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# The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.

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THE USE OF INTERPRETERS FOR THE DEAF AND THE  
LEGAL COMMUNITY'S OBLIGATION TO COMPLY WITH  
THE A.D.A.

JO ANNE SIMON<sup>1</sup>

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[F]or much of our nation's history many cultural and ethnic minorities have found themselves excluded from the benefits and privileges of full membership in our society. For many of these people who speak a language other than English the key to their experience of separation has been a virtually insurmountable inability to communicate with either individuals outside of their own culture or the institutions of our system of government.<sup>2</sup>

### I. OVERVIEW OF RELEVANT STATUTES

With the passage of the Americans with Disabilities Act ("ADA" or the "Act")<sup>3</sup> 43 million Americans<sup>4</sup> with disabilities had cause for celebration. The most sweeping civil rights legislation since the Civil Rights Act of 1964 specifically found that disabled Americans are a "discreet and insular minority . . . relegated to a position of political powerlessness . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and contribute to, society . . ."<sup>5</sup>

Title II of the ADA, which most closely resembles § 504 of the Rehabilitation Act of 1973,<sup>6</sup> requires that state and local government facilities, including courts, be accessible to individuals with disabilities.<sup>7</sup> Title III of the Act requires that public accommodations be accessible to persons with disabilities.<sup>8</sup> The Act specifically includes attorney's offices in its definition of public accommodation.<sup>9</sup> Titles II and III of the Act require that reasonable accommodations be provided to qualified persons with disabilities,<sup>10</sup> unless

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<sup>2</sup>Jara v. Municipal Court, 578 P.2d 94, 98 (Cal. 1978) (Trobiner, J., dissenting).

<sup>3</sup>Congressional finding (1), 42 U.S.C. § 12101-12213 (Supp. IV 1992).

<sup>4</sup>Congressional finding (7), 42 U.S.C. § 12101(a)(1) (Supp. IV 1992).

<sup>5</sup>42 U.S.C. § 12101(a)(7) (Supp. IV 1992).

<sup>6</sup>29 U.S.C. § 794 (Supp. IV 1992).

<sup>7</sup>42 U.S.C. § 1213-34.

<sup>8</sup>42 U.S.C. § 12181-89 (Supp. IV 1992). A "public accommodation" is defined by the ADA as a private entity whose operations affect commerce. 42 U.S.C. § 12181(7) (Supp. IV 1992). A private entity is any entity other than a public entity as defined by the Act. 42 U.S.C. § 12181(6) (Supp. IV 1992).

<sup>9</sup>42 U.S.C. § 12181(7)(f) (Supp. IV 1992).

<sup>10</sup>The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.  
42 U.S.C. § 12131(2) (Supp. IV 1992).

such provision would fundamentally alter the goods, services or programs provided.

Reasonable accommodations can take the form of auxiliary aids and services,<sup>11</sup> modification of policies, practices and procedures,<sup>12</sup> and removal of architectural barriers,<sup>13</sup> to name a few. This article will focus on auxiliary aids and services appropriate to accommodating deaf and hard of hearing persons.

Title IV of the ADA amended Title II of the Federal Communications Act of 1934 by adding a new section, § 225, requiring the establishment of telecommunications relay systems.<sup>14</sup> These systems are crucial to deaf persons' abilities to communicate with the hearing world.

The Television Decoder Circuitry Act of 1990,<sup>15</sup> passed shortly after the ADA, requires that all new televisions thirteen inches or larger, have built-in decoders.<sup>16</sup> We will discuss later how this particular accommodation may affect the legal rights of deaf and hard of hearing persons.

## II. HISTORICAL TREATMENT OF DEAF PERSONS

Deaf<sup>17</sup> and hard of hearing<sup>18</sup> persons have historically been denied access to the civil and criminal justice systems of this nation.<sup>19</sup> In ancient times

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<sup>11</sup>The term "auxiliary aids and services" includes:

(1) Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

28 C.F.R. § 36.303(b)(1)(1993).

See also 28 C.F.R. 35.104(1)(1993), the regulation which compliments Title II. It should be noted that while Title II entities are not required to provide the latest or most advanced technology (as long as the auxiliary aid or service is effective) public entities must give "primary consideration" to the preferences of the individual being accommodated. 28 C.F.R. 35.160(b)(2)(1993).

<sup>12</sup>28 C.F.R. § 35.130 (1993); 28 C.F.R. § 36.302 (1993).

<sup>13</sup>28 C.F.R. § 35.133 (1993); 28 C.F.R. § 36.304 (1993).

<sup>14</sup>47 U.S.C. § 225 (Supp. IV 1992).

<sup>15</sup>Pub. L. No.101-431, 104 Stat. 960 (1990).

<sup>16</sup>A television decoder is a device which plugs into a television set and permits captions to be displayed across the bottom of the screen. When you see the "closed captioned" designator before a TV show or movie, it means that captions are available for that show.

<sup>17</sup>The term "deaf" is used to describe the condition wherein a person whose hearing loss is so severe as to render him or her unable to understand connected speech through the sense of hearing alone.

<sup>18</sup>The term "hard of hearing" refers to those for whom the sense of hearing is impaired but who can understand connected discourse with amplification.

common wisdom held that without speech there could be no language and without language there could be no thought. It was presumed that speech could not develop without hearing, ergo those who could not hear also could not think. Aristotle wrote "[t]hose who become deaf from birth also become altogether speechless. Voice is not lacking, but there is no speech."<sup>20</sup> Most understood "speechless" to mean "stupid." Pliny the Elder later wrote "[t]here are no persons born deaf that are not also dumb."<sup>21</sup>

Professionals in the fields of deafness, education and psychology now recognize these assumptions were built on faulty premises.<sup>22</sup> These ideas, however, persisted for centuries and influenced how the hearing world treated those who were deaf.<sup>23</sup> The Code of Justinian distinguished among five classes of communication impaired persons. Those without hearing and speech had no legal rights; guardians acted on their behalf and they were barred from inheriting property under the rules of primogeniture.<sup>24</sup> During the middle ages so-called "deaf-mutes" were forbidden from taking communion because they could not confess their sins aloud.<sup>25</sup>

Today, even in educated circles, the terms "deaf-mute" and "deaf and dumb" are still used,<sup>26</sup> although with less frequency. They are, if nothing else, misnomers and highly inaccurate. As Aristotle noted, the deaf have *voices*; they are not "mute." However, because many deaf people's speech is not intelligible to the average person<sup>27</sup> they choose not to use the speech they have. Nearly every deaf person has lived his or her private version of the old school-for-the-deaf story where the young deaf boy struggles for weeks to say "ice cream cone" to the satisfaction of his speech teacher, only to go to the corner store where the befuddled proprietor looks at the boy as if he had several

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<sup>19</sup>Crowley v. People, 83 N.Y. 464, 478 (1881).

<sup>20</sup>BERYL L. BENDERLY, *DANCING WITHOUT MUSIC: DEAFNESS IN AMERICA* 107 (1980).

<sup>21</sup>PAUL C. HIGGINS, *OUTSIDERS IN A HEARING WORLD* 24 (1980).

<sup>22</sup>See HANS G. FURTH, *THINKING WITHOUT LANGUAGE: PSYCHOLOGICAL IMPLICATIONS OF DEAFNESS* (1966).

<sup>23</sup>Early Hebrew law warned: "If one exposes his cattle to the sun, or places them in the custody of a deaf mute, a fool, or a minor, and they break away and do damage, he is liable." RUTH E. BENDER, *THE CONQUEST OF DEAFNESS* 19 (1970).

<sup>24</sup>BENDERLY, *supra* note 20 at 107, 108.

<sup>25</sup>*Id.* at 108.

<sup>26</sup>Jay M. Zitter, *Annotation, Deaf-Mute as Witness*, 50 A.L.R. 4th 1188 (1993); Charles C. Marvel, *Disqualification, for Bias, of One Offered as Interpreter of Testimony*, 6 A.L.R. 4th 158 (1993).

<sup>27</sup>Those familiar with speech patterns of deaf persons have much less difficulty understanding their speech.

heads.<sup>28</sup> Most deaf people then "turn-off" their voices. They are neither mute nor dumb.<sup>29</sup> Deaf people rightly consider these terms to be insulting.

### III. REASONABLY ACCOMMODATING DEAF AND HARD OF HEARING PEOPLE

First and foremost, hearing loss is a barrier to communication.<sup>30</sup> In order to understand how to provide reasonable accommodation to deaf and hard of hearing persons<sup>31</sup> one must first define certain terms and discuss their relationship to communication and the concept of reasonable accommodation.

The deaf population in the United States is divided into roughly two groups: those who are members of the deaf community and those who are not. Those groups fall roughly in line with another very important distinction: prelingual and postlingual or adventitious deafness. Prelingually deaf persons were either born deaf or lost their hearing before they learned language - roughly before the age of three.<sup>32</sup> Before a baby turns three he is a sponge soaking up language much of which he will not be able to use for several years. When the time between birth and three years is interrupted by hearing loss the natural time to learn a spoken language is irretrievably lost. Even children who lost their hearing at age two generally fare better with regard to spoken language than those born deaf. Every minute counts. Since only about 25 to 40 per cent of the English language is visible on the lips,<sup>33</sup> it is extremely difficult to learn

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<sup>28</sup>One father of a deaf child who communicates through cued speech puts it this way: The trap I see a lot of cuing families fall into is to say, "Johnny understands everything we say, we understand everything he says . . . what's the problem? The problem is, Johnny can't talk to someone he meets on the street and Johnny can't order a hamburger at McDonald's."

Edward Dolnick, *Deafness as Culture*, ATLANTIC MONTHLY, Sept. 1993, at 48.

<sup>29</sup>Within the deaf population there are those who are both deaf and intellectually slow. This intellectual slowness is not a result of hearing loss but a separate, concomitant disability.

<sup>30</sup>JEROME SCHEIN & MARCUS DELK, *THE DEAF POPULATION OF THE UNITED STATES* 62 (1974).

<sup>31</sup>For a time the term "hearing impaired" was preferred and seen to be less politically stigmatizing because it encompassed all those along the continuum of hearing loss. However, in recent years, people with hearing impairments have expressed their preference for the terms "deaf" and "hard of hearing" primarily as a matter of self-identity. In deference to their wishes and in keeping with what is currently accepted in the field, this article uses the terms deaf and hard of hearing.

<sup>32</sup>SCHEIN & DELK, *supra* note 30, at 5. Helen Keller once noted: "Blindness cuts people off from things; deafness cuts people off from people." Dolnick *supra* note 28, at 37.

<sup>33</sup>LOU ANN WALKER, *A LOSS FOR WORDS: THE STORY OF DEAFNESS IN A FAMILY* 19 (1986). Dolnick, *supra* note 28, at 39 elaborates:

Learning to speak is so hard for people deaf from infancy because they are trying, without any direct feedback, to mimic sounds they have never heard. (Children who learn to speak and then go deaf fare better, because they retain some memory of sound.) One mother of a deaf child describes the challenge as comparable to learning to

language solely through lip reading. English, then, is learned as a second language for prelingually deaf persons. As a result, the deaf child has difficulty learning to read. The average prelingually deaf adult reads at a fourth grade level.<sup>34</sup> The deaf community is primarily made up of prelingually deaf persons and those who lost their hearing before reaching adulthood.<sup>35</sup> As members of the deaf community, they associate with other members of the community. They use American Sign Language (ASL) as their primary method of communication and are considered to be "culturally deaf."<sup>36</sup> Those who are not members of the deaf community have, more often than not, lost their hearing as adults and do not primarily associate with other deaf people.<sup>37</sup> Those who do not sign or are opposed to signing are not members of the community.<sup>38</sup> As a rule, they utilize speech and lipreading as the primary method of communication and would be considered culturally hearing. Of the two groups the latter is by far the largest. The single largest subgroup is comprised of the elderly who have lost hearing as they advanced in age.

That the deaf community is a distinct subculture cannot be disputed.<sup>39</sup> Deaf people do not see themselves as disabled, they see themselves as a linguistic minority.<sup>40</sup> When deaf people could not get insurance they formed their own

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speaking Japanese from within a soundproof glass booth. And even if a deaf person does learn to speak, understanding someone else's speech remains maddeningly difficult. Countless words look alike on the lips, though they sound quite different. "Mama" is indistinguishable from "papa," "cat" from "hat," "no new taxes" from "go to Texas." Context and guesswork are crucial, and conversation becomes a kind of fast and ongoing crossword puzzle.

<sup>34</sup>Raymond Trybus & Michael Karchmer, Office of Demographic Studies, Gallaudet College, *Academic Achievement Test Results of a National Testing Program for Hearing Impaired Students in the United States* (Spring 1981). A mere 10% of prelingually deaf persons have a reading level above the sixth grade. More than 50% of the adult deaf population have not graduated from high school. SCHEIN & DELK, *supra* note 30, at 51.

<sup>35</sup>Another component of the deaf community is the hearing children of deaf parents whose first language is American Sign Language. For this reason hearing children of deaf parents are among the most highly skilled sign language interpreters in the country.

<sup>36</sup>HIGGINS, *supra* note 21.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 41.

<sup>39</sup>JACK R. GANNON, *DEAF HERITAGE: A NARRATIVE HISTORY OF DEAF AMERICA* (1981); HIGGINS, *supra* note 21; CAROL PADDEN & TOM HUMPHRIES, *DEAF IN AMERICA: VOICES FROM A CULTURE* (1988).

<sup>40</sup>HARLEN LANE, *THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY* (1992); HARLEN LANE, *WHEN THE MIND HEARS: A HISTORY OF THE DEAF* (1984). "For many deaf people, 'disabled' describes those who are blind or physically handicapped, not Deaf people." PADDEN & HUMPHRIES, *supra* note 39, at 44.

insurance company, The National Fraternal Society of the Deaf in 1901.<sup>41</sup> The deaf community is a microcosm of society. There are Deaf Olympics, Miss Deaf America Pageants, a National Theatre of the Deaf, deaf newspapers and magazines and many other similar ventures.<sup>42</sup> Deaf people even lobbied against a proposed tax credit which was similar to that given to blind persons.<sup>43</sup> The noted psychologist and researcher Hans Furth writes:

Of all physical disabilities, deafness is the only one that makes its members part of a natural community. Therefore, although we do not find blind or crippled subgroups in society, we are justified in referring to a deaf community as a societal subgroup. This major difference between deafness and other disabilities must never be forgotten. In the United States deaf persons are perhaps better organized than in other parts of the world, but regardless of country, deafness creates an underlying communality that provides for all but a few individuals a social-psychological basis of belonging.<sup>44</sup>

In current deafness literature, members of the deaf community are Deaf (with a capital "D"), and those with severe hearing loss but who are not members of the deaf community are simply deaf, the use of the lower case "d" indicating only the physical condition of severe to profound hearing loss.<sup>45</sup> These distinctions are important for several reasons. First, Deaf people communicate primarily through American Sign Language or one of its variants, Pidgin Sign English. Many members of the Deaf community, however, are comfortable in either mode. On the other hand, most deaf and hard of hearing people communicate in English, whether manually encoded or oral, and many require significant amplification.

#### *A Word About Hearing Aids*

A widespread myth is that a hearing aid can make a person hear. Nothing could be further from the truth. First of all, most hearing loss is sensori-neural which for practical purposes means that the loss is much more than a simple "lowering of the volume." Particular sounds are imperceivable and other sounds are distorted. Speech sounds tend to be of higher frequencies than environmental sounds and are thus more subject to distortion or may be totally imperceivable because most deaf people have high frequency hearing losses. A hearing aid simply amplifies what the deaf or hard of hearing person is able to perceive. It also amplifies environmental sounds at the same level as the speech sounds. The person must then attempt to discriminate between speech

<sup>41</sup>GANNON, *supra* note 39, at 157; HIGGINS, *supra* note 21.

<sup>42</sup>GANNON, *supra* note 39, at 435; WALKER, *supra* note 33, at 22.

<sup>43</sup>GANNON, *supra* note 39.

<sup>44</sup>HANS G. FURTH, *DEAFNESS AND LEARNING: A PSYCHOSOCIAL APPROACH 2* (1973).

<sup>45</sup>PADDEN & HUMPHRIES, *supra* note 39. Today's scholars refer to those who are "culturally deaf" as Deaf with a capital "D". The lower case "d" signifies one who has a hearing loss but is not a member of the Deaf Community, a distinct subculture.



and other sounds. A person who experiences distortion will find that a hearing aid also amplifies the distortion. Where one has never heard a language, making it louder is not helpful.

For example, Jane Doe, a hearing person driving down a stretch of road where the radio reception is poor or where the dial is between stations may initially turn up the volume only to find that now the static and perhaps the bass is louder. But the static makes the lyrics largely incomprehensible and so Jane turns down the volume again. Where Jane is familiar with a song, she may understand it even though it is distorted by poor reception. However, turning up the volume on an unfamiliar song will not make the song recognizable or intelligible to Jane.

Hearing aids can be helpful. They can improve the person's ability to synthesize information received by the eyes and the tactile senses. They cannot, however, provide the ability to hear speech clearly.

#### IV. METHODS OF COMMUNICATION

American Sign Language (ASL) is a visible language linguistically independent of English. Its signs are comprised of hand shapes, positions and movement which convey meaning. ASL possesses a unique grammar and syntax.<sup>46</sup> "ASL's grammar is in the movement of signs. For example, a particular repetitive movement of some signs will change them from verbs to nouns; other repetitive movements of these same signs will signify the use of adverbs with meanings such as regularly, frequently or continually."<sup>47</sup> ASL is the natural language of deaf persons in that it developed spontaneously in the daily interaction of a human group.<sup>48</sup>

Pidgin Sign English (PSE) is a variant of ASL and English in that the signer communicates through signs in English word order, incorporating ASL for various idiomatic expressions common in English. For example, one interpreting into PSE would not sign the phrase "nutty as a fruitcake" literally but would instead use the ASL sign for "crazy." Similarly, a PSE interpreter would vary her sign for the English word "fine" depending on the context, e.g., "fine" as in good or "fine" as in penalty. The more highly educated the deaf person, the more likely he will be able to use PSE or another variant, signed English.

Another factor influencing the use of ASL or PSE is the fact that some 90% of deaf children are born of hearing parents who do not know sign language.<sup>49</sup> Thus, these children are often unable to communicate with their families and

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<sup>46</sup>WILLIAM C. STOKOE, *SIGN LANGUAGE STRUCTURE* (1960).

<sup>47</sup>Kendrick J. Kresse & Paul Klevan, *Deaf People and Sign Language Interpreters in Court: A Booklet for Bench and Bar*. Bay Area Center for the Law and the Deaf (1981).

<sup>48</sup>BENDERLY, *supra* note 20; GANNON, *supra* note 39, at 359.

<sup>49</sup>SCHEIN & DELK, *supra* note 30, at 35.

do not learn language from their parents as do hearing children.<sup>50</sup> Until very recently, ASL was not taught in schools for the deaf, but rather was "tolerated" in the dormitories. Until 20 years ago, few schools for the deaf permitted sign language in classrooms and when they did, "Total Communication," or signing while voicing in English, was used. More often than not, young children were educated orally and not permitted to sign.<sup>51</sup> When they reached junior high school age and were considered "oral failures," sign language was permitted in class.<sup>52</sup> Therefore, because they have never been taught in ASL, many deaf people do not necessarily know the ASL version of the "King's English."

ASL, like any other language grows and changes with time. Particular signs gain and lose popularity or may become politically incorrect.<sup>53</sup> While most discussions about ASL center on the handshapes and movements used, much of the structure of the language is conveyed by facial expression and body language. As with any language, regional and class differences exist within the language. As Lou Ann Walker, a hearing daughter of deaf parents writes:

The face and body convey nearly as much as the actual signs. A raised eyebrow can completely alter the meaning of a sentence. Recounting a conversation, the signer shifts his upper torso just slightly, thereby doing away with the need for unwieldy "he said . . . then she said" constructions. People stutter in sign. There are even sign language equivalents for spoken sentence fillers, such as the irritating "you know," "well," and "I mean." Instead of using those phrases, the signer repeats a particular gesture, such as the hand flipping over, palm up. And just as surely as the British can pinpoint a person's station in life and place of birth upon hearing a couple of sentences, a signer can do the same upon seeing a couple of phrases. Signing can be small and intimate or big and brassy. It can convey every nuance imaginable. The rules for inventing new signs are strict.<sup>54</sup>

As noted previously, most deaf children are born of hearing parents. They learn sign language from and with their peers. Much of the deaf community's

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<sup>50</sup>"Communication is not a gift automatically bestowed in infancy but an acquisition gained only by laborious effort," Dolnick, *supra* note 28, at 38.

<sup>51</sup>When this author was a student teacher in a preschool program at a state school for the deaf in 1976, my class and all classes through grade 3 were conducted orally. Occasionally, teachers who knew sign would "cheat" and sign particularly difficult concepts to certain students for whom oral education was clearly not successful. The difference in response, once a child understood what was being asked of her, was astounding.

<sup>52</sup>Deaf children in oral schools lived their lives in the position of our driver Jane Doe, listening intently to the words of a language they have never clearly heard as though their radio was permanently tuned between stations.

<sup>53</sup>Jennifer Senior, *Language of the Deaf Evolves to Reflect New Sensibilities*, NY TIMES, January 3, 1994 at p.1 col. 4.

<sup>54</sup>WALKER, *supra* note 33, at 48.

culture has evolved from the exposure to sign language and deaf adults in the dormitories of residential schools for the deaf. While the deaf community manifests many characteristics in common with other linguistic and cultural minorities,<sup>55</sup> it is one of the very few handed down from child to child.<sup>56</sup> While the deaf community is very cohesive, hard of hearing people are rarely fraternal.<sup>57</sup>

Manually Coded English (MCE) or Signed English is word for word English signed on the hands. This method is preferred in many professional settings by highly educated deaf people and by late deafened adults and hard of hearing people who have learned to sign.

While it is commonly thought that deaf persons live in a world of silence, that is far from the truth. Most deaf people hear sounds and are especially sensitive to background noise and reverberations. Some environmental noises, when coupled with a hearing aid, can be quite painful. The ADA requires that any large assembly area, including courtrooms, be equipped with an assistive listening system.<sup>58</sup> An assistive listening system is designed to transmit sound directly to the deaf or hard of hearing person's ear. There are three basic wireless technologies available today: induction loop technology, FM broadcast technology and infrared light technology. Each will meet the ADA's requirements. Each is easily installed in old and new facilities alike.<sup>59</sup>

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<sup>55</sup>HIGGINS, *supra* note 21.

<sup>56</sup>BENDERLY, *supra* note 20, at 231. Padden & Humphries discuss the role of the residential schools for the deaf:

In many of these schools, deaf children spend years of their lives among Deaf people—children from Deaf families and Deaf adults who work at the school. Many schools are staffed to some extent by Deaf people who graduated from the same school or another one like it. For these children, the most significant aspect of residential life is the dormitory. In the dormitories, away from the structured control of the classroom, deaf children are introduced to the social life of Deaf people. In the informal dormitory environment children learn not only sign language but the content of the culture. In this way, the schools become hubs of the communities that surround them, preserving for the next generation the culture of earlier generations.

PADDEN & HUMPHRIES, *supra* note 39, at 6.

Similarly, "schools for the deaf are what Israel is to the Jews, the land of a minority without a land." Dolnick, *supra* note 28, at 52, citing conversation with Harlan Lane.

<sup>57</sup>PADDEN & HUMPHRIES, *supra* note 39. Recently, however, we have seen the establishment and growth of Self Help for Hard of Hearing People (SHHH), a group dedicated to access for people who are hard of hearing.

<sup>58</sup>28 C.F.R. § 35.104 (1994), 28 C.F.R. § 35.160 Appendix A; *see also* Uniform Federal Accessibility Standards (UFAS) § 4.1.2(18)(b) and §§ 4.33.6, 4.33.7.

<sup>59</sup>*Induction Loop Technology*

Induction Loop Technology is based on electromagnetic transmission and has a unique advantage in that the signal is received directly by the user's hearing aid when it is equipped with a telecoil circuit or "T" switch. There is no need for an additional receiver, as is required by all other technologies. However, if the listener does not have a hearing aid

## V. INTERPRETING FOR THE DEAF (INTERPRETER QUALIFICATIONS)

This section will define terms relevant to the interpreting process and also discuss special situations in which the interpreting process will necessarily be somewhat non-traditional.

The field of sign language interpreting is fairly young and still evolving as more becomes known about ASL and as deaf people are integrated into various settings. Interpretation from one language to another has occurred for centuries. The field of spoken language interpreting as a profession came into its own with the Paris Peace Conference in 1919. Needless to say even more attention was brought to bear in this field with the Nuremberg trials and the development of the United Nations where technological advances made simultaneous translations a reality.<sup>60</sup>

While spoken language interpreting grew out of diplomatic needs, the field of sign language interpreting developed as a profession as a result of legislation mandating qualified interpreting services for deaf persons.<sup>61</sup> Prior to this, sign language interpreting was most often provided by hearing family members, neighbors, school officials or members of the deaf person's church. There was

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equipped with a telecoil, or has no hearing aid at all, then induction receivers must be used. There are three types: a wand-like device, a pocket-sized device with headphones, and a telecoil installed inside a plastic shell that looks like, but is not, a hearing aid. The first two are most common.

### *FM Broadcast Technology*

FM systems operate at FCC designated frequencies. Since each system may use its own broadcast frequency, several systems may operate simultaneously at one location without interfering with one another. However, unlike the loop system, the FM system requires a special receiver for each person, whether she or he has a hearing aid or not. Several options for coupling a hearing aid to an FM system are available. The most convenient for public places consists of either a neckloop or a silhouette inductor(s) that is used with the hearing aid's telecoil circuit.

### *Infrared Light Technology*

From a practical point of view, the infrared receiver system is in many ways similar in operation to the FM system. However, receivers must be in the line-of-sight of the emitter (transmitter); the signal can only be received inside the covered room. As with FM technology, each person, hearing aid wearer or not, must use a receiver. The options for coupling the infrared receiver to the hearing aid are the same as for FM systems.

SY DUBOW, ET AL., *LEGAL RIGHTS: THE GUIDE FOR DEAF AND HARD OF HEARING PEOPLE* 11 (4th ed. 1992).

<sup>60</sup>NANCY FRISHBERG, *INTERPRETING: AN INTRODUCTION* (1990).

<sup>61</sup>The Vocational Rehabilitation Act amendments of 1965 (P.L. 89-333) first authorized the hiring of sign language interpreters in the vocational rehabilitation setting. Later, § 504 of the Rehabilitation Act of 1973 (28 U.S.C.S. 794) authorized auxiliary aids and services, such as sign language interpreters, to be provided as reasonable accommodations to deaf persons.

little distinction between a 'helper' who knew some signs and a qualified interpreter. Simply because a person can converse in another language, it does not naturally follow that such a person is sufficiently facile to interpret from one language to another. "Being bilingual is not enough to be a court interpreter . . . [y]ou have to train your memory to retain what's being said and to understand the registers of a language."<sup>62</sup>

Interpreting can be defined as the process by which messages produced in one language (the "Source" language) are immediately changed into another language (the "Target" language).<sup>63</sup> The key to interpretation is the live immediate nature of the transmission. Translation, on the other hand, is a more general term used to indicate changing messages from one language to another. This term encompasses interpretation and written translations of language.<sup>64</sup>

Transliterating is a related term referring in the sign language sense to the process whereby the spoken message is changed into Manually Coded or Signed English and vice versa. As mentioned earlier, this may be the preferred form of communication for persons who know English well. Sign language interpreters are expected to know both forms of rendition: ASL into spoken English (or the reverse) and MCE into spoken English (or its reverse).<sup>65</sup> Because of the immediacy of the process, this article will use the term interpretation to include both interpreting and transliterating as defined above.

Interpreting may be simultaneous or consecutive. *Simultaneous* interpreting is that version with which the general public is most familiar - that of the nearly immediate interpretation from one language to another. This is what people think of most often when they envision the UN Security Council at work or when they see the news or a political speech interpreted into sign language.

*Consecutive* interpreting involves a process whereby the interpreter repeats the message into the Target language following the original speaker's remarks. This may occur at intervals of a phrase, a few sentences or an entire presentation.<sup>66</sup> In federal courts consecutive interpreting is used where a non-English speaking witness is giving testimony.<sup>67</sup> This is also the case in a number of state court systems.<sup>68</sup> In such a situation a question is asked of the

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<sup>62</sup>Suzanne Riss, *Interpreters Are Asked to Heed Ethics Code; AOC Seeks Voluntary Compliance While Bill is Stalled in Trenton*, N.J.L.J., at 3 (Sept. 20, 1990).

<sup>63</sup>FRISHBERG, *supra* note 60, at 18.

<sup>64</sup>*Id.* at 18, 19.

<sup>65</sup>*Id.* at 19.

<sup>66</sup>*Id.* at 21.

<sup>67</sup>FRISHBERG, *supra* note 60, at 21.

<sup>68</sup>Professional Standards for Court Interpretation in the New York State Unified Court System, Court Interpreter Manual at 12 (hereinafter "New York Interpreter Manual"), state, *inter alia*:  
*Modes of Court Interpreting*

The consecutive mode of court interpreting requires that the interpreter allow the speaker to complete a thought or statement before giving its interpretation. This mode

witness in English and it is then interpreted into the Target language. The witness then answers and that response is interpreted into English.

Critical to the effective use of consecutive interpreting is the taking of notes by the interpreter to aid in memory and accurate rendition of the meaning and intention of the original speaker. This method has tended not to be used by sign language interpreters who find it difficult to watch the deaf person's signs while taking notes. However, consecutive interpreting allows the interpreter the opportunity to digest the utterance, reflect upon its true meaning and intent, and render what may be a more faithful message. Sign language interpreters are now giving consecutive interpreting and notetaking a more careful look and employing this method in courtroom settings more often than ever before.<sup>69</sup>

The ADA specifically calls for the use of "qualified" sign language interpreters.<sup>70</sup> The regulations further define "qualified" to mean "an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary."<sup>71</sup> Thus, the ADA focuses on the interpreter's actual ability to make communication effective in a particular circumstance.

Currently there are no licensing requirements for sign language interpreters. The Federal Court Interpreter's Act,<sup>72</sup> requires certification but as yet has developed certification examinations only for Spanish, Haitian Creole and Navajo. Filling this void, and providing standards and a Code of Ethics, is the Registry of Interpreters for the Deaf, Inc (RID).<sup>73</sup>

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shall be used when non-English speakers are giving testimony or when the judge, counsel, or officer of the court is in direct dialogue with the non-English speaker. When using electronic recording of the proceeding, the consecutive mode of court interpreting should be used.

The simultaneous mode of court interpreting requires that the interpreter speak contemporaneously with the speaker whose statements are being interpreted. This mode shall be used when the non-English speaker is listening to others speak during the proceeding.

<sup>69</sup>Interview with Sue Eadie, CSC, CT, CLIP, January 3, 1994. Ms. Eadie, a sign language interpreter with many years of legal interpreting experience is currently chairing the Registry of Interpreters for the Deaf's revision of its legal skills certification process.

<sup>70</sup>42 U.S.C. § 12102(1)(A) (Supp. IV 1992).

<sup>71</sup>28 C.F.R. § 36.303 (1993).

<sup>72</sup>28 U.S.C. § 1827 (1988).

<sup>73</sup>The RID is headquartered at 8719 Colesville Road, Silver Spring, Md 20910. (301) 608-0050. Many state interpreter statutes or court rules require RID certification of court interpreters. New York Judiciary Law § 390 (McKinney) requires a "qualified interpreter who is certified by a recognized national or New York State credentialing authority as approved by the chief administrator of the courts..." The Office of Court Administration has designated the RID to certify professionals for this purpose. Court Interpreter Manual at 4. New Jersey also requires RID certification. Assuring Access to Courts for Linguistic Minorities: A Packet of Background Information on Court Interpreting

The RID conducts evaluations and awards certification. Since the system was revamped in 1989, the RID has awarded the following certificates:

1. Certificate of Interpretation (CI): ability to interpret between American Sign Language and spoken English in both sign-to-voice and voice-to-sign.
2. Certificate of Transliteration (CT): ability to transliterate between signed English and spoken English in both sign-to-voice and voice-to-sign.<sup>74</sup>

The evaluation process consists of a written examination which assesses (1) a candidate's ethical standards; (2) general knowledge of ASL; (3) deaf culture; (4) the role and function of interpreters; (5) the RID Code of Ethics and by-laws; and (6) the history of both the RID and the National Association of the Deaf (NAD).

A performance test is also given which consists of videotaped segments from which the candidate is required to voice for an ASL presentation or a Signed English presentation and also will be asked to interpret into ASL and/or Signed English (depending upon which certification the candidate is seeking) a spoken presentation. There is also an interactive segment wherein the candidate will be asked to simultaneously interpret in both sign-to-voice and voice-to-sign. A Certification Maintenance Program (CMP) was recently instituted by the National RID. Its function is to insure that interpreters continue to develop their skills, similar to mandatory Continuing Legal Education.

Certain specialist certificates were awarded prior to 1988, among them a legal specialist certificate or SC:L. The legal certification process is currently under revision. In the interim, a conditional legal interpreter permit (CLIP) is a relevant credential. The CLIP is an interim permit granted to those who have

Services prepared for Judges and Court Managers by the Court Interpreting, Legal Translating and Bilingual Services Section, Administrative Office of the Courts, Trenton, N.J., October 16, 1991 at 9.

<sup>74</sup>Prior to 1988 the following certificates were awarded:

*Comprehensive Skills Certificate (CSC)*: ability to interpret between American Sign Language and English and to transliterate between English and an English-like signing.

*Reverse Skills Certificate (RSC)*: ability to interpret between American Sign Language and English or transliterate between English and an English-like signing. This certificate was awarded to deaf or hard-of-hearing people only.

*Transliteration Certificate (TC)*: ability to transliterate between English and an English-like signing.

*Interpretation Certificate (IC)*: ability to interpret between American Sign Language and English.

These certificates will not be valid after 1995.

What was the RSC certification has been revised and is now known as the Certified Deaf Interpreter (CDI). At present, a CDI provisional certificate is awarded to applicants meeting certain criteria. The first formal CDI performance evaluation will be administered in August 1995 and will be administered regionally thereafter. A CDI provisional certificate holder has until one year from August 1995 to take the formal CDI evaluation leading to permanent CDI certification. If this evaluation is not taken, CDI provisional certification will expire until such time as that person takes the CDI performance evaluation.

participated in a lengthy training program. However, this permit is awarded upon completion of the training program which does not require a performance component. Therefore, an interpreter possessing a CLIP certificate may know a lot about legal interpreting, but may not be able to perform satisfactorily in a court setting. Hence, the need to remain vigilant and *voir dire* carefully.

While many local RID chapters exist and are very active, they are not permitted to award certification. This is only available through the RID's National Certification and National Testing Boards. This limitation insures a certain level of standardization and quality assurance.

#### A. Confidentiality

Not expressly mentioned, but nonetheless implied in the ADA definition, is the aspect of confidentiality. Sign language interpreters are bound by a strict code of ethics to keep all information regarding an interpreting assignment confidential.<sup>75</sup> This requirement is often reiterated by the court system.<sup>76</sup>

Due to the strict confidentiality rules guiding sign language interpreters, counsel need not be concerned about disclosures which would be otherwise privileged.<sup>77</sup> States are beginning to enact statutes which specifically recognize that sign language interpreters acting in support of a confidential attorney-client relationship are protected by the attorney-client privilege.<sup>78</sup> While an interpreter can be forced to testify regarding a communication which was not privileged, e.g., where a third (or fourth) party was present, in the attorney-client situation the sign language interpreter's indispensability to

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<sup>75</sup> See *infra* Appendix A.

<sup>76</sup> NY Interpreter Manual at 9 states:

#### 3. Confidentiality

- (a) A Court Interpreter shall not disclose any information deemed confidential by the court or by any concerned parties.
- (b) Disclosures made out of court by a non-English speaker through a Court Interpreter to another person shall be confidential unless the non-English speaker gives his or her permission for disclosure.

<sup>77</sup> According to Wigmore, common law protects as privileged communications those which meet the following criteria:

- 1) they must be confidential in nature;
- 2) the confidentiality must be essential to promote a successful and honest relationship between the parties;
- 3) the relationship must be one which society wishes to foster; and
- 4) the injury from the disclosure of this type of communication to the protected relationship must be greater than the benefit to the court which would be gaining the information.

<sup>8</sup> WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (McNaughton rev. ed. 1961).

<sup>78</sup> See, e.g., TENN. CODE ANN. § 24-108; and VA. CODE ANN. §§ 2.1-560-563, 8.01-400.1, 19.2-164, and 63.1-85.4.



furthering the relationship has been widely recognized by the courts.<sup>79</sup> The presence of the interpreter has not dissolved the privilege.

Sign language interpreters have expressed concern about being forced to testify as to non-privileged conversations because their code of ethics demands rigorous adherence and because an interpreter who is perceived by the deaf community as one who cannot be trusted to keep information confidential will soon be out of a job.<sup>80</sup> The legal technicalities which require the interpreter to testify under certain circumstances may be lost on members of the deaf community.

Experienced interpreters will seek to avoid such testimony by explaining their concerns regarding the RID Code of Ethics and suggest that other persons present at the non-privileged conversation in question, such as a police officer, testify.<sup>81</sup> Another practice is to request that the non-privileged communication be videotaped.<sup>82</sup> This is particularly useful in police interrogation situations. Another interpreter can then view the videotape and testify as to the content of the communication and as to modes of communication employed.<sup>83</sup>

### B. Accuracy

In order to be accurate the interpreter must make an assessment of the audience, must share each speaker's understanding of the intent of the message, and must be able to render a message from the speaker's language into the listener's language.

According to Frishberg:

Accuracy does not mean that there will always be equivalence between a word in one language and a word in the other. Nonetheless the myth of word-for-word translation survives in the public view. Messages that are fraught with idiomatic phrases or proper names (of products, of places, of official roles) often have many built-in cultural assumptions. Thus, accuracy means that the interpreter says as much as the sender of the message, but no more.

Accuracy also means giving the receiver the complete message, including the part carried by pauses, hesitations, or other silent or non-

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<sup>79</sup>Hawes v. State, 7 So. 302 (Ala. 1890); Foster v. Hall, 29 Mass. 89 (1833); Mileski v. Locker, 178 N.Y.S.2d 911 (Sup. Ct. 1958); State v. Laponio, 88 A. 1045 (N.J. 1913); Du Barre v. Linette, 170 Eng. Rep. 96 (1791).

<sup>80</sup>Eadie, *supra* note 69. Interview with Stephanie Lewis, CSC, December, 1993, regarding issues arising in legal interpreting settings. See also Elaine Gardner, *On Guard!*, 17 GALLAUDET TODAY, No. 4 at 31 (1987).

<sup>81</sup>Eadie, *supra* note 69.

<sup>82</sup>*Id.* at 69. Gardner, *supra* note 80.

<sup>83</sup>Eadie, *supra* note 69; Gardner, *supra* note 80.

verbal signals. The interpreter transmits the full message, not merely the words.<sup>84</sup>

In addition, accuracy means that the interpreter will interpret the entire message, regardless of whether the interpreter finds the content or language distasteful.<sup>85</sup>

### C. Impartiality

The impartiality of the interpreter is of critical importance. The interpreter may not attempt to advise or lead a party, must resist attempts of litigants and attorneys alike to seek advice, and must avoid expressing opinions about the proceedings or content of the communication.<sup>86</sup>

The impartiality of the interpreter also implies that the interpreter will maintain his/her role throughout the assignment. It is not the job of the interpreter to close a window, make photocopies or get coffee during a lull in the activities. Similarly, it is not appropriate to ask the interpreter whether he or she thinks the deaf person understands the message. That question is properly asked of the deaf person involved.<sup>87</sup>

In addition, it is a widely held view that family members are generally not able to be impartial due to emotional involvement or considerations of confidentiality. Family members, especially in a legal setting, should *not* be asked (or allowed) to interpret.<sup>88</sup>

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<sup>84</sup>FRISHBERG, *supra* note 60, at 65.

<sup>85</sup>New York Interpreter Manual at 9 handles accuracy in this way:

1. Accuracy

- a. A Court interpreter shall faithfully and accurately interpret what is said without embellishment or omission while preserving the language level of the speaker.
- b. A Court interpreter shall provide the most accurate form of a work in spite of a possibly vulgar meaning. Colloquial, slang, obscene or crude language, as well as sophisticated and erudite language, shall be conveyed in accordance with the usage of the speaker. An interpreter is not to tone down, improve, or edit any words or statements.
- c. A Court interpreter shall not simplify statements for a non-English speaker even when the interpreter believes that the non-English speaker cannot understand the speaker's language level. The non-English speaker may request an explanation or simplification, if necessary, from the court or counsel through the interpreter.
- d. A Court interpreter shall interpret for litigants at counsel table at all times. He or she will provide an interpretation of all open-court speeches, e.g., questions, answers, court rulings, bench-counsel and counsel-counsel colloquies, etc.

<sup>86</sup>FRISHBERG, *supra* note 60, at 66.

<sup>87</sup>As an interpreter, this author was put in many such situations.

<sup>88</sup>Marilyn Taylor, an attorney and member of the New Jersey Court Task Force on Interpreter and Translation Services notes "In the past, Spanish speakers might bring in a family member, take a volunteer from the courtroom or even rely on an adversary to

### D. Proficiency

Proficiency encompasses the "effectiveness" and "using any necessary specialized vocabulary" aspects of the ADA definition of qualified. Interpreters are bound by the RID Code of Ethics not to continue or to accept any assignment for which they are not qualified.<sup>89</sup> This most often arises in one of two situations: (a) the interpreter and the deaf person are unable to understand each other, or (b) the interpreter cannot understand the deaf person's signs well enough to interpret them into coherent spoken English. This situation may arise where a deaf client utilizes a foreign sign language or has minimal language skills (which will be discussed later in this section), or (b) the assignment calls for the use of specialized vocabulary for which an otherwise competent interpreter is not prepared.

This is often the case with legal interpreting. Many excellent interpreters are unfamiliar with legal terminology and the complexity of the language used and therefore do not accept legal interpreting assignments. Among the skills necessary to be a competent legal sign language interpreter are:

- (a) proficiency in English and ASL;
- (b) knowledge of legal terminology and "legalese";
- (c) knowledge of the structure and functions of various courts;
- (d) familiarity with features of civil or criminal procedures, such as line-ups, interrogations, waivers and courtroom procedures;
- (e) familiarity with legislation affecting interpreters;
- (f) familiarity with oaths; and

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interpret for them . . . There were tremendous miscarriages of justice. Interpreting, like any profession, involves specific skills, and gradually, this fact is being recognized." RISS, *supra* note 62.

<sup>89</sup>RID Code of Ethics; See *infra* Appendix A.

New York Interpreter Manual at 10 details proficiency as follows:

- a. Each Court Interpreter shall provide professional services only in matters or areas in which the interpreter can perform accurately. When in doubt as to his or her ability, the interpreter shall inform the judge.
- b. A Court Interpreter shall withdraw from any case in which his or her professional performance will be adversely affected due to lack of proficiency, lack of preparation, or difficulty in understanding the speaker for any reason.
- c. A Court Interpreter shall continuously improve his or her language skills, cultural fluency, and knowledge of the legal system and proceedings. The interpreter may wish to attend workshops, seminars, conferences, or other courses regarding changes in the law and interpretation and translation theories and techniques. Full-time Court Interpreters may apply for conference leave in accordance with the Rules of the Chief Judge and negotiated labor agreements.
- d. A Court Interpreter shall consult appropriate legal and bilingual dictionaries as needed. A short glossary of legal terms frequently encountered by Court Interpreters is provided in Appendix D.

- (g) familiarity with procedures to qualify an interpreter in court, etc.<sup>90</sup>

A lack of familiarity with specialized vocabulary is also a problem for interpreters in medical and technical settings.

Another aspect of proficiency deals with the interpreter's ability to sufficiently understand the spoken language so as to render an accurate or proficient interpretation. A sign language interpreter must have an excellent command of both English and ASL.<sup>91</sup> Lack of language competence is often a problem where relatives, particularly young hearing children of deaf parents, find themselves interpreting things that they really don't understand. In years past it was not uncommon for young children to be called upon to interpret for their parents in court. Not only does this practice violate the principles of confidentiality and impartiality, it virtually insures inaccuracy.

Yet another proficiency problem may arise where a native signer, such as the hearing adult child of deaf parents attempts to interpret and yet is unfamiliar with standard ASL or with the rigors of interpreting. In *People v. Rodriguez*,<sup>92</sup> an indictment was dismissed where an unqualified interpreter had been provided for two deaf grand jury witnesses. The interpreter in question was the daughter of deaf parents but communicated only in "home signs" (those learned at home). She did not use standard ASL signs and used a high degree of fingerspelling.<sup>93</sup> The witnesses needing interpretation were unable to understand her signs. The court noted that: "basic to the selection of a sign language interpreter is the matching of need with translation ability. That is the level of the communication skill of the person needing assistance must be matched with the level of communication skill or competency of the interpreter."<sup>94</sup>

#### *Special situations*

In addition to the more "traditional" sign language interpreting provided, several other situations warrant mention.

#### *Oral*

Many hard of hearing and late deafened adults communicate primarily by lipreading and certain clarifying gestures. For these persons an oral interpreter may be needed. This interpreter will stand/sit in front of and in close proximity to the oral deaf person and mouth the words of the various parties present. Even a very skilled lipreader cannot follow conversations among several people or at a distance.

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<sup>90</sup>Eadie, *supra* note 69.

<sup>91</sup>Most sign language interpreters have college degrees. Approximately 40% have advanced degrees. FRISHBERG, *supra* note 60, at 77.

<sup>92</sup>546 N.Y.S.2d 769 (Sup. Ct. 1989).

<sup>93</sup>Fingerspelling refers to a literal spelling of the English words via the manual alphabet.

<sup>94</sup>*Rodriguez*, *supra* note 92, at 771.

*Deaf - Blind*

There are those in our society with both hearing and visual impairments. While many deaf-blind individuals sign, such signing must be tactile, e.g., signed into their hands. Still others communicate by fingerspelling in their hands or through the Tadoma method wherein the deaf-blind person holds his/her thumb in front of the interpreter's lips and places his/her hand on the interpreter's jaw and throat. In this way the deaf-blind person "lipreads" and gets additional articulative information from the vibrations in the interpreter's face and throat.

*Relay*

In a relay situation a second or intermediary interpreter aids in the communication process. This type of situation is appropriate where a speaker communicates in a foreign language such as Polish. A foreign language interpreter would be needed to interpret from Polish to English. The sign language interpreter would then interpret from English to ASL. Similarly, a deaf relay interpreter might be used when the deaf client or litigant communicates in a foreign sign language or uses such nonstandard or idiosyncratic signs that the hearing interpreter cannot understand the deaf client. In such situations, which often have strong bi-cultural overtones,<sup>95</sup> the deaf relay interpreter will read the client's idiosyncratic signs and interpret the message into standard ASL which the hearing interpreter will interpret into spoken English (and vice versa).

*Minimal Language Skills*

Minimal Language Skills is a term characterizing the diminished or idiosyncratic communication system of some deaf individuals. This term is now used instead of the older term "low verbal" because it is more accurate and less denigrating. No tests or criteria exist to determine exactly who is included in this group. People exhibiting MLS may come from quite different backgrounds, however an interpreter's approach to these communication situations may be similar.

Most individuals who exhibit MLS also do not speak well, probably do not read or write, and in general are not familiar with English or any other spoken language.

Foreign deaf persons sometimes are labeled MLS until they acquire the sign language of the local community. Their signing appears highly idiosyncratic, and in fact many of the techniques suggested for communicating with an MLS signer will work well with a foreign signer. The difference is that the foreign signer is fluent, uses gestures and space efficiently, understands the role of eye gaze in sign language

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<sup>95</sup>INTERPRETING: THE ART OF CROSS CULTURAL MEDIATION: PROCEEDINGS OF THE NINTH NATIONAL CONVENTION OF THE REGISTRY OF INTERPRETERS FOR THE DEAF (Maria L. McIntire ed. 1985).

grammar, and is likely to be highly communicative and cognitively sophisticated.<sup>96</sup>

A deaf relay interpreter is often required to effectuate accurate communication with an MLS client.

#### *Cued Speech*

Cued speech is a controversial technique which seeks to remove the ambiguity of lipreading by adding a system of eight hand shapes used near the mouth to "cue" the deaf person into differentiating between sounds that look alike on the lips. Invented in the mid 1960's, by Dr. Orin Cornett of Gallaudet University, cued speech has met with widespread resistance but an extremely loyal acceptance by some. Parents find it easy to learn and it enables them to communicate in English.<sup>97</sup> Learning ASL, for most hearing parents, would require months, if not years, of effort. Since it is not widely used there will be less call for it in the courts. However, a person who communicates through cued speech would be accommodated by a cued speech interpreter.

### VI. LEGAL ISSUES PRESENTED (WHEN MUST AN INTERPRETER BE PROVIDED?)

#### *A. The Private Bar*

Law firms are public accommodations and are therefore subject to Title III of the ADA. Many deaf people, if not most, use some form of sign language. An attorney who represents a deaf person must first ascertain which mode of communication is preferred by that person. Because the Title III entity is the final arbiter as to what is reasonable the firm need not always provide an interpreter if the deaf client or potential client can *effectively* communicate otherwise, such as through lipreading.<sup>98</sup> However, since the ADA specifically states that the Title III entity must consult with the disabled person regarding accommodations, it would be wise to be conservative in judging whether a given mode of communication is "effective." Communication is too crucial for any lesser approach.

A method which is not effective is *per se* unreasonable. For example, a common myth is that deaf people compensate for their hearing loss by

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<sup>96</sup>FRISHBERG, *supra* note 60, at 152. A recent article in the SILENT NEWS discusses the plight of a deaf Canadian man who was never educated, knows no written, spoken or standard signed language and stands accused of sexually touching children under the age of 14. Evaluation by a psychologist with deaf parents and extensive experience in this area to determine the man's ability to understand and answer the charges against him is pending. According to the Judge hearing the case: "It's a terrible dilemma. The crown evidence cannot be communicated to him. He is not in a position to communicate his own evidence. It could be said the matter would be proceeding as if he were not present at his own trial." *It's a Terrible Dilemma*, SILENT NEWS, Feb. 1994, at 8.

<sup>97</sup>As part of her teacher training program at Gallaudet University, this author had occasion to learn cued speech. Approximately 20-25 hours of study is required for average proficiency.

<sup>98</sup>U.S. Department of Justice Advisory Letter, 3 N.D.L.R. ¶ 201., p.845.

lipreading or writing notes. As discussed previously, many deaf people have scant knowledge of English and a reading level well below average and, therefore, writing notes is not only cumbersome, but also unlikely to be effective.<sup>99</sup>

While many deaf people can lipread to some extent, we have seen that only 25%-40% of the English language is visible on the lips in the best of conditions. Many factors influence whether lipreading will be successful in any given situation. Some factors which make lipreading difficult are:

- the speaker is in motion or not directly facing the lipreader;
- the lips are obscured by hands, beards, or mustaches;
- the speaker does not articulate carefully or has distorted speech;
- the speaker has a regional or foreign accent;
- the speaker is using technical or unfamiliar words;
- the lipreader is not familiar with the language structures and vocabulary of spoken English;
- the speaker is not well-lighted;
- the lipreader must look into a glare or light;
- the lipreader has poor vision.<sup>100</sup>

Thus, while lipreading may supplement other modes of communication it is seldom sufficient in and of itself. Unless a deaf person requests only lipreading, it should not be relied upon.<sup>101</sup>

It is also important to note that deaf children are often raised to "please" hearing parents and teachers. They know how frustrated and angry hearing people can become when a deaf person does not understand. Therefore, many deaf people are inclined to say they understand so as not to cause any trouble. Coupled with the general lack of accuracy of lipreading, they may truly believe they do understand. It behooves an attorney to question the deaf or hard of hearing client carefully so as to ascertain whether the attorney's message has actually been understood. If not, the need for an interpreter has probably been established and one should be hired immediately. The cost of an interpreter in the beginning can save countless hours and money later.<sup>102</sup>

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<sup>99</sup>For example, a deaf person may write (in proper ASL order) "You true most need tell me must." An accurate English interpretation would be "You must tell me what you really need most." Kresse & Kleven, *supra* note 47, at 11. An attorney unfamiliar with ASL could never make this translation. Another such example, written by a deaf college student, follows: "As soon as you had lend me \$15, I felt I must write you to let you know how relievable I am in your aid." Dolnick, *supra* note 28, at 40.

<sup>100</sup>DU BOW et al., *supra* note 59, at 7.

<sup>101</sup>One British study found that the average deaf adult with at least ten years of practice lipreads no better than the average hearing person off the street. Dolnick, *supra* note 28, at 39.

<sup>102</sup>The Regulations state:

A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities

### B. Government and Courts

Under Title II, which covers state and local governmental agencies including police departments and courts, guidance is given as to when the requirement to provide a sign language interpreter is triggered. Many state statutes for the provision of interpreters heretofore have only been extended to criminal trials and not to arrest and civil or administrative proceedings;<sup>103</sup> several have required the deaf person to pay for interpreter services. Where a deaf criminal defendant is not provided with an interpreter at the time of arrest, he cannot be properly Mirandized. Handing a deaf defendant, who is likely to have a third or fourth grade reading level or lower, a copy of the Miranda warnings is patently unfair. The standard Miranda warning form is written at a 6-8th grade reading level, far above that of the average deaf adult.<sup>104</sup> Because of the conceptual linguistic complexity of the Miranda warnings, accurate interpretation into ASL is difficult and critically important. There are no signs for many legal terms. Many deaf adults will not understand abstract concepts such as "rights" or "Constitution."<sup>105</sup> In sign language for example, the sign for "right" and "all right" is virtually the same. A deaf defendant could easily misunderstand "you have the *right* to a lawyer" to mean "it is *all right* to have a lawyer." The possible dire consequences of such a misunderstanding are obvious. The need for a qualified interpreter at the time of arrest, arraignment, plea negotiations, probation or parole hearings is critical<sup>106</sup> because it is most often at these times that a defendant's rights are in danger of being waived. In many states interpreters are routinely not provided for meetings between a

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to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 CFR § 36.301(c) (1993).

<sup>103</sup>De Roza v. New York City In Rem Foreclosure Release Board, N.Y.L.J., Nov. 10, 1993, p.23, c.1.

<sup>104</sup>DU BOW et al., *supra* note 59, at 176.

<sup>105</sup>Deaf persons have often been described as "concrete" thinkers. Much of this arises from the difficulty hearing parents and teachers have describing abstract concepts to a child with whom they can barely communicate. It is much easier for a mother to say "No" than "No, because . . ." Many deaf children grow up with a black/white mentality. ASL can handle abstractions linguistically but does so very differently than English. For example, there is no sign for the legal term "appeal." An accurate interpretation would employ several signs, for example, "You - not satisfied with decision, ask another trial." Stephen Quigley & Joseph Youngs, INTERPRETING FOR DEAF PEOPLE 56 (1965). Similar situations arise in foreign spoken languages where the system of government in the country of the root language does not encompass certain concepts of justice embraced in the United States.

<sup>106</sup>In *De Roche v. United States*, the court held that effective assistance of counsel required adequate opportunity for consultation between the accused and counsel to prepare for arraignment and trial. 337 F.2d 606 (9th Cir. 1964).



deaf defendant and his parole officer therefore literally forcing a deaf parolee into violating parole.<sup>107</sup>

Title II of the ADA applies the regulations and analyses of § 504 of Rehabilitation Act of 1973 (29 U.S.C. § 794).<sup>108</sup>

As in Title II and III of the ADA, the United States Department of Justice promulgated regulations under § 504 of the Rehabilitation Act of 1973. Its regulation regarding the responsibilities of police departments is clear:

A recipient that employs fifteen or more persons shall provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons in a program receiving Federal financial assistance. Such auxiliary aids may include . . . qualified interpreters . . . . Department officials may require recipients employing fewer than fifteen persons to provide auxiliary aids when this would not significantly impair the ability of the recipient to provide its benefits or services.<sup>109</sup>

Its analysis elaborates:

Law enforcement agencies should provide for the availability of qualified interpreters (certified, where possible, by a recognized certification agency) to assist the agencies when dealing with hearing-impaired persons. Where the hearing-impaired person uses American Sign Language for communication, the term "qualified interpreter" would mean an interpreter skilled in communicating in American Sign Language. It is the responsibility of the law enforcement agency to determine whether the hearing-impaired person uses American Sign Language or Signed English to communicate.

If a hearing-impaired person is arrested, the arresting officer's Miranda warnings should be communicated to the arrestee on a printed form approved for such use by the law enforcement agency where there is no qualified interpreter immediately available and communication is otherwise inadequate. The form should also advise the arrestee that

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<sup>107</sup>Lewis, *supra* note 80.

<sup>108</sup>42 U.S.C. § 12134 (Supp. IV 1992). The Court Interpreter Act requires that in any civil or criminal action initiated by the federal government, a qualified interpreter must be appointed by the court at the court's expense. 28 U.S.C. § 1827 (Supp. IV 1992). Unfortunately, the federal courts have no responsibility to provide interpreters for federal actions initiated by a deaf person. Therefore, a deaf person bringing an ADA action in federal court may be denied an interpreter by that court because, unlike Congress and the Executive branch, the federal judiciary is curiously exempt from the ADA. See 42 U.S.C. § 12209 (Supp. IV 1992).

<sup>109</sup>28 C.F.R. § 42.503(f) (1993).

the law enforcement agency has an obligation under Federal law to offer an interpreter to the arrestee without cost and that the agency will defer interrogation pending the appearance of an interpreter.<sup>110</sup>

With relation to court proceedings, the Justice Department's analysis requires the appointment of qualified interpreters in both civil and criminal proceedings:

Court systems receiving Federal financial assistance shall provide for the availability of qualified interpreters for civil and criminal court proceedings involving persons with hearing or speaking impairments. (Where a recipient has an obligation to provide qualified interpreters under this subpart, the recipient has the corresponding responsibility to pay for the services of the interpreter).<sup>111</sup>

Since the ADA does not require the receipt of federal funds, but applies across the board to state and local governments, under both this analysis and the Supremacy Clause, an interpreter is required in all state and local court proceedings and law enforcement activities regardless of that state's interpreter statute. All federal agencies and the U.S. Postal Service are subject to § 504 of the Rehabilitation Act of 1973. Therefore, since 1973, they have been obligated to provide interpreters at the federal agency administrative proceeding level.

### C. Due Process and Effective Assistance of Counsel

The ADA clearly requires the provision of a qualified interpreter. The failure of a court to meet this mandate can result in a lack of due process and the ineffective assistance of counsel.

*Strickland v. Washington* recognizes, as a benchmark, that the Sixth Amendment right to effective assistance of counsel has been violated when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>112</sup>

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<sup>110</sup>28 C.F.R. § 42.512 (1993), subpart G. *But see*, *Wamer v. Commissioner of Public Safety*, 498 N.W.2d 285 (Minn. Ct. App. 1993) (failure to provide sign language interpreter or TDD not clearly erroneous and an ADA claim was not addressed because it was first asserted on appeal rather than at the trial court); *Commonwealth v. Mordan*, 615 A.2d 102 (Pa. Super. Ct. 1992), *aff'd*, 633 A.2d 588 (Pa. 1993) (no constitutional right to refuse to take breathalyzer test, therefore the failure to provide a sign interpreter at the scene of arrest for driving under the influence did not amount to a lack of due process since state law implies consent to sobriety test upon issuance of license to drive).

<sup>111</sup>45 Fed. Reg. 37,630 (1980).

<sup>112</sup>466 U.S. 668, 686 (1984). The Sixth Amendment also guarantees the right to confront adverse witnesses. If a defendant cannot understand the proceedings, this right will be violated. The right to be informed of the nature and cause of the accusation may also be violated. *See generally*, Michelle-Lee Berko, *Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant*, 97 DICK. L. REV. 101 (1992).

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

In determining whether an unreliable adversarial process has occurred, the attorney's conduct is judged against the standard of "reasonably effective assistance."<sup>113</sup> In addition, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>114</sup>

The reasonable probability standard has been defined as a "probability sufficient to undermine confidence in the outcome,"<sup>115</sup> and is a lower standard than a preponderance of the evidence.<sup>116</sup> The standard is lower than for other claims such as a newly discovered evidence claim, because an ineffective assistance claim asserts that there was no "accurate and fair proceeding,"<sup>117</sup> which a newly discovered evidence claim presumes.

Despite this standard in determining whether counsel's assistance was reasonably effective, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."<sup>118</sup> Although setting down a "particular set of detailed rules for counsel's conduct,"<sup>119</sup> "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions,"<sup>120</sup> "[r]epresentation of a criminal defendant entails certain basic duties."<sup>121</sup>

As recognized in *Strickland*, part of counsel's duties is the duty "to consult with defendant on important decisions and to keep defendant informed of important developments in the course of the prosecution."<sup>122</sup> "In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions,"<sup>123</sup> and "other litigation decisions,"<sup>124</sup> such as "informed strategic choices."<sup>125</sup>

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ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

<sup>113</sup>466 U.S. at 687.

<sup>114</sup>*Id.*, 466 U.S. at 694.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>*Id.*

<sup>118</sup>466 U.S. at 689.

<sup>119</sup>*Id.* at 688.

<sup>120</sup>*Id.* at 689.

<sup>121</sup>*Id.* at 688.

<sup>122</sup>466 U.S. at 688.

<sup>123</sup>*Id.* at 691.

Such an inquiry may focus on counsel's ability to communicate with his client through an interpreter. In the case of a deaf criminal defendant,<sup>126</sup> the inability to communicate with the defendant or keep the defendant informed of developments in the proceeding due to the lack of a qualified, unbiased interpreter would give rise to an ineffective assistance of counsel claim.<sup>127</sup>

Nearly 70 years ago, courts recognized this problem:

In the absence of an interpreter, it would be a physical impossibility for the accused, a deaf [defendant], to know or to understand the nature and cause of the accusation against him, and . . . he could only stand by helplessly . . . without knowing or understanding, and all this in the teeth of the mandatory constitutional rights which apply . . . Mere confrontation would be useless . . .<sup>128</sup>

To keep the defendant informed of important developments in the course of the prosecution, counsel should move for the court to appoint an interpreter. In *Peeler v. Missouri*, counsel's failure to request an interpreter for one of his hard of hearing clients constituted ineffective assistance of counsel under a clearly erroneous standard.<sup>129</sup> During the trial, the other co-defendant, his son, took notes of the proceedings but was unable to keep up. Despite the hearing impaired father's ability to adequately understand questions on direct and cross-examination, "this fact alone [did] not mean that he had a rational understanding of the rest of the proceeding."<sup>130</sup> The father's conviction was reversed and remanded. Paradoxically, the son's conviction was affirmed despite his assertions that he was unable to concentrate on the proceedings while taking notes.

At the heart of both Sixth Amendment right to counsel claims and Fourteenth Amendment due process claims is a lack of fairness. Thus, facts which give rise to an ineffective assistance of counsel claim can also give rise to a due process claim. The need to observe constitutional due process rights in certain civil proceedings and administrative hearings has been recognized

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<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>The constitutional right to effective assistance of counsel applies only to criminal cases and has no bearing on civil cases. See *Barkauskas v. Lane*, 946 F.2d 1292 (7th Cir. 1991); *Friedman v. Arizona*, 912 F.2d 328 (9th Cir. 1990), *cert. denied*, 498 U.S. 1100 (1991); *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988); *MacCuish v. United States*, 844 F.2d 733 (10th Cir. 1988); *Sanchez v. United States Postal Serv.*, 785 F.2d 1236 (5th Cir. 1986); *Jara v. Municipal Ct. San Antonio Judicial Dist.*, 578 P.2d 94 (Cal. 1978) (*en banc*), *cert. denied*, 439 U.S. 1067 (1979).

<sup>127</sup>*Berko*, *supra* note 112.

<sup>128</sup>*Terry v. State*, 105 So. 386, 387-88 (Ala. Ct. App. 1925).

<sup>129</sup>750 S.W.2d 687, 691 (Mo. Ct. App. 1988).

<sup>130</sup>*Id.* at 690.

by the U.S. Supreme Court.<sup>131</sup> Central to a due process claim is the opportunity to be heard which "must be tailored to the capacities and circumstances of those who are to be heard."<sup>132</sup> For a violation of the right to effective assistance of counsel, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."<sup>133</sup> Just as the lack of an interpreter caused Samuel Peeler to lack a "rational understanding" of most of the proceeding, the lack of a Spanish-speaking interpreter for a migrant worker, besides denying his Sixth Amendment right to confront witnesses, caused his trial to lack "the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment."<sup>134</sup> The right of a criminal defendant to be present at trial so that he may do such things as confront adverse witnesses means the defendant must "possess 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'"<sup>135</sup>

A court can also violate the right to effective assistance of counsel "when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."<sup>136</sup> A court's refusal to appoint an interpreter may violate a defendant's right to counsel.<sup>137</sup> Federal courts in criminal and civil cases brought by the United States must, in accordance with the federal Court Interpreters Act,<sup>138</sup> appoint an interpreter when there is "[a]ny indication to the presiding judicial officer that a criminal defendant speaks only or primarily a language other than the English language . . . ."<sup>139</sup>

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<sup>131</sup>Wolff v. McDonnell, 418 U.S. 539 (1974) (parole and probation revocation hearings); Ganon v. Scarpelli, 411 U.S. 778 (1973) (prison disciplinary hearings); *In re Gault*, 387 U.S. 1 (1967) (juvenile hearings); Trop v. Dulles, 356 U.S. 86 (1958) (passport reviews).

<sup>132</sup>Goldberg v. Kelly, 397 U.S. 254, 268-69 (1969).

<sup>133</sup>Strickland, 466 U.S. at 687.

<sup>134</sup>United States *ex rel.* Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970).

<sup>135</sup>*Id.* (quoting Dusky v. United States, 362 U.S. 402 (1962)).

<sup>136</sup>Strickland, 466 U.S. at 686.

<sup>137</sup>A court's failure to use an interpreter correctly can also violate a defendant's rights to due process and effective assistance of counsel. Interpreters in the courts often tell of judges who threaten them with contempt for interpreting. In one instance the interpreter began interpreting an off the record conversation with counsel and the deaf juvenile's parent. This conversation was not at side bar. It was audible to everyone else in the courtroom. The interpreter was told if she "did not put her hands down" she would be held in contempt. Lewis, *supra* note 80. In such a situation, the interpreter has no choice but to do that which he/she knows is violative of the interpreter's Code of Ethics, if not the law. In such a situation counsel should speak with the judge at side bar, make an appropriate objection on the record, or appeal forthwith.

<sup>138</sup>28 U.S.C. § 1827(j) (1988).

<sup>139</sup>United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980). The court rejected a prior decision of the fifth circuit, Suarez v. United States, 309 F.2d 709 (1962), and United States v. Sosa, 379 F.2d 525 (7th Cir. 1967), *cert. denied*, 389 U.S. 845 (5th Cir. 1967), which held

As discussed earlier, the lack of functional literacy among deaf adults militates against the use of notes as a method of communication in court proceedings. Similarly, the problems attendant to lipreading as a communication method are magnified in court settings. All too often, lighting is improper, the litigant is seated too far away from the speaker(s), attorneys move around while examining witnesses and addressing the jury and do not face the litigant, objections are made and arguments arise with lightening quick speed. Adequately following such proceedings is quite impossible. Even a deaf person preferring to lipread would require an oral interpreter in such a setting, which carries its own problems.<sup>140</sup>

As noted, many states have statutes requiring the provision of interpreters in criminal proceedings.<sup>141</sup> The right of a deaf defendant to an interpreter may not be waived by counsel and courts often require that the deaf defendant

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that appointment of an interpreter was discretionary. The Act specifically states that one of the reasons interpreters are appointed is so that a hearing-impaired or non-English speaking defendant's communication with counsel will not be inhibited. 28 U.S.C. § 1827(d)(1) (1988).

<sup>140</sup>Susan R. Harris, *The Hearing Impaired Advocate*, 67 JUDICATURE 95 (August 1983). Harris, a deaf attorney, finds lipreading a sufficient communication method when making appellate arguments. This is a relatively restricted setting for communication, one which does not present the myriad of possible speakers and positions taken during a trial. Harris, of course, is a highly literate person and would not experience the problems most deaf persons experience in lipreading, a language in which they have little proficiency.

<sup>141</sup>ARIZ. REV. STAT. ANN. § 12-242(a) (1983); ARK. CODE ANN. § 43-2101.1(a) (Michie 1977); CAL. EVID. CODE § 754(b) (West 1984); COLO. REV. STAT. § 13-90-201(b) (1973); CONN. GEN. STAT. ANN. § 17-137k(a) (West 1982); DEL. CODE ANN. tit. 10, § 8907 (1982); FLA. STAT. ANN. § 90.6063(2) (West 1983); GA. CODE ANN. § 99-4002 [24-9-101](a) (1982); ILL. ANN. STAT. ch. 110, ¶ 8-1402 (Smith-Hurd 1983); IOWA CODE ANN. § 622b.2 (West 1982); KAN. STAT. ANN. § 75-4352 (1982); KY. REV. STAT. ANN. § 30a-410 (Baldwin 1980); LA. REV. STAT. ANN. § 15-270(a) (West 1981); ME. REV. STAT. ANN. tit. 5, § 48(2)(a) (West 1983); MD. ANN. CODE art. 27, § 623a (1982); MASS. ANN. LAWS ch. 221, § 92 A (Law. Co-op. 1983); MICH. STAT. ANN. § 28.1256(1) (Callaghan 1983); MINN. STAT. ANN. § 611.32 (West 1984); MISS. CODE ANN. § 13-1-16 (1983); MO. ANN. STAT. § 546.035(2) (Vernon 1984); MONT. CODE ANN. § 49-4-503(1) (1983); NEB. REV. STAT. § 25.2403 (1978); NEV. REV. STAT. § 50.051 (1979); N.H. REV. STAT. ANN. § 521-a-2 (1979); N.M. STAT. ANN. § 38-9-3 (Michie 1983); N.Y. JUD. LAW § 390 (McKinney 1983) (amended 1992); N.C. GEN. STAT. § 8b-2 (1981); N.D. CENT. CODE § 28-33-02(1) (1983); OHIO REV. CODE ANN. § 2311.14(A) (Baldwin 1982); OKLA. STAT. ANN. tit. 63, § 2409(a) (West 1983); R.I. GEN. LAWS § 8-5-8 (1969); S.D. CODIFIED LAWS ANN. § 19-3-10(2) (1979); TENN. CODE ANN. § 24-1-103(b)(1) (1983); TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (West 1982); VA. CODE ANN. § 19.2-164.1 (Michie 1983); WASH. REV. CODE ANN. § 2.42.030 (West 1982); W. VA. CODE § 57-5-7(a) (1983); WIS. STAT. ANN. § 885.37 (West 1983); WYO. STAT. § 5-1-109(a) (1983).

Five additional states provide for the discretionary appointment of an interpreter at the criminal trial of a deaf defendant: ALA. CODE § 12-21-131 (1975); HAW. REV. STAT. § 606-9 (1976); S.C. CODE ANN. § 15-27-110 (Law. Co-op. 1976); UTAH CODE ANN. § 77-35-15(b) (1982); VT. R. CRIM. P. § 28 (1983).

convince the court that an interpreter is not needed.<sup>142</sup> As long ago as 1940, a deaf defendant's guilty plea was held unconstitutional when entered without the services of an interpreter.<sup>143</sup>

The presence of an interpreter is not sufficient in and of itself. The interpreter must be qualified, e.g., communication through the services of the interpreter must be effective.<sup>144</sup> The best judge of effectiveness is the deaf consumer.

Defendant's have asserted violations of their due process rights in cases where deaf persons served on juries or as witnesses in criminal trials of hearing defendants.<sup>145</sup> The State of California has issued sample jury instructions to be used when a deaf person serves as a juror.<sup>146</sup>

<sup>142</sup>See *State v. Neave*, 344 N.W.2d 181 (Wis. 1984).

<sup>143</sup>*Mothershead v. King*, 112 F.2d 1004 (8th Cir. 1940).

<sup>144</sup>See *Rodriguez*, *supra* note 92.

<sup>145</sup>*People v. Guzman*, 478 N.Y.S.2d 455 (Sup. Ct. 1984) (presence of deaf juror assisted by a sign language interpreter using Signed English did not violate defendant's rights to a fair trial); *State v. Galloway*, 284 S.E.2d 509 (N.C. 1981) (deaf prosecuting witness who also suffered from night blindness was competent to testify to the circumstances surrounding her rape by the defendant; witnesses' use of an interpreter did not violate defendant's right to due process). See also *Greater L.A. Council on Deafness v. Zolin*, 812 F.2d 1103 (9th Cir. 1987) (court's refusal to seat deaf jurors violated § 504); *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987) (deaf juror was qualified to serve on jury and presence of interpreter in deliberations did not deprive defendant of fair and impartial jury); *DeLong v. Brumbaugh*, 703 F.Supp 399 (W.D. Pa. 1989) (refusal to seat deaf juror communicating through sign language interpreter violates § 504); *Peck v. County of Alameda*, No. C 80-3629, Slip Op. (N.D. Cal. Dec. 18, 1981) (defendant's county refusal to seat a deaf juror violated § 504 of the Rehabilitation Act of 1973); *People v. Green*, 561 N.Y.S.2d 130 (County Ct. 1990) (peremptory challenge by district attorney of deaf juror based solely on disability and not on juror's ability to communicate was not rational and violated juror's right to equal protection under New York State Constitution); *State v. McCain*, 384 N.W.2d 368 (Wis. 1986) (neither the presence of a deaf person on the jury nor the presence of the sign language interpreter in jury deliberations violated state law and that defendant had not timely objected to seating of deaf juror).

<sup>146</sup>Instructions to Jurors When a Deaf/Hard-of-Hearing Jury Member Uses the Services of a Sign Language Interpreter.

1. The Interpreter is NOT a member of the jury.
2. The Interpreter does NOT participate in deliberations.
3. The Interpreter is present to facilitate communication between the Deaf/Hard-of-Hearing juror and other jurors.
4. The Deaf/Hard-of-Hearing juror's words, as spoken by the Interpreter, shall not be construed as being those of the Interpreter.
5. The Interpreter is bound by the Registry of Interpreters for the Deaf Inc.'s Code of Ethics, which states: "The Interpreter shall keep all assignment related information strictly confidential." The Interpreter is bound by this Code not to reveal any information gathered in the course of his/her work.
6. Jurors are asked to refrain from interrupting each other during deliberations so that the Sign Language Interpreter can clearly interpret each speaker's words.

Competent interpreting serves the cause of justice in yet another way. In *Commonwealth v. Edmonds*,<sup>147</sup> despite the existence of a Virginia Statute requiring the appointment of qualified interpreters, a deaf victim was provided with an unqualified interpreter to voice her testimony for the court. To his credit and in accordance with the RID Code of Ethics, the interpreter informed the judge that he was not qualified because he was not skilled at reading sign language. Despite this disclosure, the court ordered the interpreter to interpret anyway and proceed with the trial. Among the more glaring errors made was the interpreter's use of the words "made love" instead of interpreting the witnesses use of the sign for "forced intercourse," a totally different sign than that used for making love. When, later in the proceeding, the prosecutor asked what the victim/witness was wearing, she signed "blouse." The interpreter said "short blouse," thereby creating the inference that the victim/witness was dressed provocatively.<sup>148</sup> Similar instances where courts have plunged in without seeming to understand the ramifications of an unskilled interpreter abound.<sup>149</sup>

Deaf attorneys who prefer Signed English while representing deaf clients skilled only in ASL suggest that their client's due process rights may be violated where the court refuses to permit two interpreters in the courtroom.<sup>150</sup> Other deaf and hard of hearing attorneys familiar with ASL have expressed concern where they know that the interpreter has used the wrong sign, but the judge refuses to allow the hard of hearing or deaf attorney to offer the interpreter the

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<sup>147</sup>DU BOW ET AL., *supra* note 59, at 182 (citing Circuit Court, Staunton, Va. (1975)).

<sup>148</sup>*Id.*

<sup>149</sup>Hon. Jeffrey H. Gallet, et al, *Improving the Access of Deaf and Hearing Impaired Litigants to the Justice System: A Report of the Joint Committee on Access to the Courts of the Committee on Legal Issues Affecting People with Disabilities of the Association of the Bar of the City of New York and the Committee on the Elderly and the Disabled of the New York Women's Bar Association*. June, 1993.

<sup>150</sup>Conversation with Michael A. Schwartz, Esq., May 6, 1993. Mr. Schwartz is a deaf attorney, formerly with the New York City District Attorney's Office in Manhattan and the U.S. Justice Department, who has practiced privately in the New York City metropolitan area and is now an Assistant Attorney General with the N.Y. State Attorney General's Office, Civil Rights Division. As counsel, Mr. Schwartz believes it is imperative that he receive an English interpretation due to the complexities and technicalities of legal terminology, and because English is his first language, not ASL. He would be laboring under a deficit if he had to rely solely on an ASL interpretation. Likewise, if his client had to rely on Signed English he would be similarly deprived.

Other deaf attorneys have experimented with "real time captioning" an electronic system whereby the court stenographer's notes are instantaneously fed into a computer which displays the printed work on a computer screen within a few seconds. Michael Chatoff, Esq. successfully utilized this method when arguing before the U.S. Supreme Court.



correct sign, even where it clearly works an injustice to the deaf litigant/defendant.<sup>151</sup>

#### *D. Prisons*

While the deaf defendant's rights to due process and effective assistance of counsel are becoming more widely recognized and accommodated by criminal courts, accommodations by the prison system still fall short of constitutional due process.

The Department of Justice's analysis of the relevant § 504 regulation specifically provides that prisons should:

provide for the availability of qualified interpreters (certified, where possible, by a recognized certification agency) to enable hearing impaired inmates to participate on an equal basis with non-handicapped inmates in the rehabilitation programs offered by the correctional agencies (e.g., educational programs).<sup>152</sup>

As noted earlier, Title II of the ADA incorporates the regulations and analysis enforced under § 504 of the Rehabilitation Act of 1973.<sup>153</sup> Interpreters who are called in to interpret prison hearings tell of the continual failure of prison officials to unhandcuff deaf defendants. There seems to be no recognition that a deaf defendant cannot communicate with his hands in handcuffs.<sup>154</sup> This is also a continual problem in arraignments. Guards and court officers often ask plaintively "Can't he just talk?"<sup>155</sup> The simple answer, of course, is no, at least not so that the defendant could be understood.

Deaf prisoners imprisoned for fairly minor non-violent offenses have found themselves in "protective custody" which amounts to solitary confinement, released only one hour daily, as a result of prison officials' well-meaning attempts to protect the deaf defendant from harassment and violence in the general population.<sup>156</sup> There seems to be no middle ground. A deaf embezzler may be faced with a choice of being brutalized or serving much "harder" time than his criminal act warrants. While solitary is isolating for any prisoner, it is that much more so for a deaf prisoner who depends on visual stimulation and is unable even to hear such audible signals as a guard's approach for meals.

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<sup>151</sup>Interviews with Ralph Reiser, Attorney at Law, a hard of hearing attorney in suburban New York, Leonard Hall, a deaf attorney with the City of Olathe, Kansas and Gregory Hlibok, a deaf law student, October 22, 1993.

<sup>152</sup>45 Fed. Reg. 37,630 (1980).

<sup>153</sup>29 U.S.C. § 794 (Supp. IV 1992).

<sup>154</sup>Lewis interview, *supra* note 80.

<sup>155</sup>*Id.*

<sup>156</sup>*Id.*

Deaf defendants have spent days in prison before arraignment while waiting for an interpreter or for someone to notice that they are deaf.<sup>157</sup> Another common scenario occurs when a sign language interpreter arrives at the jail to interpret a conversation between counsel and a deaf defendant. Guards routinely walk through the holding pens shouting the deaf defendant's name to tell him that his interpreter and attorney have arrived.<sup>158</sup> A California court issued a bench warrant for a deaf person who was present in the courtroom, but did not hear his case called.<sup>159</sup>

Du Bow relates the story of a deaf inmate who was denied an interpreter at a disciplinary hearing and was thus unable to present a defense. As a result of the "hearing" the inmate lost "good days" which would have counted towards early release and was transferred from a minimum security camp to a maximum security corrections facility. There the state psychologist was also unable to communicate with him and thus unable to render a competent evaluation.<sup>160</sup>

The inmate sued in federal court and a consent decree was approved which provided interpreters for deaf inmates in various situations in prison life such as hearings, notification of the filing of a disciplinary report, when provided with counseling, psychiatric or medical care, or on the job or vocational training.<sup>161</sup> Similarly, hearing inmates are permitted to watch television. Unless the prison equips its television with a decoder the deaf inmate is penalized unfairly. Hearing prisoners are permitted to make phone calls. Often, prisons do not have TDDs and if they do, they are often locked in an administrative office where access is extremely limited.<sup>162</sup> Hearing aids and glasses are removed from deaf inmates, thus putting them at an even greater disadvantage.<sup>163</sup>

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<sup>157</sup>DU BOW ET AL., *supra* note 59, at 179.

<sup>158</sup>Lewis interview, *supra* note 80.

<sup>159</sup>Kresse & Kleven, *supra* note 47, at 12.

<sup>160</sup>DU BOW ET AL., *supra* note 59, at 185 (citing Pyles v. Kamka, 491 F. Supp. 204 (D. Md. 1980)).

<sup>161</sup>*Id.* "This consent decree is a model of how to provide deaf prisoners their basic due process rights and access to needed counselling, medical services, and rehabilitation programs."

<sup>162</sup>Bonnie P. Tucker, *Deaf Prison Inmates: Time to be Heard*, 22 LOY. L.A. L. REV. 1, 11 (1988).

<sup>163</sup>*Id.* at 7. Professor Tucker argues persuasively that the failure of prisons to provide reasonable accommodations to deaf inmates may violate the Eighth Amendment. With respect to pretrial detainees such treatment violates the due process clauses of the Fifth and Fourteenth Amendments.

## VII. STEPS TO COMPLIANCE

A. *Locating Qualified Interpreters*

The National RID office can refer attorneys to local chapters. The local RID will have listings of interpreters in its vicinity. Other sources of qualified interpreters include deaf consumers, local schools for the deaf, deaf organizations or clubs and interpreter referral services. Most courts keep their own lists of interpreters and hire interpreters directly. Interpreters normally charge for a two hour minimum with rates set locally.<sup>164</sup> Because qualified interpreters are in such demand, last minute attempts to schedule interpreters for trials can cause delays, often resulting in the court using a less qualified interpreter to save time.<sup>165</sup> Delays which annoy the courts are not generally beneficial to litigants. Courts should therefore flag cases requiring interpreters so that the calendar can be prepared in advance, leaving sufficient time to schedule interpreters for trial.<sup>166</sup>

B. *Interpreter Etiquette*

The National Center for Law and Deafness has published a list of suggestions as to appropriate use of an interpreter. (See Appendix B). Common errors include: referring to the deaf person in the third person ("ask her if . . ." or "does she know. . .") courts and attorneys engaging in conversation in front of the deaf person while instructing the interpreter "don't interpret this;" or asking the interpreter for an analysis of what the deaf consumer has understood.

C. *Case Preparation*

Where at all possible, the interpreter should be given time with the client to assess the level of communication with which the client is comfortable.<sup>167</sup> Time

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<sup>164</sup>Gallet, *supra* note 149.

<sup>165</sup>Eadie interview, *supra* note 69.

<sup>166</sup>When scheduling interpreters the following checklist may be helpful:

1. Date of assignment;
2. Time of assignment;
3. Duration of assignment;
4. Number of hearing-impaired participants;
5. Number of hearing participants;
6. Names of participants, where applicable;
7. Contact person's name and telephone number;
8. Nature of assignment;
9. Languages/modalities preferred by hearing-impaired participants; and
10. Procedures for payment.

FRISHBERG, *supra* note 60, at 84, 85.

<sup>167</sup>N.Y. Interpreter Manual at 11:  
Case Preparation

should also be taken for the interpreter to speak with counsel and the judge to explain the interpreter's role, method of communication, qualifications (if requested), and to ascertain how the court will be handling protocol. This is particularly helpful where the court or counsel have not used interpreters in the past.

In addition, interpreters should disclose to the court and counsel if they have previously interpreted for litigants or any attorney involved in a current court matter, particularly where one attorney may have previously paid the interpreter for other work rendered.<sup>168</sup>

#### *D. Physical Factors*

Because of deaf persons' reliance on visual stimuli, adequate lighting is of paramount importance. Normally, general lighting is sufficient. However, certain situations can adversely impact a deaf person's ability to communicate. For example, one should not sit in front of a window on a sunny day and expect a deaf or hard of hearing person to lipread. All they will see is the outline of one's head. Similarly, one should avoid communication under light fixtures that produce glare. Interpreters are very sensitive to these issues and will be instructive as to where they should be positioned for optimal communication.

An interpreter should be located opposite the deaf client. In a courtroom setting, the sign language interpreter should stand next to and slightly behind

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- a. A Court Interpreter shall prepare for a proceeding whenever possible. This may involve reviewing the case material, including the charges, police reports, complaints, indictments, transcripts of interviews, motions, or any other documents to be used in the case.
  - b. Whenever possible prior to the initial court appearance, a Court Interpreter shall instruct the non-English speaker as to the role of the Court Interpreter. The Court Interpreter shall become familiarized with the communication pattern, cultural background, and native language level of proficiency of the non-English speaker. Counsel representing the non-English speaker may wish to be present.
  - c. The Court Interpreter shall advise the non-English speaker that:
    - (i) The Court Interpreter shall translate all statements and comments throughout the proceeding.
    - (ii) The non-English speaker must not ask direct questions of the Court Interpreter or initiate any independent dialogue with the interpreter, including asking for legal advice or explanations of any statement made during the proceedings.
    - (iii) The non-English speaker must direct all questions to counsel or to the court when necessary.
    - (iv) The non-English speaker must wait for the full interpretation of the English before responding to a question.
    - (v) The Court Interpreter shall also inform the non-English speaker as to the interpretation mode (or the hand technique) which will be used and how lengthy testimony will be segmented.

See also *infra* RID Code of Ethics, Appendix A.

<sup>168</sup>FRISHBERG, *supra* note 60 at 116.

the witness who is testifying.<sup>169</sup> An oral interpreter should be positioned no more than 10 feet in front of the deaf person. This may preclude closer proximity to the speaker, but beyond 10 feet lipreading is extremely difficult.

Speakers should be careful not to stand or walk in front of the interpreter. Diagrams should be placed in such a way as to assure an easy line of vision from the interpreter to the diagram. Separate lighting should be arranged when a room is darkened for presentations with slides, videos, or overhead transparencies.

#### *E. Voir Dire of Interpreters*

As the use of sign language interpreters becomes more common in courtrooms throughout the United States, and judges and counsel recognize the need for highly skilled interpreters, the issue of qualification of interpreters will arise more frequently.<sup>170</sup> The question of qualification may be raised by the judge or deaf person in order to preserve the qualification process on the record and safeguard the appeal process. Judges might also want to qualify an interpreter so as to insure that the jury understands what may seem to be somewhat unorthodox techniques. Opposing counsel may raise the issue seeking to be reassured or to question the integrity of the interpreter's qualifications.

General reasons for qualifying interpreters include: (a) establishing the interpreter's credentials for the record and where applicable, verification that the interpreter's credentials meet statutory criteria; (b) describing the process of interpreting to the court, especially where the deaf litigant/witness uses ASL or has minimal language skills; and (c) explaining the ability of sign language to adequately reflect the various registers of a language (e.g., levels of communication varying from intimacy to formality, nuance and vocal intonations).

By formally qualifying an interpreter, the court or counsel is presented with an opportunity to challenge an interpreter who appears to be unqualified and to call for a replacement interpreter.<sup>171</sup> For this reason alone, the qualification process must occur at the outset of the court proceedings. Immediately upon being qualified, the oath should be administered<sup>172</sup> and interpreting begin.

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<sup>169</sup>N.J. STAT. ANN. § 34:1-69.11 (1988).

<sup>170</sup>See *People v. Rodriguez*, 546 N.Y.S.2d 769 (Sup. Ct. 1989); *People v. Catron*, 532 N.Y.S.2d 589 (App. Div. 1988).

<sup>171</sup>Issues basic to the voir dire of interpreters include assessing what tests of court interpreting skills the interpreter has taken and what results were achieved; the level of professional education and training received; and pertinent interpreting experiences. See also *infra* Appendix C.

<sup>172</sup>Gardner, *supra* note 80 at 36. The Court Interpreter oath administered in New York State is as follows: "I do hereby pledge and declare that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the position of Court Interpreter, according to the best

Where a team of interpreters is used, one interpreter can interpret the qualification process for the deaf party while the other interpreter is being qualified and vice versa.

#### *F. Use of Team Interpreting*

In any legal interpreting situation where the proceeding is expected to last for more than an hour or so, a team of interpreters should be used. Some of the more obvious examples include trials, lengthy hearings and depositions.

There are a number of reasons for the use of teams, fatigue and physical strain being chief among them. There has been a growing incidence of Cumulative Trauma Injury a/k/a Cumulative Trauma Disorder and tendonitis among sign language interpreters as a result of the constant repetitive strains placed on the arms and hands.<sup>173</sup> Research shows that interpreter competence begins to diminish after one-half hour of interpreting.<sup>174</sup> For this reason, team interpreters switch off at appropriate breaks in the flow of communication every 20-30 minutes. Team members are able to assist each other by feeding each other unclear phrases or words when environmental conditions or foreign accents impede understanding.

Another important reason for the use of teams, particularly in legal settings, is the availability for correction of errors by the non-signing interpreter.<sup>175</sup> Interpreters, being human, occasionally make mistakes or mishear a word or phrase. The other member of the team is in a position to assist the court and the interpreter who is currently signing by appropriately bringing errors to the court's attention.<sup>176</sup> In addition, where one interpreter prefers to voice for the deaf party and the other interpreter does not, they can agree to switch on and off in such a way as to use their respective skills to the fullest benefit of the parties and the court.<sup>177</sup>

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of my ability." NEW YORK STATE UNIFIED COURT SYSTEM, COURT INTERPRETER MANUAL, 45 (1994).

<sup>173</sup>"Overuse Syndrome" SLA quarterly, the Newsletter of Sign Language Associates, Inc. Silver Spring, Md. Cumulative Trauma Injury has until recently been known as Carpal Tunnel Syndrome. See also Areta D. Podnoralecki & Neil I. Spielholz, *Electromyographic Study of Overuse Syndrome in Sign Language Interpreters*, VIEWS (Registry of Interpreters for the Deaf) Feb. 1995 at 3, 17.

<sup>174</sup>Barbara Bannini Brasel, *The Effects of Fatigue on the Competence of Interpreters for the Deaf* (unpublished manuscript on file with author).

<sup>175</sup>David Mintz, *Correcting Interpretation Errors*, Proteus (the Newsletter of the National Association of Judiciary Interpreters and Translators) Fall 1993, at 3.

<sup>176</sup>*Id.*

<sup>177</sup>Eadie interview, *supra* note 69.

### G. Communicating with Deaf Clients

Other than utilizing the services of interpreters in person, attorneys must also be able to communicate with their clients over the telephone. Telecommunications Devices for the Deaf (TDDs) or TTYs as they were formerly known, are inexpensive and allow communication with hearing and speech impaired persons. A TDD is an electronic teletype-like device which allows users to type communications to each other.<sup>178</sup>

For many law firms the purchase of a TDD may be unnecessary.<sup>179</sup> Where communications with deaf clients are infrequent, a firm may simply rely on the telecommunications relay systems required by the ADA.<sup>180</sup> Relay systems must be "functionally equivalent" to those provided persons without hearing or speech impairments.<sup>181</sup> Functional equivalence means that relay systems must be operational 24 hours a day, 7 days a week; calls must be relayed verbatim and kept confidential; relay users may not be surcharged; and they must be given their choice of long distance companies. Relay operators may not keep records beyond the length of the telephone call.<sup>182</sup>

A relay system is utilized thusly: the TDD user places a call to a third party known as a relay operator. The TDD user gives the relay operator the telephone number and name of party he wishes to call. The relay operator places the call and reads to the call recipient what the TDD user is typing and types to the TDD user everything the call recipient says.<sup>183</sup> The process is reversed for the

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<sup>178</sup>As an alternative to the standard TDD, many people have equipped their computer with a coupler and modem to function as a TDD. E-mail users may also communicate freely with hearing and speech impaired persons.

<sup>179</sup>28 C.F.R. § 36.303(c)(d) provides:

(c) Effective communication.

A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.

(d) Telecommunication devices for the deaf (TDDs)

(1) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make available, upon request, a TDD for the use of an individual who has impaired hearing or a communication disorder.

Title II entities must comply with 28 C.F.R. § 35.161 which provides: "Where a public entity communicates by telephone with applicants and beneficiaries, TDD's or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech."

<sup>180</sup>Title IV of the ADA amends Title II of the Communications Act of 1934 by adding a new section (47 U.S.C. § 225 (Supp. IV 1992)) mandating that all telephone companies establish telecommunications relay systems by July 26, 1993.

<sup>181</sup>47 U.S.C. § 225 (a)(3).

<sup>182</sup>56 Fed. Reg. 36, 729 (1991).

<sup>183</sup>Du Bow, et al., *supra*, note 59 at 37.

hearing person calling a TDD user.<sup>184</sup> The relay operator will ask each party to the call if he/she is familiar with the process and if not, will instruct that party as to the proper use of the relay system.

While 47 U.S.C. § 225 provides that intrastate calls must be confidential, it is silent as to the confidentiality of interstate calls. It is conceivable that interstate calls of a criminal nature may be subject to subpoena under 47 U.S.C. § 705 (a).<sup>185</sup>

#### VIII. CONCLUSION

This article has touched on a number of issues. Indeed, several could be and have been the subject of entire law review articles unto themselves. The simple truths that come through are that the deaf, unlike other groups of persons with disabilities are a linguistic minority; that deaf and hard of hearing people, even if English users, without interpreters function much like a linguistic minority; and that provision of interpreter services is critical to preserving the due process rights of a population whose rights have historically been misunderstood if not ignored. Several recommendations are offered for consideration:

Training of court personnel and judges. Accommodations courts routinely make for minorities using foreign spoken languages are not made for deaf and hard of hearing persons.

Training attorneys through CLE or local bar association programs, incorporating into the training members of deaf community, interpreters who have experience in the courts, and attorneys with experience in this area.

Increased training for interpreters so that more skilled interpreters will be available to the courts. Too often this training has been simply a "baptism by fire" proposition, not a method designed to safeguard due process.<sup>186</sup>

New York State is currently undergoing a process whereby the judge's bench books will be revised to include the proper use of interpreters. The process will also provide training to judges and court personnel as well as the practicing bar. The RID, which holds the copyright to the legal interpreter training program at California State University at Northridge program is currently considering ways of making this program more available throughout the country and is considering several options including licensing. The Legal

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<sup>184</sup>*Id.* at 38.

<sup>185</sup>Michael F. Kelleher, *The Confidentiality of Criminal Conversations on TDD Relay Systems*, 79 CAL. L. REV. 1349 (1991).

<sup>186</sup>California has been quite progressive in this area and for three years has based a Department of Justice funded training program at California State University at Northridge.



Community should be supportive of this effort and encourage court systems to seriously consider this model program as a method of increasing compliance with the ADA.

As America ages, the country will see a marked increase in the needs of deaf and hard of hearing persons. These persons will come from all walks of life and will include attorneys and judges as well as defendants, litigants and jurors. The pressure on the courts and the practicing bar can only increase. Many states are presently taking a hard look at the degree of access their courts provide. In taking that hard look, however, it is important that the legal community recognizes that access is a trial and error process; that each state and municipality will not achieve the desired level of success with its first attempts at access; and that true access is an evolutionary process, one in which haste can make a terrible waste. Therefore, it is incumbent upon the legal community that it does its homework and proceeds in a focused and consistent manner, because in the final analysis, the goal is insuring justice to all those who come through its doors.

## APPENDIX A

**Code of Ethics  
of The Registry of Interpreters for the Deaf, Inc.****Introduction**

The Registry of Interpreters for the Deaf, Inc., refers to individuals who may perform one or more of the following services:

- Interpret spoken English to American Sign Language and American Sign Language to spoken English;
- Transliterate spoken English to manually coded English/pidgin signed English, manually coded English/pidgin signed English to spoken English, and spoken English to paraphrased nonaudible spoken English;
- Gesticulate/mime to and from spoken English.

The Registry of Interpreters for the Deaf, Inc., has set forth the following principles of ethical behavior to protect and guide interpreters and transliterators and hearing and Deaf consumers. Underlying these principles is the desire to insure for all the right to communicate.

This Code of Ethics applies to all members of the Registry of Interpreters for the Deaf, Inc., and to all certified nonmembers.

**Code of Ethics**

**Interpreter/transliterator shall keep all assignment-related information strictly confidential.**

*Guidelines:*

Interpreters/translilitators shall not reveal information about any assignment, including the fact that the service is being performed.

Even seemingly unimportant information could be damaging in the wrong hands. Therefore, to avoid this possibility, interpreter/translilitators must not say anything about any assignment. In cases where meetings or information becomes a matter of public record, the interpreter/translilitator shall use discretion in discussing such meetings or information.

If a problem arises between the interpreter/translilitator and either person involved in an assignment, the interpreter/translilitator should first discuss it with the person involved. If no solution can be reached, then both should agree on a third person who could advise them.

When training new trainees by the method of sharing actual experiences, the trainers shall not reveal any of the following information:

- name, sex, age, etc., of the consumer;
- day of the week, time of the day, time of the year the situation took place;
- location (including city), state or agency;
- other people involved;
- unnecessary specifics about the situation.

It takes only a minimum amount of information to identify the parties involved.

**Interpreters/transliterators shall render the message faithfully, always conveying the content and spirit of the speaker, using language most readily understood by the person(s) whom they serve.**

*Guidelines:*

Interpreters/transliterators are not editors and must transmit everything that is said in exactly the same way it was intended. This is especially difficult when the interpreter/transliterator disagrees with what is being said or feels uncomfortable when profanity is being used. Interpreters/transliterators must remember that they are not at all responsible for what is said, only for conveying it accurately. If the interpreter/transliterator's own feelings interfere with rendering the message accurately, he/she shall withdraw from the situation.

While working from spoken English to sign or nonaudible spoken English, the interpreter/transliterator should communicate in the manner most easily understood or preferred by the Deaf or Hard-of-Hearing person(s), be it American Sign Language, manually coded English, fingerspelling, paraphrasing in nonaudible spoken English, gesturing, drawing, or writing, etc. It is important for the interpreter/transliterator and Deaf or Hard-of-Hearing person(s) to spend some time adjusting to each other's way of communicating prior to the actual assignment. When working from sign or nonaudible spoken English, the interpreter/transliterator shall speak the language used by the hearing person in spoken form, be it English, Spanish, French, etc.

**Interpreters/transliterators shall not counsel, advise or interject personal opinions.**

*Guidelines:*

Just as interpreters/transliterators may not omit anything which is said, they also may not add anything to the situation, even when they are asked to do so by other parties involved.

An interpreter/transliterator is only present in a given situation because two or more people have difficulty communicating, and thus the interpreter/transliterator's only function is to facilitate communication. He/she shall not become personally involved because in so doing he/she accepts some responsibility for the outcome, which does not rightly belong to the interpreter/transliterator.

**Interpreters/transliterators shall accept assignments using discretion with regard to skill, setting and the consumers involved.**

*Guidelines:*

Interpreters/transliterators shall only accept assignments for which they are qualified. However, when an interpreters/transliterators shortage exists and the only available interpreter/transliterator does not possess the necessary skill for a particular assignment, this situation should be explained to the consumer. If the consumers agree that services are needed regardless of skill level, then the available interpreter/transliterator will have to use his/her best judgment about accepting or rejecting the assignment.

Certain situations, due to content, consumer involvement, the setting, or other reasons, may prove so uncomfortable for some interpreters/

transliterators and/or consumers, that the facilitating task is adversely affected. An interpreter/transliterator shall not accept assignments which he or she knows will be adversely affected.

Interpreters/transliterators shall generally refrain from providing services in situations where family members, or close personal or professional relationships, may affect impartiality, since it is difficult to mask inner feelings. Under these circumstances, especially in legal settings, the ability to prove oneself unbiased, when challenged, is lessened. In emergency situations, it is realized that the interpreter/transliterator may have to provide services for family members, friends, or close business associates. However, all parties should be informed that the interpreter/transliterator may not become personally involved in the proceedings.

**Interpreters/transliterators shall request compensation for services in a professional and judicious manner.**

*Guidelines:*

Interpreters/transliterators shall be knowledgeable about fees which are appropriate to the profession.

To determine the appropriate fee, interpreters/transliterators should know their own level of skill, level of certification, length of experience, nature of the assignment, and the local cost of living index.

There are circumstances when it is appropriate for interpreters/transliterators to provide services without charge. This should be done with discretion, taking care to preserve the self-respect of the consumers. Consumers should not feel that they are recipients of charity. When providing gratis services, care should be taken so that the livelihood of other interpreters/transliterators will be protected. A freelance interpreter/transliterator may depend on this work for a living and therefore must charge for services rendered, while persons with other full-time work may perform the service as a favor without feeling a loss of income.

**Interpreters/transliterators shall function in a manner appropriate to the situation.**

*Guidelines:*

Interpreters/transliterators shall conduct themselves in such a manner that brings respect to themselves, the consumers and the national organization. The term "appropriate manner" refers to:

- (a) dressing in a manner that is appropriate for skin tone and is not distracting,
- (b) conducting oneself in all phases of an assignment in a manner befitting a professional.

**Interpreters/transliterators shall strive to further knowledge and skills through participation in workshops, professional meetings, interaction with professional colleagues and reading of current literature in the field.**

**Interpreters/transliterators, by virtue of membership in or certification by the RID, Inc., shall strive to maintain high professional standards in compliance with the code of ethics.**

## APPENDIX B

## Interpreter Guidelines

A Professional interpreter should uphold the National Registry of Interpreters for the Deaf Code of Ethics, which carefully defines the role of an interpreter. This code prohibits an interpreter from continuing in any assignments if attempts to communicate are unsuccessful for either party.

The following are guidelines for use of interpreters:

- When talking, look at the deaf person, not the interpreter; speak directly to the person as if the interpreter were not present. For example, say, "The hearing will be on Tuesday," rather than, "Tell him that the hearing will be on Tuesday." The interpreter will sign exactly what is said.
- Some deaf people will speak for themselves. Others will not speak, so the interpreter will say in English what the person signs. In both cases, respond by talking to the deaf person, not the interpreter.
- The interpreter should be directly beside the speaker so that he or she is easily visible to the deaf person.
- The interpreter should not be placed in shadows or in front of any source of bright light, such as a window.
- No private conversation should occur with the interpreter or with anyone else in the deaf person's presence. The interpreter must interpret everything that is said in front of the deaf person. Any discussion of the deaf person's language or communication level should take place privately with the interpreter. Ask the deaf person, not the interpreter, if he or she understands what is being said.
- Speak naturally and not too fast. Remember that names and some other words must be fingerspelled and that this takes more time than signing. The interpreter will indicate whether it is necessary to slow down. Avoid jargon or other technical words with which the deaf person may be unfamiliar. If possible, meet with the interpreter before the interview to discuss the best ways to interpret certain technical concepts into sign language without losing any of the meaning.
- Make sure that the interpreter understands the need for complete confidentiality. Do not allow the interpreter to discuss the deaf person's problems with the person or to give any advice about the problem. The interpreter's only role is to facilitate communication with the deaf person.

Reprinted from SY DU BOW, ET AL., *LEGAL RIGHTS: THE GUIDE FOR DEAF AND HARD OF HEARING PEOPLE* 4 (4th ed. 1992).

## APPENDIX C

## Sample Voir Dire of Sign Language Interpreter

1. State your full name and address for the record.
2. Where are you presently employed?
3. What is your educational background?
4. Have you had any formal training in the area of legal interpretation? When? Where?
5. What did this training prepare you to do?
6. Are you a qualified Sign Language (Oral) interpreter as the law in this state requires? Are you certified and by who? What is the National Registry of Interpreters for the Deaf? How long have you been so certified?
7. How many times have you interpreted in a court of law? In what other kinds of legal settings?
8. Have you met the (defendant/plaintiff) in this matter?
9. Were you able to establish communication with (him/her)? How do you know?
10. What type of language does \_\_\_\_\_ use?
11. What is American Sign Language?
12. Are you fluent in American Sign Language?
13. Is interpreting American Sign Language similar to interpreting Spanish or other foreign languages?
14. What, if any, special interpreting techniques do you use when interpreting American Sign Language?
15. Please tell the court what it means to have minimal language competence.

If a Relay Interpreter is being used for a MLS defendant/plaintiff:

16. In your opinion, does the (defendant/plaintiff) have minimal language competence? What special problems will that create for you? What special tools will you need to aid the court in communicating with this person?
17. What do you mean by Reverse Skills Certification (RSC) or Certified Deaf Interpreter (CDI)?
18. If you've been certified as being able to communicate with a variety of deaf persons, why would you need an RSC's or CDI's help? Why is an RSC or CDI more qualified to interpret for this person than you are?
19. Please explain to the court how you will work with the RSC or CDI interpreter and the court.

Modification of DRAFT document

NJ Administrative Office of the Courts

Court Interpreting, Legal Translating, and Bilingual Services Section

12 April 1988

Document modified from original by Anne Witter-Merithew and Jill Hartman for a 1981 RID Legal Interpreter Training Program. (William Mitchell School of Law).

