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Deaf Interpreters in Court: An accommodation that is more than reasonable

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**THE DEAF INTERPRETER IN COURT:
AN ACCOMMODATION THAT IS MORE THAN REASONABLE**

PREPARED FOR THE
NATIONAL CONSORTIUM OF INTERPRETER EDUCATION CENTERS
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A. A Substantial Number of Deaf Litigants Are Unable to Participate in the American Judicial System Unless Provided with a Deaf-hearing Interpreting Team Accommodation¹

According to one author, “deaf people are substantially overrepresented in the criminal and quasi-criminal justice system.”² The reasons for this are complicated; however, it has been suggested that a general “lack of communication and resulting knowledge deprivation makes [some deaf people] susceptible to . . . getting involved with the police....”³ In a less ominous vein, deaf people, like those who can hear, become involved in garden variety litigation. They are accused of crimes, they witness crimes, they get divorced, they file and defend lawsuits, they adopt children and they have children taken by the state. Each interaction with the legal system offers a choice of communication accommodations. The typical paradigm for legal interpreting, sometimes referred to as the spoken language interpreting model, is a poor fit for a substantial

¹ In this document, the use of a sign language interpreter who can hear is generally referred to as a ‘court interpreter,’ a ‘hearing interpreter,’ the ‘non-deaf interpreter’ or simply as an ‘interpreter who can hear.’ This document concerns the use of a different kind of interpreter: one who cannot hear -- a deaf court interpreter -- as a reasonable accommodation in legal settings for deaf people. The deaf court interpreter works with an interpreter who can hear to render an interpretation in court and other legal settings. In this paper, this configuration will be called a deaf-hearing interpreting team accommodation. The word ‘hearing’ is a term of art in the field of sign language interpretation and is used to differentiate between those who are deaf and those who are not.

² Eric Eckes, *The Incompetency of Courts and Legislatures: Addressing Linguistically Deprived Deaf Defendants*, 75 U. CIN. L. REV. 1649, 1651 n. 18, (2007), *citing*,

number of deaf litigants.⁴ A significant portion of the deaf population is best served by the provision of a deaf-hearing interpreting team accommodation. As will be discussed more fully in subsequent sections, the deaf-hearing interpreting team consists of one deaf court interpreter and one court interpreter who can hear who work together in the transfer of meaning between any number of language pairs used by deaf people in court, including, spoken English and American Sign Language (“ASL”), spoken English and other signed languages or spoken English and other non-standard communication methods.⁵

Under the spoken language interpreting model, when the legal system is faced with a non-English speaker, a single interpreter who understands the language of the non-English 0 Td0003sing8

been given a variety of labels, including underachieving, multiply handicapped, severely disabled, minimal language skilled and traditionally underserved....⁹

In addition to the inability to hear, the NAD-RSA Report suggests that these individuals

[dependent upon welfare]... is projected to increase by 2,000 individuals each year due to the influx of new immigrants and high stakes testing requirements in public schools.”¹²

The National Consortium of Interpreter Education Centers (“NCIEC”), funded by the United States Department of Education, has established a Deaf Interpreters Work Team which is charged with investigating significant issues in the field of deaf interpreting. The Deaf Interpreters Work Team’s focus has been divided into four critical areas: the interpreting process; consumer assessment issues; foundational language requirements and ethical decision making processes.¹³ The Work Team surveyed the profession and concluded that deaf individuals with certain characteristics benefitted from receiving interpretation services provided by a deaf interpreter. Those individuals include children, youth, senior citizens, refugees and immigrants, among others. The Deaf Interpreters Work Team suggested the use of deaf interpreters is effective when a deaf person presents characteristics such as:

- underdeveloped ASL skills,
- limited socialization in the deaf community,
- limited education,
- cognitive challenges,
- delayed language,
- organic issues causing affect deficiencies,
- mental illness,

- problems caused by drug abuse, or
- other physical challenges.¹⁴

The Deaf Interpreters Work Team’s recommendations are consistent with the conclusions presented in the NAD-RSA Report. The Work Team suggested that when these characteristics are present, the proper accommodation for effective communication is a deaf interpreter as part of a deaf-hearing interpreting team. Experience has shown that individuals presenting these characteristics benefit from a more robust interpretation than can be provided by a non-deaf ASL court interpreting team. Most court interpreters agree that a deaf-hearing interpreting team is recommended when deaf individuals present these characteristics or a combination of these characteristics. The Registry of Interpreters for the Deaf (“RID”) has prepared a Standard Practice Paper which further supports this contention: “Long years of experience have demonstrated that native deaf users of ASL are more effective at communicating with this segment of the population than the general practitioner interpreter who can hear.”¹⁵

Courts have had significant experience with deaf individuals who present complex linguistic, social and experiential combinations. While many of these cases concern the deaf individual’s competency to be tried, there is legal authority regarding the use of deaf-hearing interpreting team configurations. New Jersey, for example, has fashioned guidance for its trial courts in interacting with the specific population at issue here. The Guidelines remind the judiciary to “understand the unique communication needs of Deaf people who use sign language of another country . . . or who are not able to communicate successfully in ASL” in order to

¹⁴ *Id.*

- Social isolation. Some Deaf people lead their lives isolated from both the hearing and Deaf worlds. They may lack the general social and cultural knowledge necessary for communication in any language.¹⁷

When courts are faced with litigants presenting these characteristics, the controversy often centers on the deaf person's competency. In *State v. Holmes*, a Florida case, one expert suggested that "as a result of [the deaf person's] extremely limited vocabulary, language skills and fund of knowledge, [he] would be incapable of understanding or participating in the legal proceedings."¹⁸ Sometimes, as in *Stanley v. Lazaroff*, the communications difficulty that signals the need for a deaf interpreter is attributed to a "lower level of intellectual functioning."¹⁹ In attempting to describe the defendant's individual's intellectual functioning and idiosyncratic communication style in *Stanley*, one expert testified that the defendant had trouble "sequencing events, over-personalizing matters and [he presented in] a disjointed style. [The doctor] noted that [the defendant] operates on a very concrete level ..., cannot conceptualize and often ... his comments and reactions are irrelevant."²⁰ In *Stanley*, the state tried the defendant twice without success. For the third proceeding, a deaf-hearing interpreting team was used and he was found competent.

In *People v. Reets*, the 22-year old deaf defendant was born in Guyana and communicated with only his immediate family through rudimentary gestures rather than sign

¹⁷ *Id.*

¹⁸ *State v. Holmes*, 494 So.2d 230, 231 (Fla. 1986).

¹⁹ *Stanley v. Lazaroff*, 82 Fed. Appx. 407, 416 (6th Cir. Ohio 2003)(unpublished).

²⁰ *Id.* at 413.

language.

absence of these characteristics, the deaf-hearing interpreting team has been indicated in many cases and is justified when additional factors are present such as poor English skills, the use of dialectical differences or the use of court interpreters who are not fluent in ASL.

b. A Deaf-hearing Interpreting Team

The media has brought some attention to the danger of ignoring dialectical differences in the American Deaf Community. Junius Wilson, a deaf African American, was declared incompetent and committed for sixty-nine years

the continuum in which deaf litigants fall: to wit, a deaf person from another country and who has no language skills at all. Martinez's case also illustrates the factual scenario in which the deaf-hearing interpreting team accommodation has been used most often.

Unlike Martinez, most deaf litigants will use sign language, typically ASL. However, even for a deaf person who uses ASL, dialectical differences can contribute to erroneous competency decisions. In *State v. Holmes*, the defendant used a regional dialect of ASL used by African-American deaf youths in Miami.³¹ On appeal, the court had to decide whether this young man was linguistically competent to stand trial. One expert suggested that the defendant could be tried if an interpreter familiar with his dialect could be located. The other six expert witnesses determined that based on his language use alone, he was incompetent. Many legal interpreting statutes suggest that a deaf interpreter is appropriate in a case like *Holmes* when due to an intimate acquaintance with the deaf person's communication style or dialect, the deaf interpreter would be able to understand and be understood.³² While there is no indication from the reported opinion, it is safe to assume that in the absence of a discussion of the interpreter configuration at trial, a deaf-hearing interpreting team was not used.³³ As scholars and the more

Martinez might-just might-be a little savvier than he lets on.... The killing of a 16-year-old girl should not go unresolved because of a failure to communicate.”).

³¹ *State v. Holmes*, 494 So.2d 230, 231 (Fla. 1986).

³² See n9 lets sour thfor anfippeals. mes()Tj/TT3 22_0 1 Tf02.4494 Tw 0.25eeabsence o, Lega19n9con9(-oon9)-fer tInn9n9mes, on.2

comprehensive statutes recognize, dialectical differences are a primary reason that the use of deaf interpreters is critical with this population.³⁴

Courts do not understand the complexity of the linguistic, social and environmental challenges presented by deaf litigants. Nor do courts appreciate the issues relating to the lack of ASL skills of certified, non-deaf interpreters.³⁵ While courts may understand that American Sign Language is different from English and requires a specially credentialed interpreter who can hear, they do not understand the skills that the deaf interpreter brings as a specialist accustomed to the dialects and atypical methods of communication used by some deaf litigants. Rather courts apply the spoken language interpreting model to a situation in which the fit is decidedly uneasy. When linguists or interpreters indicate the need for a deaf-hearing interpreting team accommodation, courts must trust that, as the language experts involved in the case, their recommendations are designed to serve the court's interest in ensuring that the deaf litigant is hol and enviro whodel

interpreter will be effective in the transfer of meaning in a legal setting without the aid of a deaf interpreter. When left on their own, interpreters often revert to their primary language – English – leaving the deaf ASL user at a loss to understand the proceedings.

The use of English in court presents many difficulties for deaf litigants even in the absence of the NAD-RSA characteristics. One study of deaf school age children indicated that by age eighteen, deaf students, in general, do not have the linguistic competence of ten-year old children who can hear in many of the syntactic structures of English and that less than twelve percent of deaf children at age sixteen can read at fourth grade reading level or higher.³⁶ Other reports indicate that, “thirty percent of the deaf population is functionally illiterate, reading at a grade level 2.8 or below and approximately 60% of deaf persons are unable to read and understand the Miranda warnings, which are typically written at about the eighth-grade level.”³⁷ Deaf individuals presenting these deficiencies in English face significant difficulty interacting in a system in which information is presented in English, whether it be written, spoken or represented in sign.

Yet, words are the primary tools of the legal system.³⁸ In the United States, English is the lingua franca of the court room and competence is presumed. Statutes and jury instructions consist of a litany of definitions of crimes, elements and offenses.

of a legally naïve interpreter who may lack the ability to produce an accurate and equivalent interpretation.

Undoubtedly, the legal system presents a linguistic minefield and imposes substantial barriers to understanding for most deaf individuals and many court interpreters. Even with a highly skilled legal interpreter, a deaf person may not have the framework to understand the proceedings in a manner sufficient to advise and receive advice from counsel. Deaf interpreters have rich ways of communicating that are generally unavailable even to the most skilled interpreter who can hear. The deaf court interpreter's value lies in the ability to provide an interpretation that conveys information which conforms to the experiential and linguistic framework of the deaf litigant. It is important to note that in so doing, the deaf interpreter remains faithful to the oath to interpret accurately. The deaf interpreter is not explaining or expanding upon legal concepts – such advice is the stock and trade of counsel. Rather, the deaf interpreter, through their own legal training and life experience, is able to recognize those areas that may be deficient in the deaf person's linguistic and experiential schema. The deaf interpreter is proficient in recognizing those ASL constructs that are appropriate to use precisely because the deaf interpreter lives in an environment without meaningful access to sound – their world is organized visually. Interpreters who can hear tend to choose ASL constructs that are colored by the spoken English schema of a person who can hear – their world is organized linearly.⁴⁵ The deaf interpreter is not adding information or explaining concepts to the deaf litigant; rather the deaf interpreter is accessing a far richer store of ASL constructs than is

⁴⁵ By way of anecdotal example only, many people who can hear refer to the department store JC Penny's as 'Pennys' whereas some deaf people refer to it as JCP since those letters are capitalized in the name, in the initial position of the word, are consonants which are larger when signed, and consequently more visually salient.

available to an interpreter who is tethered to sound. The deaf litigant receives the same content as others in the interaction – just organized in a more visual, spatial and natural manner.

d. A Deaf-hearing Interpreting Team Accommodation Is Reasonable to Avoid Misclassifying Deaf Litigants as Incompetent

No discussion of the value of deaf interpreters in legal settings would be complete without an examination of the issue of linguistic competency. When deaf people present certain combinations of linguistic, environmental and social factors, as suggested earlier, the thrust of the case is often a determination of the deaf person's competency. In order to determine whether a deaf litigant is incompetent, statutes should require that prior to and during a competency determination; certified deaf interpreters are provided in all proceedings. Only if this accommodation fails, can the court be sure that the competency is genuine and not the result of a sign language interpreter who is not completely fluent or other factors.

When the court prematurely assumes incompetency without first providing proper accommodations, both the deaf litigant and due process suffer. In *New York State Human Resources Administration v. Carey*, the deaf arson defendant was interviewed by a Legal Aid attorney who concluded that the defendant “could only respond to spoken language in seemingly random grunts and noises ... and that attempts to communicate in writing and by sign language also proved futile upon even the most primitive level.”⁴⁶ Equating a deaf person's vocal responses to spoken language with incompetency is a dangerous road upon which to embark.

⁴⁶ *New York State Human Resources Administration v. Carey*, 484 N.Y.S.2d 10 (NYAD 1 Dept. 1985)(emphasis added).

At no point in the court's opinion was the configuration of interpreters discussed, however, most Legal Aid attorneys are not fluent in ASL even at the most primitive level. It is

could learn, he had such limited sign language skills that he would not be able to participate in his own defense. Like the Court in *Carey*, the judge determined that he was incompetent to proceed because of his language skills alone: “For purposes of commitment and treatment, the Defendant’s form of linguistic incompetence is analogous to mental retardation albeit the Defendant does not meet the statutory definition.”⁴⁹ The statute permitted the court to detain Mr. Graham if he posed a danger to the community. In a rather disingenuous attempt to justify commitment, one expert in ‘deafness’ testified that because Mr. Graham had a propensity for burglary that he “could find himself in a home where he may not hear the residents and could be shot, or if he saw that he was being discovered, he might attempt to leave and inadvertently harm someone else.”⁵⁰ At trial, every effort was made to justify committing Mr. Graham even though he did not qualify for commitment under the statute; fortunately, the court of appeals declined the invitation to board the slippery slope of equating inadequate language skills with incompetency. In granting Mr. Graham’s writ to be released from commitment, the court of appeals held that the trial court “improperly analogized prelinguistic (sic) deafness with mental retardation.”⁵¹

impairs a defendant's comprehension or hampers his ability to consult with his counsel

afforded the full panoply of constitutional rights as are guaranteed to similarly situated litigants who can hear.

In sum, when a court is presented with a defendant who manifests some of the constellation of characteristics found by the NAD-RSA Report, the Deaf Interpreters Work Team study or in the New Jersey Guidelines, the provision of an ASL interpreter who can hear is often not effective particularly when competency is at issue.⁶⁰ A deaf-hearing interpreting team accommodation is the most effective prophylactic to

the additional challenges described in the NAD-RSA Report.⁶⁴ Further studies have shown that even highly experienced ASL interpreters struggle in producing consistent and comprehensible renditions of the Miranda Warnings.⁶⁵ Likewise, studies of the qualifications of educational interpreters have demonstrated an amazing lack of ASL skills. In a sample of 1,300 interpreters who were evaluated using the Educational Interpreter Performance Assessment, the ability to communicate important linguistic aspects of classroom discourse was lacking.⁶⁶ Given that most deaf people are now educated through the use of classroom interpreters, this deficiency has far reaching implications for those deaf people when they attain majority. Without fully developed language or behavioral modeling from native users, the likelihood that those deaf individuals will come into contact with the legal system increases.⁶⁷

While the deficiencies in ASL fluency have been described and published in the literature in the interpreting profession; those results have not been widely shared with courts. Rather, courts unwittingly rely upon the assurance provided by a certification from the RID. If the interpreter is certified, the thinking goes, he or she will be able to interpret accurately and ethically for any deaf individual facing the legal system. Nothing could be further from the truth.

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Several excerpts of interpreted testimony vividly demonstrate ineffective ASL interpreting skills and techniques used in the absence of a deaf interpreter. The transcripts provide stark evidence that courtroom interpretation standards, as relied upon by courts today, are deficient. Based upon the following exchange, the court in *State v. Burnett*, found the defendant was *linguistically* incompetent to stand trial:⁶⁸

THE COURT: [T]ell me why you are here today.

INTERPRETER: Keys. Gave them to a friend to drive. I said no, no, no.

[COUNSEL]: Your Honor-

This witness clearly had language. This witness answered the question asked. The court asked the reason why the defendant was present and the deaf person gave a full explanation of the out-of-court events leading up to the case. The interpreter appeared to be rendering the interpretation verbatim without structuring it into grammatically appropriate English. The interpreter did not even attempt to use full sentences (boy took off. ... broke seat belt off). Codes of professional responsibility for legal interpreters agree that this type of verbatim interpreting violates the oath and canons of ethics regarding accuracy because of the distortion to the grammar of the target language.⁷⁰

The interpreter also appears to be attempting to slow the witness down (wait wait wait, I don't understand . . .) and obtaining clarification of the testimony (A light. No. The sun. The Sun. ... Man here? Man to my right. No, I'm sorry. Man to my left.), rather than addressing the court when there is a need to interact with the witness. These utterances raise doubt as to who was speaking – the interpreter or the witness. Standard practice for all court interpreters is to seek clarification through the court while using the third person for the record when unsure of an interpretation or when there is a need to speak with the witness directly. Standard practice further requires that an interpreter use consecutive interpreting strategies while deaf witnesses are testifying which would obviate the need for the mid-interpretation repairs as seems to be

The unorthodox interpreting technique made the witness appear to be incoherent and confused. Because the court assumed the interpreter was accurately interpreting, it drew the conclusion that the witness was incompetent. Had this exchange been interpreted by a deaf interpreter, the ASL interpreter who could hear would have had a comprehensible source language input from the deaf interpreter. The interpreting team would have had the time to render the interpretation consecutively, as is expected when interpreting for non-English speaking witnesses, into a grammatically correct and equivalent message in English. More importantly, in making the competency determination, the court would have had the opportunity to evaluate the witness' abilities instead of the interpreter's.

State v. Holmes provided another disturbing example of substandard interpreting techniques which undoubtedly affected the decisions of the six out of seven experts who concluded that the defendant was linguistically incompetent.⁷¹ In the excerpts shown below, defense counsel is questioning the deaf defendant through an 'interpreter' who appears to be

INTERPRETER: When you stabbed the boy, was he holding your neck at the same time? He said the same time.

COUNSEL: What would happen to you if you did not stop him from doing this?

THE INTERPRETER: What would-what would-w-o-u-l-d happen if he did not stop choking you; what would happen? He's describing the incident again.⁷²

When the interpreter was able to present a

by the court reporter. In fact, the only time the interpreter varies from this inaccurate method of interpreting, it is marked in the transcript by the notation (sign) indicating that the interpreter stopped talking and the reporter no longer understood what was being said. Signing and talking at the same time is a long discredited method of communicating with deaf people.⁷⁴ Signing and talking at the same time prevents the interpreter from using ASL grammar and forces the structure of English on to the interpretation. This highly suspect method is not effective for any kind of interpreting between two languages.

While the trial court found Mr. Holmes competent, on appeal, that determination was reversed and the case was remanded for a determination of competency. The unconventional interpreting techniques used here masked the real competency of the defendant by making his testimony appear rambling and non-responsive and by editing out content and supplanting it with commentary. Had a deaf interpreter been retained who was familiar with the Miami dialect of ASL used and who employed proper interpreting techniques, the transcript would read far differently, the expert's opinions would have been modified accordingly and the trial court would have an accurate picture of the defendant's competency.

b. **Part of the Solution: Certification Authorities Recognize that Interpreters Need to Continually Train to Retain Language and Interpretation Skills**

In part, out of concerns regarding the quality of ASL interpreting issues, the RID instituted a formal continuing education program to improve the overall quality of certified interpreters.⁷⁵ The RID acknowledges that “the integrity of RID certification requires a

⁷⁴ ROBERT E. JOHNSON, SCOTT K. LIDDELL, & CAROL J. ERTING, UNLOCKING THE CURRICULUM: PRINCIPLES FOR ACHIEVING ACCESS IN DEAF EDUCATION (Gallaudet University, Gallaudet Research Institute, Working Paper No. 89-3, 1989).

⁷⁵ See http://www.rid.org/education/maintain_certification/index.cfm (last accessed July 21, 2008).

commitment to life-long learning.”⁷⁶ Certified interpreters are required to attain a total of eight continuing education units (“CEU”) per four-year cycle to maintain their certification in good standing. Each CEU represents ten hours of instruction; hence, each cycle the interpreter must attend eighty hours of training. Interpreters holding legal specialist certificates are required to attain at least two CEUs (20 contact hours) in legal interpretation. A number of state legislatures have responded to the quality control issue by enacting licensing statutes which include continuing education and mentoring requirements to improve the quality of interpreters’ skills.⁷⁷

States which are members of the National Center for State Courts’ (“NCSC”) consortium frequently impose continuing education requirements on all language interpreters including ASL interpreters. States often require both interpreting skills courses and knowledge-based courses to be taken by interpreters to maintain their eligibility to interpret in the state courts. Nevada requires that interpreters report their training in the areas of ethics, language specific interpreting and translating, or education related to specific areas of the law every three years.⁷⁸ Nevada interpreters are required to substantiate forty credit hours during the reporting cycle and those hours must be distributed over the three years with at least ten annually and no more than twenty taken in the third year.

Likewise, the Tennessee Administrative Office of the Courts implements a Supreme Court Rule requiring all registered and certified interpreters to renew their credentials every three

⁷⁶ *Id.*

⁷⁷ *See generally* ALA. CODE § 34-16-3 (1998); MO. ANN. STAT. §209.292(10)(2002); R.I. GEN. LAWS § 8-19-5 (1999); TEX. HUMAN RESOURCES CODE ANN. § 81.007 (Vernon 2003).

⁷⁸ *See* www.nvsupremecourt.us (last accessed September 13, 2008).

years.⁷⁹ In doing so, each interpreter must provide documentation of eighteen hours of approved continuing education credit during the three-year period. Tennessee requires that a minimum of twelve hours include language skills or interpreting skills, a maximum of five hours can be taken

publication, the RID lists two hundred eight (208) interpreters holding legal certification. Clearly, there are not enough properly credentialed legal interpreters to satisfy the courts' need for services. In a national survey of nearly 4,000 interpreters, only twenty-three percent (23%) responded that they worked at all in legal settings.⁸² Of those 920 interpreters who did some legal work, only five percent (5%) or forty-six (46) of them specialized in legal settings. However, of the 920 who did some work in legal settings, nearly half of them worked with deaf interpreters in legal settings seventy-five (75%) of the time.⁸³ Because many certified interpreters hesitate to engage in legal interpreting, one obvious method of increasing the number of qualified interpreting accommodations in the legal arena is to couple certified interpreters with trained and skilled deaf legal interpreters.

State courts have weighed in on the dearth of qualified legal interpreters. In *Wahid v. Long Island Railroad Co.*, the court justified paying the interpreter a higher fee b 5.77c96af (trainedASLalified e

relay interpreting services.⁸⁷ State governments as well are increasingly concerned about the problem that the interpreter shortage has caused and the danger that is presented when insufficient interpreting resources are available.⁸⁸ By using deaf interpreters, as many state legal interpreting statutes permit, to improve the quality of the interpretation by augmenting the non-deaf interpreter's ASL abilities, the number of qualified legal interpreters increases tremendously and courts can feel confident that the accommodation being provided is effective.

3. Deaf Interpreters Fill the Due Process Gap Left by Insufficiently Qualified Interpreters Who Can Hear

a. Deaf Interpreters Enable Linguistic Presence for a Large Number of Deaf Individuals Involved in the Legal System

The field of interpreting performed by deaf interpreters is not new though it has been the focus of much recent work on a national, regional and local level. The emphasis on deaf interpreting comes at a time in which, as previously noted, there is a declared national shortage of interpreters who can hear and who are fluent in ASL. The demand for ASL interpreting is at an all time high because of the introduction of new technologies which permit deaf people to communicate through video using sign language over the internet with people who can hear through a federally regulated video relay interpreting system. Deaf interpreters working in tandem with interpreters who can hear is a viable method of ensuring that the supply of high quality interpretation services is not out-paced by this extraordinary demand for services. The deaf-hearing interpreting team accommodation can and should be used beyond the courtroom to provide services in any setting where needed by deaf Americans.

⁸⁷ *Id.*

⁸⁸ Arizona and Michigan, among others, have published reports detailing the dearth of interpreters of sign and spoken languages. See http://www.supreme.state.az.us/courtserv/interpreter/2001_Committee_Report.pdf; http://www.michigan.gov/documents/cis/Interpreter_Supply_and_Demand_Final_Report_185252_7.pdf.

In the courtroom, deaf interpreters have proven their worth. In *Stanley v. Lazaroff*, a deaf defendant was found incompetent to stand trial when he was tried with only an interpreter who could hear.⁸⁹ The defendant was released because it was determined that he could not be restored to competency.⁹⁰ After he was released, the State indicted him again and held a second competency examination in which deaf interpreters were used. The court noted that this accommodation “enabled [the defendant] to understand the proceedings, to consult with counsel, and to assist in his defense....”⁹¹ The court found that while the combination of prelingual deafness and a “lower level of intellectual functioning” interfered to some extent with the defendant’s ability to present a defense, the communication problem was allayed when the proceedings were staffed with a deaf-hearing interpreting team.⁹² With a deaf-hearing interpreting accommodation, the state was able to successfully prosecute the defendant, the victims of the crime saw resolution and the court was ensured a constitutionally compliant proceeding.

In the deaf-hearing interpreting team, the deaf interpreter serves as the court’s primary interpreter. The interpreter who can hear serves as the interpreter for the deaf interpreter – an adjunct of sorts. In *People v. Vandiver*, the court described the deaf-hearing team accommodation process as:

The first interpreter, who was not deaf herself, knew ASL but was far more proficient in translating spoken English into its direct word-by-word sign language equivalent.

⁸⁹ *Stanley v. Lazaroff*, 82 Fed. Appx. 407, 416-17 (6th Cir. Ohio 2003)(unpublished).

⁹⁰ *Id.*

⁹¹ *Id.* at 417.

⁹² *Stanley*, 82 Fed. Appx. at 409.

Although she gained most of her experience by translating spoken English into standard word-for-word signs for her deaf parents, she had taken some additional training in ASL and was an official court interpreter. The second interpreter was herself deaf and had had such extensive training in ASL that she also served as a teacher of ASL. Although the first interpreter knew some ASL, she was not nearly as strong in that conceptual language. Further [the deaf witness] was very strong in ASL, but did not know direct word-for-word translation of English into signs at all. Therefore, although the second interpreter was able to communicate easily with [the witness], her own deafness made it imperative that some efficient method be found to communicate to her the attorney's questions and the colloquies between counsel and the court so that she could translate them to [the witness]. The first interpreter served that function. She signed to the second interpreter the word-for-word English spoken by the other participants in the trial; the second interpreter converted the words into ASL concepts understandable by [the witness], who then signed his responses back to her in ASL, whereupon she verbalized his answers in English.⁹³

As demonstrated in *Vandiver* and as evidenced by the 44% of interpreters in legal settings who work with deaf interpreters 75% of the time, even if a competent non-deaf interpreter is provided, a deaf court interpreter brings the level of participation for the deaf person involved to a constitutionally mandated floor. While in *Vandiver*, the process involved rendering the message from spoken English to sign language in English word order to American Sign Language for the ASL monolingual witness, other cases demonstrate similar reasoning using different language pairs.

In *People v. Vasquez*, a California case, the court described the deaf-hearing interpreting process as: “It’s almost as if we had ... a situation where the witness only spoke Dutch and the interpreter only spoke German and a second interpreter could interpret German into English, so we go Dutch to German and German into English.”⁹⁴ The court’s interpreter agreed that “you have to go from one communication medium to another to another and back through.”⁹⁵

when the lawyer asks a question, “the interpreter ... communicates that in American Sign Language to the deaf intermediary interpreter. The next line of communication is from the deaf intermediary interpreter to the witness... who does not know or use American Sign Language, the standard sign language used by deaf people.”⁹⁶ The interpreter explained that “if ... all the interpreters shared the same communication modality and ability to hear as the witness, then we wouldn’t need intermediary interpreters.”⁹⁷ The interpreters concurred that the Dutch to German analogy was apt for describing the distinct parts of the process. Partially because courts are becoming more familiar with spoken language interpreter’s use of the relay interpreting process for speakers of rare languages, these analogies can be more effective than when the ASL interpreter attempts to explain the quagmire of linguistic or communication strategies used by deaf people they encounter in court.

In *People v. Rivera*, the New York court explained its understanding of the deaf-hearing interpreting process as “[the interpreter who could hear] translated the courtroom’s spoken language into ASL for [the deaf interpreter], who is herself hearing impaired. She, in turn, transformed the ASL into a more universal, expressive language of communication, including facial expressions and bodily gestures. The reverse process was similarly employed.”⁹⁸ The court noted that this method was effective because the deaf defendant “was able to understand and communicate through these two interpreters as he asked intelligent questions and indicated

⁹⁶ *Id.* at *4.

⁹⁷ *Id.* at *4.

⁹⁸ *People v. Rivera*, 480 N.Y.S.2d 426 (1984).

when he did not understand.”⁹⁹ Courts employing the deaf-hearing interpreting team accommodation enjoy an additional layer of protection than is provided by a single interpreter who can hear following the spoken language interpreting model. Using this accommodation, no undue advantage is provided; rather, the deaf litigant is able to be present and participate in the proceedings in a manner that is fundamentally fair and comports with due process.

b. Courts Have the Inherent Authority to Retain Any Number of Language Professionals to Ensure a Fundamentally Fair Proceeding

Because of their effectiveness, Deaf interpreters are not strangers to the court system. As early as 1886, a deaf interpreter was used when the interpreter who could hear indicated that he did not understand and was incapable of interpreting for a deaf witness.¹⁰⁰ The Indiana Supreme Court upheld the propriety of appointing a deaf interpreter stating:

The court explained:

Another alleged error of law . . . was the action of the court in appointing a Miss Coons, a deaf and dumb (sic) person, as an additional interpreter, to assist Wright in the interpretation of the examination of the prosecuting witness; and in permitting the questions propounded by counsel to the prosecuting witness to be interpreted by Wright to Miss Coons, and by her to the witness; and in permitting her answers to be interpreted by Miss Coons to Wright, and by him to be given orally to the court and jury. There certainly was no error in the appointment of Miss Coons as an additional interpreter. The object of the examination of the prosecuting witness was to get the facts of this case, within her personal knowledge, before the court and jury; and the court had the power, undoubtedly, to appoint as many interpreters as to it seemed necessary to the accomplishment of that object. The manner in which such examination should be conducted was a matter to be regulated and controlled by the trial court, in its discretion, and will not be reviewed by this court, in the absence of a showing that appellant was in some way injured thereby.¹⁰¹

⁹⁹ *Id.*

¹⁰⁰ *Skaggs v. State*, 8 N.E. 695 (Ind. 1886).

¹⁰¹ *Id.* at 697.

The authority to control the mode and order of court proceedings is inherent in the court's power to try cases and expressly provided for in the Rules of Evidence.¹⁰² The idea that the court can and should appoint any number or type of interpreters to ensure the deaf litigant can fully participate has been repeatedly affirmed on appeal.¹⁰³

In *Linton v. State*, the intermediate appellate court held that a deaf interpreter should be hired when informed of the need by the court interpreter and stated that "if a hearing impaired defendant is unable to understand sign language, the court has an obligation to fashion a remedy suitable to overcome the defendant's disability."¹⁰⁴ In *Linton*, the suitable remedy was a deaf interpreter. The *Vandiver* court stated the rule in Illinois simply: "Testimony of a deaf witness may be secured by whatever means are necessary."¹⁰⁵ In *Rivera*, the New York court examined Illinois' treatment of Donald Lang and concluded that in order to try a deaf litigant who posed communication difficulties the Constitution required that "special trial procedures [be implemented] to negative the effect of [the defendant's] incompetency and to insure him a full and fair exercise of his legal rights."¹⁰⁶ A Connecticut appeals court indicated that testimony from deaf witnesses may be taken by "any method of interrogation that is best adapted to obtain

¹⁰² FED. R. EVID. 611(a); *the Tw* 342.37...8TTtPE/i8as4 Lg38 e; CalA p .

information intelligibly.”¹⁰⁷ Deaf interpreters are the logical accommodation to negate the effect of communication difficulties. Clearly, the court has the inherent power to appoint deaf interpreters to satisfy the constitutional requirements that a defendant be tried fairly, be present and able to confront and cross examine witnesses against him.

c. The Deaf Interpreting Profession Provides a Viable Resource to the Courts

The use of an interpreter, deaf or hearing, evolved from a naturalistic model of helping people involved in the legal system to understand the proceedings because the ‘interpreter’ was in some way connected with the proceeding or connected with the deaf person.¹⁰⁸ At times, the only person connected to or who understood the deaf litigant was also deaf.¹⁰⁹ Over time because of their superior skill in communicating, deaf interpreters began to work for deaf litigants with whom they had no out-of-court connection. Interpreter educators began to examine the similarities between the deaf interpreter’s work and the idea of relay interpreting as used by spoken language interpreters.¹¹⁰ Field-based research, funded by the RID and sponsored in part by the NCIEC Legal Work Group and the Superior Court of Ventura County, California, was undertaken to investigate the work of deaf interpreters in court. The research was designed to

¹⁰⁷ *State v. Tok*, 945 A.2d 558, 566 (Conn. App. 2008).

¹⁰⁸ *See United States v. Addonizio*, 451 F.2d 49 (3rd Cir. 1971)(wife of a speech impaired defendant used to interpret because she was the only one who could understand him); *State v. Rogers*, 603 S.E.2d 910 (S.C. 2004)(using

critically examine the effectiveness of the practice of using deaf-hearing interpreter teams in courtrooms nationwide.

In some areas of the United States, deaf interpreters are called upon to serve the court more frequently than in other areas. Possibly because of more active dockets, larger metropolitan courts seem to accommodate the need for deaf interpreters more readily. Deaf interpreters have been available on a full time basis, to the Los Angeles County courts since the 1990s. Deaf interpreters have been used extensively in Washington, D.C., Philadelphia, Texas and New Jersey where full time interpreting coordinators work or where active relationships between ASL court interpreters and court administrative personnel exist. As a result, in these areas deaf interpreters are retained regularly.

In recognition of the professionalization of the deaf interpreter's work, the RID created and administers a certification evaluation to measure the deaf interpreter's professional competency. The RID website describes the current certification of interpretation for deaf interpreters ("CDI") as follows:

Holders of this certification are interpreters who are deaf or hard-of-hearing, and who have completed at least eight hours of training on the NAD-RID Code of Professional Conduct; eight hours of training on the role and function of an interpreter who is deaf or hard-of-hearing; and have passed a comprehensive combination of written and performance tests. Holders of this certificate are recommended for a broad range of assignments where an interpreter who is deaf or hard-of-hearing would be beneficial.¹¹¹

RID members have long awaited a legal certification examination for deaf interpreters; however, the test has never been developed. As a supposedly temporary measure, the RID has permitted deaf interpreters holding the CDI to be conditionally approved as legal interpreters.

¹¹¹ www.rid.org (last referenced February 1, 2009).

In sum, the latter part of the twentieth century saw the field of ASL interpretation include deaf interpreters. Interpreting for the deaf, by deaf interpreters, is a viable accommodation. Given the statutory authority that exists in many states to retain deaf interpreters and the dearth of skilled ASL interpreters generally, the use of deaf interpreters should be considered a primary accommodation for deaf individuals interacting with the legal system. The following section will examine 1) state and federal statutory frameworks for legal interpreting including a discussion of existing definitions

while there is no mention of deaf interpreters in the legal interpreting statutes; there is an express requirement that court interpreters are qualified by certification or otherwise, and the determination of those qualifications is left to the discretion of the court or a related entity with experience in deafness.¹¹⁸ North Dakota, for example, while expressing a preference for certified interpreters, permits the court to use any interpreter who it determines is qualified implicitly including a deaf interpreter. The provision defines a qualified interpreter as “an interpreter certified by the national registry of interpreters for the deaf or North Dakota

¹¹⁷ Fourteen states and the District of Columbia specifically use the term “intermediary interpreter” or “relay interpreter.” ALA. CODE §24-16-3 (1975); ALA. CODE §34-16-3(6)(1998)(licensing); ARIZ. REV. STAT. §12-242 (2007); CALIF. EVID. CODE § 754 (West 1995); COLO. REV. STAT. ANN. §13-90-206 (2006); D.C. CODE ANN. §2-1905 (2001); GA. CODE ANN. § 24-9-01(4)(2008); LA. REV. STAT. ANN. § 46.2362(4)(West 1982); MASS. GEN. LAWS ANN. Ch. 221 §92A (2005); MICH. COMP. LAWS ANN. §393.502(e) (West 2008); MONT. CODE ANN. §49-4-502(3)(2007); NEB. REV. STAT. §20-151(4)(2006); N.H. REV. STAT. ANN. § 326-I:2 (2001); N.J. STAT. ANN. §34:1-69.8(e)(1984); S.C. CODE ANN. § 15-27-15 (2001); WASH. REV. CODE ANN. § 2.42.110(3) (West 1991).

Thirteen other states use the term “certified deaf interpreter” or other description of the process involving deaf-hearing interpreting team configurations. CONN. GEN. STAT. ANN. § 46a-33a(e)(West 2007); HAWAII RULES FOR CERTIFICATION OF SPOKEN AND SIGN LANGUAGE INTERPRETERS APPENDIX A (2007); IND. ADMIN. CODE Tit.460, R. 2-3-2-(d)(2000); IOWA. ADMIN. CODE R.645-361.2(d)(2(6)(2008)(licensing); KY. REV. STAT. ANN. ADMIN. PROC. AP IX §7 (Banks-Baldwin 2004); ME. REV. STAT. ANN. tit. 32 § 1521, *et seq.* (West 2000)(licensing); ME. REV. STAT. 48 3516cAT

Deaf.”¹²² While a certified deaf interpreter can be listed in the Department of Human Rights directory, the certificates required for both classes of court interpreters are attainable only by interpreters who can hear. Therefore, Iowa seemingly excludes deaf interpreters by the failure to include them in the definition of a qualified court interpreter.

The Iowa licensure statute sets forth a variety of credentials that interpreters must possess to interpret in any venue in the state. The licensing statute lists the CDI credential as one of the certifications an interpreter may hold, but the statute does not explain which settings in which various certificates are required. Moreover, the Iowa licensing statute also does not list the current RID National Interpreting Certificate (“NIC”).¹²³ In sum, there are two problems with Iowa’s legal interpreting statute: In omitting the NIC, the only current RID generalist certificate awarded, in a few years time, as interpreters holding the earlier forms of RID certification leave the field, only Class A certified interpreters holding the SC: L will qualify under the legal interpreting statute to work in court. As of last count, only three (3) Iowa interpreters hold the SC: L. Second, because the CDI is not one of the certificates listed in defining a Class A or Class B court interpreter in the legal interpreting statute, deaf interpreters are implicitly excluded. The RID could help remedy this paradox by testing and awarding the SC: L certificate to qualified deaf interpreters. Ironically, the Deaf Services Commission of Iowa is charged with maintaining the Department of Human Rights’ list of licensed interpreters to which the legal interpreting statute refers, and the Commission has been considering the ways in which it should become more involved in sponsoring educational sessions on the role of CDIs and in supporting

¹²² *Id.* (Emphasis added).

¹²³ See IOWA ADMIN CODE r. 645-361.2(1)(2007).

educational opportunities for deaf interpreters to receive training.¹²⁴

Hence, listing specific certifications is not recommended in statutory schemes because of the confusion it creates. The more inclusive statutes require national certification in the language used by the deaf person but do not specify the name of the certification.¹²⁵ At the very least, if specific certifications are mentioned, then language that permits the name of the certifications to change over time should be included. For example, the Maine statute permits deaf interpreters who hold a “Reverse Skills Certificate, a Certificate of Interpretation, or its successor” to be qualified.¹²⁶ This language removes the concern that the statute will be outdated when the RID revises the examination and its name. Regardless of a specific mandate in the statute, a compelling argument can be made that a court always has the obligation to use its inherent discretion under the rules of evidence to retain any configuration of interpreters it deems necessary to ensure that a proceeding is conducted in a fundamentally fair manner.

3. Structural Components of Legal Interpreting Statutes Either Expressly Provide for Deaf Interpreters or Permit the Court, in Its Discretion, to Qualify Deaf Interpreters

Statutes addressing the qualifications of interpreters in the legal setting are usually found in the legislative code provisions addressing court administration, rules of trial procedure, rules governing administrative proceedings or in evidence codes. Statutes governing ASL court

¹²⁴ MINUTES OF DEAF SERVICES COMMISSION OF IOWA, IOWA DEPARTMENT OF HUMAN RIGHTS. November 8, 2008 Commission meeting, *available at* http://www.state.ia.us/government/dhr/ds/PDF/Commission/November/Old_-_New_Business.pdf.

¹²⁵ *See* TENN. CODE ANN. §24-1-211, *et seq.* (2001); N.D. CENT. CODE §43-52-02 (2001) (defining a qualified interpreter as one who holds a valid nationally recognized certification; *see also* ALA. CODE §34-16-3 (1998) (requiring nationally recognized certification but not specifying the name of tTENN).

interpreting share a number of common features. Importantly, they outline the scope of the statute by listing the settings in which qualified legal interpreters are required. The traditional settings include both in-court interpreting and out-of-court legal interpreting. Most statutes include within their scope law enforcement settings, administrative settings, legislative settings and, at times, other settings such as competency evaluations.

Among other items, the legal interpreting statutes define the qualifications required to interpret in the jurisdiction. In defining qualifications, the RID certificates one must hold to interpret in legal settings are typically specified. Most of the statutes, even those designating a specific RID certification, also require that the interpreter must be qualified, leaving the determination of those qualifications up to the courts through its traditional *voir dire* process.¹²⁷ The statutes typically require the interpreter to swear to interpret accurately and require the court to make a preliminary determination that the deaf person can understand the interpreter.

Generally, statutes governing the interpreting profession can be thought of in two ways: those which simply state the certifications required to hold those licenses.

interpreting statutes typically include other provisions designed to assist the court in determining the qualifications of the interpreter including requirements that the interpreter take an oath to render the interpretation in an understandable manner or that the court undertake a preliminary determination that the deaf person can understand the interpreter before formal appointment.¹³⁰

Traditional legal interpreting statutes may also pertain to and control the work of spoken language interpreters, particularly in NCSC member states.¹³¹

Massachusetts has enacted a typical legal interpreting statute which lists the various settings in which a qualified interpreter must be provided:

In any proceeding in any court in which a deaf or hearing-impaired person is a party or a witness, or proceeding involves a juvenile whose parent, or parents, is deaf or hearing-impaired, or in any proceeding before an executive or legislative board, commission, agency, bureau committee or other body of the state or political subdivisions involving a hearing-impaired person, such court or body shall appoint a qualified interpreter to interpret the proceedings, unless such deaf or hearing-impaired person knowingly, voluntarily, and intelligently waives, in writing, the appointment of such interpreter.

In any criminal proceeding wherein counsel has been appointed to represent an indigent defendant, the court shall also appoint a qualified interpreter for such defendant, whenever such defendant is deaf or hearing-impaired to assist in communication with counsel in all phases of the preparation and presentation of the case.¹³²

Certificate will be made prior to accepting services of an interpreter with lesser certification.” The North Dakota statute requires national certification, but does not list the specific certifications required. It states: “An individual may not practice or represent as an interpreter for deaf, deaf- blind, speech-impaired, or hard-of-hearing individuals in the state unless the individual holds a valid nationally recognized certification.” N.D. CENT. CODE §43-52-02 (2001). Under both of these statutes, a deaf interpreter would qualify for appointment in legal matters.

¹³⁰ ARK. CODE ANN. §16-64-112(a)(1)(B)(ii) (Michie 1991); FLA. STAT. ANN. §90.6063(5)(6) (West 2002); IDAHO CODE Ct. Admin. Rule 52(7) (West 2005); KAN. STAT. ANN. §75-4353(b)(1993); MD. CODE ANN. RULE 16-819 (2007); MISS. CODE ANN. §§13-1-301(b) (1984); MONT. CODE ANN. §49-4-504 (1979)(preliminary determination); MONT. CODE ANN. §49-4-508 (1979)(oath in an understandable manner); NEB. REV. STAT. §2-155.01 (1977)(oath in an understandable manner to the best of his/her ability); N.H. REV. STAT. ANN. §521A:10 (1977)(true interpretation in an understandable manner oath) .

¹³¹ See e.g., MINN. GEN. R. PRAC. Rule 8.01 (2007); MD. CODE ANN. RULE 16-819 (2007); OR. REV. STAT. §45.288 (2007); WASH. REV. CODE ANN. RULES GEN. GR 11.1(West 2005).

¹³² MASS. GEN. LAWS ANN. Ch. 221 §92A (2005).

This statute sets forth the various settings (judicial, executive and legislative) in which qualified legal interpreters are required and also sets forth the three functions of legal interpreting: 1) proceedings, 2) witness and 3) counsel table interpreting (when the deaf person is a party, ... a witness or ... when needed in all phases of the preparation and presentation of the case). Elsewhere most traditional legal interpreting statutes also set forth the requirement that qualified legal interpreters be retained in law enforcement settings.

A few states have created truly broad and well defined interpreting statutes that obviously were created with input from stakeholders who understand the need for highly skilled interpreters and deaf interpreters in a myriad of settings. Connecticut has enacted a comprehensive credential-based statute covering the qualifications, the training and the settings in which specifically credentialed interpreters are required. The statute blends credentials, training and function-based descriptions to provide a fuller description of the necessary skill set required for each specific setting. As a starting point, no person in the state may hold themselves out as an interpreter unless they demonstrate professional accreditation. For specific specialized settings, the statute provides:

No person shall provide interpreting services in a legal setting unless such person is registered with the commission according to the provisions of this section and holds (1) a comprehensive skills certificate from the National Registry of Interpreters for the Deaf, (2) a certificate of interpretation and a certificate of transliteration from the National Registry of Interpreters for the Deaf, (3) a level five certification from the National Association of the Deaf, (4) a reverse skills certificate or is a certified deaf interpreter under the National Registry of Interpreters of the Deaf, (5) for situations requiring an oral interpreter only, oral certification from the National Registry of Interpreters for the Deaf, (6) for situations requiring a cued speech transliterator only, certification from the

the Deaf-National Registry of Interpreters for the Deaf national interpreting certificate.¹³³

The Connecticut statute sets forth the qualifications that an interpreter must hold to interpret in a variety of settings, including legal, medical and educational settings. The statute specifically refers to an interpreter who is qualified by virtue of holding either a Reverse Skills Certificate or a CDI from the Registry of Interpreters for the Deaf.¹³⁴ Connecticut has a graduated matrix which requires demonstrated proficiency by testing at all levels and includes progressively higher certification for more serious settings such as medical and legal settings. In both the provisions on medical interpreting qualifications and the provisions on legal interpreting qualifications, the CDI certificate is included. This places the credential at the same level of regard as the other full generalist certificates issued by the RID.

In responding to a perceived lack of a credential-based standard in the Americans with Disabilities Act (“ADA”), Michigan amended its interpreting law to require a licensed, registered and certified interpreter in all settings in which the ADA permits an interpreter as a reasonable accommodation. The Michigan statute provides “If an interpreter is required as an accommodation for a deaf or deaf-blind person under state or federal law, the interpreter shall be a qualified interpreter.”¹³⁵ An intermediary deaf interpreter is listed in the definition of a qualified interpreter.¹³⁶ In Michigan, qualified deaf interpreters may be used in any setting that the ADA requires a sign language interpreter as an accommodation. Georgia’s statute also

¹³³ CONN. GEN. STAT. ANN. § 46a-33a (West 2007)(emphasis added).

¹³⁴ *Id.*

¹³⁵ MICH. COMP. LAWS ANN.

indicates that qualified legal interpreters as defined in their statute are required in settings even broader than required of the ADA. In *Yates v. State*, the Georgia court required law enforcement officers to provide a qualified sign language interpreter even in a run of the mill DUI case – a setting which the Department of Justice’s guidance explaining Title II of the ADA indicates a sign language interpreter is normally not required.¹³⁷

Michigan and Connecticut, like many other states, have government agencies dedicated to improving the deaf community’s general welfare. Legislatures in these states often defer to the state agency to provide expertise and guidance in drafting and implementing statutes governing interpreting.¹³⁸ Several of those states legal interpreting provisions will be discussed next.

a. Qualifications in Deferral States

Sometimes, the court interpreting statutes contain references to locating qualified interpreters by referral to a specialist state agency or entity involved with deaf people. If a state has an executive agency responsible for deaf issues, such as a Commission on the Deaf and Hard of Hearing, frequently the legislation will defer issues of interpreter qualifications to that entity.¹³⁹

¹³⁷ *Yates v. State*, 545 S.E.2d 169 (Ga. 2001); *See generally*, <http://www.ada.gov>. The Department of Justice has generally advised that if the nature of the communications is serious, an interpreter may be the required accommodation. The Department has issued opinions that the right to an interpreter is co-extensive with the right to be read the Miranda warnings.

¹³⁸ MICH. COMP. LAWS ANN. §393.503(a)(West 2008).

¹³⁹ For example, ALA. CODE. §12-21-131(h)(1975) (referring to Alabama RID, Alabama NAD, or any knowledgeable community resource); ARK. CODE ANN. §16-64-112(d)(Michie 1991)(referring to the state RID, Department of Health and Human Services, University of Arkansas – Little Rock Interpreter Training Program or any community resource where the appointing authority or deaf person is knowledgeable that such qualified interpreter can be found); KAN. STAT. ANN. §75-4355b(a)(1993); KY. REV. STAT. ANN. §30A.405 (Banks-Baldwin

In Colorado, the Commission for the Deaf is charged with determining the court interpreter's qualifications. The Commission has drafted extensive regulations to differentiate the qualifications of different kinds of deaf interpreters. The Colorado legal interpreting statute defines a qualified interpreter as one "who has a valid certification of competency accepted by the Commission and includes . . . intermediary interpreters."¹⁴⁰ The Commission's regulations define a CDI as "a professional who is Deaf and holds both a valid RID certificate and Legal Credential Authorization issued by the Commission."¹⁴¹ The regulations explain that "CDI's work with professionals who can hear, in providing an accurate interpretation between English and sign language, between variants of sign language or between American Sign Language and other foreign sign languages by acting as an intermediary between the Deaf or Hard of Hearing individual and the interpreter(s)."¹⁴² The regulations distinguish a CDI from a non-certified deaf interpreter by defining a "deaf interpreter" as one who is "Deaf and holds a valid Legal Credential Authorization issued by the Commission but does not hold an RID certificate."

Finally, Colorado recognizes that at times a non-professional, whether deaf or not, will be needed to ensure that communication is successful. The regulations define this person as an “intermediary interpreter” who is “an individual who has particular knowledge and/or experience relative to the unique communication needs of a Deaf or Hard of Hearing person.”¹⁴⁴ The “CDI” and the “deaf interpreter” are professional interpreters who have obtained the Commission’s Legal Credential Authorization. The “intermediary interpreter” classification, on the other hand, recognizes that some individuals who have communication abilities with specific Deaf or hard of hearing people are not professional interpreters but may be needed in order for the proceedings to be conducted. In such cases, the regulations require that the intermediary will work with a professional interpreter to establish effective communication on a case-by-case basis. The regulations further categorize interpreters into Status I or Status II interpreters. Deaf interpreters holding a CDI are considered Status I interpreters and deaf interpreters without a CDI but with the Legal Credential Authorization are Status II interpreters. The Commission sets initial and continuing education requirements for each category of interpreters. Colorado’s thorough treatment of deaf interpreters, their qualifications, and training reveals the precise reason why legislatures delegate duties to executive agencies with experience and expertise in a particular area.

Many other states also defer to their Commissions or other deafness related entity. Kansas’ legal interpreting statute states “all interpreters for the deaf, hard of hearing and speech impaired. . . shall be certified by or registered with the Kansas commission for the deaf and hard of hearing or an agency designated by the commission. The chair person of the governmental

¹⁴⁴ *Id.*

committee or commission, or the head of the agency or other entity, or the court is responsible

West Virginia likewise defers to both its Commission and to the Supreme Court of the state to certify interpreters who are already tested by the RID or approved by the Chief of the Services for the Deaf and Hearing-impaired in West Virginia, or the West Virginia Department of Vocational Rehabilitation.¹⁵⁰ The statute provides that “the court shall work closely with West Virginia commission for the deaf and hard-of-hearing in finding the right interpreter for any duty in court.”¹⁵¹ The Legislature, in passing the statute, noted its concern that there was not enough attention to the issue of interpreter quality control and of awareness that interpreters were required for deaf people.¹⁵² The statute gave the Commission the authority to set the standards for sign language interpreting and the Supreme Court’s rules govern all language interpreters in West Virginia.

In Texas, the courts defer all interpreter competency decisions, training and testing to an executive agency: The court interpreter certification is administered by the Department of Assistive and Rehabilitative Services (“DARS”).¹⁵³ DARS awards numerous certificates and issues three separate certificates for deaf interpreters: Level III Intermediary, Level IV Intermediary and Level V Intermediary. Holders of a Level IV Intermediary certificate may work in court and legal situations but to a lesser extent than holders of a Level V Intermediary which requires extensive “knowledge and training in specialized fields including, but not limited to Mental Health/Psychiatric, Medical/Surgical, Court/Legal, and situations involving juveniles,

¹⁵⁰ W.VA. CODE §57-5-7 (1992).

¹⁵¹ W.VA. CODE §5-14A-3 (1996).

¹⁵² W.VA. CODE §5-14-1 (1996).

¹⁵³ See <http://www.dars.state.tx.us/dhhs/bei/ch1.htm#1.1>

etc.”¹⁵⁴ DARS advises courts with respect to the settings in which various certificate holders can be retained, including when deaf interpreters should be retained in legal settings.¹⁵⁵ Deaf interpreters are recommended in legal matters such as civil investigations including depositions, arrests or bookings, meetings with Parole/Probation Officers, applications for restraining orders or peace bonds, police investigations including campus police investigations, patent matters, minor civil proceedings such as family law proceedings, traffic court, will contests, immigration proceedings, adoptions, jury duty and major civil law suits, criminal pretrial proceedings, attorney client conferences, major criminal proceedings, and grand jury proceedings.¹⁵⁶ Hence, the executive agency has outlined extensive parameters for the use of deaf interpreters in Texas

The Federal Court Interpreting Act specifies that regulations will be issued by the Director of the USAOC. The regulations implement the Court Interpreters Act Amendments of

Federal courts use deaf-hearing

been used as an in-court accommodation; however, the authority exists for the deaf interpreter to be used in any legal interpreting setting listed in the statute. When a statute includes deaf interpreters under the definition of a qualified legal interpreter and also itemizes the settings in which qualified interpreters are required, then the legal authority plainly exists to retain deaf interpreters in all settings listed in the statute.

2. Statutory and Common Law Standards Exist for Appointing Deaf Interpreters

Legal interpreting statutes commonly provide a standard, which can be thought of as a test, to guide courts in determining when a deaf interpreter is required for an assignment. The standard can be contained within the definition of a qualified deaf interpreter or, more commonly, contained in a separate section explaining how and when a deaf interpreter should be used.¹⁷² These provisions guide courts when the issue of a deaf-hearing interpreting team accommodation is raised. Likewise, these provisions contain the authority for court interpreters to rely upon when recommending staffing configurations for a case. The following discussion will explore several standards contained in legal interpreting statutes and in the reported cases for the provision of a deaf interpreter.

a. Standards Require Deaf Interpreters When Court Interpreter Indicates that a Deaf Interpreter Would be Able to Assist, Improve or Enhance the Accuracy or the Quality of the Interpretation

Statutes recognize that, interpreters who can hear will be unable to establish communication satisfactorily at times. Many statutes incorporate a standard that reflects a reasoned determination by the court interpreter regarding their ability to provide effective services to the court and to the deaf litigant. When, in the court interpreter's estimation, a deaf

¹⁷² See e.g., COLO. REV. STAT. of the Interpreters, § 13-6-101.

In California, as is common in the statutes which provide a standard, the onus is on the interpreter, after the preliminary discussion with the deaf person, to inform the court that the interpreter is not familiar with the deaf person's particular language use and then the court must investigate the issue with the deaf person and counsel. Significantly, the California code provides the deaf litigant a measure of control regarding whether a deaf interpreter should be provided. The statute requires that the court consult with the deaf person and counsel in making its decision. On the other hand, the initial determination of the issue is still left to the interpreter whose professional ethics, ego or self-awareness may be imperfect.¹⁷⁵ Because the initial determination is left to the interpreter, it is of critical importance that legal interpreters undertake this analysis and to subordinate any feelings of inadequacy in the event that a deaf interpreter would be able to assist, improve or enhance the quality of the interpretation. The decision to recommend a deaf interpreter is an indication of professionalism, not a sign of incompetence.

Given the court's concern for an accurate interpretation, it is not surprising that the most common standard focuses on when a deaf interpreter will assist, improve or enhance the quality of the

between the individual who is deaf or hearing impaired and the qualified interpreter.”¹⁷⁷ Oklahoma’s definition is even broader suggesting that a deaf interpreter is one who is able to enhance communication.¹⁷⁸ Even with highly qualified interpreters, as the case in *Vandiver*, a deaf interpreter will often be able to assist, improve or enhance the quality of an interpretation. This standard for retaining a deaf interpreter when one will assist, improve or enhance the quality of the interpretation is a powerful tool for court interpreters to consider in every instance.

Once the interpreter has engaged in the required analysis and determined that a deaf interpreter would assist, improve or enhance the interpretation, the court has an affirmative obligation to attend to the interpreter’s request. Some statutory language is quite strong regarding the court’s responsibility to retain a deaf interpreter when the court interpreter indicates one is necessary. In California, the appointing authority is required to appoint an intermediary interpreter in the event that the interpreter is unable to establish communication with the deaf litigant. The code states: “In the event that the appointed interpreter is not familiar with the use of particular signs by the individual who is deaf or hearing impaired or his or her particular variant of sign language, the court or other appointing authority shall, in consultation with the individual who is deaf or hearing impaired or his or her representative, appoint an intermediary interpreter.”¹⁷⁹ This provision sets forth the order of proceeding: 1) the court interpreter engages in the required analysis, 2) informs the court that a deaf interpreter will assist, improve or enhance the interpretation which shifts the burden to the court to 3) consult with the deaf person and appoint an interpreter. Because of the mandatory tone of the language, the court’s ability to ignore the interpreter’s recommendation for a deaf interpreter is limited.

¹⁷⁷ CAL. EVID. CODE § 754(e) (West 1995)(Emphasis added.).

¹⁷⁸ OKLA. STAT. ANN. tit. 63 § 2408 (West 2005).

¹⁷⁹ CAL. EVID. CODE § 754(g) (West 1995)(Emphasis added.).

In Michigan, like in Maine, the standard incorporates both the “unable to render a satisfactory interpretation” and the “improve the quality of the interpretation” standards. Again the obligation in the first instance lies with interpreter to inform the court of the need for a deaf interpreter. Once the interpreter indicates the need for a deaf interpreter, the court is obligated to appoint one. The Michigan statute states “if a qualified interpreter states that the interpreter is unable to render a satisfactory interpretation and that an intermediary interpreter or deaf interpreter will improve the quality of the interpretation, the appointing authority shall appoint an intermediary interpreter or deaf interpreter to assist the qualified interpreter.”¹⁸² The two tests supply different information to the court and can be determined in different ways by different people. The “unable to render a satisfactory interpretation” standard is subjectively determined normally, in the first instance, by the working court interpreter who can hear. If the interpreter believes that the interpretation is satisfactory, no request for a deaf interpreter will be made in the absence of some immediate review of the interpreter’s work by an expert at counsel table. In the absence of a table interpreter, it is unlikely that monolingual counsel will be able to fully understand and object to the unsatisfact

the quality of ASL interpreters in general, however, it is logical to presume that a qualified deaf interpreter would normally be able to assist, improve or enhance the quality of most interpretations. The decisions on both prongs are fairly straightforward for an expert in interpretation to review to determine whether the ASL court interpreter should have taken advantage of the statutory provision for retaining a deaf interpreter.

While there is scarce case law regarding these provisions, the Michigan Court of Appeals has interpreted the “improve the quality of the interpretation” standard as a viable reason to request a certified deaf interpreter.¹⁸³ In *In re Wickman*, the Court of Appeals explained that “[t]he benefit of a deaf interpreter over a hearing interpreter for deaf witnesses is

language. In terms of the standards discussed herein, the court interpreter indicated he was unable to provide a satisfactory interpretation and that a deaf interpreter would improve, assist or enhance the quality of the interpretation. At that point, even in a Federal court with no clear statutory provision expressly allowing deaf interpreters, a deaf-hearing team interpreting accommodation was used for part of the proceedings based upon the interpreter's reported difficulty in providing a satisfactory interpretation.¹⁸⁵

the statutory standard for hiring deaf interpreters. The oath requires the best of the interpreter's ability in a language the deaf person understands. If the best of the interpreter's ability is insufficient to produce an interpretation in a language the deaf person understands, then duty to recommend a deaf interpreter is triggered because both prongs of the test will be met: 1) the interpreter is unable to produce a satisfactory interpretation in a language the deaf person understands; and 2) a deaf interpreter will be able to assist, enhance or improve the quality of the interpretation by rendering it in a language the deaf person understands. Therefore, the interpreter has an ethical and statutory obligation to inform the court of the need for a deaf interpreter. In order to abide by the oath and the ethical requirements to interpret accurately, the court interpreter must honestly assess whether a deaf interpreter will enhance or improve the quality of the interpretation or will assist in providing an accurate interpretation in a language the deaf person understands. Given what has already been discussed regarding the quality and fluency of non-deaf interpreters, a deaf court interpreter is the accommodation that will ensure fidelity to the oath requiring that the proceedings be interpreted in a language the deaf person understands.

b. asb.

knowledge of the litigant's communication style and needs to interpret for the person in court.¹⁸⁸

The intimate knowledge standard is demonstrated by the Massachusetts' statute which lists the reasons a deaf interpreter might be appointed as "because of an intimate acquaintance with deaf or hearing-impaired persons who use mainly natural or unusual gestures for communicating, [the intermediary] can act as a mediator between the hearing-impaired person and the qualified interpreter."¹⁸⁹ The definition recognizes the unique abilities of deaf interpreters to understand and communicate with deaf litigants who do not use standard American Sign Language or who present characteristics such as those described in the NAD-RSA Report.

Like Massachusetts, New Jersey's Language Services Section of its administrative office recognized that intimate knowledge is an important factor in successful communication with certain deaf people and has issued a directive regarding the use of deaf interpreters when they have intimate knowledge of the communication style of the litigant.¹⁹⁰ The directive cautions courts that the deaf interpreter should be *voir dire*d and should be administered the standard oath for interpreters.¹⁹¹ The intimate knowledge does not necessarily mean a personal acquaintance, but rather the knowledge derives from certification, training and most importantly, from living and communicating entirely in American Sign Language for their day-to-day communication.

Occasionally, the person who will function as an intermediary is not a professional interpreter but is familiar with the deaf person's communication style. Normally, this person is not trained in interpreting and may not even know standard sign language. Because of this

¹⁸⁸ MASS. GEN. LAWS ANN. Ch. 221 §92A (2005); MONT. CODE ANN. §49-4-502(3)(2007); N.J. STAT. ANN. §34:1-69.8(e)(1984); *see also*

person's personal acquaintance with the deaf person, they are able to communicate to some extent. States address the non-professional intermediary in a variety of ways. New Jersey for example requires that the non-professional intermediary undergo *voir dire*, take an oath and be instructed on their obligations to interpret accurately and impartially.¹⁹² California recognizes that the intermediary may be a person who can hear, such as a family member.¹⁹³ Colorado requires supervision from a professional interpreter.¹⁹⁴ Colorado makes this distinction clear by creating a discrete classification for non-professional intermediary interpreters whether deaf or hearing.¹⁹⁵ In one federal case, *United States v. Bell*, the 'interpreter' was the deaf defendant's sister who could hear and was able to interpret between the defendant's signing and spoken Chocktaw.¹⁹⁶ The sister did not speak English and required another interpreter who could hear to relay the testimony from Chocktaw to spoken English for the court to understand her brother's testimony. When a family member must be used to interpret a court proceeding because no other qualified interpreter can effectively communicate with the litigant, many courts require that a professional interpreter, whether deaf or hearing, supervises the non-interpreter's ethical conduct to the extent possible.

c. Standards Require Deaf Interpreters Are Appointed in Consultation with the Deaf Litigant

The more comprehensive statutes afford some decision-making authority to the deaf

¹⁹² New Jersey Directives 3-05. Standard 2.3 (2004).

¹⁹³ As does Georgia. GA. CODE ANN. § 24-9-01(4)(2008)(any person, including a hearing impaired person, who is able to assist).

¹⁹⁴ See notes and discussion *supra*

litigant in the case.¹⁹⁷ The ADA supports this in consultation with standard and requires an interactive process with the disabled person regarding the type of accommodation to be provided.¹⁹⁸ Some states, such as Maine, entitle deaf litigants to request a specific accommodation. The Maine statute states: “A qualified legal interpreter or CART provider must be appointed under this subsection after consultation with, and giving primary consideration to the request of, the deaf person or hard-of-hearing person. If the appointed qualified legal interpreter does not meet the needs of the deaf person or hard-of-hearing person, the presiding officer shall, with the consent of the deaf person or hard-of-hearing person, appoint another qualified legal interpreter.”¹⁹⁹ This language can be understood to create a duty for the court to articulate the factual findings it relied upon to either grant or deny the appointment of a deaf interpreter into the record for review on appeal. It constrains the court from arbitrarily denying the deaf person’s request by forcing transparency in its ruling.

The Arizona court interpreting statute takes a somewhat different approach to the in

deaf litigant a more prominent role in informing the court of the need and in the selection of a specific interpreter who would be effective in interpreting the proceedings. Timing and preparation are of paramount consideration to effectively use these statutory tools. If it appears, mid-proceeding, that the court appointed interpreter is unable to render effective interpretation, then the proceedings must be stopped until a qualified deaf interpreter is located. Because of the disruption to the process, it is

the deaf litigant standing to raise the issue independently. In these states, the deaf litigant has the power to lodge an objection to the unsatisfactory nature of the interpretation. The court is then required to hold a hearing to determine the validity of the challenge. Experts should review the interpretation to determine if the interpretation was unsatisfactory or that an intermediary would have assisted, improved or enhanced the quality of the interpretation. If the court denies the request, counsel should press for the court to articulate its factual findings for denying the request for a deaf interpreter. Hence, a record would be created for appeal.

The language incorporated into the standards for providing a deaf interpreter usually originate from how interpreters and other experts have explained the reasons why a deaf interpreter is needed. Legislatures typically create law after soliciting public comment from stakeholders. Deaf interpreters have been described as being able to assist, improve or enhance the quality of the interpretation. Deaf interpreters have been described as being necessary because the assigned court interpreter does not understand the signs of the deaf person or cannot provide a satisfactory interpretation. In the past, deaf interpreters have been described as having intimate knowledge of communication styles of certain deaf individuals. These descriptions have been incorporated into the statutes. Likewise, courts have sometimes borrowed terminology from experts to characterize the deaf litigant who could benefit from a deaf interpreter as one who became deaf at a certain age. While age of onset of deafness may have some relevance to a deaf person's English fluency, it is not generally indicative of the court interpreter's need for a qualified deaf interpreter to assist, improve or enhance the quality of the interpretation. Nevertheless, several cases linking age of onset

d. Standards Require Deaf Interpreters When the Defendant Has Been Labeled Prelingually Deaf by Expert Witnesses or Presents Other Characteristics Contained in the NAD-RSA Report

Standards for considering the appointment of deaf interpreters are not contained solely in court interpreting statutes, but also derive from common law as set forth in reported cases. One such standard frequently seen in competency cases is the pre-lingual deafness standard. Some experts who evaluate deaf litigants use the term ‘prelingual’ in testimony to explain communication difficulties. There is nothing inherently problematic about becoming deaf prior to learning language, as long as language learning takes place at some point in the developmental process. Generally the experts who use this term mean that formal language learning did not take place during the critical developmental period. While these deaf individuals may have strategies to communicate about certain familiar topics, they may not have a fully developed language--English or ASL. Furthermore, experts tend to use the designation to describe the communication strategies or language abilities of deaf litigants presenting one or more of the constellation of factors addressed earlier in the NAD-RSA Report.

In *Linton v. State*, a Texas case, the intermediate appellate court held that a “deaf-relay” interpreter should have been provided at trial to a defendant who was “prelingually deaf.”²⁰³ In *Linton*, the qualified court interpreter who could hear informed the court, he could not interpret accurately for the defendant due to language difficulties, stating that the defendant “[did] not appear to know American Sign Language.”²⁰⁴ Expert testimony established that the defendant had a fourth grade English reading level and that the defendant would not understand an English-based translation through the appointed interpreter. In other words, the defendant could not

²⁰³ *Linton v. State*, 2007 WL 2323929 *2 (Tex. App. – Corpus Christi), *rev’d*, No. PD-0413-08 (Tex. Crim. App. January 14, 2009).

²⁰⁴ *Linton*, at *1.

The oath provision in the Texas code contains the requirement that the interpretation should be in a language understandable to the deaf litigant.²⁰⁸ Relying on this provision, the court interpreter met his obligation to inform the court that there was an impediment to accurate interpretation. The appeals court agreed holding that alternative arrangements to bring in a deaf interpreter should have been made. Under many statutes (though the Texas statute is silent on the point), the standard simply requires a deaf interpreter upon showing that the court interpreter was unable to provide an accurate interpretation. In the absence of a statutory provision on point, it is proper to justify a deaf interpreter based upon the interpreter's oath and ethical mandates. Canon 8 of the NCSC Model Code is entitled Assessing and Reporting Impediments to Performance and requires that "Interpreters shall assess at all times their ability to deliver services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the appropriate judicial authority."²⁰⁹ The Commentary cautions the interpreter that "[i]f the communication mode or language of the non-English speaking person cannot be readily interpreted, the interpreter should notify the appropriate judicial authority."²¹⁰ The linguistic conclusion that the interpretation is not understandable to the deaf person logically falls to the sworn court interpreter even in the absence of a specific statutory mandate. Hence, courts should attend to the interpreter's assessment that the interpreter is unable to render the message in a language understandable by

²⁰⁸ TEX. CIV. PRAC. & REM. CODE ANN. §21.005(Vernon 1987); *see also In re Bryon*, 176 Ca. App. 3d 822, 233 Cal. Rptr. 319 (Cal. App. 5 Dist. 1986)(father of juvenile appealed based upon the interpretation not being rendered in a language he could understand).

²⁰⁹ *See* WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 207 (1995).

²¹⁰ *Id.*

the deaf person. The rational resolution is to provide a deaf interpreter who is able to transfer meaning in a method that is accessible to and effective for the deaf litigant.

On appeal, the Texas Court of Criminal Appeals reversed the intermediate appellate court's decision that a deaf interpreter should have been appointed on these facts.²¹¹ The court set forth its holding straight away: “[W]e find that the three deaf interpreters (sic) provided by the trial court were constitutionally sufficient. We therefore reverse the court of appeals which had held, in essence, that the trial court reversibly erred in not providing the “best” interpretive services – including a deaf-relay interpreter – to ensure appellant’s full understanding of the trial proceedings.”²¹²

After recounting the evidence presented below and the applicable law, the Court of Appeals confirmed that the duty of the trial court once learning that the defendant is deaf is to take whatever steps are necessary to ensure minimum understanding. A minimum understanding means that the defendant is able to understand the proceedings and assist in the defense. Ms. Linton’s counsel argued and expert testimony was presented that she did not understand ASL and was not fluent in English and because the interpreter used an English based form of signing which was above Ms. Linton’s English reading level, she consequently did not have a minimum understanding of the proceedings. While the lower court agreed, the Court of Appeals disagreed. The court set forth numerous examples of instances in which Ms. Linton was able to communicate and interact through the interpreter during the proceedings. Accordingly, these

²¹¹ *Linton v. State*, No. PD-0413-08 (Tex. Crim. App. January 14, 2009), *reversing*, 2007 WL 2323929 (Tex. App. – Corpus Christi).

²¹² *Id.* at 2.

direct exchanges demonstrated that Ms. Linton had a minimum understanding of the proceedings.

The court explained that the “best” interpretation is not constitutionally required unless the defendant can point to specific examples in which understanding was impossible or in which he was unable to assist counsel. The court noted that Ms. Linton failed to set out in any motion any specific instances in which she failed to understand crucial testimony or was unable to communicate with counsel. The state, on the other hand, set forth numerous instances showing Ms. Linton engaged in the proceedings.

The opinion sets forth guidance for attorneys who represent deaf clients who need deaf interpreters. Clearly, counsel must formally move for a deaf interpreter. In *Linton*, the discussion of a deaf interpreter emanated from the expert witness provided in response to a question from the State regarding the type of accommodation which would permit Ms. Linton to minimally understand the proceedings. Counsel should affirmatively move for a deaf interpreter at the earliest possible indication of communication difficulties. Further, counsel must make a clear record of each and every time there is a difficulty in understanding the interpretation or in being able to assist in the defense. In *Linton*, the court left open the opportunity for deaf interpreters to be used upon an adequate showing that understanding was not possible or that there were difficulties in the interpretation. Counsel must have competent linguistic assistance at the table to monitor the proceedings interpreters in real time in order to make an appropriate record on appeal.

Finally, the opinion sets forth guidance for interpreters working in court. Upon perceiving that there are communication difficulties, the interpreter should make a clear record

in a legal setting such as ‘judge’ or ‘jury.’”²¹⁷ The suggestion that the trial would be slow and methodical does not lead to the conclusion that no trial should be held. Further, without more,

First, because of the inordinate amount of time the prosecutor spent with the deaf-hearing interpreting team in preparing the witness, the process must have biased the deaf witness.²²³ Second, the use of the two interpreters in a chain-type arrangement violated the defendant's Sixth Amendment right to confront witnesses.²²⁴ The defendant contended that the deaf-hearing interpreting team process removed the witness two steps from counsel's question and consequently impeded the defendant's ability to exercise his constitutional rights to confront and cross-examine the witness.

The court rejected the first argument noting that the special interpretation requirements necessitated the length of time, and the defendant had the opportunity to fully explore the witness' potential bias on cross-examination. The court held that the second argument was without merit. According to the court on appeal, in the deaf-hearing team process, the two interpreters serve different functions.²²⁵ The deaf interpreter serves as the primary interpreter for the witness in the proceedings and for the court. The non-deaf interpreter serves as an adjunct to facilitate communication between the deaf interpreter and the participants who can hear. This paradigm presents a rational framework to understand the respective division of duties and responsibilities within the interpreting team.

²²³ Deaf interpreters make the communication process more effective for a wide variety of deaf people; however, the process of working with a deaf interpreter can be challenging for courts. Private negotiations between the witness and any interpreter are particularly objectionable. Private negotiations between interpreters have formed the basis of numerous appeals. While the court must be willing to be patient in order for the process to be effective, that patience has limits. The issue is so common that the Language Services Section of the New Jersey Administrative Office of the Courts counsels attorneys and the court to have patience when interpretation is taking place with a deaf interpreter in the consecutive mode. New Jersey Guidelines for Persons who do not communicate Competently in American Sign Language. Language Services Section, Special Programs Unit. Programs and Procedures Division. Office of Trial Court Services. Administrative Office of the Courts 2. (Rev. 2004).

²²⁴ *Vandiver*, 468 N.E.2d at 457.

²²⁵ *Id.*

In *People v. Vasquez*, the California court, approved of the use of a collaborative interpreting process by a deaf-hearing interpreting team to elicit testimony from a witness who

Regarding the second issue, typically, all interaction between the deaf witness and the interpreters must be mediated through the court. Private discussions between the witness and the interpreter are particularly vexing for judges. Sometimes, however, deaf witnesses are seemingly unable to answer questions with the specificity or in the format required by the court. The deaf witness may not have the vocabulary in ASL or other language fluency to convey the response. The deaf witness may provide a chronological narrative which includes a relational account instead of providing an immediate or direct response to the question. This discourse strategy was seen in *Holmes*, discussed earlier, when the interpreter stated for the record, “he’s describing the incident again.”²²⁹ Finally, the deaf witness may not be able to provide a narrative at all yet may be able to physically demonstrate the sequence of events that occurred.

Attorneys may erroneously believe that these responses occur because the deaf witness is hostile, is overly influenced by the interpreters, is changing the story or is avoiding a direct answer to the question. Out of frustration, the interpreter or deaf witness may be accused of obfuscation. In *Vandiver*, the defendant objected strenuously when the deaf interpreter initiated repetitions and re-phrasing of counsel’s question. The private negotiations were undertaken by the deaf interpreter on her own initiative without informing the court and without interpreting the non-responsive answers. The court admonished the deaf interpreter not to independently interact with the deaf witness for any reason. While the appellate court sympathized to some extent with counsel’s frustration, it reaffirmed the principle that “testimony of a deaf witness may be secured by whatever means are necessary.”²³⁰

²²⁹ See discussion *supra* section 2.a.

²³⁰ *Vandiver*, 468 N.E.2d at 458.

Sometimes, however, with clear parameters established in advance, the deaf interpreter can mediate directly with a witness much more effectively than through the standard question-response structure of witness examination. The Massachusetts statute discussed earlier expressly authorized a type of collaborative interpreting by defining the deaf interpreter as one who “can

for a portion of the trial. On appeal, the deaf defendant claimed his rights were violated when the deaf interpreter and the court interpreter were not both present to interpret all of the proceedings. The appeal failed in part because “during the sole time that a deaf interpreter was unavailable for a deaf witness and the questioning proceeded with just a hearing interpreter, the questioning was immediately stopped when the hearing interpreter concluded that a deaf interpreter was necessary.”²³⁵ The Michigan statute, relied upon in *Wickman*, provided that when the interpreter who can hear indicates that communication is not successful, a deaf interpreter will be provided. Here, when the deaf interpreter was not available, the proceedings went forward only until the court interpreter indicated that communication was not effective. At that point, court was adjourned until the deaf interpreter could return.

Like in *Wickman*, the deaf litigant in *Division of Youth and Family Services v. R.E.G.*, based the appeal on the inconsistent provision of a certified deaf interpreter for a portion of a termination of parental rights hearing.²³⁶ One party moved for a mistrial when the certified deaf interpreter was not present for the entire matter. The court noted that the request for a deaf interpreter must be made by the interpreters at the earliest opportunity when they realize the deaf person may not understand the proceeding

languages due to new and changing immigration patterns in the United States.²⁴¹ De Jongh estimates that in the 2000 census “approximately 2,000 unique languages were identified within the borders of the United States.”²⁴² Within Alaska alone, there are more than twenty (20) native languages and an unofficial language called Village English which “includes a patois of English and Native Alaskan words as well as nonverbal communication.”²⁴³ In one location, for example, “...villagers whistle at each other and can conduct a whole conversation using nothing but the high-pitched air coming out of their pursed lips.”²⁴⁴ Finding trained court interpreters to work within these unique language and communication systems is a daunting challenge for the courts.

When faced with such linguistic diversity, court administrators face difficulty in locating a single interpreter for all possible language pairs. Spoken language interpreters, like ASL interpreters, use ‘relay interpreting’ in which several interpreters fluent in different languages combinations convey the message to the non-English speaker.²⁴⁵ The National Association of Judiciary Interpreters and Translators (“NAJIT”) defines relay interpreting as “a process whereby interpreters of different languages are used to communicate into English. For example speakers of indigenous Mexican languages are more likely to speak Spanish as a second

²⁴¹ National Association of Judiciary Interpreters and Translators. NAJIT Position Paper Preparing Interpreters In Rare Languages. 2005.

²⁴² Elena M. de Jongh, *Court Interpreting: Linguistic Presence v. Linguistic Absence*, FLORIDA BAR JOURNAL 21-22 July/August 2008.

²⁴³ Tamar Ben-Yosef, *Interpreting Alaskan Native Languages Requires More than Just Words*, ARCTIC SOUNDER, March 20, 2008, available at <http://thearticsounder.com>.

²⁴⁴ *Id.*

²⁴⁵ *Id.* See also, Holly Mikkelson, *Relay Interpreting: A Solution for Languages of Limited Diffusion?* Monterey Institute of International Studies (undated)(on file with author).

language than English. With relay, first an interpreter will interpret the witness' testimony from the indigenous language into Spanish, and then a certified or qualified Spanish interpreter will interpret from Spanish into English for the record."²⁴⁶ This process was used in *Bell* where the deaf witness was understood by his sister who only spoke Choctaw. Because she did not speak English, the sister needed a Choctaw-English interpreter to relate her translation of the witness' signed testimony into English for the court.

While Spanish is the most commonly interpreted language in the state court system, there are a plethora of other languages for which interpreters or combinations of interpreters must be located in order for the legal system to be just and fair to non-English speakers. In a one year period in the state courts of Utah, the following languages made up five percent (5%) of the interpreted docket: Russian, Cambodian, Laotian, Korean, Samoan, Somalian, Persian, Punjabi, Czech, Japanese, Tigrena, Cantonese, Portuguese, Navajo, Hindi, Tagalog, Filipino, Mongolian, Nepalese, Lithuanian, and Mandarin Chinese.²⁴⁷ In California, it has been reported that "more than a third of the population is foreign-born and more than half speaks a language other than English at home, that sometimes means court officials are sent scrambling for speakers of Chuukese, Marshallese, Mexican Sign Language or Q'anjob'al, a Mayan variant."²⁴⁸

A number of cases illustrate the challenges facing courts in accommodating speakers of these rare languages. In Oregon, Santiago Ventura Morales, an eighteen year old boy from a

²⁴⁶

small village in the mountains of Southern Mexico, was convicted of murder.²⁴⁹ Morales spoke a rare language used in remote parts of Mexico – Mixteco – and his murder trial was interpreted entirely in Spanish. Two years after the verdict, Mr. Morales’ conviction was reversed and he was released because the trial was conducted in a language he did not understand. In another case, *Jesus v. State*, a federally certified Spanish interpreter encountered a defendant who spoke a Guatemalan version of Spanish and had a low level of education.²⁵⁰ The court interpreter struggled because the defendant did not know common Spanish words, for example, he did not know the difference in Spanish between the words for judge and lawyer.²⁵¹ The resolution in *Jesus* permitted the court interpreter to explain the common Spanish words to him, though had there been an interpreter familiar with the Guatemalan version of Spanish used; relay interpreting would have been employed.

In *State v. Jeudis*, the defendant appealed claiming that he and the interpreter spoke different dialects of Haitian Creole – Northern versus Southern.²⁵² The court required the defendant to produce expert witness testimony to substantiate the dialectical differences. While the court determined that Mr. Jeudis was able to understand well enough to participate in his defense, had the facts shown otherwise, the court would have been faced

dialects to retain an appropriate interpreter. For example, in one termination of parental rights case in Iowa, the parents appealed the termination because they were not provided with a Chatino interpreter. The Court resorted to the internet to locate a definition for this rare language and explained in the written opinion that Chatino: “is the language spoken by Middle American Indians living in the southwestern portion of Oaxaca state in southern Mexico. *See* www.brittanica.com; azteca.net/aztec/lang.html.”²⁵⁶ In an interview, a California court administrator admitted that in the event no interpreter can be located for a specific dialect or language, he has successfully, in the past, sent staff to local restaurants in search of kitchen help who might speak a particular dialect or language.²⁵⁷ Certainly, the days in which court administrators could comfortably assume that anyone with a Latino surname would be assigned a Spanish interpreter are gone.²⁵⁸

In southern Mexico, there is a language called Mixe which is spoken by only 7,000 people in a mountainous region of Oaxaca. In a recent California criminal court, it took three months for court officials to find an interpreter in Mexico who used Mixe and who was teleconferenced in to interpret a preliminary hearing from Mixe to Spanish while a California interpreter rendered the interpretation from Spanish to English.²⁵⁹ The efforts to accommodate this Mixe speaker were explained:

[A]ttorneys initially thought [the defendant] would need a Zapotec interpreter, court records indicate. A Spanish interpreter told officials he thought [the defendant] spoke Mixe, an indigenous language spoken in eastern Oaxaca by an agrarian people who have

²⁵⁶ *In the Interest of J. R. [REDACTED] DR. [REDACTED] MCID 6 B Tc 0.004 Tw 039T35220.0Aendant [sp]e D BDC 0.00628 5220.05 NGEL*

increasingly been migrating to northern Me

interpreter must have fortitude and strength of character to stand firmly by their ethical decision to require a deaf interpreter under such pressure.

Statutes can be written to requi

sometimes a deaf litigant informs the court that (1) the interpretation is not satisfactory and (2) a deaf interpreter would assist, improve or enhance the quality of the interpretation, a deaf interpreter must be retained. If a court interpreter creates a record indicating that he or she cannot be faithful to the oath and interpret in a language understandable to the deaf person, then the burden shifts to the court to either grant the request for a deaf interpreter or place its factual findings on the record for appeal as to why the request for a deaf interpreter was unreasonable.

To avoid being the cause of an appealable issue, court interpreters must prepare for the case by preliminarily interviewing the deaf litigant in the presence of counsel and with the court's permission. Court interpreters must make the appropriate recommendations for staffing well in advance in order to ensure that proceedings are conducted efficiently and effectively and that the areas within the court interpreter's unique area of competence – effective communication – do not hamper or impede the court proceedings. Many times and for many cases the reasonable accommodation that will be indicated will be the provision of a deaf-hearing interpreting team accommodation.