



30TH ANNUAL  
CONFERENCE  
ISSUE

TABLE OF CONTENTS

FEATURE ARTICLE

Fundamental Fairness and  
Limited English Proficiency  
Page 1

MESSAGE FROM  
THE CHAIR  
Page 2

PHILOSOPHER'S  
CORNER

Natural Law and Dao:  
Comparing Legal and  
Cultural Concepts  
Page 3

CONFERENCE NEWS

Scottsdale Memories  
Page 9

Translation World in Toronto  
Page 11

ADVOCACY IN ACTION  
Page 13

A LEXICOGRAPHER'S  
LAIR  
References Worth their  
Weight in Gold  
Page 14

EYE ON CALIFORNIA  
Page 16

GETTING DOWN TO  
BUSINESS  
Page 17

WEBSITES OF INTEREST  
Page 18

## FUNDAMENTAL FAIRNESS AND LIMITED ENGLISH PROFICIENCY: ONE SHOULD NOT PREVENT THE OTHER

Hon. Ronald B. Adrine



*The following text is an edited version of the keynote address at NAJIT's 30th annual conference, held in Scottsdale, Arizona, in May 2009. The author is administrative and presiding judge in the Cleveland Municipal Court.*

**T**he genius of the Constitution of the United States is that it establishes certain central shared values: this is a society governed by the rule of law, not the rule of men; everyone who lives here is entitled to the equal protection of those laws; the government can't deprive you of your life, your liberty, or your property without affording you the due process provided under those laws; and the fact that fundamental fairness breeds community. It is our belief in these values that allows us to tolerate wildly disparate views without resorting to violence. It is our belief in these values that leads us to hold that each of our views will be heard and considered, even if they are not immediately adopted. It is our belief in these values that allows us to engage in civil discourse instead of armed conflict when our ideas do not enjoy current favor.

It is fundamental fairness that makes this nation great, and fundamental fairness that has always set the United States of America apart among nations. It is the reason that, over the centuries, so many people from around the world have sought to come here. They believed that in this place their "otherness" could be overlooked and that they would ultimately be judged by what they contributed. America is at its very core a nation made great by the contributions of diverse people who nurtured a belief

that the American value of fundamental fairness would allow them the opportunity to succeed.

But while I am a cheerleader for my country, my eyes are not closed to the myriad divergences from America's true beliefs. I am a consummate realist, and therefore am painfully aware that throughout our history, we as a nation have not always lived up to our ideals.

At no other time in our history has our resolve to keep our ideals been so tested as it is today. At a time of catastrophic worldwide economic unrest, never has the desire of others to come to America, the land of opportunity and fundamental fairness, been greater than it is today. Yet, at the same time, faced with both internal and external threats, a majority of our people, motivated by the fear and unease that comes with an uncertain future, seem to question those core values that make us great.



We find ourselves confronted and conflicted. In no other arena is the conflict for our constitutional soul more evident than in the area of linguistic diversity. On the one hand, the pressure to conform to the use of a shared public language has played a huge part in the ability of this nation to effectively work

and grow together. The rapid demographic and linguistic changes of the last 40 years, brought about by increased immigration, especially from places other than Europe, have strained our ability to assimilate the newcomers, particularly as it relates to serving their language needs.

Nowhere is that strain more evident than in the judicial system, the institution that we have entrusted

> *continues on page 4*

FAIRNESS AND ENGLISH PROFICIENCY *continued from page 1*

with the task of safeguarding our most important shared values. It embarrasses me to say that when it comes to dealing with those with limited English proficiency, despite our best efforts, we have on balance failed to demonstrate that our stated commitment to equal protection and due process for all remains unshakably in place.

Why would I say such a thing? Primarily because, despite a federal law that makes it illegal to discriminate against people with limited English language proficiency; and despite the creation of a national consortium of approximately 41 states that have pledged to address the judicial needs of individuals with limited English language proficiency; every day we read about failures to uphold our values, resulting in manifest miscarriages of justice for those who have not mastered the use of the English language. These miscarriages are the result of a classic clash of competing interests.

I believe it was one of John F. Kennedy's cabinet members, Joseph Califano, who described politics as the art of determining who lives, who dies, and who pays. For those with limited English proficiency, due process and equal protection are frequently the casualties of an unwillingness of our society to pay. We believe that those who don't have English skills are entitled to the same rights as everyone else — until we get the bill.

This is particularly true in courthouses across this country. Why are judges so challenged when we try to address the issues surrounding the provision of equal protection and due process to those whose first language is not English? To begin with, it's a matter of privilege. Those of us who are proficient in English are privileged; and those who are not, aren't.

In America, someone who speaks English and doesn't get the concept of privilege is like a fish that doesn't get the concept of wetness. It's all around us, it's essential to our survival, and yet we are totally oblivious of it. If you speak English in this country, you never give language a second thought, because you never have to. When it comes to language, it is all about you all of the time — that's just the way it is. It's a given that requires no thought.

Judges are a particularly privileged lot when it comes to language. We've been trained in its use. Before we took the bench, most of us made our living as wordsmiths. We take great pride in our ability to turn a phrase or discern the meaning of a passage. Therefore, for some of us, dealing with those who are not privileged is at best an irritation, and at worst, an aggravation.

The unprivileged require that we spend precious time on their problems — time that we don't have — because of their ignorance. They also cost us money that we don't have, which we expend for interpreter and translator services, as well as for specialized testing, intervention, treatment, and counseling.

Because we are privileged, some of us think that the majority of those claiming limited English proficiency are actually malingering. We resent the time that they require and just wish they would go away.

Virtually all of us who have donned the judicial robe did so because we wanted to make a positive contribution to the communities that we live in and to the people who appear before the judicial systems that serve them. The judges in many of the jurisdictions where you come from probably want to do something

to improve the circumstances of those with limited English proficiency, but in many instances, they don't have a clue as to what they can do.

So what *should* judges do? First, let me suggest that we could all use a little education, because in many instances we don't even know what we don't know about this issue. Most of us are woefully uninformed about the extent that language issues have pervaded our communities and the justice systems that we work in. We are not as informed as we should be about the federal laws enacted to secure the constitutional rights of equal protection and due process to those whose first language is not English. We are not, as a group, fully aware of the duties placed upon us to safeguard those rights, nor are we aware of the penalties that we and our courts face if we are complicit in the violation of those rights.

I believe, however, that with the recent action by the U.S. Department of Justice towards the State of Indiana, the State of Maine, and the State of Oklahoma, that may be changing. Everyone is paying more attention now because there's a new sheriff in town, and he doesn't appear to be prepared to look the other way.

**Let me share with you several things that any judge can do right now, at little or no cost, to proactively address the issues that limited English proficiency present to the courts:**

- Become familiar with the bare minimum technical and ethical skills constitutionally required for anyone to adequately provide interpreter or translator services.
- Determine how frequently interpreter services are used by the court; how often the court has resorted to the use of non-professional interpreter services in the last year — and more importantly — why?
- Only allow those who can meet the required technical and ethical standards to provide interpreter services in a courtroom. This would exclude, in many instances, not only miscellaneous bilingual friends, family, community members, and other interested parties, but also untrained attorneys and court employees, law enforcement officers, and others.
- Ensure that when the court is called upon to acquire the services of an interpreter, that the court's protocol will deliver someone capable of providing a service that meets minimum constitutional standards.
- If the court has no protocol, convene a community committee or a task force to develop one.
- Identify all of the agencies in the community that provide professional interpreter and translation services.
- Determine if those agencies employ individuals who have been specifically trained to provide interpreter and translation services in a legal setting. If they don't, establish a timeline for them to come into compliance.
- Determine how the court acquires legal interpreter and translator services for those who speak foreign languages other than Spanish.
- Conduct regular clinics for court employees, such as clerks and security officers, to sensitize them to the issues facing people with limited English proficiency, and provide them with the resources necessary to assist.

- Give every judicial officer and every court department copies of the “I Speak” language identification booklet.
- Convene a group or groups from foreign language-speaking and hearing-impaired communities to identify the existence of access to justice issues in the court, and to develop and/or enhance the capacity to deliver legal interpreter and translator services.
- Identify fiscal resource impediments regarding the deployment of legal interpreter and translator services, and develop strategies to overcome them.
- Determine the applicability of Title VI of the U.S. Code to the court and the penalties for failing to comply with its provisions.
- Give at least one presentation to a community group on the importance of interpreter and translator services to the rule of law.
- Distribute to all judicial officers bench cards or bench-books from the National Center for State Courts or from the Supreme Court of the jurisdiction, if such a resource is available, on interpreter and translator services.
- Urge your state to join the National Center for State Courts’ consortium that is developing national proficiency tests to certify interpreters in major languages.
- If your state is already a member of the consortium, become active in its activities.

- Sponsor a judicial seminar on interpreter and translator issues for the judicial officers in your jurisdiction, complete with continuing judicial education credits.
- In jurisdictions with large concentrations of specific non-English speaking populations, post appropriate signage throughout the courthouse.

**On issues involving improvements to the administration of justice, judges are expected to lead. This list is not intended to serve as the ultimate answer to the question of what judges should do when faced with defendants with limited English proficiency. Rather, by sharing it with you, it is my intention to showcase the fact that within every judge’s comfort zone, there are many things that can and should be done to advance solutions to the problems posed by these issues.**

**We know for a fact that these questions are not going to go away and are not going to diminish. The decision to do nothing is still a decision. And doing nothing in this context is the one thing that we cannot afford to do; not if we value our civil society and the quality of our justice system. Fundamental fairness and our constitution demand that the judiciary take its rightful place in the vanguard of those working to resolve these access issues in order to insure that justice is available for all of us. ▲**

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