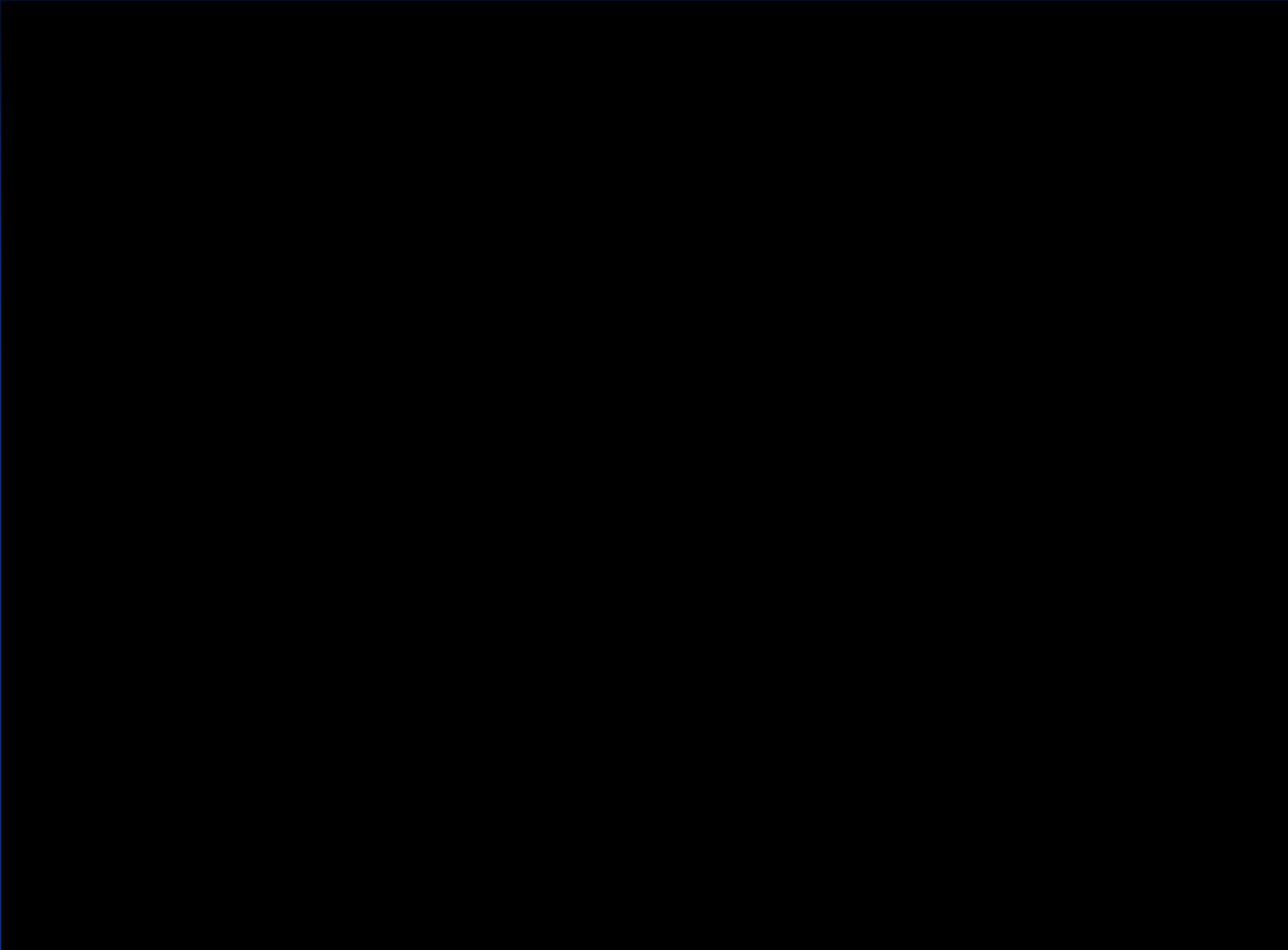


# Tennessee Judicial Academy 2014

## August 21, 2014

### Cultural (and Related) Issues in the Courtroom

Jerry Gonzalez  
Jerry Gonzalez, PLC  
2441-Q Old Fort Parkway  
No. 381  
Murfreesboro TN 37128  
615-360-6060 off.  
615-604-0520 cel.  
[jgonzalez@jglaw.net](mailto:jgonzalez@jglaw.net)



# Basic Introductory Issues

- 78% of the total unauthorized population is from North America.
  - Mexicans are about 57% of the total
  - 24% other Latin American countries
  - Asia 9%
  - Europe and Canada 6%.

# Basic Introductory Issues

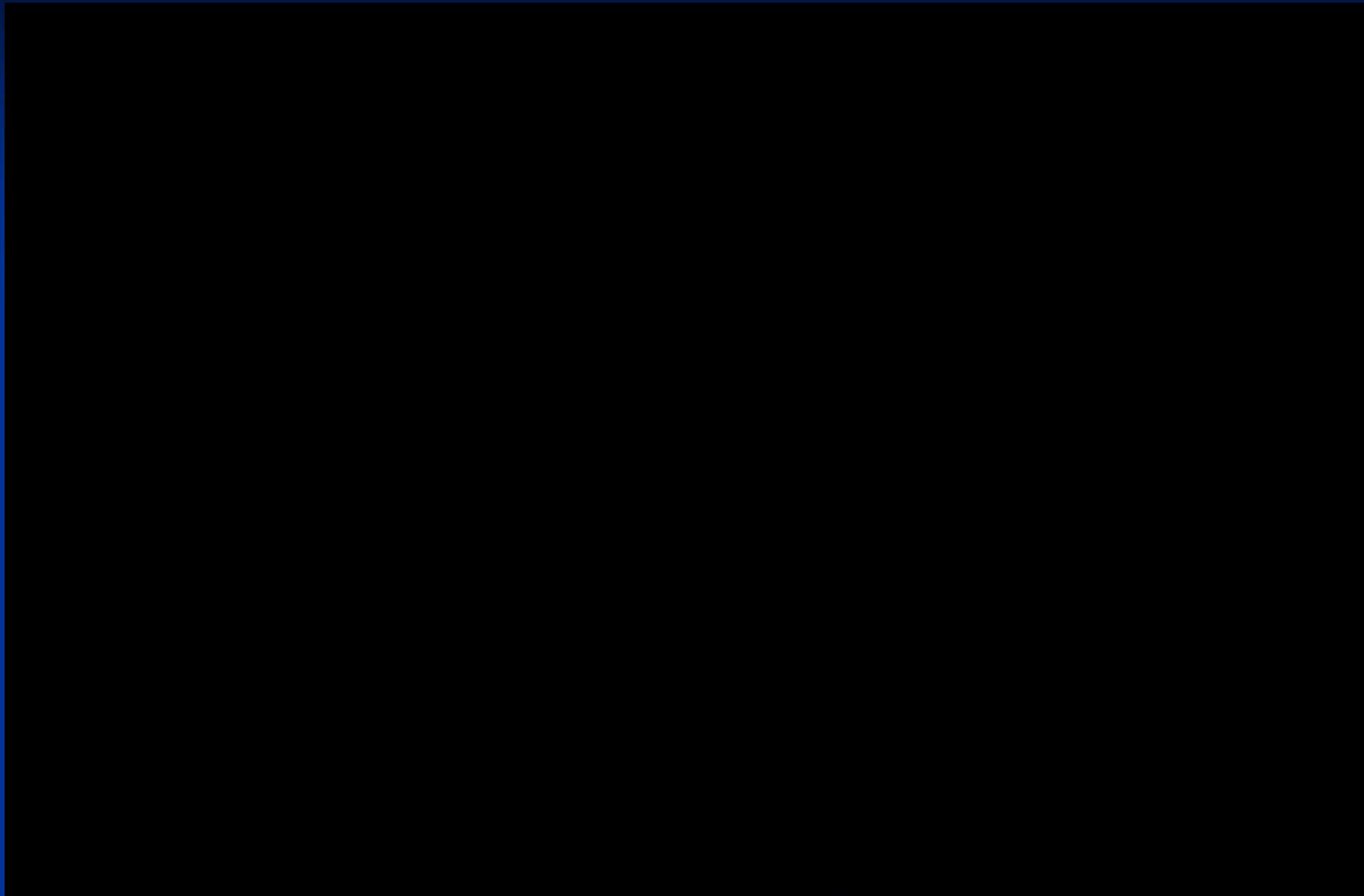
(Continued)

- Immigrants/aliens come in all sizes, shapes and colors.
- Lack of a SSN DOES NOT give a reliable indicator of illegal residency status.
- Possession of an SSN DOES NOT give a reliable indicator of legal residency status.
- ITIN vs SSN

- Working knowledge of English.
- Hispanic naming traditions.
  - Gerardo Alejandro Gonzalez Bowen.
  - Gerardo Alejandro Gonzalez B.
  - Sr. Gonzalez
- Exceeding authorized stay after lawful entry is not a criminal offense but rather a civil “status” offense.

- Unlawful entry, on the other hand, is a crime.
  - 8 U.S.C. 1325
    - First improper entry – misdemeanor
    - Subsequent entry – felony
  - 8 U.S.C. 1326
    - Reentry of removed aliens – felony.

- Not all "Hispanics" speak Spanish.
  - In Mexico alone, there are over 68 distinct indigenous languages spoken.
  - Puerto Rican, Cuban, South American, and Mexican Spanish can sound very different in slang and accent.
- Not all Hispanics have dark skin and black hair.
- Religious issues - Swearing on Bible. Muslim? Catholic? Mormon? Hindu?



# Access to courts / Constitutional rights of aliens

- “[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

- “No state shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any state deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.”
  - U.S. Constitution, Amendment 14, Section 1.

- “[N]o plausible distinction with respect to Fourteenth Amendment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.”
  - *Plyler v. Doe*, 457 U.S. 202, 212, fn10 (1982).

- “The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that **all persons lawfully in this country** shall abide 'in any state' on an equality of legal privileges with **all citizens** under non-discriminatory laws.”
  - *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948).

- Other interests protected include those that the Supreme Court has found so rooted in the traditions and conscience of our people as to be fundamental:
  - *Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982) (right to reasonable care and safety while in government custody);
  - *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry);
  - *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (to have children);

- *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (to direct the education and upbringing of one's children);
- *Griswold v. Connecticut*, 381 U.S. 479 (1965) (to marital privacy);
- *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (to use contraception);
- *Rochin v. California*, 342 U.S. 165 (1952) (to bodily integrity);
- *Bridges v. Wixon*, 326 US 135 (1945) (to freedom of speech and of press, specifically applying the right to aliens).

- *Bell v. Ohio State University*, 351 F.3d 240, 250 (6th Cir. 2003) (to travel)
- *Saenz v. Roe*, 526 U.S. 489, 498 (1999). The “constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.”
- *Johnson v. Cincinnati*, 310 F.3d 484, 495-98 (6th Cir. 2002) (right to travel locally through public spaces and roadways).

# Some lesser rights

- *Hernandez v M/V Ragaan*, 848 F.2d 498, 500 (5th Cir. 1988) (en banc) (the right to obtain damages for personal injury);
- *Klapa v O & Y Liberty Plaza Company*, 645 N.Y.S.2d 281, 282 (1996) (the right to have the rules of evidence applied in their cases);
- *Patel v Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988) (right of undocumented workers to sue for unpaid wages and liquidated damages under FLSA).

- *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 122 S.Ct. 1275 (2002).
  - Cannot award backpay to undocumented alien who had never been legally authorized to work in the United States.
- *Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir.1988) (Title VII applies to undocumented workers.)

# Limited English Proficiency

- Attorneys representing LEP's must be reminded to inquire with the client as to the need for an interpreter, and whether he/she can communicate via the chosen interpreter.
- Witness's expression of difficulty understanding what is said to him.

# Limited English Proficiency

- “To allow a defendant to remain silent throughout the trial and then.. assert a claim of inadequate translation would be an open invitation to abuse.” *Gonzalez v United States*, 33 F.3d 1047, 1051 (9th Cir. 1994).

# Attorneys as interpreters

- An “attorney shall not act as both an attorney and as interpreter for his or her client in the same matter.” Advisory Ethics Opinion No. 2002-A-765

# Attorneys as interpreters

- *State v Zambrano*, 1989 Lexis 3951 (Ohio App.)
  - Defendant's bilingual attorney served as interpreter during a guilty plea on a charge of attempted rape. The court upheld the conviction despite the fact that the attorney was not formally qualified as an expert interpreter nor administered the usual interpreter oath. The court observed that counsel, as an officer of the court, was bound to render a true translation of the judge's inquiries and the client's responses.
- But what about ethical duty to client?

# Tennessee Supreme Court Rules

- Rule 41, Rules of Ethics for Spoken Foreign Language Interpreters in Tennessee Courts.
  - Terminology
    - Consecutive vs Simultaneous interpreting

# Tennessee Supreme Court Rules

- Rule 42, Standards for Court Interpreters
  - Applies to all courts in the state.
  - The court *shall* appoint an interpreter according to the preference listed below:
    - 1. State certified court interpreter;
    - 2. State registered court interpreter;
    - 3. Non-credentialed court interpreter.
  - Court must make a finding that diligent, good faith efforts to obtain a certified or registered interpreter and none were reasonably available.

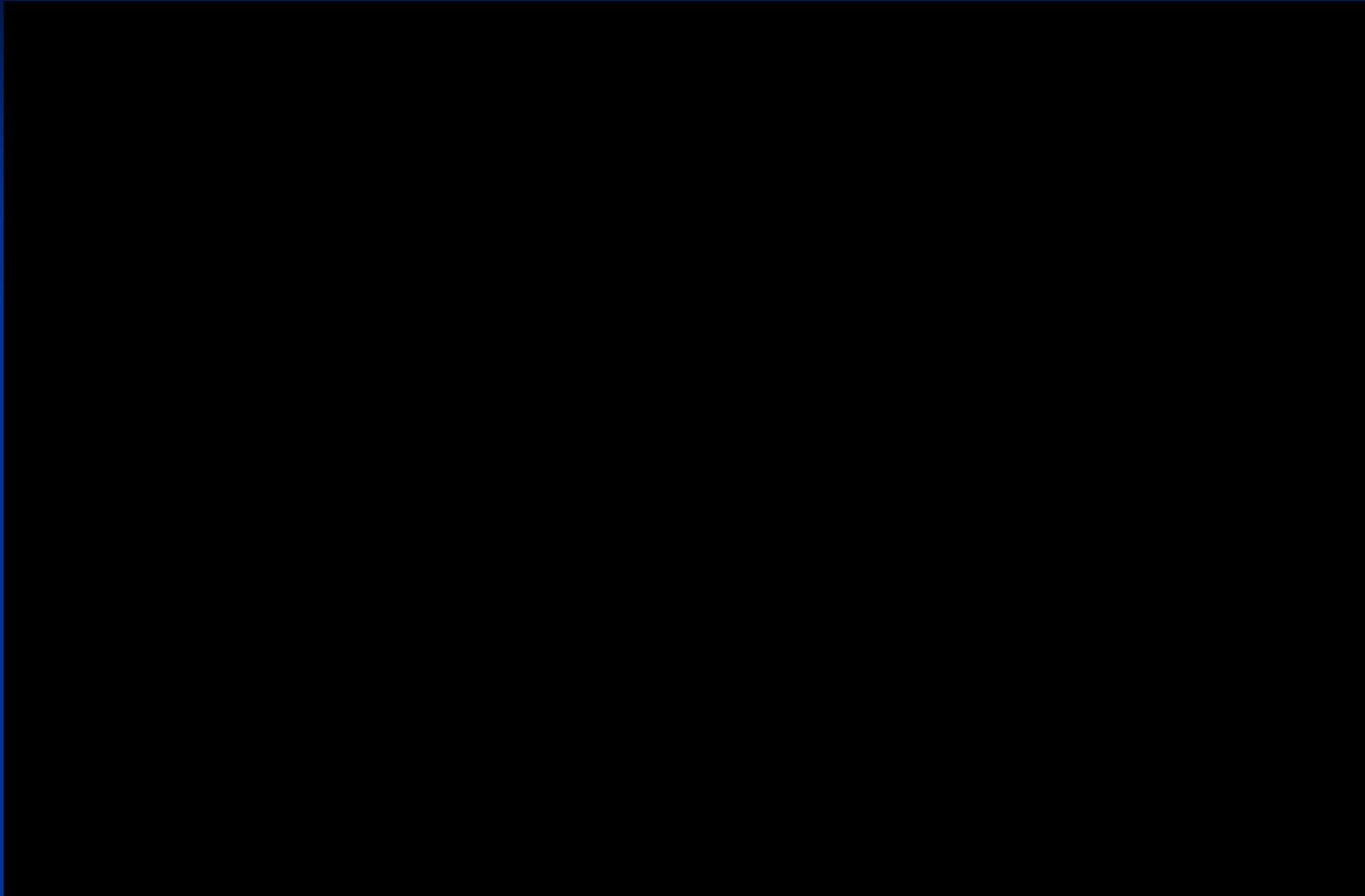
# Guidelines while using interpreter

- DO seek and preferentially use qualified interpreters who have invested the time and expense to earn credentials in the language pair. (Federal certification has a 4% pass rate.)
- DO ask for and examine credentials
- DO try to simplify your use of legalese.
- DO NOT ask interpreter to take LEP litigants outside and explain them their rights.

- DO NOT say to interpreter “Tell him to ...”  
Speak directly to the LEP and let the interpreter interpret.

# Title VI

- Title VI of the Civil Rights Act of 1964, 42 USC 2000d and DOJ guidelines.
  - §601 prohibits discrimination on the basis of race, color, or national origin under any program or activity that receives federal financial assistance.
  - DOJ guidelines (28 C.F.R. 50.3).
  - *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001). “So far as we can tell, this authorizing portion of §§ 602 reveals no congressional intent to create a private right of action.”



Jerry Gonzalez  
Jerry Gonzalez, PLC  
2441-Q Old Fort Parkway  
No. 381  
Murfreesboro TN 37128  
615-360-6060 off.  
615-604-0520 cel.  
[jgonzalez@jglaw.net](mailto:jgonzalez@jglaw.net)  
[www.jglaw.net](http://www.jglaw.net)

Tennessee Administrative Office of the Courts  
Judicial Academy  
Murfreesboro, Tennessee  
Cultural (and related) Issues in the Courtroom  
August 21, 2014

I. **Basic introductory issues**

- A. Immigrants/aliens come in all sizes, shapes and colors.
- B. *Lack* of a SSN DOES NOT give a reliable indicator of illegal residency status.
- C. *Possession* of an SSN DOES NOT give a reliable indicator of legal residency status.
- D. ITIN vs SSN
- E. Working knowledge of English.
- F. Hispanic naming traditions.
- G. Exceeding authorized stay after lawful entry is not a criminal offense but rather a civil “status” offense. Unlawful entry, on the other hand, is a crime. 8 U.S.C. 1325 (first improper entry - misdemeanor, subsequent entry - felony), 8 U.S.C. 1326 (reentry of removed aliens - felony).
- H. Not all "Hispanics" speak Spanish. In Mexico alone, there are over 68 distinct indigenous languages spoken. Puerto Rican, Cuban, South American, and Mexican Spanish can sound very different in slang and accent.
- I. Not all Hispanics have dark skin and black hair.
- J. 78% of the total unauthorized population is from North America. Mexicans are about 57% of the total, 24% other Latin American countries, Asia 9%, Europe and Canada 6%.
- K. Religious issues - Swearing on Bible. Muslim? Catholic? Mormon? Hindu?

II. **Access to courts/Constitutional rights of aliens**

- A. “[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 2500 (2001).
  - 1. “No state shall make or enforce any law which shall abridge the privileges or immunities of **citizens** of the United States; nor shall any state deprive any **person** of life, liberty, or property, without due process of law; nor deny to any **person** within its jurisdiction the equal protection of the laws.” U.S. Constitution, Amendment 14, Section 1.
- B. “[N]o plausible distinction with respect to Fourteenth Amendment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.” *Plyler v. Doe*, 457 U.S. 202, 212, fn10 (1982).
- C. “The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under

- non-discriminatory laws.” *Toraō Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948).
- D. Suspect classifications which require heightened judicial scrutiny are race, alienage, and national origin. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)
- E. If a state law on its face expressly distinguishes among persons because of a protected classification, the Fourteenth Amendment requires that the law be subject to strict scrutiny and be narrowly tailored to serve a compelling governmental interest. *Shaw v. Reno*, 509 U.S. 630 (1993).
- F. [T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi [v Fish and Game Comm.]*, 334 U.S. [410], 420, 68 S.Ct., at 1143, that 'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits. *Graham v. Richardson*, 403 U.S. 365, 371-372, 91 S.Ct. 1848,1852 (1971)
- G. Even classifications which affect some, but not all aliens, are scrutinized strictly. *Nyquist v. Mauclet*, 432 U.S. 1, 2, 97 S.Ct. 2120, 2122 (1977) (holding that any incentive through a statute restricting educational loans to citizens or aliens expressing an intent to become citizens is not a proper state concern, since control over immigration and naturalization is exclusively a federal function and rejecting state's purported interest of enhancing the educational level of the electorate.)
- H. The interests protected by substantive due process through the Due Process clause of the 14th Amendment, which the legislature may not infringe upon unless supported by sufficiently important state interests, include those protected by specific constitutional guarantees, such as the Equal Protection Clause. *Bell v. Ohio State University*, 351 F.3d 240, 250 (6th Cir. 2003).
- I. Other interests protected include those that the Supreme Court has found so rooted in the traditions and conscience of our people as to be fundamental.
1. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 321-23, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (right to reasonable care and safety while in government custody);
  2. the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967);
  3. to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942);
  4. to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925);
  5. to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965);
  6. to use contraception, *Id*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972);

7. to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952),
  8. and to abortion, *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).
  9. to stay and live and work in this country, *Bridges v. Wixon*, 326 US 135, 89 L Ed 2103, 65 S Ct 1443 (1945) (specifically applying the right to aliens);
  10. to freedom of speech and of press, *Id.* (specifically applying the right to aliens);
  11. And yes, the right to travel. *Bell v. Ohio State University*, 351 F.3d 240, 250 (6th Cir. 2003). The "'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498, 119 S.Ct. 1518, 1524 (1999). See also, *Johnson v. Cincinnati*, 310 F.3d 484, 495-98 (6th Cir. 2002) (right to travel locally through public spaces and roadways).
  12. Since the Due Process clause applies even to unlawfully present aliens and temporary as well as permanent aliens (*Zadvydas, supra*) and the right to travel is rooted in the 14th Amendment Due Process clause as one "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed" (*Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.E.2d 772 (1997)), by logical extension, the right to travel also applies to illegal aliens.
  13. Indeed, illegal aliens are afforded many lesser rights. For example, the right to obtain damages for personal injury, *Hernandez v M/V Ragaan*, 848 F.2d 498, 500 (5th Cir. 1988) (*en banc*); the right to have the rules of evidence applied in their cases, *Klapa v O & Y Liberty Plaza Company*, 645 N.Y.S.2d 281, 282 (1996). See, further, below.
- J. Issues particular to Illegal or undocumented aliens**
1. Relevance of undocumented status
    - a. "Because Dianella presented no proof that Hernandez was about to be deported or would surely be deported, the court did not err in basing its award on Hernandez's past earnings stream as required by *Culver II*. Dianella is liable to make Hernandez whole for the injury inflicted. It cannot defeat his right to recover by asserting that his award for future lost wages should be based upon speculation regarding what he might be earning were he in Mexico." *Hernandez v M/V Ragaan*, 848 F.2d 498, 500 (5<sup>th</sup> Cir. 1988) (*en banc*)
    - b. "[A] plaintiff's status as an illegal alien, in and of itself, cannot be used to rebut a claim for future lost earnings. The fact that a plaintiff is deportable does not mean that deportation will actually occur. Further, whatever probative value illegal alien status may have is far outweighed by its prejudicial impact." *Klapa v O & Y Liberty Plaza Company*, 645 N.Y.S.2d 281, 282 (1996).

- c. [P]laintiff's illegal alien status is, by itself, irrelevant, and cannot be used to prevent plaintiff from recovering compensatory damages in this case. Accordingly, Ford may not assert plaintiff's status as a defense to this action." *Mischalski v Ford Motor Company*, 935 F.Supp. 203, 205 (E.D. NY 1996).
  - d. Trial court properly precluded evidence of plaintiff's illegal alien status since "no offer of proof was made 'by ... defendant[s] that deportation was anything other than a speculative or conjectural possibility.'" *Gonzalez v. City of Franklin*, 137 Wis.2d 109, 139, 403 N.W.2d 747, 759 (1987).
  - e. Trial court's refusal to allow defendants to cross-examine plaintiff's wife regarding his status as an illegal alien upheld. The court found that plaintiff had been "gainfully employed in this country prior to his ... accidents, there was no evidence that he had any intention of leaving the country and the speculation that he might at some point be deported was so remote that it rendered the issue of citizenship irrelevant" to the calculation of damages. *Clemente v. State*, 40 Cal.3d 202, 221, 219 Cal.Rptr. 445, 456, 707 P.2d 818, 829 (Sup.Ct.1985).
  - f. "The fact that a plaintiff is deportable does not mean that deportation will actually occur. Further, whatever probative value illegal alien status may have is far outweighed by its prejudicial impact." *Klapa v. O & Y Liberty Plaza Company*, 645 N.Y.S.2d 281, 282 (1996).
2. Fair Labor Standards Act/Back pay
    - a. Undocumented workers may sue for unpaid wages and liquidated damages under FLSA. *Patel v Quality Inn South*, 846 F.2d 700, 706 (11<sup>th</sup> Cir. 1988).
    - b. FLSA protections are applicable to citizens and aliens, whether documented or not. *In re Reyes*, 814 F.2d 168, 170 (5<sup>th</sup> Cir. 1987).
  3. National Labor Relations Act
    - a. "[I]n computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S.Ct. 2803, 2814, 81 L.Ed.2d 732 (1984). (IRCA §§ 101(a)(1), 100 Stat. 3360, 8 U.S.C. §§ 1324a enacted two years later.)
    - b. The Supreme Court, Chief Justice Rehnquist, held that federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA), foreclosed the NLRB from awarding backpay to undocumented alien who had never

been legally authorized to work in the United States, abrogating *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, and *Local 512, Warehouse and Office Workers' Union v. N.L.R.B.*, 795 F.2d 705. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 122 S.Ct. 1275 (2002).

4. Title VII
  - a. Title VII applies to undocumented workers. *Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir.1988).
5. National Environmental Policy Act
  - a. Plaintiffs' status as nonresident aliens did not detract from their standing to sue under the National Environmental Policy Act. *People of Saipan v. United States Dep't of Interior*, 356 F.Supp. 645, 652 (D.Haw.1973).
6. Access to courts
  - a. "There can be no doubt that an alien illegally present in the country has the right to sue in our courts". *Catalanotto v. Palazzolo*, 46 Misc.2d 381, 383-84, 259 N.Y.S.2d 473, 476 (Sup.Ct., N.Y.County 1965).
7. Equal Protection/due process analysis
  - a. State classifications which treat aliens differently on the basis of that status are reviewed under the equal protection clause of the Fourteenth amendment while federal acts are subject to the due process clause of the Fifth Amendment.
  - b. State law classifications based on alienage are inherently suspect and subject to close judicial scrutiny. "Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Graham v Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).
  - c. Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments. Unlawfully resident aliens afforded limited protection from state or local laws which arbitrarily deny them benefits or impose burdens. (Intermediate scrutiny-classification furthers substantial state goal). *Plyler v Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).
  - d. "even if IRCA preempted state law with respect to wages, there is no reason it would do so with respect to the recovery of medical expenses. As was discussed by the Supreme Court in Hoffman, the recovery of United States wages necessarily assumes that the alien would have engaged in new illegal acts to obtain these wages:

specifically, his illegal employment. See Hoffman, 535 U.S. at 148-50. In the case of medical expenses, however, no new illegal act is required in order to incur such expenses.” *Hernandez v GPSDC Inc.*, U.S. District Court, SDNY, Case No. 04 Civ.127, March 9, 2006.

### III. **Limited English Proficiency (LEP)**

A. Attorneys representing LEP’s must be reminded to inquire with the client as to the need for an interpreter, and whether he/she can communicate via the chosen interpreter.

#### B. **Interpreters**

##### 1. Generally

- a. T.R.E. and F.R.E. 604.both characterize interpreters as expert witnesses.
- b. Witness’s expression of difficulty understanding what is said to him.
- c. “To allow a defendant to remain silent throughout the trial and then.. assert a claim of inadequate translation would be an open invitation to abuse.” *Gonzalez v United States*, 33 F.3d 1047, <sup>10</sup>51 (9<sup>th</sup> Cir. 1994).
- d. Attorneys as interpreters
  - (1) An “attorney shall not act as both an attorney and as interpreter for his or her client in the same matter.” Advisory Ethics Opinion No. 2002-A-765
  - (2) *State v Zambrano*, 1989 Lexis 3951 (Ohio App.). Defendant’s bilingual attorney served as interpreter during a guilty plea on a charge of attempted rape. The court upheld the conviction despite the fact that the attorney was not formally qualified as an expert interpreter nor administered the usual interpreter oath. The court observed that counsel, as an officer of the court, was bound to render a true translation of the judge’s inquiries and the client’s responses.

e. Evaluating language skills should be done outside presence of jury.

##### 2. Federal Courts

a. 28 U.S.C. 1827 Court Interpreters Act.

- (1) The duty to inquire of the need for an interpreter arises only when, in addition to English not being the defendant’s primary language, the defendant’s language difficulties would “inhibit [his] comprehension of the proceedings or communication with counsel or the presiding judicial officer.” *Hrubec v United States*, 734 F.Supp. 60, 67 (E.D. N.Y. 1990)

- (2) Any indication to the presiding judicial officer that a criminal defendant speaks only or primarily a language other than the English language should trigger the application of Sections (d) and (f)(1) of the Court Interpreters Act.” *United States v Osuna*, 189 F.3d 1289, 1291-92 (10<sup>th</sup> Cir. 1999).
      - (3) Must use certified court interpreters. If not available, “otherwise qualified interpreters [may] be used.” 28 USC 1827(a)(2).
    - b. 6<sup>th</sup> Amendment
      - (1) Right to assist in one’s own defense by active participation; receive effective assistance of counsel and provide counsel with informed and intelligent input; and confront the government’s witnesses and cross-examine them on the testimony presented.
  - 3. State Courts
    - a. Tennessee Supreme Court rules
      - (1) Rule 41, Rules of Ethics for Spoken Foreign Language Interpreters in Tennessee Courts.
      - (2) Rule 42, Standards for Court Interpreters
    - b. 6<sup>th</sup> Amendment through incorporation by the 14<sup>th</sup> Amendment.
  - 4. Do and Don’ts
    - a. DO seek and preferentially use the services of qualified interpreters who have invested the time and expense to earn credentials in the language pair. (Federal certification has a 4% pass rate.)
    - b. DO ask for and examine credentials (some interpreters claim credentials that do not exist or have not been truly acquired), preferably on the record.
    - c. DO try to simplify your use of legalese.
    - d. DO NOT use the cook at the local Mexican restaurant unless they show familiarity with legal terminology.
    - e. DO NOT ask interpreter to take LEP litigants outside and explain them their rights.
    - f. DO NOT say “Tell him that....” Speak directly to the LEP and let the interpreter interpret.
    - g. DO NOT ask the interpreter to repeat what the witness or defendant said - if an answer is unclear, have the attorney restate the question.
  - 5. Other resources
    - a. Jean F. Rydstrom, LL.B., Annotation, Right of Accused to Have Evidence or Court Proceedings Interpreted. 36 A.L.R.3d 276 (2001).
- C. Handling interrogatories and other discovery**

1. “There is virtually no authority on the question of a district court's power to order a party producing documents in discovery to pay-at the pretrial stage-the costs of translating the documents from one language to another for the benefit of the requesting party. “ *In re Puerto Rico Electric Power Authority* [PREPA], 687 F.2d 501, 506 (1<sup>st</sup> Cir. 1982).
  2. In *Cook v Volkswagen of America, Inc*, 101 F.R.D. 92 (S.D.W. Va. 1984), the plaintiff had filed a motion to compel Volkswagen to provide English translations of its response to certain paragraphs of the Plaintiffs' request for production of documents. The documents were produced but in German. The District Court, citing *PREPA, supra*, denied the motion and stated that the better-reasoned view to the problem is for the plaintiffs to bear their own expense of litigation and apply for costs after prevailing.
  3. T.R.C.P. 30.02(4)(A), “A party may arrange to have a stenographic transcription made at the party’s own expense.”
  4. 30.02(4)(B), “Any party may make at the party’s own expense a simultaneous stenographic or audio record of the deposition. Upon a party’s request and own expense, any party is entitled to an audio or audio-visual copy of the audio-visual recording.”
  5. “[T]he officer shall deliver the deposition ... to the party who requested taking of the deposition. Upon payment of reasonable charges, the officer shall furnish copies to any party or to the deponent.”
  6. Tennessee Practice, McLean & McLean, Vol. 3, pg 535, “Usually the party taking the deposition pays for the transcript, and any party or the deponent may obtain a copy upon payment of reasonable charges.”
  7. Suggested compromise.
    - a. Allow LEP’s to answer interrogatories in native language after they translate questions. Let requesting party re-translate back into English.
    - b. Interpreters at depositions should be paid by party noticing dep.
    - c. Interpreters in civil cases should be paid by party with burden of proof.
- D. Title VI of the Civil Rights Act of 1964, 42 USC 2000d and DOJ guidelines**
1. §601 prohibits discrimination on the basis of race, color, or national origin under any program or activity that receives federal financial assistance.
  2. DOJ guidelines (28 C.F.R. 50.3) found at link below. DOJ Civil Rights Division, 202-307-2222  
<http://www.justice.gov/crt/about/cor/byagency/28cfr503.pdf>
  3. *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S.Ct. 1511, 1521 (2001). “So far as we can tell, this authorizing portion of §§ 602 reveals no congressional intent to create a private right of action.”