January 25, 2013

Attn: Invitation to Comment

Judicial Council of California

Administrative Office of the Courts

455 Golden Gate Avenue

San Francisco, CA 94102

**Re: Proposed Mandatory E-Filing: Uniform Rules to Implement AB 2073**

**Item Number: W13-05**

Submitted via Electronic Mail to *invitations@jud.ca.gov*

To Whom It May Concern:

I am writing on behalf of [insert your organization here] to provide public comment to the Judicial Council as it considers the implementation of rules on mandatory electronic filing and electronic service in the trial courts. Thank you for taking the time to consider the effects of these proposed rules on California's civil litigants.

We would like to recognize the simultaneously submitted public comments being offered by the Legal Aid Association of California (LAAC); State Bar of California Standing Committee on the Delivery of Legal Services (SCDLS); California Commission on Access to Justice; and various other legal services community and advocacy groups addressing the general impact of e-filing and e-service, including issues related to fee waivers, limited scope representation, disability access and other concerns facing legal services-eligible Californians. We note our agreement with the insights and recommendations offered in those comments and urge the Judicial Council’s close attention to them. **We write here separately to focus on language access issues within the scope of our experiences and expertise with** **limited-English proficient (LEP) litigants and communities**.

**Introduction**

California is a state that is racially, ethnically, and linguistically diverse. Over 27 percent of Californians are foreign-born, compared to nearly 13 percent nationally.[[1]](#footnote-1) Californians speak over 220 languages[[2]](#footnote-2) and 43 percent of Californians speak a language other than English in their homes.[[3]](#footnote-3) The top five primary languages spoken at home after English include Spanish (8.1 million speakers), Chinese (815,386 speakers), Tagalog (626,399 speakers), Vietnamese (407,119 speakers), and Korean (298,076 speakers).[[4]](#footnote-4) While the wide variety of languages spoken in the state enriches California culturally, individuals who speak other languages at home may also be limited-English proficient (LEP). In fact, approximately 6 million Californians “experience some difficulty speaking English,” with “roughly 40% of Latinos and Asians overall and half of certain Latino and Asian ethnic groups being LEP.”[[5]](#footnote-5)

Limited-English proficiency impacts one’s “ability to access fundamental necessities such as employment, police protection, and healthcare.”[[6]](#footnote-6) While underrepresented groups among native English speakers often face similar challenges, these challenges are compounded for LEP individuals who must also contend with an incredible language barrier. Thus, unsurprisingly, access to the courts has proven difficult for LEP individuals, who have higher rates of poverty than the general population in California.[[7]](#footnote-7)

As the California Commission on Access to Justice observed in its 2005 report, “[f]or Californians not proficient in English, the prospect of navigating the legal system is daunting, especially for the growing number of litigants who have no choice but to represent themselves in court and therefore cannot rely on an attorney to ensure they understand the proceedings.”[[8]](#footnote-8) The report notes that approximately 7 million Californians “cannot access the courts without significant language assistance, cannot understand pleadings, forms or other legal documents and cannot participate meaningfully in court proceedings without a qualified interpreter.”[[9]](#footnote-9) To ensure that the California state court system is promoting justice for all Californians regardless of language ability, issues concerning language access and limited-English proficiency in the courts must be addressed in light of the proposed rule change concerning mandatory electronic filing and service.

**Legal Background and Mandates**

 Safeguards protecting limited-English proficient individuals in accessing the courts can be found in both state and federal statutes. California Government Code §§ 11135, *et seq.* and its accompanying regulations provide that no one shall be “denied full and equal access to benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state,” on the basis of “linguistic characteristics”.[[10]](#footnote-10)

Federally, Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulations prohibit direct and indirect recipients of federal financial assistance from discriminating on the basis of national origin, which has been interpreted to include meaningful language access.[[11]](#footnote-11) As recipients of federal financial assistance, California courts are subject to the mandates of Title VI and its implementing regulations to ensure equal access to the courts by providing necessary language assistance services.  The Department of Justice (DOJ), the federal agency that enforces Title VI requirements, provides financial assistance to California courts, and on June 18, 2002 issued guidance to recipients of such funding detailing these mandates. This guidance is clear that language access to litigants be provided both inside and outside the courtroom.[[12]](#footnote-12) The DOJ has released a number of guidance letters to recipients on this issue, including one on August 16, 2010, making it clear that Title VI requires state courts to provide free interpreter services in all civil, criminal, and administrative proceedings.[[13]](#footnote-13) This mandate is also for services outside the courtroom, as well:

Examples of such court-managed offices, operations, and programs can include information counters; intake or filing offices; cashiers; records 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. Access to these points of public contact is essential to the fair administration of justice, especially for unrepresented LEP persons. DOJ expects courts to provide meaningful access for LEP persons to such court operated or managed points of public contact in the judicial process, whether the contact at issue occurs inside or outside the courtroom.[[14]](#footnote-14)

Therefore, any implementation of new requirements mandating electronic filing and electronic service must take into consideration the needs of LEP litigants at every stage of the court process.

**Overview of Key Issues Affecting LEP Litigants and Communities**

We do not wish to duplicate comments on general topics concerning low-income, legal services-eligible individuals and court access, as these are well-documented in other comments submitted by the organizations referenced above. We want to emphasize that the needs of and mandates regarding LEP litigants must be incorporated into all aspects of any rule. The points below highlight and support some key areas that we believe are especially critical for LEP litigants and communities.

1. **Certain Populations Should Be Automatically Exempted, Not Forced to Opt-Out**

We strongly support the comments of other organizations in recommending that self-represented litigants be automatically exempt, but able to “opt-in” if they choose to electronically file documents. Self-represented litigants may not have access to computers and may have difficulty filing documents electronically. This is particularly true for litigants with limited-English proficiency, who are more likely than English-speaking litigants to be living in poverty and face more barriers to accessing the courts.

Many self-represented litigants lack access to technology and even if such technology is provided by the courts or public access areas, those who are LEP will experience even more confusion attempting to navigate unfamiliar equipment and terminology. Litigants may have to learn how to use scanners, printers, modems, software to “save as” PDFs, etc., as well as compose and send private personal information via a public library or court terminal. LEP litigants are more likely to lack comprehension regarding how to send and confirm transmittal of an electronic document, which could greatly impede these litigants from having their cases fairly presented and heard.

Forcing self-represented litigants to opt-out would be overly burdensome.  In many immigrant communities, there is already a pervasive problem with many LEP self-represented litigants seeking assistance from unscrupulous notarios and brokers, who charge exorbitant fees to assist individuals with form preparation, which is usually very poor quality. Placing further burdens and barriers on the low-income LEP population would only create new opportunities for these notarios and brokers to take advantage of litigants facing desperate situations.

If there is no exemption for all self-represented litigants, certain types of cases should be exempted, such as domestic violence restraining order proceedings, civil harassment restraining order proceedings, elder abuse cases, unlawful detainer proceedings, and all family law cases. These cases have an overwhelming number of self-represented litigants and critical issues at stake, including fundamental rights regarding the care of minor children and relief from abuse. The recent Elkins Family Law Task Force’s Final Report and Recommendations, released in April 2010 by the Judicial Council of California Administrative Office of the Courts, found that in many communities, more than 75% of family law cases have at least one self-represented litigant. In many immigrant LEP communities, underreporting of domestic violence is a serious problem, and imposing additional requirements may serve as further impediments for victims seeking needed protection.[[15]](#footnote-15)

1. **Notice of the Exemption and Opt-In/Opt-Out Process Should be Made Clear**

If there is an exemption, the exemption and opt-in process should be made very clear so that self-represented litigants understand that it is not mandatory for them. This is especially important for LEP litigants. As detailed further below, we recommend that any notices and outreach regarding new court policies should be translated into the top five most widely spoken non-English languages in each county. Further, court staff who are bilingual or have access to interpretive services should be available to explain any new rules to LEP litigants.

Further, if a self-represented litigant opts-in, there should be an opportunity to opt-out later if the litigant discovers that electronic filing or service of documents is not appropriate for that person. Accessing electronically served documents in public libraries, borrowed computers, smart phones, or dial-up internet all creates additional barriers to accessing court files and may lead to additional confusion.  Any opt-in forms should offer two options when a litigant chooses to file a document electronically: an opt-in for the remainder of the case and an opt-in only for the one particular filing. This is important in cases where a litigant may learn of a required filing while in court and need to file that same day. The litigant may want to opt-in for that filing only, or may choose to opt-in later when she gains reliable access to the internet.

Many low-income litigants also obtain attorneys for limited periods and often go in and out of being self-represented. This is very common with LEP litigants because they often cannot understand their court filings, cannot obtain qualified interpreters for their hearings, or access traditional legal services. As a result, they may hire an attorney for one hearing or limited scope, and then be self-represented again. There must be a meaningful way for these litigants to opt-out easily if this occurs. For example, a represented party who has consented to e-filing and e-service but becomes unrepresented should be exempt from that point on unless they opt-in and/or become represented again. The Substitution of Attorney – Civil form should be modified to include an opt-out box to check, so that both the court and other parties are aware that the self-represented litigant is no longer subject to e-filing or e-service. If an LEP litigant, now self-represented, is unaware that she must e-file and receive e-service, there could be disastrous consequences in her legal case.

1. **Electronic Filing vs. Electronic Service**

Separate forms and procedures should be available for e-filing and e-service. Self-represented LEP litigants who choose to e-file will likely have to obtain assistance preparing their paperwork and filing. Thus it may be possible for a self-represented LEP litigant to e-file as a one-time or occasional occurrence, but that litigant may not have ready access to an email account. Libraries have time-limited access to computers and litigants may not have computer or internet at home. These limitations will affect self-represented LEP litigants not only during the filing process, but during the service process. Even if they do have access to an email account, self-represented LEP litigants may not be able to understand what they are receiving or that they are being served documents in this manner. Therefore, e-filing and e-service should be separate and distinct processes, and self-represented litigants should be exempt from both, but be allowed to opt-in to one or the other.

1. **Opting-Out of Electronic Filing and Electronic Services**

If the Judicial Council does not adopt an exemption, and there is an opt-out, rather than an opt-in exemption, each court will have to ensure that all litigants’ access to the courts is protected. Requiring an opt-out procedure further complicates litigants’ experience with the courts as self-represented litigants must understand when to file a request before they miss early deadlines.  Again, for self-represented LEP litigants, this creates an additional barrier in accessing the courts. We request that courts provide appropriate written translations and have staff with access to interpretive services available to explain the new requirements, so that LEP litigants can meaningfully access the court process. Requiring an opt-out procedure will increase the burden on the courts because self-represented LEP litigants will inevitably require individualized assistance in their language.

Like the current fee waiver process, litigants must be permitted to paper file any documents or pleadings with their request to opt-out. It must be considered filed as of the day of filing, and the litigant must be given an opportunity to cure any defects in the request within a reasonable period of time.

1. **Pro Bono Clients and Legal Services Clients**

In addition to self-represented parties, parties represented by pro bono and legal services attorneys should also be allowed to “opt-out” or to qualify for a waiver of the cost of electronic filing. As a legal services provider that represents many LEP litigants, we are uncertain of whether we will have the personnel and resources to meet the technological requirements for electronic filing. Without such an option, added expenses and costs may prevent or curtail pro bono attorneys’ ability and willingness to represent clients.

**Translating Materials and Forms**

The proper translation of state court materials and forms is essential to bridging the language divide between the California court system and the LEP populations it serves. The following suggestions are ways in which state courts can make themselves more accessible to LEP populations, should the proposed mandatory electronic filing rule be adopted.

First, courts in each county should work with their vendors to create introductory materials and clear guidance such that LEP individuals understand the steps they need to take in order to successfully complete necessary transactions and electronic filings. Each county’s courts should provide any such materials and/or guidance in the five most widely spoken non-English languages in each county. Courts should also have bilingual staff or access to interpretive services at filing windows, public kiosks and self-help centers so LEP litigants can ask questions and seek assistance.

Similarly, courts in each county should provide bilingual forms containing translated text written alongside the original English text, thus facilitating litigants understanding and completing forms in English. The courts should create one such form for each of the five most widely spoken non-English languages in their respective counties.

Third, courts should be strongly discouraged from using Google Translate or similar services to translate court webpages, as the translations have been proven to be inaccurate and confusing to non-English speakers. The use of online translators such as Google is not an adequate substitute for human translation. Our bilingual staff attempted to explore the website of the Orange County Courts ([www.occourts.org](http://www.occourts.org)), where a pilot project of this mandatory rule is being conducted, using the Google translation offered on the homepage. Navigating the website in some of the Asian languages, as translated by Google, did not provide meaningful translation of the content and was very confusing to the reader. The court forms were too large to translate and the services provided by the vendor were not translated.

Finally, the courts must conduct effective outreach to LEP communities concerning any changes to court rules regarding electronic filing. Courts in each county should create signs and flyers to be posted prominently in each courthouse detailing electronic filing requirements. These signs and flyers should appear in the five most widely spoken non-English languages in the county. Additionally, courts should consider placing translated notices pertaining to the changes in local media that reach LEP communities, such as non-English language newspapers. This multilingual outreach should clearly explain both changes to the electronic filing requirements and any exemptions that may apply. Effective outreach is essential in ensuring that LEP communities receive fair and proper notice concerning any changes to state court filing requirements.

 Thank you very much for your consideration. If you have any questions regarding these comments, please feel free to contact me at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

Sincerely,

1. *See* U.S. Census Bureau, “State & County QuickFacts,” available at: <http://quickfacts.census.gov/qfd/states/06000.html> (listing 2007-2011 figures for foreign-born individuals). [↑](#footnote-ref-1)
2. *See* California Commission on Access to Justice, “Language Barriers to Justice in California” at 1 (2005), available at: <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=79bAIYydnho%3D&tabid=216> [↑](#footnote-ref-2)
3. *See* U.S. Census Bureau, “State & County QuickFacts,” available at: <http://quickfacts.census.gov/qfd/states/06000.html> (listing percentage of people over age 5 speaking language other than English at home, 2007-2011). [↑](#footnote-ref-3)
4. Asian Pacific American Legal Center of Southern California and APIAHF, “California Speaks: Language Diversity and English Proficiency by Legislative District” at 5 (2009), available at <http://www.apiahf.org/sites/default/files/APIAHF_Report05_2009.pdf> [↑](#footnote-ref-4)
5. *Id*. at 6. [↑](#footnote-ref-5)
6. *Id*. at 2. [↑](#footnote-ref-6)
7. *See* U.S. Census Bureau, American Fact Finder, available at: <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_S1603&prodType=table> (listing characteristics of people by language spoken at home, 2011 American Community Survey 1-Year Estimates). [↑](#footnote-ref-7)
8. “Language Barriers to Justice” at 1. [↑](#footnote-ref-8)
9. *Id.* [↑](#footnote-ref-9)
10. California Government Code §§ 11135, 11139; Cal. Code Regs. Title 22, Section 98210(b). [↑](#footnote-ref-10)
11. 42 U.S.C. § 2000d (2004); *Lau v. Nichols*, 414 U.S. 563, 568-569 (1974) (“Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the [Title VI] regulations.”). [↑](#footnote-ref-11)
12. 67 Fed. Reg. 41455-41471 (2002). [↑](#footnote-ref-12)
13. [www.lep.gov/final\_courts\_ltr\_081610.pdf](http://www.lep.gov/final_courts_ltr_081610.pdf) [↑](#footnote-ref-13)
14. *Id.* [↑](#footnote-ref-14)
15. National Asian Women’s Health Organization, “Silent Epidemic: A Survey of Violence Among Young Asian American Women.” 2002, p. 9. [↑](#footnote-ref-15)