

THE ROLES OF INTERPRETERS AND CONFLICTS OF INTEREST

I. The Role of American Sign Language (ASL) Interpreters

Deaf individuals are unique in the court system because not only is there a language difference, there they are also a recognizable ADA “disabled person.” Accordingly, Deaf individuals not only require specialized interpreters, often the situation requires multiple interpreters and they must hold a special certification.¹ The Code of Criminal Procedure defines a “qualified interpreter” is an interpreter who holds a current legal certificate issued from the Department of Assistive and Rehabilitative Services or Legal certification (SC:L) from the National Registry of Interpreters for the Deaf (RID).² An interpreter who interprets a court proceeding without being court-certified commits a Class A misdemeanor offense.³

Placement of the Interpreters

ASL interpreters act much in the same way as spoken language interpreters. However, because ASL is a *visual language*, there are some major differences. One major difference is the placement of the sign language interpreter in court.

Where spoken language interpreters typically sit at counsel table and speak in the ear of the defendant, interpreting both the proceedings of the court and communications between the attorney and the defendant, ASL interpreters cannot. Spoken language interpreters collapse the functions of interpreting the proceedings and interpreting privileged communications because they are already seating next to the defendant.

The second major difference is the two distinct roles of the interpreters—the Proceedings Interpreter and the Table Interpreter. The roles of the interpreters in court are strictly governed by the RID, following the guidelines and principles of the National Center for State Courts (NCSC) and the National Association of Judiciary Interpreters & Translators (NAJIT). Interpreters must remain within their roles in order to avoid conflicts.

Proceedings Interpreters

Because ASL is a visual language, the interpreter must be in the visual line of the deaf individual. This puts the ASL interpreter in the well of the courtroom, interpreting all that is said during the proceedings. This interpreter is the Proceedings Interpreter (PI). “The role of the PI’s is to interpret what is said by the parties in a proceeding. These interpreters are sworn in and are aligned with the court.”⁴ Since they are in the well, ASL interpreters “collapse the functions of proceedings and

¹ The Department of Justice has defined the meaning of a qualified interpreter as one “who is able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary.” 28 C.F.R. §35.104.

² Tex.Code Crim.Proc. Ann. art. 38.31(g)(2)

³ Tex. Gov. Code, Title 2 §57.027

⁴ Carla Mathers, *Sign Language Interpreters in Court: Understanding Best Practices*. Bloomington, IN: 2007.

witness interpreting... where they can usually be seen by both the defendant and the witness. The only function of the proceedings interpreter is to interpret.

There are typically two PI's assigned to proceedings that last one hour or more or are contested. In these proceedings the PI's will take turns and switch between being the "on" interpreter who is interpreting the proceedings, and the "off" interpreter who assists by monitoring and feeding information to the "on" interpreter. This is also helps to reduce interpreter fatigue and minimize interpreting error.

Table Interpreter

The table interpreter (TI) interprets attorney-client privileged communications. Because this role is associated with privileged communications and strategy, care must be made to avoid creating a conflict of interest.⁵ The TI has three main functions: 1) interpret communications between attorney and client, 2) act as an expert in respect to interpreting and deafness, and 3) monitor the proceedings interpreter(s).⁶

Because table interpreters work with the parties, interpreting attorney-client privileged information, and assisting in the investigation and preparation of their case, "[t]able interpreters for either side are included in those who are ethically disqualified by a per se conflict of interest from interpreting the proceedings."⁷

Investigatory Interpreting

Interpreters who work for the prosecution in the investigatory stages of a criminal case, whether they have worked with the police, the prosecutors, investigators—including applications for protective orders, CPS/APS investigations—or the grand jury are precluded from being PI.⁸ Investigatory interpreting is acquainted with those statements that are testimonial in nature.⁹ The National Center for State Courts "specifically mentions law enforcement interpreting and prior interpreting for the investigation or preparation of a case as per se conflicts for which the interpreter should decline the later proceedings interpreting. Prior proceedings interpreting for the same parties in the same case is not prohibited because it is not private interpreting; it is interpreting for the court."¹⁰

⁵ Mathers at 41.

⁶ The TI is an expert. He is part of the defense team, interpreting attorney-client communications, assisting with strategy, and is a monitor of the PI. As a practical matter, the table interpreter will be monitoring the proceedings interpreters and needs to be available to testify if necessary. Mathers at 92.

⁷ Mathers at 110-111.

⁸ *Id.*

⁹ *Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁰ Mathers at 109-110.

II. Interpreter Conflicts of Interest

There are multiple reasons that interpreters must maintain distinct and separate roles. “A conflict of interest is a conflict between the private interests (personal, financial, or professional) and the official or professional responsibilities of an interpreter in a position of trust, whether actual or perceived, deriving from a specific interpreting situation.”¹¹ Once an interpreter is assigned to a particular interpreting role, he cannot then later switch to a different role. This is a conflict of interest.

Appearance of Impropriety

The Deaf community is a small, high-context¹² population who often fears or distrusts the “hearing” world. An interpreter who interprets for both sides—prosecution and defense—gives the appearance of impropriety and is improper by practical definition. “Canon 3 of the NCSC Code specifies that it is a conflict of interest to engage in behavior that appears improper, even if the interpreter subjectively considers himself or herself to be neutral. The appearance is judged from how the conduct looks to a reasonable observer, not how it feels to the interpreter. Interpreting both the preparation work and the proceeding work in the same case appears improper to an objectively reasonable person.”¹³ This issue is well established by the Court in two main cases—*Bednarski v. Bednarski*, 141 Mich.App.15 (1985), 366 N.W.2d 69¹⁴ and *State v. Pham*, 234 Kan. 649 (1984), 675 P.2d 848.¹⁵

A number of cases have been appealed based upon the interpreter who works privately with either side and then interprets for the record. Courts have expressed concern about the appearance of impropriety in permitting court interpreters to work in privileged settings and subsequently to interpret witness testimony. Ethical codes prohibit the lateral move from interpreting privately for a party to interpreting for the record. The interpreter who huddles with first one side and then interprets that person’s testimony appears aligned with that side. The interpreter should

¹¹ RID/NAD Code of Professional Conduct.

¹² High-context cultures (including much of the Middle East, Asia, Africa, and South America) are relational, collectivist, intuitive, and contemplative. This means that people in these cultures emphasize interpersonal relationships. Developing trust is an important first step to any business transaction. These cultures are collectivist, preferring group harmony and consensus to individual achievement. And people in these cultures are less governed by reason than by intuition or feelings. Words are not so important as context, which might include the speaker’s tone of voice, facial expression, gestures, posture—and even the person’s family history and status. Edward T. Hall, *Beyond Culture*. Garden City, N.Y.: Anchor Press, 1976.

¹³ Mathers at 110-111.

¹⁴ The court acknowledge the subjective component to the appearance of bias: Interpreting requires a relationship between the deaf person and the interpreter which is based upon trust. When an interpreter works for both sides of a case, it places the interpreter in conflicting roles with both sides who may view the interpreter’s association with the opponent as an insurmountable obstacle to developing trust. Without trust, the party may not share critical information with counsel.

¹⁵ The opinion stressed that the defendant’s interpreter had been interpreting bona fide privileged communications prior to trial. The request to interpret then for the record presented a conflict of interest “approaching the greatest degree.” [citing *State v. Van Pham* 675 P.2d 848 (Kan. 1984)]

appear to be aligned with no one except the court. *State v. Alvarez*, 797 N.E.2d 1043, 1046 (Ohio 2003).

There are two types of conflicts for interpreters: 1) the per se conflict; and 2) ethical conflicts. Both are ethical in nature and have legal implications.

Per Se Conflicts

There are certain conflicts that are per se conflicts of interest. The circumstances that are presumed to create actual or apparent conflicts of interest for interpreters where interpreters should not serve are: when the interpreter is 1) a TI or 2) has served in an investigative capacity for any party involved in the case—including law enforcement, prosecutors, or Grand Jury, and 3) when the interpreter is a witness or potential witness in the case.

Witness/Non-Privilege Communications

“It presents a conflict of interest to act as a witness for the defense and also function as the court’s interpreter.”¹⁶ Law enforcement interpreting constitutes a per se conflict according to the National Center for State Courts¹⁷ “not only for appearance reasons, but because the risk is high that those interpreters will also be called as witnesses at trial.”¹⁸ Interpreters who work in law enforcement (or any prosecutorial setting) are interpreting in *non-privileged settings* and their testimony may be necessary by the prosecution to authenticate the interpretation.¹⁹ It is unethical to be appointed as the proceedings interpreter and then to be called to the stand as a witness. “Because the likelihood is great that the prior interpreting will be an issue” later in the case and the interpreter will likely be called to testify, “it is a conflict of interest of the highest order for an interpreter to work for law enforcement and then to interpret the later proceedings.”²⁰

Ethical Conflicts

The other type of conflict is an ethical conflict. This occurs when the interpreter has a personal interest in the legal proceeding, is a family member or friend to the deaf person, or does not possess the skills to interpret the assignment.²¹

¹⁶ Mathers at 213.

¹⁷ Canon 3

¹⁸ Mathers at 85.

¹⁹ *Id.* at 110.

²⁰ *Id.*

²¹ Most interpreter ethics require the interpreter to remove himself or herself from a setting in which they feel their skills are inadequate or in which they have ethical conflicts. *Id.* at 11.

Intermingle information

Another reason that the interpreter cannot switch roles is due to the intermingling of information.

“When ASL interpreters work with the same deaf person over time...they create “short hand” ways of referring to events [or people, places, and things] that have previously been fully explained. This discourse strategy is an efficient method to avoid having to continually repeat understood information.”²²

“In the court, however, the interpreter who incorporates background knowledge from prior interpreting to construct meaning is considered to be adding information that was not present in the source language. It serves as one basis for challenging the accuracy of an interpretation from an interpreter who has previously interpreted privileged communications and witness preparation from the interpreting the witness’ testimony.”²³

More importantly, “[w]hen the interpreter moves back and forth between privileged conversations and witness testimony, the fear is that the interpreter will be unable to... separate out background information learned during those sessions and/or become biases, even unwittingly, through exposure to the theories, strategies and tactics of one side”²⁴ and “prevent privileged information from filtering into the testimony.”²⁵

Lastly, there is a risk that a deaf defendant who observes the same interpreter interpreting for the opposition (prosecution, plaintiff, or a co-defendant) will have subjective fears that may deter him from speaking freely with his attorney.²⁶

III. Appropriate Actions to Take when a Conflict Arises

There are ways to mitigate conflicts of interest.

If an interpreter knows there is a conflict, she should not accept the assignment. “When a per se conflict exists, the interpreter should not accept the proceedings work. The primary rationale is that an appearance of impropriety surrounds the interpreter who works for both sides in an adverse legal proceeding.”²⁷

If there is a question of whether a conflict exists or not, the interpreter must disclose. Should the issue be brought to the Court’s attention and a conflict is determined, the interpreter should then be removed from being a proceedings interpreter.

²² Mathers at 106.

²³ *Id.* at 107.

²⁴ *Id.* at 113.

²⁵ *Id.* at 106.

²⁶ *Id.* at 171.

²⁷ Commentary to Canon 3.