

# CHAPTER 2: ACCESS TO JUSTICE



## INTRODUCTION

Immigrants and refugees in Minnesota face serious barriers to accessing justice that are compounded by lack of immigration status, language, and lack of familiarity with the U.S. legal system. People reported limited availability of free civil legal services, in general, and immigration legal services, in particular. In the criminal context, people noted that immigrants and refugees may face grossly disproportionate consequences for criminal convictions. People also noted perceptions of bias in the criminal justice system, lack of access to high quality interpreters in all aspects of proceedings, lack of understanding by immigrants and refugees of how the court system works, and significant delays in cases that cause hardship to immigrant plaintiffs. Finally, for people who have been victims of discrimination in housing, employment, public benefits, or other sectors, fear of deportation acts as a barrier to seeking an effective remedy.

## HUMAN RIGHTS AND ACCESS TO JUSTICE

The right to a fair and accessible justice system is enshrined in the Universal Declaration of Human Rights, the U.S. Constitution, and the Minnesota Constitution.<sup>206</sup> All three guarantee equal protection and due process to all persons.<sup>207</sup> Due process is fundamental, ensuring that the government follows fair procedures before depriving a person of their rights.<sup>208</sup> The justice system is comprised of two types of matters: civil and criminal. Common civil matters include immigration claims, deportation, marriage dissolution, child custody, eviction, foreclosure, and contractual disputes. Criminal matters are actions prohibited by statute that are punishable by incarceration.<sup>209</sup>

The Universal Declaration of Human Rights also echoes the U.S. and Minnesota Constitutions in providing protections for criminal defendants. These include the right not to be arbitrarily arrested or detained, the right to be apprised of any criminal charges, and the presumption of innocence until proven guilty.<sup>210</sup>

Effective access to justice means having a forum to seek a remedy for a violation of rights, such as an eviction from housing.<sup>211</sup> It also means fair treatment in that forum. The Minnesota Constitution states, “Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase,

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<sup>206</sup> Universal Declaration of Human Rights (UDHR) Arts. 7, 8, 10; U.S. Const. amends. V, VI, XIV; Minn. Const. Art.1 §§6-8.

<sup>207</sup> U.S. Const. amends. V, XIV; Minn. Const. Art. 1 §7.

<sup>208</sup> Cornell University Law School Legal Information Institute, “Due Process,” [http://www.law.cornell.edu/wex/due\\_process](http://www.law.cornell.edu/wex/due_process).

<sup>209</sup> Minn. Stat. §609.02 sub. 1.

<sup>210</sup> UDHR Arts. 9- 11; U.S. Const. amends. V, VI, VIII; Minn. Const. Art. 1, §§5–7.

<sup>211</sup> UDHR Art. 7.

completely and without denial, promptly and without delay, conformable to the laws.”<sup>212</sup> Particularly vital in the case of criminal proceedings, where the right to liberty is threatened, the accused has a right to understand the proceedings. The International Covenant on Civil and Political Rights (ICCPR) requires, “The free assistance of an interpreter should be provided if the person does not speak or understand the language used in court.”<sup>213</sup>

## LIMITED ACCESS TO CIVIL LEGAL SERVICES

Minnesota immigrants and refugees face serious barriers to civil legal services, primarily because the system lacks sufficient resources to meet the need for free or low-cost legal services. For some undocumented immigrants, legal assistance may be entirely unavailable due to federal Legal Services Corporation funding restrictions.<sup>214</sup>

“Every person is entitled to obtain justice freely and without purchase.”

In order to fully realize the right to access to justice, many individuals need counsel to represent their interests and navigate the system. Effective use of the justice system often depends on having an attorney. Having a legal advocate to navigate the system is particularly important for immigrants who may not speak English and are not familiar with the U.S. justice system. Unfortunately, the availability of free and low cost legal services is limited in Minnesota. As a result, many people are left to navigate the system on their own or face a long wait for assistance.

The importance of representation has been recognized in criminal cases, where access to free representation is guaranteed.<sup>215</sup> Despite the fundamental rights at issue in civil proceedings, such as housing, employment, immigration status, or family unity, there is no state obligation to provide representation free of cost.<sup>216</sup> Free legal representation in civil matters is currently provided by legal services organizations and other nonprofit legal organizations.

<sup>212</sup> Minn. Const., Art. I, § 8.

<sup>213</sup> International Covenant on Civil and Political Rights (ICCPR), Art. 14(3)(f).

<sup>214</sup> 8 C.F.R. §§1626.1-1626.11.

<sup>215</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>216</sup> The American Bar Association has recognized this need by passing a resolution urging federal, state and territorial governments to “provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake.” The Minnesota State Bar Association co-sponsored the resolution and has recommended that the state explore implementing legislation guaranteeing free representation in civil proceedings. American Bar Association Resolution 112A, (Aug. 7, 2006), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A_authcheckdam.pdf); Minnesota State Bar Association Civil Gideon Task Force, *Access to Justice: Assessing Implementation of Civil Gideon in Minnesota*, (Dec. 2, 2011).

Civil legal services funding is provided by the Minnesota Legislature and administered by the Legal Services Advisory Committee.<sup>217</sup> Eighty-five percent of this funding goes to the core legal aid programs recognized by the State of Minnesota, many of which are Legal Services Corporation (LSC) funded and therefore subject to federal funding restrictions that limit the services that can be provided to certain immigrants, primarily the undocumented.<sup>218</sup> This means that, for many immigrants residing in areas served by LSC programs, free legal services in matters such as housing, education, or family law may not be available. Budgetary issues at both the federal and state levels have had a significant impact on civil legal services in Minnesota over the past five years.<sup>219</sup> While there is statewide availability of free legal services,<sup>220</sup> the numbers of people seeking help as well as the types of matters they need help with outstrip the available resources.<sup>221</sup> Minnesota civil legal service providers served nearly 50,000 low-income clients during 2012.<sup>222</sup> Unfortunately providers estimated that they were only able to provide representation to one in three eligible clients who contacted their offices.<sup>223</sup> Although the justice system allows *pro se* representation in all proceedings,<sup>224</sup> for many, the lack of access to an attorney effectively bars pursuit of remedies. In particular, our civil legal system is not fulfilling the promise in the Minnesota Constitution that people may “obtain justice freely and *without purchase*” if they cannot obtain free counsel to assist in a case.

Challenges in finding legal help were the most consistently voiced complaint about the legal system in the project interviews. A legal service provider explained that clients frequently complain about a lack of services. “What they are saying [when people say there is not a good referral system] is there is not enough service. I called here and they could not take my case and I called there and they could not take it. There is not enough assistance.”<sup>225</sup> This was echoed throughout Minnesota, especially outside the Metro area.<sup>226</sup> Interview respondents were very aware that civil legal services

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<sup>217</sup> Minn. Stat. §§480.24, 480.242.

<sup>218</sup> Minn. Stat. §480.242; 42 U.S.C. §2996 et.seq.

<sup>219</sup> Brandt Williams, *Uneven cuts stressing Minn. criminal justice system*, Nov. 7, 2011, Minnesota Public Radio, <http://www.mprnews.org/story/2011/11/07/minnesota-criminal-justice-system-cuts>; Minnesota Supreme Court Legal Services Advisory Committee, *FY13 Annual Report*, (Nov. 14, 2013) [http://www.mncourts.gov/Documents/0/Public/administration/LSAC\\_Annual\\_Report\\_FY13.pdf](http://www.mncourts.gov/Documents/0/Public/administration/LSAC_Annual_Report_FY13.pdf).

<sup>220</sup> Legal Services State Support, “Map of Legal Services Offices in Minnesota,” <http://www.mnlegalservices.org/RTF1.cfm?pagename=NewPageName1>.

<sup>221</sup> Legal Services Advisory Committee, *FY13 Annual Report*, (Nov. 14, 2013), 2 [http://www.mncourts.gov/Documents/0/Public/administration/LSAC\\_Annual\\_Report\\_FY13.pdf](http://www.mncourts.gov/Documents/0/Public/administration/LSAC_Annual_Report_FY13.pdf).

<sup>222</sup> Legal Services Advisory Committee, *FY13 Annual Report*, (Nov. 14, 2013), 2 [http://www.mncourts.gov/Documents/0/Public/administration/LSAC\\_Annual\\_Report\\_FY13.pdf](http://www.mncourts.gov/Documents/0/Public/administration/LSAC_Annual_Report_FY13.pdf).

<sup>223</sup> Legal Services Advisory Committee, *FY13 Annual Report*, (Nov. 14, 2013), 2 [http://www.mncourts.gov/Documents/0/Public/administration/LSAC\\_Annual\\_Report\\_FY13.pdf](http://www.mncourts.gov/Documents/0/Public/administration/LSAC_Annual_Report_FY13.pdf).

<sup>224</sup> Minnesota General Rules of Practice for the District Court 1.04; Minn. Stat. §611.19 (waiver of public defender).

<sup>225</sup> Interview 121.

<sup>226</sup> Interview 86; Interview 89; Interview 90; Interview 97; Conversation 20.

are limited in scope and availability.<sup>227</sup> One business leader explained the lack of access to attorneys: “It is very limited. Demand exceeds the supply. Lawyers have the luxury of choosing clients. Only one-third of our members can pay for their own legal services, the rest need subsidies.”<sup>228</sup> A community member observed, “There is only access to legal services if you have the money. That is a big issue; there is no low-cost or free legal service.”<sup>229</sup> Because of limited resources, civil legal providers must prioritize which types of cases receive services.

In addition to an overall lack of access, Minnesota’s legal services delivery system has not kept pace with cultural changes in Minnesota’s population. A recent survey of low income Minnesotans found that immigrants had lower levels of trust in civil legal services than long-term residents.<sup>230</sup> That survey cited a lack of bilingual and bicultural legal services staff as one barrier to representation.<sup>231</sup> A Muslim immigrant seeking culturally appropriate legal help expressed frustration that, “there just are not many Muslim attorneys.”<sup>232</sup>

“I called here and they could not take my case and I called there and they could not take it. There is not enough assistance.”

For those who do not qualify for free services because of case type, residence, or income level, paying for an attorney is the alternative. A community advocate said that the costs of private representation were a barrier for many.<sup>233</sup> While respondents stated a need for more family law and other legal services,<sup>234</sup> immigration legal help was identified as the greatest need.

## INSUFFICIENT IMMIGRATION LEGAL SERVICES

Immigrants seek legal help for two primary types of cases: applications for immigration benefits (such as citizenship, permanent resident status, or petitions for family members), and representation in deportation hearings. All of these matters are adjudicated by federal agencies.

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<sup>227</sup> Interview 111; Interview 113; Conversation 21.

<sup>228</sup> Interview 134.

<sup>229</sup> Interview 89.

<sup>230</sup> Minnesota State Bar Association, *Overcoming Barriers that Prevent Low-Income Persons from Resolving Civil Legal Problems: A Study Prepared for the Legal Assistance to the Disadvantaged Committee of the Minnesota State Bar Association*, Hannah Lieberman Consulting LLC/John A. Tull & Associates (Sept. 2011), 18, [http://www.mncourts.gov/Documents/0/Public/administration/Final\\_MN-CABS\\_Study\\_September\\_2011.pdf](http://www.mncourts.gov/Documents/0/Public/administration/Final_MN-CABS_Study_September_2011.pdf).

<sup>231</sup> Minnesota State Bar Association, *Overcoming Barriers that Prevent Low-Income Persons from Resolving Civil Legal Problems: A Study Prepared for the Legal Assistance to the Disadvantaged Committee of the Minnesota State Bar Association* (Sept. 2011), 47, [http://www.mncourts.gov/Documents/0/Public/administration/Final\\_MN-CABS\\_Study\\_September\\_2011.pdf](http://www.mncourts.gov/Documents/0/Public/administration/Final_MN-CABS_Study_September_2011.pdf).

<sup>232</sup> Interview 127.

<sup>233</sup> Interview 127.

<sup>234</sup> Interview 63; Conversation 21.

Although the benefits application process is not a court process, the complex nature of immigration law and the high stakes often necessitate representation by people familiar with immigration law. Demand for free legal services in immigration matters exceeds the available resources. As a result, even those providers who do represent immigrants must prioritize the types of cases that they believe merit assistance, excluding many noncitizens whose issues do not fall within that scope.

The free legal services list for the Bloomington Immigration Court lists only three providers in Minnesota.

Among the most commonly reported problems was getting free legal help with immigration matters.<sup>235</sup> One community advocate said “there is only one attorney in town and he is expensive. [The free legal service] will determine if they are low or high priority

and they have to wait a long time and people do not have time to wait.”<sup>236</sup> The problem is acute for immigrants in detention who are facing deportation; as one advocate observed, “most do not have attorneys.”<sup>237</sup> A service provider explained: “Basically, the demand has increased but our manpower and that of others has decreased.”<sup>238</sup> Additionally, the restrictions on types of services and populations served are not always clear or understood by the community. One advocate expressed frustration that the local legal service provider says they help with a particular type of case, but in reality do not accept most of those types of cases.<sup>239</sup> A provider said “There is a lot of confusion of why we cannot help with everything.”<sup>240</sup>

There is particularly inadequate free representation for immigrants facing deportation. Nationally only fifty-six percent of individuals in immigration court were represented during 2012, in proceedings where a common outcome is deportation.<sup>241</sup> Despite the high stakes of deportation, there is no right to free counsel in immigration proceedings. The statute only guarantees a right to an attorney “at no cost to the government.”<sup>242</sup> Compounding the problem, the majority of legal services organizations do not represent undocumented immigrants due to funding restrictions.<sup>243</sup> The free legal services list for the Bloomington Immigration Court lists only three providers in

<sup>235</sup> Interview 63; Interview 78; Interview 83; Interview 86; Interview 89; Interview 90; Interview 94; Interview 97; Interview 99; Interview 110; Interview 111; Interview 113; Interview 119; Interview 121; Interview 134.

<sup>236</sup> Interview 78.

<sup>237</sup> Interview 122.

<sup>238</sup> Interview 87.

<sup>239</sup> Interview 94.

<sup>240</sup> interview 87.

<sup>241</sup> Executive Office for Immigration Review, *FY2012 Statistical Year Book*, Feb. 2013, A1 (Statistics are for the United States as a whole; they are not broken out by state or jurisdiction).

<sup>242</sup> 8 C.F.R. §1003.16(b).

<sup>243</sup> 8 C.F.R. §§1626.1 – 1626.2.

Minnesota.<sup>244</sup> Only one of the three agencies has a satellite office outside the Twin Cities metro, although all three provide service to immigrants statewide. The need for more free or low cost assistance for immigration matters is particularly acute.

Despite the need for more free services, existing legal services were generally praised for the quality and value of their work. One service provider said “I believe immigrants have a better access in Minnesota because of the strong nonprofit and social services sectors that help with these issues.”<sup>245</sup> One immigrant reported that her pro bono lawyer “helped me a lot.”<sup>246</sup> Another reported feeling that the help from a legal services office was “very effective. They treat me nicely and are very helpful and I still have a connection with them.”<sup>247</sup> A client said “I sent an email to the [agency] and got a response within two hours, which is impressive.”<sup>248</sup> In one community, a women’s group hosted a luncheon for the legal services staff as a “thank you” and a way to further build a relationship.<sup>249</sup> The community organizer said “Our community gives the legal services an A+.”<sup>250</sup> Another small community also praised the legal service attorney and agency by name, saying that both were great.<sup>251</sup> An English language learner teacher reported that “we have always been able to get legal help for the people who need it.”<sup>252</sup> Legal services offer a tremendous value for those who can access them; the challenge for Minnesota is to ensure all low-income residents have access to counsel in civil legal matters.

Those who cannot get free representation must either hire an attorney or handle the matter themselves. In both cases, the most common barriers experienced by immigrants are the cost of private counsel and a lack of trust.<sup>253</sup> An organizer cited a perception among the immigrants in his community that the immigration attorneys are too expensive and do not put forth enough effort to justify this cost.<sup>254</sup> An immigrant reported consulting with an attorney but not having the money to pay for representation.<sup>255</sup> In response to the expense of hiring an attorney, some immigrants reported filling out their own application forms.<sup>256</sup> One immigrant said, “We did not know you could

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<sup>244</sup> United States Department of Justice, “Free Legal Services Providers List,” <http://www.justice.gov/eoir/probono/freelgchtMN.pdf>.

<sup>245</sup> Interview 106.

<sup>246</sup> Interview 23.

<sup>247</sup> Interview 32.

<sup>248</sup> Interview 7.

<sup>249</sup> Interview 74.

<sup>250</sup> Interview 74.

<sup>251</sup> Interview 65.

<sup>252</sup> Interview 55.

<sup>253</sup> Interview 96; Interview 110.

<sup>254</sup> Interview 94; Interview 119.

<sup>255</sup> Interview 45; Conversation 23.

<sup>256</sup> Interview 19; Interview 29; interview 51.

get a lawyer, so we did the process ourselves.”<sup>257</sup> Another reported that the application to immigrate through marriage was fairly easy so they did it without an attorney.<sup>258</sup> A woman reported consulting with an attorney about an application and feeling “like I knew more about what I needed than he did.”<sup>259</sup>

As a result of the lack of affordable immigration legal help, people report immigrants seeking legal help from *notarios* and other non-attorney community members. *Notarios* are individuals who hold themselves out as qualified legal representatives but who lack legal qualifications and often charge large fees for help they cannot and do not provide.<sup>260</sup> One community reported knowing of two people in town who “do help with legal stuff” without a law degree, but people believe “their heart is in the right place.”<sup>261</sup> A refugee resettlement agency reported that some of their clients had received incompetent or fraudulent legal help from *notarios*.<sup>262</sup> Another person reported, “The only incidence I can think of is someone doing immigration work who put up flyers in the public library. I tried to call the number but no one answered. No one has been charged (with unauthorized practice of law) here locally but I know someone was in another part of the state.”<sup>263</sup> A shelter worker in greater Minnesota believed there was a problem with people being “taken advantage of” in the Cities by *notarios*, but reported no problems in her community.<sup>264</sup> A police officer said there were not *notarios* as much as situations where “fellow community mates attempt to assist. Their intention may be good, but they are not properly qualified, we see that regularly.”<sup>265</sup> Clients who are undocumented are often reluctant to report problems with *notarios*,<sup>266</sup> and the bad experience may leave them less likely to trust a licensed attorney.<sup>267</sup>

## IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

Minnesota noncitizens in the criminal justice system may face deportation in addition to a criminal conviction. The stressed public defender system must advise these clients about potential

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<sup>257</sup> Interview 35.

<sup>258</sup> Interview 29.

<sup>259</sup> Interview 44.

<sup>260</sup> American Bar Association, “Fight Notario Fraud,”

[http://www.americanbar.org/groups/public\\_services/immigration/projects\\_initiatives/fightnotariofraud.html](http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html).

<sup>261</sup> Interview 78.

<sup>262</sup> Interview 115.

<sup>263</sup> Interview 87.

<sup>264</sup> Interview 99.

<sup>265</sup> Interview 83.

<sup>266</sup> G.M. Filisko, “Notoriety for Notarios: ABA project targets consultants who steer noncitizens afoul of U.S. immigration laws,” *ABA Journal*, Dec. 1, 2009,

[http://www.abajournal.com/magazine/article/notoriety\\_for\\_notarios/](http://www.abajournal.com/magazine/article/notoriety_for_notarios/).

<sup>267</sup> Interview 96.



immigration consequences, in addition to the usual work of negotiating the best outcome on the criminal charges, without additional resources or time.

Noncitizens of all statuses can be deported from the United States if they are convicted of certain crimes. The massive overhaul of immigration laws in 1996 expanded the types of criminal convictions which can lead to deportation.<sup>268</sup> Certain criminal offenses that are misdemeanors under Minnesota law, such as a violation of a protection order,<sup>269</sup> are considered deportable offenses under immigration law.<sup>270</sup> Determining whether a criminal offense is deportable can be complicated, requiring a detailed review of the criminal law statute and the immigration law statute. In 2010, the U.S. Supreme Court recognized that noncitizen criminal defendants must be informed about whether their guilty pleas will carry a risk of deportation.<sup>271</sup> The court acknowledged that “deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>272</sup>

#### BEST PRACTICE

In order to help its attorneys comply with the obligation to advise clients about the possible immigration consequences of criminal convictions imposed by the Supreme Court’s decision in *Padilla v. Kentucky*,<sup>273</sup> the Office of the Hennepin County Public Defender brought on board an experienced immigration attorney who can meet with clients and advise other defenders about the immigration consequences of plea agreements and other convictions.<sup>274</sup>

The majority of criminal defendants in Minnesota qualify for free legal representation.<sup>275</sup> This representation is provided through the public defender system, which is administered by the Board of Public Defense.<sup>276</sup> A 2010 report showed that Minnesota public defenders carried average caseloads in excess of 700 cases per year, much higher than the recommended average of 400 cases per year.<sup>277</sup> Most cases are resolved with a plea, not a trial, and plea agreements are generally

<sup>268</sup> Illegal Immigration Reform and Immigrant Responsibility Act, Public Law Number 104-208, (2006). See also Appendix: Immigration.

<sup>269</sup> Minn. Stat. §518b.01 subd. 14(b).

<sup>270</sup> 8 U.S.C. §1227(a)(2)(E)(ii).

<sup>271</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010), 368-369.

<sup>272</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010), 356.

<sup>273</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

<sup>274</sup> Interview 124.

<sup>275</sup> Scott Russell, “Public Defenders: A Weakened But Indispensable Link,” *Bench & Bar of Minnesota*, Feb. 2009, [http://www2.mnbar.org/benchandbar/2009/feb09/public\\_defenders.html](http://www2.mnbar.org/benchandbar/2009/feb09/public_defenders.html).

<sup>276</sup> State of Minnesota Board of Public Defense, “About Us,” <http://www.pubdef.state.mn.us/aboutus>.

<sup>277</sup> Office of the Legislative Auditor, State of Minnesota, *Report: Public Defender System*, (Feb. 2010), xi, <http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf>.

memorialized in a written document.<sup>278</sup> Public defenders representing noncitizens in criminal matters must consider the immigration consequences of a guilty plea or conviction in order to provide effective representation.<sup>279</sup> Given the constraints of the public defender system, this often means a quick conversation of ten minutes or less with a defendant.<sup>280</sup> Even in the criminal context, not every charge qualifies for public defender services.<sup>281</sup> Clients in these situations may decline counsel, or chose to represent themselves, without realizing the impact of that decision.<sup>282</sup>

“The judge was shocked that a theft of \$1.28 could lead to deportation.”

Public defenders expressed concern that clients do not really understand the legal terms of art in plea petitions.<sup>283</sup> Given the short amount of time indigent defendants have with their public defenders, attorneys sometimes later challenge plea deals because “people have not really understood the language in the agreement or had anyone go over it with them.”<sup>284</sup> Once a noncitizen is convicted, he frequently goes directly into immigration custody and deportation proceedings. Immigration judges only consider the immigration law, and cannot look into the facts underlying a conviction or claims that the noncitizen did not understand the terms of the plea agreement.

One criminal defense attorney described a case where a client narrowly avoided deportation. The client had been a permanent resident for years and his entire family had become U.S. citizens. He was convicted of what is considered a “crime involving moral turpitude”<sup>285</sup> and his criminal defense attorney failed to advise him that a second conviction would be a problem. The attorney says, “He was drunk and went into a convenience store where he grabbed a beer and drank it. As a result, he was charged with theft. Because it was such a small crime, he did not qualify for a public defender and he represented himself.”<sup>286</sup> The client ended up in immigration custody, facing deportation because he had been convicted of two “crimes involving moral turpitude.”<sup>287</sup> The attorney was

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<sup>278</sup> Office of the Legislative Auditor, State of Minnesota, *Report: Public Defender System*, (Feb. 2010), 15, <http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf>.

<sup>279</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

<sup>280</sup> Office of the Legislative Auditor, State of Minnesota, *Evaluation Report: Public Defender System* (February 2010), 36, <http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf>.

<sup>281</sup> Minn. Stat. §611.14.

<sup>282</sup> Interview 112.

<sup>283</sup> Interview 124.

<sup>284</sup> Interview 124.

<sup>285</sup> 8 U.S.C. §1227(a)(2)(A)(i).

<sup>286</sup> Interview 112.

<sup>287</sup> Interview 112.

ultimately able to get the conviction reversed. She recalls, “The judge was shocked that a theft of \$1.28 (the cost of the beer) could lead to deportation.”<sup>288</sup>

In many cases, however, attorneys report that “there is a callousness regarding immigration consequences. Some will just say ‘that is collateral; I’m not going to look at it.’”<sup>289</sup> This attitude was noted among court personnel and attorneys.<sup>290</sup> One attorney said “When I am talking to prosecutors, I often emphasize the cost to the state. If this person is deported, the family will become dependent on the government and that is a much greater cost than amending a plea agreement.”<sup>291</sup>

The timing of immigration hearings and deportations creates additional problems for immigrant defendants. Immigrants can be transferred to immigration custody for a deportation hearing while the criminal case is pending. Often in these cases the county does not issue a writ for the immigrant to be transferred from immigration custody back for a criminal hearing, resulting in delays in the criminal case or the case never being completed.<sup>292</sup> If the case is not completed, it may result in a warrant for the individual’s arrest for failing to appear at the hearing, through no fault of his own, but because he was in immigration custody or deported.

Similarly, probation requirements create problems for immigrants who are subsequently deported, because they cannot fulfill their probation obligations.<sup>293</sup> If the immigrant returns to the United States in the future, he faces an arrest warrant for having violated probation.<sup>294</sup> Unfortunately, not all attorneys are advising their noncitizen clients about these consequences, often because the attorneys also are unaware of the consequences.<sup>295</sup> One attorney explained how she addresses the problem: “I ask to have my clients placed on active probation until they leave the county [to immigration custody], and then administrative probation only. Once they document their departure from the country, the probation can be ended.”<sup>296</sup>

Attorneys interviewed recommended better training about immigrants and immigration consequences for court staff and attorneys.<sup>297</sup> Interviewees generally believed judges and attorneys would be open to training, but that the resources had not been made available.

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<sup>288</sup> Interview 112.

<sup>289</sup> Interview 124.

<sup>290</sup> Interview 70; Interview 124.

<sup>291</sup> Interview 112.

<sup>292</sup> Interview 116.

<sup>293</sup> Interview 112; Interview 116.

<sup>294</sup> Interview 112; Interview 116.

<sup>295</sup> Interview 112.

<sup>296</sup> Interview 112.

<sup>297</sup> Interview 70; Interview 124.

## PERCEPTIONS OF BIAS

Attorneys cited some problems with judges and other court personnel not having sufficient training about bias, diversity, and immigrant issues. A criminal defense attorney said it is challenging to get judges to understand the particular issues facing the refugee community, in addition to appreciating the broader issues facing communities in poverty.<sup>298</sup> Another attorney stated that the lack of diversity in the local bench and bar in her community was a problem, resulting in unacknowledged bias in how immigrants (and other minorities) were treated in court.<sup>299</sup> She cited two criminal cases which occurred a few months apart; one involving Hispanic and Native American juveniles and the other involving white juveniles, where the minority defendants received stricter sentences.<sup>300</sup>

A domestic violence advocate in greater Minnesota noted that her clients experience discrimination in the judicial system: “They are not treated the same as Caucasians. It really depends on the prosecutor and public defender. One woman called the police and she was the one arrested. The prosecutor said ‘I do not think they will clear the charges against her.’”<sup>301</sup> In another community a public defender observed that bond amounts tend to be higher for noncitizens: “You are considered a flight risk if you are from another country.”<sup>302</sup> That attorney also reported an “unspoken belief that you are not credible or are assumed to be undocumented (or both) if you are using an interpreter in court.”<sup>303</sup>

Some attorneys report that occasionally immigrants may be treated better than similarly situated low-income long-term residents within the system. One public defender explained, “People in the system (judges, prosecutors, probation, public defenders) sometimes are more sympathetic to immigrants because, but for their status, they would not be in this situation. In contrast, people in poverty in the same circumstances are seen as lazy and somehow to blame for their situation.”<sup>304</sup>

## INTERPRETERS

In The Advocates’ 2004 report, *The Government Response to Domestic Violence Against Refugee and Immigrant Women in the Minneapolis/St. Paul Metropolitan Area: A Human Rights Report*, many of the recommendations centered around the need for better interpretation services at all

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<sup>298</sup> Interview 124.

<sup>299</sup> Interview 87.

<sup>300</sup> Interview 87.

<sup>301</sup> Interview 99.

<sup>302</sup> Interview 70.

<sup>303</sup> Interview 70.

<sup>304</sup> Interview 124.

levels of the justice system.<sup>305</sup> Based upon the interviews conducted for this report, access to language services and interpretation in the court system has greatly improved since 2004. Under Title VI of the Civil Rights Act of 1964, the courts are required to provide “timely and reasonable language assistance” for limited English Proficiency (“LEP”) individuals.<sup>306</sup> Minnesota law further provides that “the constitutional rights of persons disabled in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings.”<sup>307</sup> Each of the courts in Minnesota has a Language Access Plan which is publicly available and includes provisions for training.<sup>308</sup>

Overall, interviewees reported good access to interpreters in the court system.<sup>309</sup> A domestic violence advocate remarked, “Court interpreters are good. The majority of counties do have good ones.”<sup>310</sup> Another community agency noted that the immigrant families they work with really appreciate the translators at court, particularly since not all other agencies provide in-person interpreters of the same competence as the court interpreters.<sup>311</sup>

The most common problem reported was the quality of interpreters, especially with less common languages.<sup>312</sup> One attorney recounted “a three hour hearing where the interpreter was not very good. He basically admitted at the end that he had missed things.”<sup>313</sup> A legal services attorney had the impression that “there is only one court-certified Somali interpreter in the state,”<sup>314</sup> (although according to the state court website, there are actually two court-certified Somali interpreters.)<sup>315</sup> One court-certified interpreter speculated that the process of testing and accrediting interpreters hampers efforts to increase the interpreter pool for some languages.<sup>316</sup> Particularly where people were not literate in the language initially, the test creates an additional barrier to accreditation.<sup>317</sup>

Domestic violence cases often involve many different agencies within the justice system. Advocates report that while interpreters are available for court hearings, they are not always available at

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<sup>305</sup> The Advocates for Human Rights, *The Government Response to Domestic Violence Against Refugee and Immigrant Women in the Minneapolis/St. Paul Metropolitan Area: A Human Rights Report*, (Dec. 10, 2004), 139-148.

<sup>306</sup> Minnesota Judicial Branch, “Language Access Plans,” <http://www.mncourts.gov/?page=444>.

<sup>307</sup> MN Stat. §611.30.

<sup>308</sup> Minnesota Judicial Branch, “Language Access Plans,” <http://www.mncourts.gov/?page=444>.

<sup>309</sup> Interview 82; Interview 116; Interview 124; Interview 126; Interview 173.

<sup>310</sup> Interview 99.

<sup>311</sup> Interview 97.

<sup>312</sup> Interview 116.

<sup>313</sup> Interview 124.

<sup>314</sup> Interview 75.

<sup>315</sup> Minnesota Judicial Branch, <http://www.mncourts.gov/FindInterpreters/Default.aspx> (database of interpreters).

<sup>316</sup> Interview 112.

<sup>317</sup> Interview 112.

meetings with victim witness advocates, child protection, or order for protection meetings.<sup>318</sup> Outside of the courtroom, it is not always clear when an interpreter must be provided to fulfill state and federal “meaningful access” requirements, which take into account the number and frequency of non-English speakers coming into contact with the agency.<sup>319</sup> As a result of the lack of interpreters, people with domestic violence cases may not always be informed of what is happening and why.

As a way to fulfill the requirement to provide interpreters, many jurisdictions rely on telephonic interpreters via a “language line.” Attorneys report that telephonic interpreters are used at some hearings as a cost-saving measure by courts, even for common languages such as Spanish.<sup>320</sup> One attorney explained, “It is hard to understand phone interpreters. People strongly prefer in-person interpreters.”<sup>321</sup> A public defender added, however, that because objecting to a telephonic interpreter can result in a hearing delay and continued custody, attorneys are reluctant to object to telephonic interpreters.<sup>322</sup>

Some respondents reported adjudicators who were insensitive to their requests for interpreters. One attorney cited a couple of SSI (Social Security Insurance) cases where judges would not allow an interpreter.<sup>323</sup> In at least one case the judge determined the client’s language proficiency, saying “I think you speak English well enough.”<sup>324</sup> In another case, the judge asked the client, “So you speak English,” the client replied “no” because he did not feel comfortable conducting a hearing in English.<sup>325</sup> The judge got mad and reprimanded the attorney for failing to correct the client’s statement, alleging it was a misrepresentation and an ethical breach.<sup>326</sup> Attorneys noted that, “Sometimes in conciliation court, the judge will do introductory stuff without the interpreter, which is a problem because that explains what is going to happen and the roles and clients need to understand that.”<sup>327</sup> Another attorney said that “sometimes judges let the back and forth between the interpreter and the client go on, without any of it being interpreted.”<sup>328</sup> It is important that judges enforce the standards for interpreters, which include not having conversations on the record that are not translated. Overall, problems with interpreters seem to be isolated and not systematic.

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<sup>318</sup> Interview 173.

<sup>319</sup> Interview 173; 28 C.F.R. §42.104 (1964); Minn. Stat. §15.441 (2012).

<sup>320</sup> Interview 112.

<sup>321</sup> Interview 75.

<sup>322</sup> Interview 112.

<sup>323</sup> Interview 126.

<sup>324</sup> Interview 126.

<sup>325</sup> Interview 126.

<sup>326</sup> Interview 126.

<sup>327</sup> Interview 126.

<sup>328</sup> Interview 112.

As one attorney pointed out, “there was a period of time where the judge was not having the interpreter translate everything. We seem to be past that.”<sup>329</sup>

## DIFFICULTIES UNDERSTANDING THE COURT SYSTEM

One of the common barriers immigrants face is not understanding how the legal system works.<sup>330</sup> A public defender said, “People have no idea how the system works. We spend a lot of time educating people about how the system works and what their rights are.”<sup>331</sup> One challenge is that many documents, including court orders and forms, are not always available in languages other than English. Additionally, attorneys report that court forms are written in a language that is not always accessible to people with low-literacy or limited English, even if they are translated.<sup>332</sup> Another attorney said “We need to do a lot of explanation of the legal system to people. It is important to have informed consent. We ask people ‘what are your concerns’ and ‘what do you want to happen from this process?’”<sup>333</sup> A community advocate in greater Minnesota said “I recommend to people, “If you think your rights are violated, go to the legal system.”<sup>334</sup> Part of the problem he highlighted is that “people do not know their rights. I think it would help to have a civil rights/human rights office more accessible here.”<sup>335</sup> One legal services attorney conducts training at English language classes about housing rights and responsibilities. She reports “it was really useful, there were lots of questions. The room was probably about one-third recent refugees.”<sup>336</sup>

A county attorney in one region convened Community Conversation Circles in an effort to build relationships between community groups and the county attorney’s office.<sup>337</sup> It helped the county attorney’s office be aware of the issues in the community, but also connected the community more strongly to the office. The county attorney’s underlying philosophy is to focus on the front end and build a good relationship.<sup>338</sup> “We have a role to be the conscience of the community; we decide whether to charge a crime and what should be done – to do this, we need to find out the needs of the community.”<sup>339</sup> The same office also conducted training for members of the media, in an effort

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<sup>329</sup> Interview 126.

<sup>330</sup> Conversation 2.

<sup>331</sup> Interview 124.

<sup>332</sup> Interview 124.

<sup>333</sup> Interview 60.

<sup>334</sup> Interview 74.

<sup>335</sup> Interview 74.

<sup>336</sup> Interview 126.

<sup>337</sup> Interview 59.

<sup>338</sup> Interview 59; St. Louis County Attorney, *Annual Report*, (2012), <http://www.stlouiscountymn.gov/Portals/0/Departments/Attorney/flipbook/index.html>.

<sup>339</sup> Interview 59.

to better educate the public about the court system.<sup>340</sup> Better education “helps to increase public confidence in the system.”<sup>341</sup>

There are also resources available from the Minnesota Judicial Branch and legal services, including videos, to help orient immigrants to the system.<sup>342</sup> A recent production, “Going to Court in Minnesota” is available in Somali, Spanish and Hmong, and uses interviews with court system personnel and a description of how court works to orient immigrants.<sup>343</sup> Fact sheets are available which describe different civil legal processes, also translated into Spanish, Somali, and Hmong.<sup>344</sup> The court system in Minnesota is continuing to work at educating immigrant communities, an on-going process which is vital to ensuring all Minnesotans can recognize their rights to freely access justice.

## DELAYS

One complaint about the justice system was the length of time to receive a decision. The delay may cause people to opt out of seeking recourse. A labor advocate related a case against a construction contractor where there were “lots of court findings against him but they went uncollected; he dragged out cases beyond the capacity of low-wage workers to wait.”<sup>345</sup> In other cases, there are multiple steps people must go through to seek recourse, which delays the outcome. One labor activist reported that people seeking pay from an employer can sue but that does not actually force payment. “The court cannot actually force the employer to pay; the employee must get repeated court filings and find bank accounts on their own.”<sup>346</sup> An attorney working with sexual assault victims noted, “The speed of the system is hard. Any evidence from a sexual assault or a murder case has to go to the BCA and it takes about a year to process. So there is an eighteen month to two year delay on actually getting a court hearing and resolution.”<sup>347</sup> One agency employee noted, “Case processing is too long and drawn out. For example, I had a case for a woman who was pregnant and had complications. Her supervisor required 72-hour notice for medical emergency. That case took two years to resolve!”<sup>348</sup> For the employee, whose condition had ended well before the case was resolved, the delay created a feeling that the system was not working.

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<sup>340</sup> St. Louis County Attorney, *Annual Report*, (2012), 11, <http://www.stlouiscountymn.gov/Portals/0/Departments/Attorney/flipbook/index.html>.

<sup>341</sup> Interview 59.

<sup>342</sup> Minnesota Judicial Branch, YouTube channel, <https://www.youtube.com/user/MNJudicialBranch>.

<sup>343</sup> Minnesota Judicial Branch, “ECHO: Going to Court in Minnesota (English),” Online video clip, YouTube, July 17, 2013, <http://www.youtube.com/watch?v=SL9g2WD3r6I>.

<sup>344</sup> Pro Bono Net, “LawHelpMN.org,” <http://www.lawhelpmn.org/>.

<sup>345</sup> Interview 107.

<sup>346</sup> Interview 107.

<sup>347</sup> Interview 60.

<sup>348</sup> Interview 101.



## INEFFECTIVE CIVIL REMEDIES FOR DISCRIMINATION CLAIMS

Immigrants and refugees in Minnesota are not able to access effective remedies for claims of discrimination. People reported that noncitizens did not seek recourse because they feared deportation if they reported the violation or because they were, in fact, deported and therefore could not pursue the remedy.

The legal structure for addressing discrimination requires an individual to bring a legal claim for a remedy. An adjudicator noted that his agency sees a comparatively lower number of complaints from immigrants than they would expect, based on overall complaints.<sup>349</sup> He speculated that immigrants fear deportation, and so do not bring complaints forward.<sup>350</sup> Agencies responsible for handling discrimination claims, including the Minnesota Department of Human Rights and the Equal Employment Opportunity Commission, have engaged in outreach to help encourage foreign nationals to file complaints when necessary.<sup>351</sup> However, resources to enforce discrimination claims have decreased over the past fifteen years, resulting in longer waits for resolution and fewer resources to investigate violations.<sup>352</sup> Advocates noted that people do not necessarily want to wait through a long process to get the case resolved.<sup>353</sup> Many immigrants are unaware of their rights, particularly to be free from discrimination, which is another barrier to seeking remedies.<sup>354</sup> Additionally, people who have been deported are unable to seek redress; since they are not in Minnesota, they cannot bring a claim in the courts in Minnesota. Unfortunately, due to this confluence of factors, civil remedies for discrimination claims often are not effective for immigrants.

## RECOMMENDATIONS

Finding: Immigrants and refugees do not have sufficient access to free legal counsel for civil cases or immigration procedures.

### Recommendations

- Increase funding for legal services to ensure access to counsel for all who need representation in civil and immigration matters.

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<sup>349</sup> Interview 125.

<sup>350</sup> Interview 125.

<sup>351</sup> Interview 125.

<sup>352</sup> Interview 101; Interview 125.

<sup>353</sup> Interview 101; Interview 107; Interview 125.

<sup>354</sup> Interview 118; Interview 119; Interview 139; Interview 146.

- Implement a guarantee of free counsel in civil cases to ensure free legal representation for those who cannot afford it and who are facing loss of a fundamental human right, such as housing, employment, or family unity.
- Remove funding restrictions tied to immigration status from legal aid money to enable undocumented immigrants to qualify for all free legal services.
- The federal government should provide free legal counsel for those facing deportation, given the deprivation of rights that comes with effective exile.

Finding: Criminal convictions have disproportionate consequences in the immigration system.

#### **Recommendations**

- Increase funding for public defender offices to ensure quality representation.
- Public defender offices should have an on-staff immigration attorney dedicated to screening cases for immigration consequences and advising public defenders in the office on consequences of pleas and convictions for immigrant clients. Funding for this position should be provided as a new item and not drawn from existing staff.
- Congress should revise and narrow the definitions and types of crimes that qualify as aggravated felonies and deportable offenses under immigration law.

Finding: Immigrants perceive bias in the justice system based on language, culture, and national origin.

#### **Recommendations**

- Provide training for judges, prosecutors, probation officers, and other staff about immigrant groups in Minnesota, the refugee experience, cross-cultural communication, and other topics as needed to ensure quality service delivery to all.
- Consider creating a refugee court, similar to the existing Veterans Court, to address the special needs of refugees who are often survivors of trauma and torture.

Finding: The court system does not have sufficient high quality interpreters in all languages to meet demand.

#### Recommendations

- Minnesota courts should continue to recruit and train additional interpreters in less common languages, including ongoing monitoring of the quality of interpretation.
- Continue to support training for judges and other court staff on effective use of interpreters.

Finding: Immigrants and refugees do not fully understand the legal system.

#### Recommendations

- Expand promotion and dissemination of existing educational resources, including videos by ECHO Minnesota and *pro se* guides by LawHelpMN.org.
- Continue to develop a wide range of *pro se* materials in all relevant languages that are effective for low-literacy populations, including videos and picture-based resources.

Finding: Delays in resolving cases makes immigrants feel that the justice system is not working for them.

#### Recommendations

- Increase funding for the court system to ensure timely adjudication of civil cases.

Finding: Undocumented immigrants face barriers to filing discrimination claims, especially if they are deported before they can file their case.

**Recommendations**

- Permit discrimination claims to be filed from outside Minnesota to allow immigrants who have been deported and who may have suffered discrimination to pursue a remedy and bring to light illegal conduct.