Order

Michigan Supreme Court
Lansing, Michigan

September 11, 2013

ADM File No. 2012-03

Adoption of Rule 1.111 and Rule 8.127 of the Michigan Court Rules and Rescission of Rule 2.507(D) of the Michigan Court Rules (Foreign Language Interpreters)

The Michigan Supreme Court embraces the goal of providing access to all the courts of this State. This includes interpreter services for persons with Limited English Proficiency (LEP), to ensure that they have meaningful access to our courts.

The rules we adopt today provide court-appointed foreign language interpreters for truly needy LEP persons to support their access to justice, while not compelling taxpayers to bear the burden for LEP persons who can afford to pay for this service.

Our rules provide for court interpreters without cost to indigent LEP persons. If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court at the conclusion of the case or court proceeding. Moreover, our rules provide additional protection by allowing the trial judge to provide a court interpreter without cost to any LEP party, based on the judge's finding that assessing costs for the interpreter would limit that person's access to court.

Some history is in order. In August 2010, under the leadership of then-Chief Justice Marilyn Kelly, the Supreme Court convened a steering committee of judges and court administrators to develop proposals addressing access to court services for LEP individuals. The steering committee produced a court rule proposal specifying the procedures for appointment of an interpreter in Michigan's trial courts, as well as creating a structure for certifying various levels of interpreters, and creating a board to produce recommended requirements for interpreters and handle any misconduct claims.

Since February 2011, the Court has also worked cooperatively with the United States Department of Justice to improve the ability of LEP persons to access Michigan's courts. The Court's staff has communicated regularly with the Department, sharing numerous versions of the proposed court rules, exchanging ideas for the hiring and training of interpreters, and devising new and innovative ways to provide interpreter services at low or reduced costs. The Justice Department, through its administrative investigation function, has identified areas for improvement in individual trial courts across the state.

As a result of the dedicated work of the LEP committee, as well as the helpful and productive discussions with the Justice Department, the Court has fashioned a rule that reasonably accommodates access to the courts for LEP individuals with limited resources, and provides additional protection by allowing the trial judge to make a fact-

based individualized determination whether assessment of costs would limit an LEP person's access to the court. This is a truly "flexible and fact-dependent standard." 67 *Fed. Reg*. 41459 (June 18, 2002). In fact, the rule is an individualized assessment that balances the four factors of (1) the number or proportion of LEP persons eligible to be served or likely to be encountered in court; (2) the frequency with which LEP individuals come into contact with the courts; (3) the nature and importance of the court system in people's lives; and (4) the resources available and costs. *Id*. The rules the Court has adopted strike the balance between ensuring meaningful access while not imposing undue burdens on Michigan's local courts. *Id*.

The Court has adopted a rule that focuses on the critical legal requirement: *meaningful access.* Under Rule 1.111(B)(1), a court is required to provide an interpreter for a party or witness if the court determines one is needed for either the party or the witness to meaningfully participate. LEP services are provided to all who have a need for them, and, under the rule, only parties who are able to pay for them are subject to reimbursement at the conclusion of the matter. In determining whether a party has the ability to reimburse for interpreter services, the court will impose costs only if the party has income above 125% of the federal poverty level *and* the court finds assessment of the interpreter costs would not unreasonably impede the person's ability to pursue or defend a claim. In other words, Rules 1.111(A)(4) and (B)(1) ensure that there will be no chilling effect on the LEP person's opportunity to pursue or defend a legal action.

Further, the rule we adopt is a frank acknowledgement that our trial courts – and indeed, our State's economy – are under severe financial stress and cannot, without explicit legal authority, be required to provide, at taxpayer expense, interpreter services for all LEP persons regardless of their means.

We will conduct appropriate educational programs with state court judges, administrators, and stakeholders as we work to implement this significant change in Michigan's procedure for appointment of foreign language interpreters.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, MCR 1.111 and MCR 8.127 are adopted, effective immediately.

[The following court rules are new rules.]

Rule 1.111 Foreign Language Interpreters

(A) Definitions

When used in this rule, the following words and phrases have the following definitions:

(1) "Case or Court Proceeding" means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer.

(2) "Party" means a person named as a party or a person with legal decision-making authority in the case or court proceeding.

(3) "Reimbursement" means reimbursement at the conclusion of the case or court proceeding.

(4) A person is "financially able to pay for interpretation costs" if the court determines that requiring reimbursement of interpreter costs will not pose an unreasonable burden on the person's ability to have meaningful access to the court. For purposes of this rule, a person is financially able to pay for interpreter costs when:

(a) The person's family or household income is greater than 125% of the federal poverty level; and

(b) An assessment of interpreter costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter.

(5) "Certified foreign language interpreter" means a person who has:

(a) passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

(b) met all the requirements established by the state court administrator for this interpreter classification, and

(c) registered with the State Court Administrative Office.

(6) "Interpret" and "interpretation" mean the oral rendering of spoken communication from one language to another without change in meaning.

(7) "Qualified foreign language interpreter" means:

(a) A person who provides interpretation services, provided that the person has:

(i) registered with the State Court Administrative Office; and

(ii) met the requirements established by the state court administrator for this interpreter classification; and

(iii) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(b) A person who works for an entity that provides in-person interpretation services provided that:

(i) both the entity and the person have registered with the State Court Administrative Office; and

(ii) the person has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(c) A person who works for an entity that provides interpretation services by telecommunication equipment, provided that:

(i) the entity has registered with the State Court Administrative Office; and

(ii) the entity has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services

(B) Appointment of a Foreign Language Interpreter

(1) If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party.

(2) The court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding.

(3) In order to determine whether the services of a foreign language interpreter are necessary for a person to meaningfully participate under subrule (B)(1), the court shall rely upon a request by an LEP individual (or a request made on behalf of an LEP individual) or prior notice in the record. If no such requests have been made, the court may conduct an examination of the person on the record to determine whether such services are necessary. During the examination, the court may use a foreign language interpreter. For purposes of this examination, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(C) Waiver of Appointment of Foreign Language Interpreter

A person may waive the right to a foreign language interpreter established under subrule (B)(1) unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding. The court must find on the record that a person's waiver of an interpreter is knowing and voluntary. When accepting the person's waiver, the court may use a foreign language interpreter. For purposes of this waiver, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(D) Recordings

The court may make a recording of anything said by a foreign language interpreter or a limited English proficient person while testifying or responding to a colloquy during those portions of the proceedings.

(E) Avoidance of Potential Conflicts of Interest

(1) The court should use all reasonable efforts to avoid potential conflicts of interest when appointing a person as a foreign language interpreter and shall state its reasons on the record for appointing the person if any of the following applies:

(a) The interpreter is compensated by a business owned or controlled by a party or a witness;

(b) The interpreter is a friend, a family member, or a household member of a party or witness;

(c) The interpreter is a potential witness;

(d) The interpreter is a law enforcement officer;

(e) The interpreter has a pecuniary or other interest in the outcome of the case;

(f) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;

(g) The interpreter does have, or may have, a perceived conflict of interest;

(h) The appointment of the interpreter creates an appearance of impropriety.

(2) A court employee may interpret legal proceedings as follows:

(a) The court may employ a person as an interpreter. The employee must meet the minimum requirements for interpreters established by subrule (A)(5). The state court administrator may authorize the court to hire a person who does not meet the minimum requirements established by subrule (A)(5) for good cause including the unavailability of a certification test for the foreign language and the absence of certified interpreters for the foreign language in the geographic area in which the court sits. The court seeking authorization from the state court administrator shall provide proof of the employee's competency to act as an interpreter and shall submit a plan for the employee to meet the minimum requirements established by subrule (A)(5) within a reasonable time.

(b) The court may use an employee as an interpreter if the employee meets the minimum requirements for interpreters established by this rule and is not otherwise disqualified.

(F) Appointment of Foreign Language Interpreters

(1) When the court appoints a foreign language interpreter under subrule (B)(1), the court shall appoint a certified foreign language interpreter whenever practicable. If a certified foreign language interpreter is not reasonably available, and after considering the gravity of the proceedings and whether the matter should be rescheduled, the court may appoint a qualified foreign language interpreter who meets the qualifications in (A)(7). The court shall make a record of its reasons for using a qualified foreign language interpreter.

(2) If neither a certified foreign language interpreter nor a qualified foreign language interpreter is reasonably available, and after considering the gravity of the proceeding and whether the matter should be rescheduled, the court may appoint a person whom the court determines through voir dire to be capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct the proceeding without prejudice to the limited English proficient person.

(3) The court shall appoint a single interpreter for a case or court proceeding. The court may appoint more than one interpreter after consideration of the nature and duration of the proceeding; the number of parties in interest and witnesses requiring an interpreter; the primary languages of those persons; and the quality of the remote technology that may be utilized when deemed necessary by the court to ensure effective communication in any case or court proceeding.

(4) The court may set reasonable compensation for interpreters who are appointed by the court. Court-appointed interpreter costs are to be paid out of funds provided by law or by the court.

(5) If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for payment of interpretation costs.

(6) Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter.

(7) At the time of determining eligibility, the court shall inform the party or witness of the penalties for making a false statement, and of the continuing obligation to inform the court of any change in financial status.

(G) Administration of Oath or Affirmation to Interpreters

The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following: "Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?"

Rule 8.127 Foreign Language Board of Review and Regulation of Foreign Language Interpreters

(A) Foreign Language Board of Review

(1) The Supreme Court shall appoint a Foreign Language Board of Review, which shall include:

(a) a circuit judge;

(b) a probate judge;

(c) a district judge;

(d) a court administrator;

(e) a fully-certified foreign language interpreter who practices regularly in Michigan courts;

(f) an advocate representing the interests of the limited English proficiency populations in Michigan;

(g) a prosecuting attorney in good standing and with experience using interpreters in the courtroom;

(h) a criminal defense attorney in good standing and with experience using interpreters in the courtroom;

(i) a family law attorney in good standing and with experience using interpreters in the courtroom.

(2) Appointments to the board shall be for terms of three years. A board member may be appointed to no more than two full terms. Initial appointments may be of different lengths so that no more than three terms expire in the same year. The Supreme Court may remove a member at any time.

(3) If a position on the board becomes vacant because of death, resignation, or removal, or because a member is no longer employed in the capacity in which he or she was appointed, the board shall notify the state court administrator who will recommend a successor to the Supreme Court to serve the remainder of the term.

(4) The state court administrator shall assign a staff person to serve as executive secretary to the board.

(B) Responsibilities of Foreign Language Board of Review

The Foreign Language Board of Review has the following responsibilities:

(1) The board shall recommend to the state court administrator a Michigan Code of Professional Responsibility for Court Interpreters, which the state

court administrator may adopt in full, in part, or in a modified form. The Code shall govern the conduct of Michigan court interpreters.

(2) The board must review a complaint that the State Court Administrative Office schedules before it pursuant to subrule (D). The board must review the complaint and any response and hear from the interpreter and any witnesses at a meeting of the board. The board shall determine what, if any, action it will take, which may include revoking certification, prohibiting the interpreter from obtaining certification, suspending the interpreter from participating in court proceedings, placing the interpreter on probation, imposing any fines authorized by law, and placing any remedial conditions on the interpreter.

(3) Interpreter Certification Requirements

The board shall recommend requirements for interpreters to the state court administrator that the state court administrator may adopt in full, in part, or in a modified form concerning the following:

(a) requirements for certifying interpreters as defined in MCR 1.111(A)(5). At a minimum, those requirements must include that the applicant is at least 18 years of age and not under sentence for a felony for at least two years and that the interpreter attends an orientation program for new interpreters.

(b) requirements for interpreters to be qualified as defined in MCR 1.111(A)(7).

(c) requirements under which an interpreter certified in another state or in the federal courts may apply for certification based on the certification already obtained. The certification must be a permanent or regular certification and not a temporary or restricted certification.

(d) requirements for interpreters as defined in MCR 1.111(A)(5) to maintain their certification.

(e) requirements for entities that provide interpretation services by telecommunications equipment to be qualified as defined in MCR 1.111(A)(7).

(C) Interpreter Registration

(1) Interpreters who meet the requirements of MCR 1.111(A)(5) and MCR 1.111(A)(7)(a) and (b) must register with the State Court Administrative Office and renew their registration before October 1 of each year in order to

maintain their status. The fee for registration is $60. The fee for renewal is $30. The renewal application shall include a statement showing that the applicant has used interpreting skills during the 12 months preceding registration. Renewal applications must be filed or postmarked on or before September 30. Any application filed or postmarked after that date must be accompanied by a late fee of $100. Any late registration made after December 31 or any application that does not demonstrate efforts to maintain proficiency shall require board approval.

(2) Entities that employ a certified foreign language interpreter as defined in MCR 1.111(A)(5), or a qualified foreign language interpreter as defined in MCR 1.111(A)(7) must also register with the State Court Administrative Office and pay the registration fee and renewal fees.

(D) Interpreter Misconduct or Incompetence

(1) An interpreter, trial court judge, or attorney who becomes aware of misconduct on the part of an interpreter committed in the course of a trial or other court proceeding that violates the Michigan Code of Professional Responsibility for Court Interpreters must report details of the misconduct to the State Court Administrative Office.

(2) Any person may file a complaint in writing on a form provided by the State Court Administrative Office. The complaint shall describe in detail the incident and the alleged incompetence, misconduct, or omission. The State Court Administrative Office may dismiss the complaint if it is plainly frivolous, insufficiently clear, or alleges conduct that does not violate this rule. If the complaint is not dismissed, the State Court Administrative Office shall send the complaint to the interpreter by regular mail or electronically at the address on file with the office.

(3) The interpreter shall answer the complaint within 28 days after the date the complaint is sent. The answer shall admit, deny, or further explain each allegation in the complaint. If the interpreter fails to answer, the allegations in the complaint are considered true and correct.

(4) The State Court Administrative Office may review records and interview the complainant, the interpreter, and witnesses, or set the matter for a hearing before the Foreign Language Board of Review. Before setting the matter for a hearing, the State Court Administrative Office may propose a resolution to which the interpreter may stipulate.

(5) If the complaint is not resolved by stipulation, the State Court Administrative Office shall notify the Foreign Language Board of Review,

which shall hold a hearing. The State Court Administrative Office shall send notice of the date, time, and place of the hearing to the interpreter by regular mail or electronically. The hearing shall be closed to the public. A record of the proceedings shall be maintained but shall not be public.

(6) The interpreter may attend all of the hearings except the board's deliberations. The interpreter may be represented by counsel and shall be permitted to make a statement, obtain testimony from the complainant and witnesses, and comment on the claims and evidence.

(7) The State Court Administrative Office shall maintain a record of all interpreters who are sanctioned for incompetence or misconduct. If the interpreter is certified in Michigan under MCR 1.111(A)(5) because of certification pursuant to another state or federal test, the state court administrator shall report the findings and any sanctions to the certification authority in the other jurisdiction.

(8) This subrule shall not be construed to:

(a) restrict an aggrieved person from seeking to enforce this rule in the proceeding, including an appeal; or

(b) require exhaustion of administrative remedies.

(9) The State Court Administrative Office shall make complaint forms readily available and shall also provide complaint forms in such languages as determined by the State Court Administrative Office.

(10) Entities that employ interpreters are subject to the same requirements and procedures established by this subrule.

On further order of the Court, in response to the adoption of MCR 1.111 and MCR 8.127, the following amendment is adopted in Rule 2.507 of the Michigan Court Rules, effective immediately.

Rule 2.507 Conduct of Trials

(A)-(C) [Unchanged.]

~~(D) Interpreters. The court may appoint an interpreter of its own selection and may set reasonable compensation for the interpreter. The compensation is to be paid out of funds provided by law or by one or more of the parties, as the court directs, and may be taxed as costs, in the discretion of the court.~~

(E)-(G)[Relettered (D)-(F), but otherwise unchanged.]

MARKMAN, J. (*dissenting*). I respectfully dissent. On August 16, 2010, the Department of Justice sent a letter to the highest courts of all fifty states. The letter, from then-Assistant Attorney General Thomas Perez of the Civil Rights Division, was sent "to provide greater clarity regarding the requirement that courts receiving federal financial assistance provide meaningful access for [limited-English-proficient (LEP)] individuals." According to the Department, "meaningful access" requires that state courts for the first time provide *free* interpreters to *all* LEP persons, regardless of the individual's ability to pay, "including non-party LEP individuals whose presence or participation in a court matter is necessary or appropriate" in "*all* court and court-annexed proceedings, whether civil, criminal, or administrative including those presided over by non-judges" and "court-managed offices, operations, and programs," including "information counters; intake or filing offices; cashiers; records rooms; sheriff's offices; probation and parole offices; alternative dispute resolution programs; *pro se* clinics; criminal diversion programs; anger management classes; [and] detention facilities," as well as during meetings with any "individuals who are employed, paid, or supervised by the courts," including "criminal defense counsel, child advocates or guardians *ad litem*, court psychologists, probation officers, doctors, [and] trustees." The letter further advised state supreme courts that the failure to provide these services "may" place them in violation of Title VI of the Civil Rights Act of 1964, prohibiting discrimination in the provision of services "on the ground of race, color, or national origin."

Thus, the costs of non-compliance with the Department's LEP demands are evident: if a state court system fails to comply, their state's federal financial assistance would be placed in jeopardy. At least in part because of this risk, the Court has chosen to comply in significant respects with the demands of the Department by adopting two new court rules, MCR 1.111 and MCR 8.127. Because I believe the rules being adopted today under the coercive circumstances created by the Department are both unnecessary and ill-advised, I dissent.

The full scope of the Department's demands is staggering. The Department does not simply demand that free interpreters be provided to indigent criminal defendants and others whose comprehension of court proceedings may be a matter of constitutional imperative. Rather, it demands that state courts, including Michigan, for the first time provide *free* interpreters for *all* persons involved in any way in criminal, civil, mediation, arbitration, and administrative hearings regardless of an individual's ability to pay. So, the next time a Gulf state emir or a South American multi-millionaire businessman, who is limited-English-proficient, chooses to file a civil lawsuit in this state, the Department would guarantee as a matter of legal right that the people of Grand Rapids, Detroit, and Marquette would be subsidizing that lawsuit.[1] But even this illustration does not identify

[1] I acknowledge that Michigan's Treasury will not be depleted by lawsuits brought by Gulf state emirs and South American multi-millionaires, but the point is simply that these persons would be *eligible* for, and legally *entitled* to, such public largesse, as would far

the outer limits of the Department's generosity with Michigan taxpayers' money, as free interpreters must be provided not only to parties and litigants, but also to witnesses and all other "individuals whose presence or participation in a court matter is necessary or appropriate." Accordingly, any family member of a party or a witness might under the Department's proposed rules be entitled to a free interpreter without regard to ability to pay. Furthermore, the Department's proposed rules would not only apply to court-like proceedings, but also to any court-managed office, operation, and program, including information counters. Within the "Hall of Justice," for example, in which this Court is located, an interpreter would have to be employed to assist limited-English-proficient visitors and tourists in exploring our museum-like Learning Center. Finally, the Department's proposed rules would not just apply to court-managed offices, but would also apply to meetings with individuals who are employed, paid or supervised by the courts, such as a doctor or psychologist. Indeed, the breadth of the Department's proposed rules can hardly be overstated-- they would apply for the benefit of almost any individual having virtually any interaction with any court-related proceeding or program, and they would require the courts to provide these individuals with free interpreters regardless of their ability to pay.

It is not altogether clear the extent of federal grants that would be placed at risk if Michigan failed to comply with the Department's LEP demands and if the Department was to file a lawsuit to withdraw such assistance. In a letter of October 5, 2012, the Department refers broadly to compliance with its demands "as a condition of [the court system] receiving *federal financial assistance*," an amount estimated at $108.6 million, not including grants paid directly to local courts. However, in an earlier letter of September 28, 2011, the Department more narrowly refers to a $1.5 million program as triggering the LEP requirements. No doubt, the Civil Rights Division has recognized that it is a more effective "negotiating" strategy to allow a state to stew in uncertainty concerning the financial stakes involved should it fail to jump high enough in response to the Department's demands. In fact, however, I seriously question whether the Department could actually deprive the Michigan court system of the entirety of its federal funding for partial non-compliance with its extraordinarily overreaching LEP demands. The U.S. Supreme Court has recognized that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v Dole*, 483 US 203, 211; 107 S Ct 2793; 97 L Ed 2d 171 (1987), quoting *Steward Machine Co v Davis*, 301 US 548, 590; 57 S Ct 883; 81 L Ed 1279 (1937). Accordingly, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.* at 207, quoting *Massachusetts v United States*, 435 US 444, 461; 98 S Ct

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larger numbers of financially-able, non-English-proficient persons who should be required to look to their *own* resources to pursue private civil lawsuits, just as they already are required to do with regard to hiring counsel, conducting pretrial investigations, and securing expert witnesses.

1153; 55 L Ed 2d 403 (1978); see also *Nat'l Federation of Indep Business v Sebelius*, ___ US___; 132 S Ct 2566, 2604 (2012) (opinion by Roberts, C.J.) ("When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."). In *Dole*, the Court upheld the financial inducement because "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age [would be] 5% of the funds otherwise obtainable under specified highway grant programs." *Id.* at 211. It is hardly self-evident that the Court would look as favorably upon a threat directed toward the Michigan court system focused upon the loss of 100% of its federal financial assistance, almost all of which has little or nothing to do with the matter in dispute. See, for example, *Nat'l Federation of Indep Business*, ___ US at ___; 132 S Ct 2566; 183 L Ed 2d 450 (opinion by Roberts, C.J.) ("[T]he financial 'inducement' Congress has chosen [in this case] is much more than 'relatively mild encouragement'—it is a gun to the head.").

The breadth of the Department's demands, and the intransigence of its position, are all the more remarkable in light of the flimsiness of the legal support for its view that Michigan and other states would be in violation of the laws of the United States by failing to adopt *in toto* its LEP rules. The purported source of the Department's newly-discovered power to demand the free provision of interpreters to all who might wish to take advantage is Title VI of the Civil Rights Act of 1964. More precisely, the Department relies upon a *letter* from the Assistant Attorney General placing a new *gloss* upon a non-binding statement of "*policy guidance*" previously issued by the Department.[2] That "policy guidance" in turn is ostensibly based upon the Department's

[2] DOJ's "policy guidance" provides, in pertinent part:

Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs. As indicated above, the intent of this guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens. [67 Fed. Reg. 41,455 June 18, 2002.]

To begin with (and perhaps to end with, as well), DOJ's "policy guidance" "lack[s] the force of law." *Christensen v Harris Co*, 529 US 576, 587; 120 S Ct 1655; 146 L Ed 2d 621 (2000). Furthermore, nothing within this generalized "policy guidance" even arguably requires the adoption of the Department's breathtakingly broad and specific

own *regulations*,[3] which are in turn based upon Title VI, the only authority in this listing that is an actual statute of the United States. 42 USC 2000d *et seq*. To restate, the Department relies upon a *letter* signed by the Assistant Attorney General purporting to interpret his own "*policy guidance*" purporting to be grounded in a *regulation* of the Department purporting to construe an actual *statute*, which statute in relevant part closely implicates the Fourteenth Amendment to the Constitution. Not exactly, I would submit, what the Framers had in mind when they described the "legislative power" of the United States in Article I, § 1 of the Constitution. And Title VI prohibits discrimination in the provision of public services "on the ground of race, color, or national origin," none of which forms of discrimination are apparently implicated by LEP policy, even under the Department's own regulations and "policy guidance."

Not surprisingly, the Department fails to provide any specific details or documentary, non-anecdotal evidence of instances in which discriminatory practices within the Michigan court system have actually prevented any individual from "meaningfully participating" in the judicial process because of race, color, or national origin.[4] But, of course, as the Department views things, "discrimination" does not simply mean "discrimination," as traditionally understood i.e., distinguishing or differentiating between persons "because of," "due to," "on account of," "on the basis of," or "on the grounds of" race, color, or national origin, but encompasses also the theory of "disparate impact or results," or statistical "discrimination."[5] See n 3. Relying upon this theory,

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free-interpreters-for-all rules set forth in its subsequent demand letter to this and to other state supreme courts.

[3] See, e.g., 28 CFR 42.104(b)(2), which forbids recipients of federal funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." The propriety of this particular federal regulation has been called into question. See, e.g., *Alexander v Sandoval*, 532 US 275, 281-282; 121 S Ct 1511; 149 L Ed 2d 517 (2001) (regulations that "proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under [Title VI] . . . are in considerable tension with the rule of [*Bakke*, 438 US 265] and [*Guardians*, 463 US 582] that [Title VI] forbids only intentional discrimination . . . .").

[4] The only specific complaint identified by the Department of which I am aware pertains to an allegation against a Washtenaw county court, not for failing to provide interpreters, but for failing to provide interpreters *free of charge*.

[5] None of which is to suggest that "disparate impact" theory is an invention of the current Department of Justice; it is not.

evidence of an intention or purpose to discriminate becomes largely irrelevant, and it is sufficient that statistically-imperfect outcomes or results are produced by public and private policies and actions.

But the legal flaws of the "disparate impact" theory, upon which the Department's LEP demands rest, reach even deeper. In numerous cases, such as *Regents of Univ of Cal v Bakke*, 438 US 265; 98 S Ct 2733; 57 L Ed 2d 750 (1978), *Guardians Ass'n v Civil Serv Comm*, 463 US 582; 103 S Ct 3221; 77 L Ed 2d 866 (1983), and *Alexander v Sandoval*, 532 US 275; 121 S Ct 1511; 149 L Ed 2d 517 (2001), the U.S. Supreme Court has held that Title VI prohibits only *intentional* discrimination and that "[i]t is clear now that the disparate-impact regulations do not simply apply [Title VI]-- since they indeed forbid conduct that [Title VI] permits." *Alexander*, 532 US at 285; see also n 3; compare *Lau v Nichols*, 414 US 563; 94 S Ct 786; 39 L Ed 2d 1 (1974).[6] Indeed, the Civil Rights Division's own recent conduct demonstrates that it is well aware of the shaky foundations of its "disparate impact" theory. As the media has widely reported, Assistant Attorney General Perez, apparently apprehensive that the U.S. Supreme Court might directly repudiate the "disparate impact" theory, engaged in a quid pro quo in February with the city of St. Paul, Minnesota, whereby the Department agreed not to intervene in two civil rights cases against the city in exchange for the city's agreement to withdraw its appeal in *Magner v Gallagher*, ___US___; 132 S Ct 548; 181 L Ed 2d 395 (2011), a case calling the "disparate impact" theory into question and scheduled to be heard by the U.S. Supreme Court. See, e.g., *Another Supreme Court Dare*, Wall Street Journal, May 23, 2013. It is manifest that the desire of the Division to protect its "disparate impact" theory was central to this agreement. In a press release explaining its decision to withdraw its appeal, St. Paul stated that, if not withdrawn, such appeal "could completely eliminate "disparate impact" civil rights enforcement . . . The risk of such an unfortunate outcome is the primary reason the city has asked the Supreme Court to dismiss the petition." *The Talented Mr. Perez*, Wall Street Journal, March 21, 2013. This agreement caused Assistant Attorney General Perez's nomination for Secretary of Labor to be delayed in the Senate for months. Thus, the Department grounds its efforts to compel state supreme courts to adopt its preferred LEP court rules exclusively in "disparate impact" analysis. However, not only has the Department failed to present any evidence of any intentional discrimination by Michigan based "on the ground of race, color, or national origin," but it has failed even to present evidence of "disparate impact discrimination," much less connect a state's LEP policies with Title VI discriminations. Given that Title VI nowhere

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[6] The Constitution likewise prohibits only intentional discrimination. See, e.g., *City of Mobile v Bolden*, 446 US 55, 62; 100 S Ct 1490; 64 L Ed 2d 47 (1980); *Massachusetts Personnel Admr v Feeney*, 442 US 256, 272; 99 S Ct 2282; 60 L Ed 2d 870 (1979); *Village of Arlington Heights v Metropolitan Housing Dev Corp*, 429 US 252, 265; 97 S Ct 555; 50 L Ed 2d 450 (1977); *Washington v Davis*, 426 US 229, 239; 96 S Ct 2040; 48 L Ed 2d 597 (1976).

requires or implies the free appointment of interpreters, the Department's argument that Title VI provides it with the legal authority to compel state adoption of its favored LEP policies deserves to be resisted and challenged in court if necessary.

Consistent with the federal and state constitutions, Michigan law already requires the appointment of interpreters for all criminal defendants that are in need of an interpreter. MCL 775.19a; *People v Warren (After Remand)*, 200 Mich App 586, 591-592; 504 NW2d 907 (1993), lv den 445 Mich 857; 519 NW2d 155 (1994); *People v Atsilis*, 60 Mich App 738, 739; 31 NW2d 534 (1975). And in civil matters, a trial court may also appoint an interpreter and direct that interpretation costs "be paid out of funds provided by law or by one or more of the parties." MCR 2.507(D). By all measures, these rules have operated well. Indeed, in my experience on this Court over the last 14 years, I cannot recall a single case in which an LEP person alleged that he or she had been denied an interpreter. The Department's crusade, at least in Michigan, is a classic case of a solution in search of a problem.

Despite the absence of any obvious problem in Michigan, as well as the dubiousness of federal authority to compel Michigan to adopt new LEP rules, this Court has chosen to comply in significant part with the demands of the Department by adopting new court rules that will *require* courts to appoint foreign language interpreters for any party or witness[7] who requires one to "meaningfully participate" in any "case or court proceeding,"[8] including most notably *civil* proceedings. Then, "at the conclusion of the case or proceeding," MCR 1.111(A)(3), "[i]f a party is financially able to pay for

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[7] MCR 1.111(B)(1) provides:

If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court *shall* appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party. [Emphasis added.]

In addition, MCR 1.111(B)(2) provides that "[t]he court *may* appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." (Emphasis added.)

[8] "Case or Court Proceeding" is defined as "any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

interpretation costs,[9] the court *may* order the party to reimburse the court for payment of interpretation costs." MCR 1.111(F)(5) (emphasis added). That is, the new court rules provide trial courts with the discretion to provide *free* interpreters, even where an individual is "financially able to pay for interpretation costs."[10]

> While I respect that this Court has not fully accepted the Department's demands, I believe nonetheless that it has acceded to significantly more of these demands than is warranted, and that what remains in dispute is of considerably-diminished practical consequence, notwithstanding the intransigence of the Department in insisting that this Court comply with exactitude to its demands. The rules adopted and implemented by the Court today require the appointment at public expense of interpreters in all "court proceedings," including both criminal and civil cases, for all parties and witnesses. These rules then allow, but do not require, the court to order financially-able parties to reimburse the Court at the conclusion of trial. The likely success of such after-the-fact reimbursement efforts can only be estimated by examining the rate at which judicial bodies have successfully recouped other types of post-trial costs and fees from those owing such amounts. The Court both significantly expands the scope of judicial proceedings in which interpreters must be provided and significantly expands the scope of judicial proceedings in which interpreters must be provided at public expense, including to individuals who are financially able to pay for such services themselves.

Rather than adopting the new court rules under duress from the Department, I would reject its demands and apprise now-Secretary Perez's successor as Assistant

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[9] "A person is financially able to pay for interpreter costs when: (a) The person's family or household income is greater than 125% of the federal poverty level; and (b) An assessment of interpreter costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter." MCR 1.111(A)(4). In light of (a), it is anyone's surmise as to what (b) adds to the "financially able to pay" analysis, except that it is clear there will be some unknown number of persons *above* 125% of the poverty level who will be viewed as legally *entitled* to free, i.e., taxpayer-funded, interpreter services.

[10] The "standardlessness" of free interpreter appointments for financially-able individuals renders it unlikely that there will be meaningful appellate review of such appointments. It is equally unlikely that there will be incentive on the part of any other party to object to these appointments, since, of course, it is not something for which *they* would be paying. Thus, the new rules effectively favor the appointment of interpreters, including free interpreters, see MCR 1.111(F)(6) ("Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter"), but do not favor the reimbursement of costs associated with such appointments. See MCR 1.111(A)(3), providing, "'Reimbursement' means reimbursement at the *conclusion* of the case or court proceeding." (emphasis added.)

Attorney General that, in the judgment of the people of Michigan, and as reflected in the decisions of their elected legislative, executive, and judicial representatives, the court rules of our state concerning interpreters have operated fairly and effectively to ensure that limited-English-proficient individuals have reasonable and meaningful access to Michigan's court system in circumstances in which there is a constitutional or legal right to a free interpreter. If the Department then wishes to carry out its implicit threats to sue the state, I would aggressively defend against that suit and ensure that the burden of proof is clearly placed upon the Department to demonstrate: (1) that there is a constitutional or legal right to a free interpreter in all judicial and court-related proceedings or programs; (2) that there is a constitutional or legal right to a free interpreter in all judicial and court-related proceedings or programs, without regard to financial ability to pay; (3) that there is evidence that the state of Michigan has been engaged in either constitutional or statutorily-prohibited discrimination against persons on the basis of national origin or any other "protected category;" (4) that "discrimination" in the context of either the Constitution or Title VI is properly defined with reference to "disparate impact" analysis; (5) that a federal agency acts pursuant to its authority within our constitutional architecture, in particular our system of federalism, when it seeks to require the supreme courts of every state to adopt court rules imposing considerable new financial costs upon their citizens, which rules are predicated upon "letter interpretations" grounded in statements of "policy guidance" based upon administrative regulations purporting to interpret congressional statutes; and (6) that the Department possesses the constitutional authority to deprive the Michigan court system of the entirety of its federal financial assistance where Michigan does not fully assent to the conditions imposed by the Department pertaining to limited-English-proficiency persons, i.e., that the "financial inducement" the Department has chosen in that circumstance is closer to a "relatively mild encouragement" than to a "gun to the head." Who can better assert the constitutional prerogatives of the fifty states of our Union than their supreme courts acting together?[11]

Perhaps most troubling to me is that the demands of the Department are reflective of an increasingly familiar pattern by which this and other state supreme courts have routinely been "commandeered" or "dragooned" by federal agencies to enact new court rules, not as the product of any exercise of independent judgment by the courts themselves that such rules are warranted, but as the product of financial threats by these

[11] What is particularly regrettable about the Court's position today is that, despite the significant accommodations that have been made to the Department, Michigan may *yet* find itself subject to a lawsuit because we have not accommodated the Department's demands "jot and tittle." The lawsuit that I have described in this paragraph would be of consequence both in asserting the rule of law and in delineating the contours of American federalism. The lawsuit that may *now* result despite the Court's efforts at deterrence will instead focus largely upon mere details that divide the Department and this Court.

agencies. These demands typically occur in areas of policy that lie within the core constitutional responsibility of the states, such as child support regulations, foster care rules, and juvenile guardianship policies, and where there is little or no federal authority that can be discerned from the Constitution. A charade then proceeds in which the federal agency pretends to respect the authority of the state courts, and the state courts pretend to exercise that authority. A constitutional dynamic thus arises that caricatures the proper relationship between our national and state governments, in which publicly-unaccountable federal officials decree word-for-word to elected state justices what new court rules are required, and how exactly the justices must cast their votes at their next judicial "deliberations." It is hard to imagine a more distorted illustration of republican self-government, in which elected representatives of the people become little more than mechanical instrumentalities for obediently carrying out the demands of federal officials. And by this process, the federal government's spending authority is abused, both by imposing obligations upon the states allowing the federal government to accomplish policy ends it could accomplish in no other fashion, and by making state representatives appear feckless and ridiculous. Although I believe that this Court has conceded too much to the demands of the Department, as I have already indicated, it is very much to the Court's credit that it has refused to accept in its entirety the Department's extreme and unwarranted demands.

Because I believe that our state's current court rules reasonably and meaningfully protect limited-English-proficient individuals as to their constitutional and legal rights, I would retain these rules and would not adopt those demanded in their place by the Department.[12]

[12] By the adoption of our new rules, the Court also establishes an additional and unnecessary judicial-branch bureaucracy, one whose absence the state has endured well for its first 175 years-- a nine-member Foreign Language Board of Review and Regulation of Foreign Language Interpreters, replete with its own staff, Code of Professional Responsibility for Court Interpreters, state certification requirements, standards of conduct, training programs, continuing certification requirements, registration fees for both interpreters and "entities that employ a certified foreign language interpreter," disciplinary procedures, and an array of new administrative processes.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 11, 2013

Clerk