

## Is it Reversible Error?

Hits: 394



### Due Process and Access to Justice for LEP and DHH Individuals[i]

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In administering justice each day, Georgia's courts face a number of challenges, including ensuring access to justice for limited English proficient (LEP) and Deaf/Hard of Hearing (DHH) litigants. Georgia has ten (10) judicial districts and forty-nine (49) judicial circuits in which approximately 1,400 judges enter their respective courtrooms each day committed to reaching just decisions and ensuring all Georgians have meaningful access to justice. From 1990 to 2000 our national LEP population grew 80 percent, with the Southeastern and Southwestern United States seeing some of the highest growth rates.[iii] Specifically, Georgia ranked among the top ten states (#3) with the largest number of LEP residents.[iv]

Additionally, Georgia ranked among the top ten states (#3) with the sharpest growth - its LEP population growing 379% between 1990 and 2010.[v] The current policy of the State of Georgia requires all courts to provide qualified sign language and foreign language interpreters, without cost, to LEP and DHH litigants and witnesses.[vi] A court's failure to provide qualified interpreters, as needed, in any legal proceeding in Georgia can result in reversible error on appeal.[vii]

Because Georgia has a non-unified court system as well as fiscal and other restraints, our courts face additional challenges with uniformly ensuring language access across our state. However, it is important to note, according to the U.S. Department of Justice (DOJ), that "fiscal pressures are not a blanket exemption from civil rights requirements." [viii] Additionally, the DOJ encourages courts to focus not only on the costs involved with providing interpreters, but the significant costs involved when interpreters are not provided, including the waste of money, time and resources of court staff when cases have to be continued or retried.[ix]

Georgia's current language access policy stems from several federal and state laws, statutes and case law.[x] Title VI of the Civil Rights Act of 1964 prohibits any recipient of federal funding, like Georgia's courts, from discriminating on the basis of a number of protected classes, including national origin.[xi]

Moreover, Title VI requires our courts to provide language access services, at no cost to LEP and DHH litigants.[xii] In 2003, the Supreme Court of Georgia created the Commission on Interpreters (Commission) to secure the rights of non-English speaking persons utilizing the state court system by establishing a statewide plan for the use of interpreters in Georgia courts during the presentation of civil or criminal matters. Subsequently, the Court held that an interpreter must be appointed for those who cannot communicate effectively in English in criminal cases.[xiii] In *Ling* the Court strongly stated that meaningful access to justice must be provided in *all* Georgia courts, including civil courts, for persons who are limited English proficient in order to comply with federal law. Specifically, the Court's opinion stated "vigilance in protecting the rights of non-English speakers is required in all of our courts." [xiv]

The holding in *Ling* resulted in the following general rule being added to the Supreme Court of Georgia

Rule on the Use of Interpreters for Non-English Speaking and Hearing Impaired Persons (hereinafter "Rule")[xv] in May 2011:

The following rules apply to all criminal and civil proceedings in Georgia where there are non-English speaking persons in need of interpreters. See also, *Ling v. State*, 288 Ga. 299 (702 SE2d 881) (2010). *All other court-managed functions including information counters, intake or filing offices, cashiers, record rooms, sheriffs' offices, probation and parole offices, alternative dispute resolution programs, pro se clinics, criminal diversion programs, anger management classes, detention facilities and other similar offices, operations and programs, shall comply with Title VI of the Civil Rights Act of 1964. (Emphasis Added)*

Additionally, Georgia's language access policy affords specific protections for DHH litigants/witnesses generally[xvi] and LEP and DHH litigants/witnesses involved in cases brought under Georgia's Family Violence Act, O.C.G.A. § 19-13-1 *et seq.*, in particular.[xvii] The fact that a litigant or witness, for whom English is a second language, knows some English does not prevent him or her from being entitled to a court-appointed interpreter.[xviii]

Despite the rulings in *Ling* and *Ramos v. Terry*[xix] and the 2011 amendment to the Rule, LEP and DHH individuals are inconsistently provided with qualified interpreters in Georgia courts. Courts are encouraged to consider that the risks involved in appointing an unqualified interpreter or no interpreter at all include the case being reversed or remanded on appeal. According to the National Association of Judicial Interpreters and Translators (NAJIT), the primary interpreter issues on appeal include 1) failure to appoint an interpreter; 2) ineffective assistance of counsel; 3) bias and conflict of interest; 4) confidentiality; 5) appointment of uncertified interpreters; 6) bilingual attorneys serving as interpreters; 7) "borrowed interpreters" and 8) accuracy of interpretation.[xx] Based on the review and analysis of several hundred appellate opinions from across the country, according to NAJIT, it has been concluded that the majority of issues raised on appeal are procedural and beyond the interpreter's control.[xxi] Additionally, according to NAJIT, objections to interpreting errors must be made during the proceedings and preserved for the record and many interpreting issues are in fact resolved at the trial court level.[xxii] Errors not preserved on the record cannot be raised on an appeal to which the "abuse of discretion" standard applies.[xxiii] Review under the "plain error" standard is far more stringent, and for the appeal to succeed a showing must be made of a substantial violation of the fundamental right to a fair trial.[xxiv]

Specifically, the Supreme Court of Georgia has held "a court abuses its discretion when it selects an interpreter who is not qualified, sworn, and impartial. *Gopar-Santana v. State*, 862 So.2d 54 (Fla.App.2003)."[xxv] In *Ramos*, the Court also noted that "in the case at bar, the habeas court quickly determined Ramos was in need of an interpreter and sought the services of an interpreter who had a history of satisfactory participation in court proceedings. When that interpreter proved unavailable, the habeas court, concerned about inconvenience to the sole witness, resorted to using a prison employee whose qualifications to serve as an interpreter were her ability to speak Spanish and her presence." [xxvi] Furthermore, "no information about her background in language skills, e.g., whether she was a native of a country where Spanish is spoken, whether she was fluent in English, whether she previously had translated in a court proceeding, whether she had taken and passed the interpreter exams administered by Georgia or another state, whether the Spanish she spoke was compatible with the Spanish spoken by Ramos, and her professional standing in the interpreter community, was obtained before the habeas court decided to appoint her as the interpreter in this matter . . . following her appointment, the prison employee/interpreter was not given the suggested instructions on interpreting in a courtroom setting and her understanding of the interpreter's role was not verified, and she was not required to agree in writing to comply with the court interpreters' code of professional responsibility." [xxvii] Consequently, the Court concluded in *Ramos* that "it is an abuse of discretion to appoint someone to serve as interpreter who is neither certified nor registered

as an interpreter without ensuring that the person appointed is qualified to serve as an interpreter, without apprising the appointee of the role s/he is to play, without verifying the appointee's understanding of the role, and without having the appointee agree in writing to comply with the interpreters' code of professional responsibility." [xxviii] *Ramos* also highlighted that the failure to interpose a timely objection to an interpreter's qualifications constitutes a waiver of the issue on appeal. [xxix]

Licensed interpreters in Georgia are not only trained on technical interpreting skills but also their ethical obligations. Their ethical obligations include interpreting completely and accurately, maintaining impartiality and maintaining confidentiality. [xxx] Currently the Commission has three licensing designations for legal interpreters in Georgia – Certified, Conditionally Approved and Registered. [xxxi] Courts are required to make a diligent effort to appoint interpreters from the Certified category first. [xxxii] It is intended that interpreters from the Conditionally Approved category will be appointed only after a diligent search for a Certified interpreter has been made and none is available. [xxxiii] Likewise, it is intended that an interpreter from the Registered category will only be appointed if no Certified or Conditionally Approved interpreter is available. [xxxiv]

The Commission recognizes that there will be instances when courts will need to use a telephonic or other less-qualified interpreter. In those instances, courts are encouraged to reference the Commission's *Instructions for Use of Non-Licensed Interpreters* and make a diligent effort to ensure a licensed interpreter is secured for any future legal proceedings associated with the case. [xxxv] It is important to note that while telephonic interpreters are often very helpful, especially in rural areas where access to qualified interpreters is limited, telephonic interpreters are best suited for when no certified or other qualified interpreter is available in-person. [xxxvi] Telephonic interpreters are also best suited for legal proceedings of short duration. [xxxvii] Additionally, according to NAJIT, telephone interpreting can be problematic in some circumstances. [xxxviii] For example, if individuals are hard of hearing or elderly, or struggling with mental illness, telephone interpreting can be too confusing. [xxxix] It is also important to consider that interpreters accessed through commercial services may not necessarily be specialists in legal interpreting specifically. [xl] When a non-licensed or other less-qualified interpreter is used, it is recommended that the decision maker personally verify a basic understanding of the interpreter's role on the record. [xli] The term "decision maker" includes judges, magistrates, special masters, commissioners, hearing officers, arbitrators, neutrals or mediators. [xlii] Additionally, when the use of a non-licensed interpreter is necessary, courts are reminded that it is not appropriate to use children, family or friends of an LEP or DHH individual. [xliii] Furthermore, it is inappropriate for bilingual attorneys, judges, bailiffs or other court personnel to serve as interpreters during a legal proceeding. [xliv] When faced with a need, where no interpreter is available locally, courts should weigh the need for immediacy in conducting a hearing against the potential compromise of due process, or the potential of substantive injustice, if interpreting is inadequate. [xlv] Unless immediacy is a primary concern, some delay might be more appropriate than the use of a telephonic language service or other less-qualified interpreter. [xlvi]

Courts may find themselves in situations where the LEP or DHH individual insists on using a friend or family member in lieu of a qualified court-appointed interpreter. In this instance, the court is encouraged to still appoint a qualified interpreter who can monitor the non-licensed interpreter's competency and accuracy. Courts may also find themselves in a situation where all parties involved have stipulated to the use of a non-licensed interpreter. When faced with this situation, courts are encouraged to remind the parties that the court has a legal obligation to make a diligent search for a licensed interpreter, and appoint one if available, before the use of a non-licensed interpreter may be considered. [xlvii]

Lastly, courts may also find themselves in a situation where there is a bilingual attorney of record on the case who speaks the same language as his or her client or the opposing party. As previously

mentioned, it is inappropriate for a bilingual attorney to also serve as an interpreter in his or her own case. In addition to the attorney likely not being licensed to interpret, the roles of attorney and interpreter are largely antithetical. For example, an attorney has an ethical obligation to represent his or her client's interests. Conversely, an interpreter is ethically bound to be impartial. Furthermore, professional interpreters are ethically required to avoid having undue contact with witnesses, parties, attorneys and jurors before, during and until the case is concluded.[xlvi] Conversely, an attorney is ethically bound to communicate effectively with his or her client, which requires frequent attorney/client communication before, during and until the case is concluded.[xlix]

Additionally, the U.S. Department of Justice has noted that "it is critically important to ensure that interpreters are competent and *not merely bilingual*. A bilingual person may inaccurately interpret or roughly interpret a summary of communications between the court and an LEP person, they may have a conflict of interest, or they may even be adverse. Under these circumstances, an LEP person is denied meaningful access to court operations in a way that a fluent English speaker is not. The [ U.S.] DOJ Guidance emphasizes the importance of interpreter competency and states: 'Competency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret in and out of English.' [U.S.] DOJ Guidance, 67 Fed. Reg. at 41,461." [i]

Language access stakeholders are not limited to members of the bench and court personnel. Attorneys also play a vital role in protecting the rights of LEP and DHH individuals. In civil cases, courts and attorneys are required to provide advanced notice of the use of/need for an interpreter to all parties and the decision maker as soon as practicably possible.[ii] To promote judicial efficiency, courts and attorneys are strongly encouraged to provide advanced notice to all parties and the decision maker in all other types of cases including but not limited to criminal and administrative.

In addition to its regulatory duties, the Commission is available to all Georgia courts to assist with language access needs or concerns. Courts are encouraged to contact Commission staff if they are having a difficult time finding an interpreter.[iii] The Commission may be able to assist in finding a qualified individual with the right language and skill set.[iiii] Furthermore, the Commission may also be able to provide guidance to the court on how to budget and allocate the interpreter's time and resources.[liv] For example, the Commission may be able to assist the court with assessing, on a case by case basis, whether it would be effective to use some remote or telecommunications services for the preliminary hearings and save the in-person interpreter for the more evidentiary hearings.[lv]

Georgia is considered a leader in language access, largely because of our current Supreme Court rule (which is more comprehensive than many other jurisdictions) as well as the trailblazing work of our Judicial Council/Administrative Office of the Courts (AOC) both statewide and nationally. Through continued collaboration with local courts, trial court councils, court administrators and other pertinent stakeholders, the Commission and AOC endeavor to continue to work toward developing effective solutions to language access challenges in our legal system. The Commission welcomes feedback from all stakeholders so that Georgia may continue its leadership in this area and ensure due process and access to justice for LEP and DHH individuals.

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[i] The views expressed herein are based on interpretations of cited authority and may not reflect the views

of the Supreme Court or the Commission on Interpreters.

[ii] Ms. Edmondson-Cooper, a member of the Supreme Court of Georgia Commission on Interpreters, is a Bilingual Staff Attorney with Georgia Legal Services Program. Ms. Edmondson-Cooper draws upon her past experience as a professional legal interpreter and current role as a bilingual legal services attorney to engage in strategic access to justice advocacy, including but not limited to contributing to the development of statewide and national curricula for training attorneys and judges on language access as an access to justice issue as well as the development of local, state and federal language access policies. Further details about her advocacy may be found at [www.linkedin.com/in/jjecesq/](http://www.linkedin.com/in/jjecesq/).

[iii] Pandya, Chhandasi, Jeanne Batalova, and Margie McHugh. 2011. "Limited English Proficient Individuals in the United States: Number, Share, Growth, and Linguistic Diversity." Washington, DC: Migration Policy Institute. *available at* <http://www.migrationinformation.org/integration/LEPdatabrief.pdf> (Last visited February 5, 2015).

[iv] *Id.*

[v] *Id.*

[vi] *See*, Supreme Court of Georgia Rule for the Use of Interpreters for Non-English Speaking and Hearing Impaired Persons (hereinafter "Rule"), Appendix A (II) *available at* [http://w2.georgiacourts.org/coi/files/Rule%20on%20Interpreters%20-%20FINAL\\_JULY.pdf](http://w2.georgiacourts.org/coi/files/Rule%20on%20Interpreters%20-%20FINAL_JULY.pdf) (Last visited February 5, 2015). *See also*, Georgia Administrative Office of the Courts – Committee on Access and Fairness in the Courts, *available at* <http://www.georgiacourts.org/index.php/aoc/directors-office/committee-on-access-and-fairness-in-the-courts/95>. (Last visited February 5, 2015) *See also*, O.C.G.A. §§ 24-6-652 through 658; 15-6-77(e)(4).

[vii] *See*, *Ling v. State*, 288 Ga. 299; 702 S.E.2d 881 (2010); *See also*, *Ramos v. Terry*, 279 Ga. 889, 622 S.E.2d 339 (2005) (holding the use of qualified interpreters is necessary to preserve meaningful access to the legal system for persons who speak and understand only languages other than English).

[viii] *See*, U.S. DOJ Letter to NC Administrative Office of the Courts, p. 2 (March 8, 2012) *available at* [http://www.justice.gov/crt/about/cor/TitleVI/030812\\_DOJ\\_Letter\\_to\\_NC\\_AOC.pdf](http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf) (Last visited February 5, 2015). Additionally, the DOJ stated "any focus only on the financial costs of providing additional interpreter services ignores the significant fiscal and other costs of non-compliance with the AOC's obligation to take reasonable steps to ensure access to court operations for LEP individuals. It costs money and time to handle appeals and reversals based on the failure to ensure proper interpretation and effective communication. Similarly, delays in providing interpreters often result in multiple continuances, which needlessly waste the time and resources of court staff. And ineffective communication deprives judges and juries of the ability to make reliable decisions; renders victims, witnesses, and defendants effectively absent from proceedings that affect their rights; and causes other significant costs in terms of public safety, child welfare, and confidence in the judicial system." *Id.* at p. 3.

[ix] *Id.*

[x] *See*, *Lau v. Nichols*, 444 U.S. 563 (1974); *See also*, Executive Order 13166, 65 F.R. 50121( 2000); *See also*, O.C.G.A. §§ 24-6-652 through 658; 15-6-77(e)(4).

[xi] 42 U.S.C. § 2000d.

[xii] *Id.*

[xiii] *See, Ling v. State*, 288 Ga. 299; 702 S.E.2d 881 (2010); *See also, Ramos v. Terry*, 279 Ga. 889, 892 (2005)(holding the use of qualified interpreters is necessary to preserve meaningful access to the legal system for person who speak and understand only languages other than English).

[xiv] *See, Ling v. State*, 288 Ga. 299; 702 S.E.2d 881, 884 (2010).

[xv] *See, supra*, Endnote 5 at Appendix A.

[xvi] *See*, O.C.G.A. §§ 24-6-652 through 658.

[xvii] *See*, O.C.G.A. § 15-6-77(e)(4).

[xviii] *Rule*, Appendix A (II)(B).

[xix] 279 Ga. 889 (2005).

[xx] Benmaman, Virginia, *Interpreter Issues on Appeal*, PROTEUS Vol. IX, No. 4 -- FALL 2000 available at <http://www.najit.org/certification/FAQarticleBenmaman.htm> (Last visited February 12, 2015).

[xxi] *Id.*

[xxii] *Id.*

[xxiii] *Id.*

[xxiv] *Id.*

[xxv] *Ramos*, 279 Ga. 889, 893 (2005).

[xxvi] *Id.* at 892.

[xxvii] *Id.* at 892.

[xxviii] *Id.* At 892.

[xxix] *Id.* at 893.

[xxx] *See*, Interpreter Code of Professional Responsibility, Standard VI (Interpreters shall interpret accurately and faithfully without indicating any personal bias. In doing so, interpreters shall: (A) Preserve the level of language used and the ambiguities and nuances of the speaker without editing; (B) Request clarification of ambiguous statements or unfamiliar vocabulary from the judge or counsel; (C) Refrain from expressing personal opinion in a matter before the court; and (D) Promptly notify the court of any error in their interpretation). *See also*, Standard VII (Interpreters shall maintain impartiality by avoiding undue contact with witnesses, attorneys, interested parties, and jurors before, during and until the case is concluded) available at <http://w2.georgiacourts.org/coi/files/Code%20of%20Professional%20Responsibility%20for%20Interpreters.doc> (Last visited February 5, 2015).

[xxxi] *See, Rule* at Appendix B (II)(A)-(C) . The Commission maintains a registry of all foreign language

interpreters in Georgia licensed by the Commission as well as licensed American Sign Language interpreters. The registry is available at [http://w2.georgiacourts.org/coi/index.php?option=com\\_content&view=article&id=47&Itemid=71](http://w2.georgiacourts.org/coi/index.php?option=com_content&view=article&id=47&Itemid=71) (Last visited February 5, 2015).

[xxxii] *Id.*

[xxxiii] *Id.*

[xxxiv] *Id.*

[xxxv] Direct Link: [http://w2.georgiacourts.org/coi/files/model%20form\(1\).doc](http://w2.georgiacourts.org/coi/files/model%20form(1).doc). (Last visited February 5, 2015). See also, *Rule*, Appendix A (II)(F)

[xxxvi] See, *National Association of Judicial Interpreters & Translators (NAJIT) Position Paper-Telephone Interpreting in Legal Settings* (February 2009) available at <http://www.najit.org/documents/Telephone%20Interpreting.pdf> (Last visited February 23, 2015).

[xxxvii] *Id.*

[xxxviii] *Id.*

[xxxix] *Id.*

[x] *Id.*

[xli] *Rule*, Appendix A (II)(F) Commentary.

[xlii] *Rule*, Appendix A (II)(A).

[xliii] GA Administrative Office of the Courts Brochure: *Working with Foreign Language Interpreters in the Courtroom* available at [http://w2.georgiacourts.org/coi/index.php?option=com\\_content&view=article&id=94&Itemid=104](http://w2.georgiacourts.org/coi/index.php?option=com_content&view=article&id=94&Itemid=104) (Last visited February 5, 2015).

[xliv] *Id.*

[xlv] *Rule*, Section I.

[xlvi] *Id.*

[xlvii] If any interpreter, other than a Certified interpreter, is used, Courts are required to make an audio or audio-visual recording of all non-English testimony. *Rule*, Section VII (A)-(B).

[xlviii] See also, Interpreter Code of Professional Responsibility, Standard VII (Interpreters shall maintain impartiality by avoiding undue contact with witnesses, attorneys, interested parties, and jurors before, during and until the case is concluded) available at <http://w2.georgiacourts.org/coi/files/Code%20of%20Professional%20Responsibility%20for%20Interpreters.doc> (Last visited February 5, 2015).

[xlix] See, Georgia Rules of Professional Conduct (GRPC) Rule 1.4 available at <http://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm> (Last visited February 5, 2015).

[l] See, U.S. DOJ Letter to NC Administrative Office of the Courts, p. 9 (March 8, 2012) available at [http://www.justice.gov/crt/about/cor/TitleVI/030812\\_DOJ\\_Letter\\_to\\_NC\\_AOC.pdf](http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf) (Last visited February 5, 2015).

[li] Rule, Appendix (A)(IV)(B).

[lii] Supreme Court of Georgia Commission on Interpreters- Administrative Office of the Courts, 244 Washington Street, SW - Suite 300, Atlanta, Georgia 30334 / E-mail: [coi@gaaoc.us](mailto:coi@gaaoc.us) / Telephone: (404) 463-6478 / Fax: (404) 651-6449 / Website: <http://w2.georgiacourts.org/coi/> A full list of current Commission staff is available on the Commission website.

[liii] Edmondson-Cooper, Jana J., "Justice Melton in Q&A on Language as a Barrier to Access," Daily Report (February 19, 2014) available at <http://www.dailyreportonline.com/id=1202643381739/Justice%20Melton%20in%20Q%20%20A%20on%20Language%20as%20A%20Barrier%20to%20Access?mcode=1202617074542&curindex=3&curpage=ALL> (Last visited February 12, 2015); Also available at <http://www.gisp.org/2014/02/19/justice-melton-answers-questions-from-gisp-on-language-access-in-the-courts/> (Last visited February 12, 2015).

[liv] *Id.*

[lv] *Id.*

< Prev