

The Murky Waters of Testifying in Court

Carla M. Mathers, Esq., CSC, SC:L, Maryland

I have written previously explaining the evidentiary reasons why attorneys need to subpoena interpreters to testify, no specific guidance regarding what an interpreter should do in preparation for testifying has been given—outside of legal interpreter training. In 2006, in preparation for the Iron Sharpens Iron Conference of legal sign language interpreters, Anna Witter-Merithew and I undertook an examination of interpreters as expert witnesses. As part of that task, we were able to collect a great deal of information on the techniques that expert witnesses use in order to prepare for testifying. Given the time constraints we faced, a significant portion had to be omitted. Nevertheless, I thought it appropriate to share some of that information because of the relative scarcity of guidance in the literature (a gray area, if you will) for interpreters when faced with testifying in court regarding a prior interpreting assignment. First, it is helpful to remind yourself why you might be subpoenaed to testify and then tailor your preparation to that end. The majority of cases will likely be to authenticate or demonstrate that you interpreted accurately in order for a third party to testify to the deaf person's comments.¹ In this context, the examination will focus upon your skills, education, and training to establish that the prior interpretation was accurate. Likewise, any cross examination will attempt to demonstrate that you lacked the appropriate skills, education, and/or neutrality to interpret the interaction. Hence, your preparation should focus on presenting your qualifications in the light most favorable to you and on preparing to explain any gaps in your educational or experiential background that might be exploited on cross examination.

The most beneficial way to prepare for this task would be to practice answering questions about your skills and knowledge in order to respond concisely and directly to the examiner. Additionally, you should review your résumé and update it if necessary, focusing on your relevant legal interpreting experience and training. You will want to bring copies of your résumé with you to provide to the court. If you have developed a legal portfolio, you should bring it with you as well. Second, if you are not being called solely to authenticate, you may be called because your interpreting has been challenged as ineffective for the deaf person or because your conduct during the assignment allegedly fell below the generally accepted ethical standards in the field. Most non-skills-based challenges reported in the case law deal with the interpreter's allegedly unprofessional behavior at the prior assignment.² Again, preparation should focus on presenting a description of your conduct during the assignment in a way that highlights your strengths and minimizes any difficulties encountered.

To prepare for this type of challenge, the interpreter should critically review the assignment. Frequently, interpreters say that they do not recall the assignment well enough to testify. While this may be true, it should not be used as a strategy unless it is, in fact, true. Generally, law enforcement interpreting makes up very little of a private practitioner's interpreting practice. It is probably accurate to say these cases may be emotionally charged and stress-producing. A case can be made that these circumstances, to a reasonable person, make the assignment more memorable. A blanket claim that the witness recalls nothing of the assignment may be used to cast doubt on the interpreter's credibility.

In any event, interpreters can take steps to jog their memories by reviewing their calendar and any contemporaneous notes taken at the time of the assignment. For example, many interpreters keep a journal of legal assignments and will note for themselves circumstances that led to specific decisions. For example, the interpreter might note that the suspect grew up in Austin. Knowing that the deaf person is Texan will guide certain sign choices made by the interpreter. A review of the contemporaneous notes might refresh the interpreter's recollection regarding their choices while interpreting or suggest other circumstances that may be questioned later as ethical or conduct-based issues.

Other times, particularly in law enforcement assignments, the interpretation may have been videotaped. In that case, the videotape will be in the possession of the prosecution, and the interpreter should ask to review the tape with the attorney to refresh their recollection prior to testifying. In the context of a motion to suppress the evidence, where an expert may have been hired by the defense to critique the law enforcement interpreter's work, this preparation is mandatory. The expert will have viewed the tape and based the opinion regarding the interpreter's effectiveness based on the viewing. It is critical that the interpreter witness also be afforded this opportunity.

The Murky Waters of Testifying in Court

Once at court, the interpreter should keep a number of points in mind. The general public has many misconceptions about deaf people and their experience. The interpreter needs to be prepared to provide articulate testimony that is easily understandable to the layperson without using jargon or interpreter-talk.

Additionally, the interpreter should:

- ◆ Communicate only with the attorney who signed the subpoena
- ◆ Not discuss the case with any other witnesses
- ◆ Speak to the judge or the jury during testimony
- ◆ Not ask the attorney for help
- ◆ Stop talking immediately, if there is an objection
- ◆ Ask to look at any contemporaneous notes to refresh your memory
- ◆ Not read notes aloud; review them and testify from memory
- ◆ Listen to the question, think about its intent, and state your answer
- ◆ Not rush; take your time
- ◆ Answer “yes” or “no” whenever possible
- ◆ Elaborate if a simple “yes” or “no” is misleading

On direct examination, the attorney asking you questions is normally “friendly.” It is important to highlight your credentials persuasively to demonstrate that your testimony is worthy of belief. The direct examiner’s questions will normally establish your educational and professional background. It is easy to become comfortable on direct examination when being questioned by friendly counsel. Interpreters should retain focus, however, and realize that opposing counsel will take up the examination next and will use statements made on direct examination as fodder for cross. The witness should avoid absolute statements as they are prime targets for a cross examiner. For example, the statement, “deaf people do not read lips” will be challenged, and astute counsel will have examples of successful deaf lip-readers to show that the witness tends to exaggerate and that the testimony should be suspect. Cross examination is more difficult. Though cross-examination has been called the attorney’s greatest tool in ascertaining the truth, the process is not as enjoyable to those on the receiving end. Cross-examination techniques are designed to trap the unwary and obtain damaging admissions that will weaken either the case or the witness’ credibility. The witness will be cross-examined concerning the traditional impeachment areas of bias, prior inconsistent statements, and the like. In these areas, the neutrality, ethical behavior, and professionalism of the interpreter are questioned. For example, if the witness has had unauthorized contact with anyone involved in the case, the cross-examiner will use that contact to imply to the jury that the witness is biased or tainted. Likewise, the examiner will inquire into the interpreter’s involvement with the parties or the community to establish bias. Testimony should be given powerfully, without hedging or qualifying. If there is a point that is unfavorable but is irrefutable, the witness should acknowledge it directly. No good comes from a witness who refuses to concede a point that is harmful but factual. Moreover, arguing with an attorney simply makes the witness look defensive. It is perfectly appropriate to truthfully answer a question with “I do not know” or “I do not recall.” The attempt to answer a question that one does not actually know the answer to can only lead to trouble. The witness may become flustered, casting doubt on those portions of the testimony that the witness testified to confidently. Even worse is a witness who does not know but readily speculates on an answer. If the witness cannot answer a question with confidence, the answer should be “I do not know” not “I do not know, but I imagine...” If pressed, the response should be “I am sorry, but I am not going to speculate on that.” It is human nature to try to help other people. If the cross examiner is struggling with the question, do not help them. Many attorneys use a technique of appearing to be ignorant while seeking the witness’s assistance to understand the testimony. The goal is to get the witness to volunteer information which provides the examiner with further ammunition. Answer only the question asked. A common example is: Do you know what color the counsel’s tie is? The answer should always be “yes” or “no,” not “blue.” Force the examiner to work for each question. If a question is misleading and cannot be answered without an explanation, provide one concisely. Most people are uncomfortable with silence. If the examiner stops talking, resist the urge to fill the gap with speech.

Testifying in court can be a nerve-wracking experience, yet it does not have to be uncharted territory. Probably the most important advice is to remain calm and answer all questions truthfully. Though many of these suggestions are

The Murky Waters of Testifying in Court

based on common sense, the need for education and preparation of interpreters who are called as witnesses is an important area to focus on in legal, and in all, interpreter training. Testifying in court may be a rare occurrence; nevertheless, being thoroughly prepared is a critical skill to develop, since it will bear fruit in navigating the murky waters of testifying in a legal proceeding.

Carla M. Mathers, Esq., who is a senior associate with McCollum & Associates, LLC in College Park, MD, is licensed to practice law in the state and federal courts of Maryland and the

District of Columbia. She graduated magna cum laude from Howard University School of Law, summa cum laude from the University of Maryland, and received her interpreting degree from the College of Southern Idaho. In 2005, Ms. Mathers received the Region II Judie Husted Leadership Award from RID. Her publications, including the 2006 "Sign Language Interpreters in Court: Understanding Best Practices," may be found at www.DeafLawBlog.com.

Footnotes: 1

Most often, interpreters who work in law enforcement settings are the ones who find themselves subpoenaed to testify about the prior interpreting. While this paper discusses testifying about a prior law enforcement assignment, the principles apply to any setting. You might wonder how you know the purpose for which you are called to testify. I recommend contacting the attorney whose name and telephone number appear on the subpoena and ask them directly the purpose for your testimony.

VIEWS NOVEMBER 2006