judicial officers to be unaware of the qualifications of interpreters who appear in their cases.

Judges need training and a real understanding of interpreter skills and standards of accuracy, so that they seriously review and consider whether non-certified interpreters are acceptable candidates, rather than routinely accepting any interpreter sent by the interpreter coordinator.

The same standard for determining good cause, and the existing Rule of Court 2.893 that applies to appointment of non-certified interpreters in criminal and juvenile proceedings should be adopted and applied to all court proceedings (recommendations #70 and #71). There is no difference in the skills and abilities required to interpret completely and accurately in different proceeding types. If anything, interpreting in civil proceedings can be more challenging. Therefore, the standard in civil matters should be the same, and if any changes are made to existing standards, these should be focused on making the rules more effective at ensuring that the good cause and qualification standards are taken seriously and only competent interpreters are used.

One change that we would recommend would be to add the requirement that the judicial officer inform the LEP court user that the appointed interpreter is not certified (or not registered) and invite the LEP court user to notify the court should there be any issues with comprehension or if they would prefer to postpone the case until a certified or registered interpreter is available.

c. Waivers

In our experience, judges routinely accept interpreter waivers in criminal matters without an understanding that having an LEP person proceed in a case without an interpreter has serious due process implications. Attorneys regularly waive their client's right to an interpreter without knowledge or understanding of case law that requires waiver of the constitutional right to an interpreter in criminal matters must be personal, knowing, intelligent and voluntary.

Waiving the right to an interpreter without an interpreter to take the waiver begs the question as to how a knowing and personal waiver can be made without an interpreter to ensure the LEP court user fully understands.

We are concerned about institutionalizing this practice by providing procedures that, similar to the good cause clause, may become a routine method of circumventing language access requirements. LEP persons generally do not understand their language access rights in the first place, and can easily feel pressured to "cooperate" with authorities and proceed without full understanding. In reality, judicial officers and attorneys often place greater value on expediency and convenience than on protecting language access

rights. LEP persons likewise may value convenience or wish to avoid delays and may be willing to sacrifice full understanding or participation. This is not necessarily in the interest of the other parties or the court itself, since all parties have an interest in sound decisions being made based on a clear understanding of the facts and evaluation of the credibility of all information provided to the court.

11. Comments on Appendix B: Factors and Considerations for Remote Interpreting

- a. The preference for using in-person interpreters should be included at the beginning of this Appendix and should be stated unambiguously.
- b. The courts' obligation to make diligent efforts to find and schedule an in-person interpreter should be included following (a).
- c. Minimum Technology Requirements must be set at a high level on a statewide basis and be mandatory.
- d. The Factors and Considerations in Appendix B should be revised to define appropriate use more narrowly and to make the guidelines mandatory.
- e. Section D should be revised to disallow evidentiary proceedings rather than saying that proceedings involving "more than simple evidence" are not appropriate for RI. As written it does not provide clear guidance and is subject to interpretation and abuse. The word "typically" should be removed to make the definition of inappropriate events unambiguous.
- f. The first bullet point under Section D should be removed. This appears to imply that cost issues and efficiencies are justifications to use RI. This is contrary to the LAP's statement that use of in-person interpreters is preferred whenever possible and the controlling goal of providing consistent services and meaningful access.
- g. It is unclear what the intention is of the 7th bullet point under Section D. The factors under D should make clear that proceedings should involve limited speakers overall. RI is not appropriate to serve multiple LEP speakers in a proceeding through one remote interpreter. Moreover, a remote interpreter always serves all speakers in a proceeding by facilitating communication in all directions (remove 7th bullet point).
- h. The appendix should include that the court must consider whether the proceeding is sufficiently short and simple to be conducted in the consecutive mode and establish that the consecutive mode is required.
- i. Use of RI for relay interpreting between two foreign languages into English presents a series of problems. This is most often used for indigenous languages that present unique issues and complexities.
- j. In Section J: provisionally qualified interpreters should not be appointed using RI. The point of using RI rather than in-person interpreters is to allow access to certified interpreters when an in-person interpreter is not available. The good cause loophole should not be applicable in RI. Certified and registered interpreters only.
- k. In Section K: revise b to state: add: For purposes of ensuring LEP rights are protected and monitoring the effectiveness of RI, courts should conduct regular follow-up with RI participants, including LEP parties, and track technical difficulties, delays and continuances or complaints associated with RI.

12. Comments on Appendix D: Visual/Auditory Issues, Confidentiality, and Modes of Interpreting When Working Remotely

- a. Section 1 is taken from the sign language interpreter guidelines and is not appropriate for spoken language interpreting. A clear view of the LEP speaker is most essential for sign language but is not more important than views of other speakers for spoken language interpreters. Views of all speakers are essential for spoken language interpreters.
- b. Section 2 does not provide adequate guidelines or safeguards to protect attorney-client communications, confidentiality and avoid logistical interference with natural opportunities for

attorneys to communicate with their clients spontaneously during proceedings as well outside the courtroom for case preparation.

- c. Section 3 creates an unrealistic expectation that RI will be possible in simultaneous mode. Equipment currently being used for VRI in sign language is not capable of use simultaneously in spoken language. Systems with duplex audio that are capable of being used in simultaneous mode are much more highly sophisticated and very expensive. Courts are likely to expect spoken language interpreters to provide simultaneous interpretation using technical solutions that are not adequate to this task. For this reason we recommend that the court recognize in this appendix and Appendix B that only very short proceedings that can be handled in simultaneous mode are appropriate for VRI.
- d. Section 4 accepts the idea that courts will experiment with VRI technology solutions and the state will not have a single, responsible and reliable technology solution for VRI. This is misguided, inefficient and not conducive to the goals of the LAP. We highly recommend that the working group reconsider this approach in light of the way this approach to “innovation” has demonstrated, in Region 3, that courts are not equipped to establish VRI in a manner that meets the LAP goal of ensuring “high quality communication” and protects meaningful access. See CFI letter dated September 26, 2014 on issues with Region 3 VRI plan.
- e. Sections 5, 6 and 7 do not provide adequate guidelines for courts to follow in order to ensure that LEP rights are protected and that interpreters can perform at the level required to protect access and participation. For example, there is no mention of the need to provide basic information to the interpreter in advance or at the start of the proceeding. Much more specific procedures would need to be developed to ensure VRI does not compromise communications.

13. Additional Comments on Specific LAP Recommendations:

Recommendation 1. Language access needs identification. Language access needs must be clearly and consistently documented in the case management system and in court records.

The courts currently have very poor systems for tracking language access needs. It is imperative that courts prioritize including language access needs into the electronic case management systems. CFI has been talking to courts about this for years, because it would greatly assist interpreters in managing their time to know which cases on calendar need interpreters. For years courts have said that they have other priorities in terms of programming changes to their existing systems. Any new case management systems must include electronic recording and tracking of language needs. Such a system should include a way to note, when known, whether witnesses in a case require an interpreter, and the language.

Current processes (including interpreter daily activity logs, interpreter request protocols and the CIDCS reporting system) are inefficient and unreliable. In most courts the computerized calendaring systems cannot track and search for interpreter needs. This makes it difficult if not impossible for interpreter coordinators to efficiently manage interpreter resources. The goal should be for an interpreter coordinator to be able to electronically search for and produce a list of all pre-scheduled cases in need of an interpreter by date or other timeframes.

Recommendation 4. Mechanisms for LEP court users to self-identify. *Add to recommendation: Court staff will be trained to include a notice that free language access services are available in general announcements given to court users at the beginning of calendars.*

Recommendation 8. Expansion of interpreters to all civil proceedings. The term "qualified interpreters" should be defined throughout the document to mean certified or registered. Although this information is included in a footnote, it is not clear throughout the document what “qualified” means and this may not be understood by readers who do not see the footnote.

As noted in our general comments, we do not believe it is necessary to wait until 2020 to provide interpreters in all court proceedings. This recommendation should make clear that the intent is for courts to provide interpreters in all court proceedings as quickly as possible, and that it is not the intent of this recommendation, or the phase in recommendations, for courts to stop providing services in areas where they are already providing interpreters. Many courts are already providing interpreters in Phase 2 cases, such as general family law and civil harassment. It would be important to clarify this to avoid a court determining that in order to expand to Phase 1 unlawful detainers, they will stop providing interpreters in family law matter, which are designated as Phase 2 in the LAP.

The recommendation to give priority to in-court proceedings over court-ordered events may be impractical and counterproductive. For example, court-ordered mediations are often critical for a family law case to proceed efficiently in court. It does not make sense to provide an interpreter for a proceeding but not for the mediation. This approach may well result in the proceeding being continued at a cost to the court and the parties if they cannot proceed with the mediation due to lack of an interpreter.

Additionally, court-ordered mediations are currently included as part of the bargaining unit work of staff interpreters and are covered routinely in many courts. It would not be appropriate for courts to stop providing interpreters for such events as a result of the LAP's phase in schedule, and if as a result parties had to bring their own interpreters, this would violate the interpreter MOU's.

Recommendation 10. The meaning of "court-ordered/court-operated events" should be defined with examples.

Recommendation 11. Preference for in-person interpreters.

See CFI comments on VRI in our LAP Public comments (pp. 10-13). Any use of remote interpreting in court proceedings must be carefully and strictly limited to ensure its use does not compromise LEP rights.

This recommendation should be amended to reflect a strict preference and priority for use of in-person interpreters in court proceedings. The phrase, "... but courts may consider the use of remote interpreting where it is appropriate and advantageous for a particular proceeding" is vague; it is unclear what "appropriate and advantageous" means. This phrase creates a loophole you can drive a truck through, rendering the preference for in-person interpreters meaningless.

Suggestion for revised recommendation:

The use of in-person, certified and registered court interpreters is preferred for court proceedings and court-ordered/court-operated events. ~~but courts may consider the use of remote interpreting where it is appropriate and advantageous for a particular proceeding.~~

The following recommendations (12 & 13) and Appendix B address the use of remote interpreting and it is thus unnecessary to include the language that is stricken above.

Recommendation 12. Rather than stating that courts should "consider" factors in Appendix B before using remote interpreting in the courtroom, this recommendation should refer courts to required factors that must be met before using remote interpreting. Appendix B should provide required steps and circumstances that clearly define when VRI is and is not appropriate.

Recommendation 13. This recommendation should reference another Appendix to include mandatory minimum technology that must be used for courtroom interpretation.

Recommendation 14. CFI is open to the idea of having a centralized hub where certified and registered staff interpreters are available to courts statewide to provide language access using remote interpreting, provided adequate equipment is used, and provided that VRI is appropriately limited for events outside of courtrooms and in short, non-complex proceedings only where competent language access would otherwise be impossible.

Recommendations 16-23—Add recommendation in this section.

This section pertains to considerations when appointing an interpreter. Although the discussion preceding these recommendations briefly mentions good cause findings and procedures, the need to comply with these steps is not reflected in the recommendations.

The same good cause and qualification rules that apply in criminal proceedings should be adopted in civil proceedings, as is suggested by recommendations 9, 70 and 71. We recommend adding a recommendation at the beginning of this section to clarify conditions that must be met before appointing a non-certified or non-registered interpreter.

Suggested additional recommendation to precede recommendation 16:

Courts will only appoint a non-certified, non-registered interpreter to interpret in a court proceedings when:

- 1) no certified or registered interpreter is available;
- 2) a finding of good cause is made on the record and other diligent search and qualification procedures have been followed; and
- 3) the judge in the proceeding determines the individual is provisionally qualified.

Recommendation 16. This recommendation should be reworded to state this more clearly as a prohibition. Replace, “must avoid appointing” to “shall not appoint.”

Recommendation 17. This recommendation is highly problematic for a number of reasons.

- a. It is highly unlikely that family members or friends have the requisite skills, knowledge and proficiency in two languages to be qualified to interpret in any court proceeding.
- b. Family members and friends have a conflict of interest and cannot be relied upon to be impartial. Using them as interpreters could impact a judge’s ability to determine the facts or fairly adjudicate a matter.
- c. The same reasoning for not appointing opposing parties and others cited in recommendation 16 applies to family members and friends.
- d. Using family members and friends to interpret violates the regional MOU provisions that only bargaining unit members (certified and registered staff interpreters) may perform bargaining unit work.

We recommend revising this recommendation to prohibit use of an LEP court user’s family members or friends to interpret in court proceedings, as follows:

17. Family members or friends of the LEP court user will not be appointed to interpret for courtroom proceedings. This recommendation does not prohibit family members and friends of an LEP court user from providing informal assistance in order to determine the language needed or to inform the court user of a continuance or other basic instructions related to their matter.

Recommendation 18. We agree with the recommendation to prohibit the use of minors to interpret for their LEP family members.

Recommendation 19. This recommendation appears to give significant and inappropriate discretion to courts to use of bilingual staff to interpret in courtroom proceedings. This is contrary to the overall goals of the LAP, and contrary to other recommendations. As written, this recommendation will create confusion and blur lines that need to be clear with respect to who is qualified and competent to interpret in court proceedings. This recommendation is problematic for the following reasons:

- a. Bilingual staff are not tested for the requisite skills, knowledge and proficiency in two languages to interpret in court proceedings (unless they are also certified or registered court interpreters).
- b. As acknowledged in the discussion of this section, and reported in public hearings, use of bilingual staff presents problems related to impartiality, and can become a convenient substitute for hiring needed, fully qualified interpreters.
- c. Using bilingual staff in court proceedings violates the regional MOUs that provide only bargaining unit members (certified and registered staff interpreters) may perform bargaining unit work and that contracting out will follow G.C. 71802. It also may violate G.C. 71802(d) of the Interpreter Act that requires courts to follow good cause and qualification rules adopted pursuant to G.C. 68561 before appointing any non-certified, or non-registered interpreters

We recommend revision of this recommendation as follows:

19. Bilingual staff will not be appointed to interpret in courtroom proceedings except in extraordinary circumstances; if the court does appoint bilingual staff, the bilingual staff person must meet all the provisional qualification requirements, and the court must find good cause in accordance with Rule of Court 2.893.

Recommendation 20. This recommendation should be reviewed and revised to reference AB2370 (Chau) which was signed by the governor and will become law in January 2015.

Recommendation 22. A portion of this recommendation needs clarification or examples. As written, the intent of the recommendation is unclear: [...] and identifying situations where justice partners have the responsibility or capacity to provide additional certified or registered interpreters for their clients or witnesses.

Recommendation 23. See 20 above. This section again references “justice partners who will be providing interpreters.” This is unclear and also raises questions about compliance with the Interpreter Act.

Recommendation 50. We recommend adding a bullet point to this description of what training should include, as follows: • The interpreter’s need for basic information, preparation time, and pre-appearance interviews in some proceedings such as trials and other evidentiary hearings.

Recommendations 62, 65 and 66. We support the concept of a complaint form related to language access issues, and assessment of interpreter skills and adherence to ethical requirements. These processes should be developed with interpreter organizations, and should include peer review and an opportunity for interpreters to be informed of and respond to any issues that arise.

Recommendations 70, 71. Good cause and qualification procedures should be the same for civil as criminal. There should not be a different standard.

Thank you for your hard work and for your consideration of these comments.
Please do not hesitate to contact Mary Lou Aranguren, CFI Legislative Committee Chair, at 510-290-8103, if you have any questions or we can provide clarification on any aspect of these comments.