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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  
CARLA M. MATHERS, ESQ., SC: L, CSC

MARCH 2009

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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 Accommodation<sup>1</sup>**

According to one author, “deaf people are substantially overrepresented in the criminal and quasi-criminal justice system.”<sup>2</sup> 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....”<sup>3</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> Eric Eckes, *The Incompetency of Courts and Legislatures: Addressing Linguistically Deprived Deaf Defendants*, 75 U. CIN. L. REV. 1649, 1651 n. 18, (2007), citing, Michele Lavigne & McCay Vernon, *An Interpreter Isn’t Enough: Deafness, Language and Due Process*, 2003 WIS. L. REV. 843, 867 (2003).

<sup>3</sup> Jean F. Andrews, McCay Vernon & Michele LaVigne, *The Bill of Rights, Due Process and the Deaf Suspect/Defendant*, REGISTRY OF INTERPRETERS FOR THE DEAF JOURNAL OF INTERPRETATION 9, 13 (2007).

number of deaf litigants.<sup>4</sup> 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.<sup>5</sup>

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 speaker is retained to interpret the entire case. However, this model must be reconsidered when dealing with many deaf people who struggle to understand legal proceedings interpreted without deaf interpreters. As will be discussed in subsequent sections, many court interpreters who can hear and sign are not fluent in ASL.<sup>6</sup> Courts assume that because a court interpreter can sign, the court interpreter can also interpret in a manner that is understandable to the deaf litigant. However, many certified interpreters who can hear are not fluent in ASL, have insufficient exposure to legal settings and will not have the knowledge or the linguistic skill required to satisfy the oath to interpret the proceedings accurately. The deaf interpreter ensures that the

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<sup>4</sup> CARLA M. MATHERS, SIGN LANGUAGE INTERPRETING IN COURT: UNDERSTANDING BEST PRACTICES. 124-25 (2007).

<sup>5</sup> For matters of any length and complexity, teams of interpreters are required and the proceedings would be interpreted by two deaf interpreters assisted by two interpreters who could hear in order to avoid errors in interpretation that result from fatigue. *See e.g.*, MD. CODE ANN., CTS. & JUD. PRO. ART. RULE 16-819(d)(4)(2007) for the proposition that a team of interpreters should be provided to ensure the accuracy of the interpretation, among other reasons. *See also* Federal Court Interpreting Act, 42 U.S.C. 1828 (1994) for the proposition that in complex cases, a party can move the court to provide multiple interpreters.

<sup>6</sup> *See* discussion *infra* Section 2.

court interpreter is able to achieve the level of accuracy required in legal settings. Hence, the model discussed here to protect the rights of deaf litigants is more inclusive and efficient than the typical spoken language interpreter model. Deaf interpreters, assisted by court interpreters who can hear, are the reasonable accommodation that ensures that most deaf litigants, not just those with specific language challenges, are afforded full and equal access to justice.

**1. Characteristics of Some Deaf Individuals for whom a Deaf-hearing Interpreting Team Accommodation Is Reasonable**

**a. A Deaf-hearing Interpreting Team Accommodation Is Reasonable When Deaf Litigants Present Complex Linguistic and Experiential Combinations**

In 2004, the National Association of the Deaf (“NAD”), in collaboration with the Rehabilitation Services Administration (“RSA”), published a paper describing a certain population of deaf Americans who possess unique language needs that normally cannot be satisfied by the provision of a single ASL interpreter who can hear.<sup>7</sup> According to the NAD-RSA Report, within the estimated 54 million individuals with disabilities in the United States, some 43 percent are deaf or hard of hearing.<sup>8</sup> Within that subset of individuals, there is a group of approximately 125,000 to 165,000 deaf or hard of hearing individuals with

inadequate or no environmental supports whose functional skills and competencies are considered to be significantly below average making them the most at risk and underserved portion of the overall deaf population. These individuals over the years have

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<sup>7</sup> A MODEL FOR A NATIONAL COLLABORATIVE SERVICE DELIVERY SYSTEM SERVING INDIVIDUALS WHO ARE LOW FUNCTIONING DEAF. NATIONAL ASSOCIATION OF THE DEAF, 2004 (hereafter the “NAD-RSA Report”) *available at* [www.nad.org/lfd](http://www.nad.org/lfd) (last accessed October 18, 2008). The Strategic Work Group was convened by the Postsecondary Education Programs Network (PEPNet) and sponsored by the Rehabilitation Services Administration, a component of the Office of Special Education and Rehabilitative Services in the U.S. Department of Education.

<sup>8</sup> *Id.*

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

In addition to the inability to hear, the NAD-RSA Report suggests that these individuals present further issues, including,

- the presence of secondary disabilities,
- being foreign born or having English as a second language,
- a lack of family support,
- inappropriate diagnosis,
- substance abuse,
- discrimination,
- inappropriate education, and
- residence in a rural or low income urban setting.<sup>10</sup>

As a consequence, this subset of the deaf population can sometimes be characterized as having “limited communication abilities, experienc[ing] difficulty maintaining employment, demonstrat[ing] poor social and emotional skills and [having difficulty living] independently without transitional assistance.”<sup>11</sup> These individuals may have significantly depressed English skills usually at or below the fourth grade level and many do not obtain high school diplomas or certificates of completion of high school. According to the NAD-RSA Report, “most ... are dependent on welfare and do not work. Research indicates that more than 100,000 [of these individuals] are dependent on federal programs, notably SSI and SSDI. In addition, the number

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2.

[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.”<sup>12</sup>

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.<sup>13</sup> 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,

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<sup>12</sup> *Id.* at 3.

<sup>13</sup> See [http://www.asl.neu.edu/riec/projects\\_activities/national\\_projects/deaf\\_interpreting/documents/DI\\_Presentation\\_RID07.pdf](http://www.asl.neu.edu/riec/projects_activities/national_projects/deaf_interpreting/documents/DI_Presentation_RID07.pdf) (last referenced August 25, 2008).

- problems caused by drug abuse, or
- other physical challenges.<sup>14</sup>

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.”<sup>15</sup>

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

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<sup>14</sup> *Id.*

<sup>15</sup> REGISTRY OF INTERPRETERS FOR THE DEAF, STANDARD PRACTICE PAPER, INTERPRETING IN LEGAL SETTINGS (2007) available at [www.rid.org](http://www.rid.org).

successfully accommodate them.<sup>16</sup> The New Jersey Guidelines explain the relatively straightforward concept that deaf people may come from other countries and use sign languages indigenous to the country of birth. The New Jersey Guidelines then address the population examined by both the NAD-RSA Report and the NCIEC Deaf Interpreters Work Team. The New Jersey Guidelines explain that a deaf interpreter may be necessary due to numerous environmental factors in addition to deafness, including:

- Limited opportunities for acquisition of ASL. Some Deaf people do not interact with the signing community and this inhibits their exposure to and acquisition of ASL.
- A bilingual home/school environment, e.g., deaf children, born into Spanish-speaking homes, who lip-read and hear Spanish until entering public school where they are exposed to lip-reading and hearing English accompanied by signs.
- The presence of a secondary handicapping condition such as mental retardation, a learning disability, or mental illness.
- A lack of natural language development during the crucial ages of 0-5 years, e.g., a deaf child born into a hearing family in which no one signs.
- Limited or no formal education.

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<sup>16</sup> 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. 1 (Rev. 2004)(hereafter “New Jersey Guidelines”).

- 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.<sup>17</sup>

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."<sup>18</sup> 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."<sup>19</sup> 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."<sup>20</sup> 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

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<sup>17</sup> *Id.*

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

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

<sup>20</sup> *Id.* at 413.

language.<sup>21</sup> Mr. Reets was charged with the sale of a small amount of cocaine, and the court granted a motion to dismiss the charges in the interest of justice rather than attempt to try him. There may be times when deaf individuals, such as Mr. Reets, have such a limited fund of knowledge or underdeveloped language skills that a deaf-hearing interpreting team will not be effective and the charges should be dismissed or the person should be committed for language habilitation. However, as will be discussed further, a competency determination should not be embarked upon unless and until the accommodation of a deaf-hearing team of interpreters has been determined to be ineffective.

When the characteristics set forth in the NAD-RSA Report, in the Deaf Interpreters Work Team's survey and in the New Jersey Guidelines are present in the wider non-Deaf population, people are placed at greater risk for becoming involved in the legal system. Social scientists agree that some of the same characteristics or combinations of characteristics are associated with recidivism in the larger community that can hear. Social and environmental characteristics such as disrupted families, school failure, drug and alcohol abuse, unemployment and under-employment have all been linked to recidivism rates in studies conducted with juvenile offenders.<sup>22</sup> Many deaf individuals presenting the characteristics described in the NAD-RSA Report, in the Deaf Interpreters Work Team's survey and in the New Jersey Guidelines will at some point come into contact with the legal system for any number of reasons. When these characteristics are present, a deaf-hearing interpreting team should be provided. Even in the

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<sup>21</sup> *People v. Reets*, 597 N.Y.S.2d 577 (N.Y. Sup., 1993).

<sup>22</sup> Tamara Dawn Dempsey, *Hierarchical Cluster Analysis of Juvenile Delinquents and Juvenile Recidivists in Harris County*. CRIMINAL JUSTICE THESES AND DISSERTATIONS 15-17 (2007), available at <http://www.ecommons.txstate.edu/crjtad/1>, citing, M. SCHUMACHER & G.A. KURZ, THE 8% SOLUTION: PREVENTING SERIOUS, REPEAT JUVENILE CRIME (2000); M. RUTTER & H. GILLER, JUVENILE DELINQUENCY: TRENDS AND PERSPECTIVES (1983).

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 Accommodation Is Reasonable When Deaf Litigants Present Regional and Dialectical Variation in American Sign Language**

The diversity of deaf individuals encountering the justice system presents challenges for the non-deaf interpreter who may be unfamiliar with the communication styles of a wide range of deaf individuals.<sup>23</sup> It has been suggested that the profession of sign language interpreting is characterized by an overwhelming number of interpreters of European descent.<sup>24</sup> Yet research has shown that users of ASL manifest a diverse range of dialectical differences by age, minority group membership, educational background, cultural literacy and region.<sup>25</sup> These differences can present linguistic nuances easily misunderstood by outsiders, yet recognizable to in-group members or those with close association or intimate knowledge of the speaker's style.<sup>26</sup> In recognition of the dialectical differences in ASL usage, several states define a deaf interpreter as: "a knowledgeable deaf person who, because of the person's intimate acquaintance with deaf persons ...can be used as an intermediary between the deaf person and a qualified interpreter."<sup>27</sup>

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<sup>23</sup> Phillip A. Jones, *Issues Involving Black Interpreters and Black Deaf*, in INTERPRETING: THE ART OF CROSS CULTURAL MEDIATION, PROCEEDINGS OF THE 1985 RID CONVENTION 85 (Marina McIntire ed., 1985).

<sup>24</sup> *Id.*

<sup>25</sup> Katrina R. Miller & McCay Vernon, *Linguistic Diversity in Deaf Defendants and Due Process Rights*, 6:3 JOURNAL OF DEAF STUDIES AND DEAF EDUCATION 226, 226-27 (2001) (hereafter "Miller & Vernon, Linguistic Diversity").

<sup>26</sup> Anthony Aramburo & Ester McAllister, *Interpreting for Southern Black Deaf*, in INTERPRETING: THE ART OF CROSS CULTURAL MEDIATION, PROCEEDINGS OF THE 1985 RID CONVENTION at 107 (Marina McIntire ed. 1985).

<sup>27</sup> See MONT. CODE. ANN. §40-4-502(3)(2007) (emphasis added); MASS. GEN. LAWS ANN. ch. 221 § 92A (West 2005); N.J. STAT. ANN. §34:1-69.8(e)(2008). The term 'intermediary' is one of the terms used in the profession of

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 in a mental hospital because the legal system was unequipped to accommodate his unique dialect of ASL called the Raleigh Dialect used by some African American deaf people at the time of the alleged crime.<sup>28</sup> Mr. Wilson was eventually released and a civil settlement was negotiated on his behalf. However, no amount of money can ever fully compensate Mr. Wilson for those sixty-nine years spent detained without any form of meaningful human communication.

Likewise the media has focused much attention on the 2005 murder and rape of a teenager in Virginia, or more accurately on the legal system's inability to try a suspect in the case. Oswaldo Martinez is a deaf Mexican who communicates almost exclusively through what has been termed 'home signs.'<sup>29</sup> While Martinez has been found incompetent and sent to a language immersion program, he cannot be committed indefinitely because he has no mental disability as required under the Virginia competency statute. The media has reported a sense of community outrage that the case may never be resolved and has suggested that Martinez has substantial reason to fake linguistic incompetency in order to avoid being tried and facing the death penalty if convicted.<sup>30</sup> Martinez's communication difficulties represent the extreme end of

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sign language interpreting to refer to a deaf interpreter.

<sup>28</sup> Miller & Vernon, Linguistic Diversity at 226-27(presenting a history of the origins of sign language and the diversity found in deaf Americans today).

<sup>29</sup> See *supra* note 2, p. 2 note 24, *citing*, Keith Rushing, *Lack of Language Skills Will Delay Suspect's Trial; Oswaldo Martinez, Who Can't Hear or Speak, Is Accused of Raping and Killing a James City Teenager in 2005*, DAILY PRESS (NEWPORT NEWS, VA.), Apr. 6, 2006, at C2 (describing Martinez's limited communication skills).

<sup>30</sup> See *supra* note 2, p. 2 note 40, *citing*, Tamara Dietrich, *Is It Right To Remain Silent?*, DAILY PRESS (NEWPORT NEWS, VA.), Apr. 9, 2006, at B5 ("Maybe if there were less evidence of guilt ... or some light at the end of the tunnel to sign-language competency, the frustration factor would ease. And maybe if there weren't this gnawing feeling that

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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> As scholars and the more

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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.”).

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

<sup>32</sup> See statutes cited *supra* note 27.

<sup>33</sup> This assumption is not unfounded. Attorneys are hypersensitive to the need to attend to language interpretation as a potential source for appeals. See Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1 (January 2008)(stating that when courtroom interpreters translate a witness's testimony, errors are not just possible, they are inherent to the process); see also Debra L. Hoveland, *Errors in Interpretation: Why Plain Error Is Not Plain*, 11 LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 473, 481 (1993). In the research for this brief, only two cases were found that mentioned a deaf-hearing interpreting team configuration only in passing because the interpreting was not the central issue in the appeal. *People v. Shephard*, 2008 WL 2070614 (Cal. App. 6

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

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.<sup>35</sup> 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 tried fairly and in an understandable manner.

**c. A Deaf-hearing Interpreting Team Accommodation Is Reasonable When Deaf Litigants Are Not Fluent in English**

It seems logical to assume that a deaf litigant not fluent in English would be well served by a typical court interpreter who can hear and has been tested in interpreting from English to ASL. However, due to factors such as the lack of ASL fluency, the limited exposure to court interpreting, the complex procedural nature of court work, and the convoluted characteristics of 'legalese' used in the judicial system, the conclusion simply cannot be supported that an ASL

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Dist.)(unpublished); *State v. Barquet*, 2003 WL 23019949 (Wash. App. Div. 1)(unpublished). In all other cases reviewed, the interpreting configuration formed a central basis for appeal.

<sup>34</sup> See Aramburo & McAlister, *supra* note 26, p. 109.

<sup>35</sup> See discussion and notes *infra* at Section 2.

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.<sup>36</sup> 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.”<sup>37</sup> 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.<sup>38</sup> 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 burdens of proof reading much like a

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<sup>36</sup> R. Wilbur, *The Use of ASL to Support the Development of English and Literacy*, 5(1) JOURNAL OF DEAF STUDIES AND DEAF EDUCATION, 81 (2000).

<sup>37</sup> Jean F. Andrews, McCay Vernon & Michel LaVigne, *The Bill of Rights, Due Process and the Deaf Suspect/Defendant*, REGISTRY OF INTERPRETERS FOR THE DEAF JOURNAL OF INTERPRETATION 12 (2007).

<sup>38</sup> Sarah S. Geer, *When 'Equal' Means 'Unequal' and Other Legal Conundrums for the Deaf Community*, in LANGUAGE AND THE LAW IN DEAF COMMUNITIES 82 (Ceil Lucas ed. 2003).

dictionary.<sup>39</sup> Substantial research has been conducted on the convoluted style and usage of English in the legal system.<sup>40</sup> Documents written in English and routinely given to defendants to read far surpass the ability of most deaf litigants to understand.<sup>41</sup>

Those unfamiliar with the use of English in the legal system because of limited English proficiency or because of a lack of experience with the legal system have been termed ‘legally naïve speakers.’<sup>42</sup> These ‘speakers’ flounder in the legal system because they are unfamiliar with the scripts which must be used in legal settings to attain certain objectives. While these difficulties apply to all legally naïve speakers, they fall more harshly and on a far wider range of deaf litigants than the courts have been willing to admit.<sup>43</sup> To further complicate matters, most court interpreters who can hear work in the legal setting on a very limited basis.<sup>44</sup> Being unfamiliar with the use of legal English, they too could be termed ‘legally naïve speakers’ unable to understand what they hear in court well enough to articulate the message effectively in ASL. Therefore, the deaf litigant is at risk of receiving complicated legal information through the filter

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<sup>39</sup> PETER M. TIERSMA, LEGAL LANGUAGE 51 (1999).

<sup>40</sup> *Id.* at 203-10; see also R. P. Charrow and V. R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions* 79 COLUMBIA LAW REVIEW 1306-74 (1979).

<sup>41</sup> Jean F. Andrews, McCay Vernon & Michele LaVigne, *The Bill of Rights, Due Process and the Deaf Suspect/Defendant*, REGISTRY OF INTERPRETERS FOR THE DEAF JOURNAL OF INTERPRETATION 9-38 (2007).

<sup>42</sup> Janet Ainsworth, ‘*You Have the Right to Remain Silent...’ But Only If You Ask For It Just So: The Role of Linguistic Ideology in American Police Interrogation Law*, 15.1 INTERNATIONAL JOURNAL OF SPEECH, LANGUAGE AND THE LAW 2 (2008).

<sup>43</sup> Courts erroneously believe that Deaf people are fluent in English and, for example, that is one reason they were permitted to serve on juries prior to the passage of the ADA. In *State v. Guzman*, 555 N.E.2d 259, 260 n.2 (N.Y. 1990), the deaf juror was permitted to serve only because the court assumed he used English. The court remarked “that this appeal does not require us to determine whether a juror dependent on a nonliteral sign language, such as American Sign Language, would be qualified under our statutory requirement that a juror be English-speaking.” *Id.*

<sup>44</sup> See discussion and notes *infra* at Section 2.

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.<sup>45</sup> 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

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<sup>45</sup> 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.”<sup>46</sup> Equating a deaf person's vocal responses to spoken language with incompetency is a dangerous road upon which to embark.

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<sup>46</sup> *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 likely that no deaf-hearing interpreting team was retained or the court would have addressed their efforts at communicating. While the State and the court wanted to commit the defendant, it was a social worker who suggested that the defendant was only deaf, not mentally impaired, and did not qualify for mental commitment proceedings. The court grudgingly agreed that the defendant's deafness alone did not qualify him to be committed under the mental incompetency statute.<sup>47</sup> On appeal, however, the defendant's deafness was summarily declared to be a mental impairment and he was committed. Given that the defendant in *Carey* was simply deaf and the evidence of incompetency went to his ability to respond verbally to spoken language stimuli, this summary declaration jeopardizes the liberty of all deaf litigants. It is certainly quicker to declare a deaf person incompetent and commit them rather than to engage in the process of obtaining appropriate and meaningful accommodations. A wiser course for all deaf litigants would be to provide a deaf-hearing interpreting team from the outset when the communication difficulty was first encountered. At that point, the court would have a better understanding of whether the defendant was able to consult with counsel and whether he understood the proceedings against him.

In *Graham v. Jenne*, the Florida court granted the deaf defendant's writ of habeas corpus because he had been declared incompetent to stand trial based on his limited sign language skills alone.<sup>48</sup> In *Graham*, several experts testified that Mr. Graham was not mentally retarded and

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<sup>47</sup> *Id.* at 626.

<sup>48</sup> *Graham v. Jenne*, 837 So.2d 554 (Fla. App. 4 Dist. 2003).

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.”<sup>49</sup> 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.”<sup>50</sup> 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.”<sup>51</sup>

Long ago, the Supreme Court explained that “[d]ue process requires that a defendant not be made to stand trial unless he has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.”<sup>52</sup> As one court noted regarding a deaf defendant, “[a] defect that

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<sup>49</sup> *Id.* at 557.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 558.

<sup>52</sup> *Dusky v United States*, 362 US 402 (1960).

impairs a defendant's comprehension or hampers his ability to consult with his counsel effectively, whether arising from physical or mental impairment, may lead to a finding of incompetence."<sup>53</sup> In *People v. Lang*, undoubtedly the most famous case involving a deaf defendant, the Illinois court explained why a deaf person who is linguistically absent may not be tried:

Historically, the concept of incompetency to stand trial is an extension of the common law ban against trials *in absentia*. At common law, it was believed that the incompetent defendant was mentally 'absent' from the trial and would not be able to recall evidence or produce evidence that might acquit him or permit him to properly assume the role of defendant, and thus he would be deprived of his due process rights.<sup>54</sup>

While these competency standards are designed to determine whether a deaf person has the linguistic ability to assist counsel and participate in the trial, it has been suggested that courts are incompetent to try deaf people who use non-standard communication systems.<sup>55</sup> This view has been echoed in the reported cases: "While the Illinois court viewed the defendant as incompetent to stand trial, a more accurate view is that the judicial system was incompetent to constitutionally try the handicapped defendant."<sup>56</sup> Legal scholars have called for a separate statutory scheme to determine whether a deaf litigant is competent – one that focuses on their linguistic incompetence as opposed to mental incompetence.<sup>57</sup> This recommendation comes too late. Protections are available, on the front end, to obviate the competency issue altogether. The

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<sup>53</sup> *People v. Jackson*, 449 N.Y.S.2d 759 (1982); see also *People v. Lang*, 26 Ill.App.3d 648 (1975)(stating that where a defendant is unable to understand and participate in the legal proceedings because of his inability to communicate, the state is precluded from subjecting him to a trial.).

<sup>54</sup> *People v. Lang*, 26 Ill.App.3d 648 (1975).

<sup>55</sup> See *supra* note 2, p. 1671.

<sup>56</sup> *People v. Rivera*, 480 N.Y.S.2d 426, 433 n. 11 (1984).

<sup>57</sup> See *supra* note 2, p. 1674.

most promising is to require a certified deaf interpreter be utilized prior to a finding of incompetency whether linguistic or otherwise. Additionally, to be certain that the incompetency is a result of the deaf individual's own limitations; a linguistic assessment should be undertaken by a qualified expert. The interview should be conducted with the assistance of a deaf-hearing interpreting team.

Some state statutes recognize that additional measures of protection are needed in competency hearings. South Carolina, for example, sets forth communication protocols for competency hearings separate from its provision defining a qualified interpreter: "In an action where the mental condition of a deaf person is being considered and where the person may be committed to an institution, all the court proceedings pertaining to the person must be interpreted to the deaf person in a language that the person understands by a qualified interpreter appointed by the court."<sup>58</sup> South Carolina's definition of a qualified interpreter already requires RID certification; yet, the definition does not expressly require that the qualified interpreter be able to interpret in a language the deaf person understands.<sup>59</sup> It is only in this further provision where the potential to be committed to a mental institution is at stake does the legislature require more from the qualified interpreter. The qualified interpreter must also be able to interpret in a language that the deaf person understands. Hence in high stakes settings where a person's liberty can be lost even in the absence of trial, additional measures must be implemented to negate the effect of the communication problems. The most effective additional measure is a deaf interpreter who works with the qualified non-deaf interpreter to ensure that the deaf litigant is

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<sup>58</sup> S.C. CODE. ANN. §15-27-15(C)(1976)(emphasis added).

<sup>59</sup> *Id.* at §15-27-15(A).

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.<sup>60</sup> A deaf-hearing interpreting team accommodation is the most effective prophylactic to ensure that competency decisions are made fairly and comport with due process.<sup>61</sup>

## **2. Characteristics of Some Non-Deaf Interpreters for whom a Deaf Interpreter Will Be Able to Assist, Improve or Enhance the Quality of the Interpretation**

While all interpreting requires a fair amount of mental agility, court interpreting is exceptionally demanding and places unique burdens upon even highly skilled interpreters. A report on interpreter services provided in Vermont explained the challenges facing court interpreters:

Courtroom work is a particularly difficult kind of interpreting. It is highly procedural, it moves quickly and it employs its own dense specialized vocabulary, along with Latin phrases and government acronyms. The results often turn on the nuances of a written document, an exchange of words, or a party's intent. At the same time, testimony often involves street talk and slang in two languages, and a great deal of emotion may be conveyed in a few words. Even professional interpreters who perform well in community settings may be unqualified for the rigors of legal interpreting.

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<sup>60</sup> *Stanley v. Lazaroff*, 82 Fed. Appx. 407, 416 (6<sup>th</sup> Cir. Ohio 2003)(unpublished); *State v. Holmes*, 494 So.2d 230, 231 (Fla. 1986).

<sup>61</sup> However, even with a deaf-hearing interpreting team accommodation, there may be times when the litigant is unable to comprehend the proceedings. In these instances, the person may be declared incompetent and be committed if it is anticipated that competency can be restored within a reasonable time. If competency cannot be restored, the defendant must be released. This is the predicament that Virginia finds itself in with the Oswaldo Martinez matter discussed earlier. If released, however, the person may be re-charged if he or she becomes competent within the statute of limitations.

Elena de Jongh, author and professor of court interpretation for spoken language interpreters, has described the competencies required of court interpreters as “high-level proficiencies in the source and target languages and cultures, including knowledge of geographic variation, an understanding of the legal process and related terminology, the ability to manipulate the various discourse styles used in the courtroom, along with interpreting skills and adherence to standards of ethics and professional conduct [which are] essential in protecting a non-English speaker’s right to due process.”<sup>62</sup> Most ASL court interpreters would fully agree with these observations regarding the knowledge, skills and abilities required of the court interpreter.

Qualified ASL court interpreters take specialized training after they obtain their initial generalist certification and before they enter the legal realm. The RID specialist certification examination for legal interpreters requires not only generalist certification and legal training, but it also requires legal interpreting experience prior to applying for the test. As these entry level requirements recognize, legal interpreting is one of the most challenging high risk interpreting settings for the interpreter and the participants.

a. **Part of the Problem: Non-deaf Interpreters May Not Be Fluent in ASL**

Vermont’s report presumes highly skilled bilingual interpreters will face difficulty interpreting in legal settings. However, research has shown that a distressing number of interpreters are not fluent in ASL, the language used by most Deaf Americans.<sup>63</sup> As a result, interpreters often face difficulty interpreting accurately for the typical ASL user, even without

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<sup>62</sup> Elena M. de Jongh, *Court Interpreting: Linguistic Presence v. Linguistic Absence*, FLORIDA BAR JOURNAL 21 July/August 2008.

<sup>63</sup> MARTY T. TAYLOR, INTERPRETATION SKILLS: ENGLISH TO AMERICAN SIGN LANGUAGE 6 (1993).

the additional challenges described in the NAD-RSA Report.<sup>64</sup> Further studies have shown that even highly experienced ASL interpreters struggle in producing consistent and comprehensible renditions of the Miranda Warnings.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

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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<sup>64</sup> *Id.* See also *People v. Vandiver*, 468 N.E.2d 454 (Ill.App.1 Dist. 1984)(explaining that a deaf interpreter was required because of the inability of the interpreter who could hear to use ASL in a manner that the deaf litigant could understand).

<sup>65</sup> Rob Hoopes, *Trampling Miranda: Interrogating Deaf Suspects*, in LANGUAGE AND THE LAW IN DEAF COMMUNITIES 44 (Ceil Lucas ed., 2003)(three out of 10 evaluators found the advanced interpreters' renditions of the *Miranda* warnings to be confusing, the other seven indicated the renditions were 'fairly clear.' Of the intermediate level group of interpreters involved, the evaluators consistently found their interpretations to be confusing or incomprehensible.).

<sup>66</sup> Brenda Schick, *How Might Learning Through an Educational Interpreter Influence Cognitive Development?* in EDUCATIONAL INTERPRETING: HOW IT CAN SUCCEED 77 (Elizabeth Winston ed., 2004).

<sup>67</sup> See notes and accompanying discussion *supra* at note 22.

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:<sup>68</sup>

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-

COURT: No. Finish the answer.

INTERPRETER: Go ahead. Now, put the seat belt on, pulled it, couldn't get it off. Broke seat belt off. It was broke. Pulled out. Couldn't get in. Fast. A light. No, the sun. The sun. And I was hitting the person beside me and I put my hand over my head. Person took the steering wheel. The tire blew, the air went out. Blew a tire. I fell, hit my nose, my face and blood coming down.

Wait a minute. Wait a minute. Wait a minute. Wait a minute. I don't understand. First person? Man here? Man to my right. No, I'm sorry. Man to my left. Sorry. Man to my left fell over, hit my nose. Hit my lip and nose, got dizzy. Person took off. I don't know. I looked. I couldn't focus, couldn't open door. Couldn't-I don't know. And I tried to unlock. Couldn't get-took off the seatbelt, grabbed the steering wheel, climbed over driver's side and went out.

Flagged down someone. Semi driver took me, saw-wait, wait, wait. Saw-wait. No, no. Wait, wait. I don't understand. Wait a minute. Saw semi driver and I was bleeding down my face. Saw the semi driver. He told me to come in. He opened the door, pulled me and as I was coming in, I was shaking, blood coming down everywhere. Wait, wait, wait.

Semi driver took you to friend, to a house. I told him to stop. Said thank you and I went out and then I-bloody. I knocked on the door and a boy that was a friend talked and then I passed out. The blood everywhere from my nose. It was just blood gushing everywhere. Boy took off. Didn't see him where he is. He took off. He's gone. I don't-I don't know.<sup>69</sup>

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<sup>68</sup> *State v. Burnett*, 2005 WL 32797 (Ohio App. 2 Dist.).

<sup>69</sup> *Id.*

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.<sup>70</sup>

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 suggested by these examples. While it is admittedly difficult from the written transcript to know for certain that the interpreter was employing these strategies, the techniques used in *Burnett* present a troubling indicia of the use of discredited methods of interpreting in any language.

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<sup>70</sup> William E., Hewitt, *Model Code of Professional Responsibility for Interpreters in the Judiciary*, in COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 197 (1995).

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.<sup>71</sup> In the excerpts shown below, defense counsel is questioning the deaf defendant through an 'interpreter' who appears to be speaking at the same time as signing. The transcript reads:

COUNSEL: What did you do when he grabbed your neck?

INTERPRETER: When-w-h-e-n the boy grabbed neck, what did you do? What did you do when he grabbed-what did you do? Okay. When the boy grabbed you, okay, what did you do? You pushed him away, pushed him away. You pushed him away and then you stabbed him? He grabbed him twice. He pushed him away. And then, he pushed him away and stabbed him and ran.

COUNSEL: The man had you by the throat. Could you breathe?

INTERPRETER: Okay. When the boy grabbed you, could you breathe? Okay. When the (sign) grabbed you, okay? He say a little bit.

COUNSEL: When you stabbed him, was he holding your neck?

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<sup>71</sup> *State v. Holmes*, 494 So.2d at 233-35.

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.<sup>72</sup>

When the interpreter was able to present a comprehensible question to the witness, the deaf defendant answered it coherently. Counsel asked what the deaf defendant what he did when the boy grabbed his neck, and the defendant plainly stated that he pushed him, stabbed him and ran. The bulk of the transcript shows the difficulty the interpreter had in putting a comprehensible question to the witness. The interpreter uses primarily second person in rendering the testimony (“he say a little bit”), and narrates and summarizes the testimony at times (“He’s describing the incident again.”).<sup>73</sup> As previously mentioned, interpreters are required to use the first person when interpreting for the record precisely to avoid confusion and to make a clean record. Further, narration or summarization of the testimony such as “he’s describing the incident again” violates not only the interpreter’s oath, but also a number of ethical tenets requiring a complete and accurate interpretation without commentary or opinion inserted by the interpreter.

More troubling was that the interpreter was obviously signing and speaking at the same time. This transcript reflects the interpreter’s wording of every question in the transcript as heard

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<sup>72</sup> *State v. Holmes*, 494 So.2d at 233-35.

<sup>73</sup> This statement from the interpreter that the witness is “describing the incident again” speaks volumes about the interpreter’s skills, training and lack of knowledge regarding deaf people and ASL. Deaf people tend to use a relational style of responding to questions. Other language communities also use a narrative style in responding to questions – it is appropriate in those language communities even if it is not valued in the American legal system. See WILLIAM O’BARR ET AL., *The Power of Language: Presentational Style in the Courtroom*, 14 DUKE L.J. 266-79 (1978). Interpreters are obligated to interpret the statements of deaf witnesses rather than provide commentary on the testimony. No certified, qualified and educated interpreter would engage in this unethical behavior.

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.<sup>74</sup> 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.<sup>75</sup> The RID acknowledges that “the integrity of RID certification requires a

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<sup>74</sup> 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).

<sup>75</sup> See [http://www.rid.org/education/maintain\\_certification/index.cfm](http://www.rid.org/education/maintain_certification/index.cfm) (last accessed July 21, 2008).

commitment to life-long learning.”<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> 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

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<sup>76</sup> *Id.*

<sup>77</sup> 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).

<sup>78</sup> See [www.nvsupremecourt.us](http://www.nvsupremecourt.us) (last accessed September 13, 2008).

years.<sup>79</sup> 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 online for language or interpreting skills and a maximum of three hours may be taken online in their general education category.

Washington State Administrative Office of the Court's Court Interpreter Program maintains a list of 257 different courses or training opportunities which satisfy the state continuing education requirements.<sup>80</sup> Along with the more typical interpreter education fare such as consecutive interpreting and sight translation, classes such as "the Meth Lab Next Door" and "the English Cicero Knew" demonstrate the wide array of knowledge areas which can benefit the court interpreter in their daily work.<sup>81</sup> Continuing education requirements acknowledge the fact that language skills are dynamic and that professional court interpreters must maintain their skills and knowledge in order to be true to the obligation to interpret the proceedings accurately and impartially.

**c. The Other Part of the Problem: Even if ASL Interpreters Are Fluent, the Number of Qualified Legal Interpreters Is Insufficient to Meet the Demand**

Even if the bulk of all certified interpreters were fluent in ASL, there simply are not enough non-deaf interpreters available to ensure that the due process rights for deaf people encountering the legal system are protected. Deaf interpreters remedy this gap. As of

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<sup>79</sup> See [www.tsc.state.tn.us](http://www.tsc.state.tn.us) (last accessed September 13, 2008).

<sup>80</sup> See [http://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/index.cfm?fa=pos\\_interpret.classlist](http://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.classlist) (last accessed September 29, 2008).

<sup>81</sup> *Id.* See also [www.nvsupremecourt.us](http://www.nvsupremecourt.us) (last accessed September 13, 2008) for such courses as "the Perfect Deposition" and "Gangs in Las Vegas" which reflect the variety of educational opportunities approved by the Supreme Court for interpreter's continuing education requirements.

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.<sup>82</sup> 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.<sup>83</sup> 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 because of the inability to locate qualified legal interpreters.<sup>84</sup> The Court explained the reason it issued a written opinion was to “throw a spotlight on the disturbing lack of skilled ASL interpreters in the courts.”<sup>85</sup> The outlook is not encouraging for reducing the shortage. According to the Bureau of Labor Statistics, the profession of language interpreting will grow much faster than average for all other professions in the decade from 2006 to 2016.<sup>86</sup> The Bureau attributes the growth in the profession of sign language interpreting to the drain on the field caused by the increase of video

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<sup>82</sup> NATIONAL INTERPRETER EDUCATION CONSORTIUM INTERPRETING PRACTITIONER NEEDS ASSESSMENT FINAL REPORT 15 (2007). Available at <http://www.asl.neu.edu/nciec/resource/docs/PracRept.pdf>.

<sup>83</sup> *Id.* at 13.

<sup>84</sup> *Wahid v. Long Island Railroad Co.*, 2007 WL 2265429 (N.Y. Sup.).

<sup>85</sup> *Id.* at \*2.

<sup>86</sup> <http://www.bls.gov/oco/ocos175.htm> (last accessed September 1, 2008).

relay interpreting services.<sup>87</sup> 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.<sup>88</sup> 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.

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<sup>87</sup> *Id.*

<sup>88</sup> 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.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](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.<sup>89</sup> The defendant was released because it was determined that he could not be restored to competency.<sup>90</sup> 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....”<sup>91</sup> 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.<sup>92</sup> 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.

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

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 417.

<sup>92</sup> *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.<sup>93</sup>

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.”<sup>94</sup> The court’s interpreter agreed that “you have to go from one communication medium to another to another and back through.”<sup>95</sup> Thus

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<sup>93</sup> *People v. Vandiver*, 468 N.E.2d 454, 457-58 (Ill. App. 1 Dist. 1984)(emphasis added).

<sup>94</sup> *People v. Vasquez*, 2004 WL 348785 \*3 (Cal. App. 2 Dist).

<sup>95</sup> *Id.*

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.”<sup>96</sup> 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.”<sup>97</sup> 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.”<sup>98</sup> 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

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<sup>96</sup> *Id.* at \*4.

<sup>97</sup> *Id.* at \*4.

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

when he did not understand.”<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Skaggs v. State*, 8 N.E. 695 (Ind. 1886).

<sup>101</sup> *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.<sup>102</sup> 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.<sup>103</sup>

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."<sup>104</sup> 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."<sup>105</sup> 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 negate the effect of [the defendant's] incompetency and to insure him a full and fair exercise of his legal rights."<sup>106</sup> A Connecticut appeals court indicated that testimony from deaf witnesses may be taken by "any method of interrogation that is best adapted to obtain

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<sup>102</sup> FED. R. EVID. 611(a); *see also* *Todd v. State*, 380 So.2d 370 (Ala. Crim. App. 1980)(appointment of interpreters is left to the sound discretion of the court).

<sup>103</sup> *State v. Tok*, 945 A.2d 558, 566 (Conn. 2008); *Linton v. State*, 2007 WL 2323929 (Tex. App. – Corpus Christi); *People v. Vasquez*, 2004 WL 348785 (Cal. App. 2 Dist); *State v. Warden*, 891 P.2d 1074 (Kan. 1995); *People v. Vandiver*, 468 N.E.2d 454 (Ill. App. 1 Dist. 1984); *People v. Spencer*, 457 N.E. 473 (Ill. App. 1 Dist. 1983); *State v. Skaggs*, 8 N.E. 695 (Ind. 1886).

<sup>104</sup> *Linton v. State*, 2007 WL 2323929 (Tex. App. – Corpus Christi), *citing*, *Lincoln v. State*, 999 S.W.2d 806 (Tex.App. – Austin 1999)(emphasis added); *Adams v. State*, 749 S.W.2d 635, 639 (Tex.App. –Houston [1<sup>st</sup> Dist.] 1988). *Linton* was reversed on appeal; however, the high court indicated that on different facts, a deaf interpreter would be the suitable remedy. *See* discussion *infra* B.2.d.

<sup>105</sup> *People v. Vandiver*, 468 N.E.2d 454, 458 (Ill. App. 1 Dist. 1984).

<sup>106</sup> *People v. Rivera*, 480 N.Y.S.2d 426, 433 (1984).

information intelligibly.”<sup>107</sup> 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.<sup>108</sup> At times, the only person connected to or who understood the deaf litigant was also deaf.<sup>109</sup> 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.<sup>110</sup> 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

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

<sup>108</sup> See *United States v. Addonizio*, 451 F.2d 49 (3<sup>rd</sup> 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 victim’s son due to idiosyncratic language patterns); *State v. Gonzalez-Gongora*, 673 S.W. 2d 811 (Mo. App. 1984)(minister appointed to interpret for Spanish speaking defendant); *Kley v. Abell*, 483 S.W.2d 625 (Mo. Ct. App. 1972)(brother); *Fairbanks v. Cowan*, 551 F.2d 97 (Ky. 1971)(father for witness); *c.f.*, *People v. Allen*, 317 N.E.2d 633 (Ill. App. 1974)(holding it was improper to use a friend of the victim who was also an interested person and a person with actual knowledge of the alleged crime to interpret for the defendant).

<sup>109</sup> *Skaggs v. State*, 8 N.E. 695 (Ind. 1886).

<sup>110</sup> M.J. Bienvenu & Betty M. Colonos, *Relay Interpreting in the 90’s*, THE BICULTURAL CENTER 69-80 (1990). See discussion *infra* section D for more information regarding spoken language interpreters and relay interpreting in court.

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.<sup>111</sup>

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.

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<sup>111</sup> www.rid.org (last referenced February 1, 2009).

The permit is entitled the Conditional Legal Interpreting Permit – Relay (“CLIP-R”). The RID’s website explains:

Holders of this conditional permit have completed an RID-recognized training program designed for interpreters and transliterators who work in legal settings, and who are also deaf or hard-of-hearing. Generalist certification for interpreters/translitterators who are deaf or hard-of-hearing (RSC, CDI-P or CDI) is required prior to enrollment in the training program. This permit is valid until one year after a legal written and performance test for deaf interpreters becomes available nationally. CLIP-R holders will be required to take and pass the new legal certification examination to maintain certification in the specialized area of interpreting in legal settings. Holders of this conditional permit are recommended for a broad range of assignments in the legal setting.<sup>112</sup>

In the absence of an actual certification examination for deaf court and legal interpreters, state statutes which address the issue tend to require deaf interpreters to hold the CDI. In Oklahoma, for example, the legal interpreting statute defines a qualified deaf interpreter as an individual who:

(a) is deaf or hard-of-hearing [and] who possesses the knowledge, skills, specialized training and experience to enhance communication with persons who are deaf or hard-of-hearing and whose communication modes are so unique that they cannot be adequately assessed by interpreters who are hearing, and

(b) holds the following qualifications as a deaf interpreter: National Registry of Interpreters for the Deaf, Certified Deaf Interpreter (CDI)...<sup>113</sup>

The Oklahoma definition recognizes that there are deaf people who present complex or unique communication modes for whom a deaf interpreter should be retained. Such statutes support the contention that there is a population of deaf people, perhaps typified by the NAD-RSA characteristics, for which the deaf interpreter is the reasonable and anticipated accommodation.

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<sup>112</sup> [www.rid.org/education/edu\\_certification/index.cfm/AID/46](http://www.rid.org/education/edu_certification/index.cfm/AID/46) (last referenced February 1, 2009).

<sup>113</sup> OKLA. STAT. ANN. tit. 63 §2408 (West 2005).

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 of qualified deaf interpreters, and 2) the statutory and common law standards to determine when a qualified deaf interpreter should be retained.

## **B. Ample Statutory Authority Supports Retaining Deaf Interpreters in a Number of Legal Settings**

No statute expressly prohibits the use of deaf interpreters in legal proceedings.<sup>114</sup> Courts have an affirmative obligation to manage the proceedings in the courtroom. Without question, courts have the inherent authority as a part of this affirmative obligation to hire qualified deaf interpreters when indicated.<sup>115</sup> By state statute, administrative rule or otherwise, twenty-eight jurisdictions expressly authorize deaf interpreters<sup>116</sup> in legal settings.<sup>117</sup> In twenty-three states,

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<sup>114</sup> While not prohibiting a deaf interpreter, some statutes are written to specify only interpreters with certain RID credentials are permitted to work in court. This is a dangerous practice given the number of times the RID has changed the testing system which results in changing the name of the certifications. Rarely once a statute is passed, does a legislature go back and revise the definitional sections to accommodate RID name changes. Sometimes emergency legislation or rules can be promulgated to include new RID certifications, however, this is likely the exception rather than the rule, and it is still a time consuming and cumbersome process. *See Missouri State Committee of Interpreters, Licensure Requirements, 20 CSR 2232-2.040, Emergency rule filed Aug. 22, 2006* (adding the NIC as an acceptable credential under the licensing rule). Another unfortunate consequence of specifying certificates in statutes results when the only certificates that are included are certificates available to interpreters who can hear.

<sup>115</sup> FED .R. EVID. 611(b).

<sup>116</sup> The statutes and literature are inconsistent in the treatment of the term used to describe deaf interpreters and at times they refer to, deaf interpreter, certified deaf interpreter, intermediary interpreter, reverse skills certificate holder or relay interpreter. When a specific statute or case uses a term, that term will be retained; otherwise, the term “deaf interpreter” or “deaf-hearing interpreting team” should be understood to refer to all statutory designations.

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.<sup>118</sup> 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

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<sup>117</sup> 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. ANN. tit. 5 § 48-A(1)(H)(West 2003)(legal interpreting); MINN. GEN. R. PRAC. Rule 8.01 (2007); MO. ANN. STAT. §209.322(1)(West 2004)(licensing); NEV. REV. STAT. §656A.060(2001)(no specific term used but deaf-hearing interpreting team process explained and authorized); OHIO SUPREME COURT, INTERPRETER SERVICES PROGRAMS RULES (2006); OKLA. STAT. ANN. tit. 63, § 2408 (West 2005); 2 PA. CONS. STAT. ANN. § 583 (West 2007)(by Administrative Rule implementing §583); TEX. HUM. RES. CODE ANN. §81.007(Vernon 2003)(directing the Department of Rehabilitative and Assistive Services (“DARS”) to establish qualifications for court interpreters. DARS has established qualifications including the CDI which are listed at Board of Evaluation of Interpreters, Court Certification Policies and Procedures Manual 1.3.1.; *see also* discussion *infra* B.1.a.). A number of these statutes are considered licensing statutes. Some contain elements of both a licensing and a legal interpreting statute by requiring that a qualified interpreter in legal settings must be licensed by the statute pursuant to the licensing statute. *See e.g.*, NEB. REV. STAT. § 20-153 (2006); NEV. REV. STAT. §656A.100(2001).

<sup>118</sup> ALASKA R. EVID. 604 (West 1989); ARK. CODE ANN. §16-89-105 (Michie 1991); DEL. CODE ANN. tit. 10, § 8907 (1976); FLA. STAT. ANN. §90.6063 (West 2002); IDAHO CODE Ct. Admin. Rule 52(7) (West 2005); KAN. STAT. ANN. §75-4353(b)(1993); 224 ILL. COMP. STAT. ANN. 442/5 (West 1997)(licensing); 725 ILL. COMP. STAT. ANN. 140/1 (West 2008)(legal interpreting); MD. CODE ANN. CRIM. PRO. §1-202 & §3-103 (2001), MD. CODE ANN. RULE 16-819 (2007); MISS. CODE ANN. §13-1-301 (1984); N.M. STAT. ANN. §38-9-3 (1978); N.Y. JUDICIARY LAW §390 (McKinney 1992); N.C.GEN. STAT. §8-B1 & 8-B2 (2007); N.D. CENT. CODE §28-33-01 (1979); OR. REV. STAT. §45.285 (2008); R.I. GEN. LAWS § 8-19-2 (1999); S.D. Cod. L. §1-36A-10.5 (2008); S.D. Cod. L. §19-3-10 (1974); TENN. CODE ANN. §24-1-211 (2001); UTAH CODE ANN. §78-24a-3 (2007); VT. STAT. ANN. tit. 1, §§ 331 & 333 (2005); VA. CODE ANN. §19.2-164.1& § 8.01-384.1(Michie 2007);W.VA. CODE § 5-14A-3 (1996);WIS. STAT. ANN. §885-38 (2007); and WYO. STAT. §5-1-09 (2004).

association for the deaf, or an interpreter who has been approved by the superintendent of the school for the deaf, or, in the event such an interpreter is not available, any other interpreter whose actual qualifications have otherwise been appropriately determined.<sup>119</sup> This section clearly permits a court to appoint a non-certified deaf interpreter in the event that the deaf interpreter is needed for communication and as long as the deaf interpreter's qualifications are appropriately determined. Additionally, since the names of specific certificates are not listed, a certified deaf interpreter would be permitted in North Dakota under the definition which requires that the interpreter be certified by the RID.

Only one state sets forth court interpreter requirements that, on the face of the statute, cannot be obtained by deaf interpreters.<sup>120</sup> Iowa was included as a statute mentioning certified deaf interpreters in its licensing provision even though its legal interpreting statute excludes certified deaf interpreters by omission. The legal interpreting statute defines a Class A certified interpreter as a “an interpreter who is listed on the directory provided by the Iowa Department of Human Rights and who holds a specialist certificate: legal (SC:L) from the National Testing System of the Registry of Interpreters for the Deaf.”<sup>121</sup> A Class B noncertified court interpreter is defined as one “who is listed on the directory provided by the Iowa Department of Human Rights and who holds a valid comprehensive skills certificate (CSC), a master comprehensive skills certificate (MCSC), or both a certificate of interpretation (CI) and a certificate of transliteration (CT) from the National Testing System of the Registry of Interpreters for the

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<sup>119</sup> N.D. CENT. CODE §28-33-01 (2007) (emphasis added); *Todd v. State*, 380 So.2d 370 (Ala. Crim. App. 1980).

<sup>120</sup> IOWA. CODE ANN. §14.3(1)(2008)(emphasis added).

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

Deaf.”<sup>122</sup> 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”).<sup>123</sup> 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

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<sup>122</sup> *Id.* (Emphasis added).

<sup>123</sup> See IOWA ADMIN CODE r. 645-361.2(1)(2007).

educational opportunities for deaf interpreters to receive training.<sup>124</sup>

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.<sup>125</sup> 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.<sup>126</sup> 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

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<sup>124</sup> 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](http://www.state.ia.us/government/dhr/ds/PDF/Commission/November/Old_-_New_Business.pdf).

<sup>125</sup> *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 the certificate).

<sup>126</sup> ME. REV. STAT. ANN. tit. § 48-M(2) (West 2003) (emphasis added).

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.<sup>127</sup> 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 be licensed to interpret in any venue in the state (sometimes including legal venues),<sup>128</sup> and those traditional legal interpreting statutes which may or may not also list a specific certification required for legal work.<sup>129</sup> Legal

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<sup>127</sup> See e.g., ARK. CODE ANN. §16-89-105 (Michie 1991); FLA. STAT. ANN. §90.6063 (West 2002); IDAHO CODE Ct. Admin. Rule 52(7) (West 2005); 224 ILL. COMP. STAT. ANN. 442/5 (West 1997); MD. CODE ANN. RULE 16-819 (2007).

<sup>128</sup> See e.g., ALA. CODE §34-16-3(6)(1998); ALA. CODE §34-16-3(6)(1998); ARIZ. REV. STAT. §36-1971 (2007); CONN. GEN. STAT. ANN. § 46a-33a(d-e)(West 2007); IOWA ADMIN CODE r. 645-361.2(1)(2007); ME. REV. STAT. ANN. tit. 32 § 1521, *et seq.* (West 2000); MISS. CODE ANN. §37-33-173 (2005); MO. ANN. STAT. §209.322(1)(West 2004); NEV. REV. STAT. §656A.100 (2001); N.D. CENT. CODE §43-52-02 (2001).

<sup>129</sup> TENN. CODE. ANN. § 24-1-211(a)(3)(2001) states: "Qualified interpreter means an interpreter certified by the National Registry of Interpreters for the Deaf, Tennessee Registry of Interpreters for the Deaf, or, in the event an interpreter so certified is not available, an interpreter whose qualifications are otherwise determined. Efforts to obtain the services of a qualified interpreter certified with a Legal Skills Certificate or a Comprehensive Skills

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.<sup>130</sup>

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

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.<sup>132</sup>

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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.

<sup>130</sup> 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) .

<sup>131</sup> 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).

<sup>132</sup> 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 National Training, Evaluation and Certification Unit and has passed the National Registry of Interpreters for the Deaf written generalist test, or (7) holds a National Association of

the Deaf-National Registry of Interpreters for the Deaf national interpreting certificate.<sup>133</sup>

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.<sup>134</sup> 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.”<sup>135</sup> An intermediary deaf interpreter is listed in the definition of a qualified interpreter.<sup>136</sup> 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

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

<sup>134</sup> *Id.*

<sup>135</sup> MICH. COMP. LAWS ANN. §393.503(a)(West 2007). The Legislative Analysis of the 2007 revisions to the Michigan Deaf Persons’ Interpreters Act, House Bill 4208, the House Fiscal Agency explained that the law is extended to require attorneys, medical providers, financial institutions and employers to hire qualified interpreters including certified deaf interpreters or qualified deaf interpreters. MICH. HOUSE BILL 4208 (H-2) at p.4 (2007).

<sup>136</sup> MICH. COMP. LAWS ANN. §393.502(e)(West 2007).

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.<sup>137</sup>

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.<sup>138</sup> 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.<sup>139</sup>

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<sup>137</sup> *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.

<sup>138</sup> MICH. COMP. LAWS ANN. §393.503(a)(West 2008).

<sup>139</sup> 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."<sup>140</sup> 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."<sup>141</sup> 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)."<sup>142</sup> 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."<sup>143</sup> This provision expressly recognizes that there are deaf interpreters who are trained and credentialed by the state but who have not yet attained certification and allows them to work in legal settings under conditions as specified in the regulations.

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1994); MO. REV. STAT. §209.285(3)(West 2002); N. D. CENT. CODE §28-33-08 (1979)(deferring to the school for the deaf).

<sup>140</sup> COLO. REV. STAT. §13-90-202(8)(1994).

<sup>141</sup> Colorado Commission for the Deaf and Hard of Hearing, Colorado Department of Human Services, 12 CCR 2516-1, 27.210.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

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.”<sup>144</sup> 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

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<sup>144</sup> *Id.*

committee or commission, or the head of the agency or other entity, or the court is responsible for assuring the procurement of the interpreter.”<sup>145</sup> The provision continues, “no person shall serve as in interpreter . . . unless the commission makes the determination that the person is qualified to interpret.”<sup>146</sup> While neither the legal interpreting statute nor the legislation implementing the Commission on the Deaf and Hard of Hearing mentions the use of deaf interpreters in court, the Commission’s registration form for being listed in its directory does include a category for certified deaf interpreters.<sup>147</sup> Arguably, then, under the legal interpreting statute, the Kansas Commission has the authority to determine that a certified deaf interpreter who is registered with the Commission is a qualified interpreter for a legal proceeding.

Kentucky’s structure is similar. The legal interpreting statute defers to the Kentucky Commission on the Deaf and Hard of Hearing, the Kentucky Registry of Interpreters for the Deaf, and the Kentucky Association of the Deaf for recommending qualified interpreters to the courts.<sup>148</sup> Kentucky defines a qualified interpreter using the standard ADA definition that an interpreter must be able to interpret expressively and receptively using any specialized terminology appropriate to the setting, defers to the specialized deafness-related entities listed for interpreter referrals, and places the obligation to administer the rules regarding qualifications to the court administrator’s office.<sup>149</sup>

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<sup>145</sup> KAN. STAT. ANN. §75-4355b(a)(1993).

<sup>146</sup> KAN. STAT. ANN. §75-4355b(d)(1993).

<sup>147</sup> See [http://www.arkansas.org/kcdhh/text/KQAS/KQAS\\_registration\\_form\\_2007.pdf](http://www.arkansas.org/kcdhh/text/KQAS/KQAS_registration_form_2007.pdf).

<sup>148</sup> KY. REV. STAT. ANN. §30A.405 (Banks-Baldwin 1994).

<sup>149</sup> *Id.*

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.<sup>150</sup> 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.”<sup>151</sup> 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.<sup>152</sup> 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”).<sup>153</sup> 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,

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<sup>150</sup> W.VA. CODE §57-5-7 (1992).

<sup>151</sup> W.VA. CODE §5-14A-3 (1996).

<sup>152</sup> W.VA. CODE §5-14-1 (1996).

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

etc.”<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup> Hence, the executive agency has outlined extensive parameters for the use of deaf interpreters in Texas by not only the courts, but private attorneys and law enforcement entities as well.

In these states, the decision regarding qualifications of interpreters is assigned to the state agency perceived as the expert in deafness and interpretation. Most often, the agency with expertise is a Commission for the Deaf and Hard of Hearing, however, at times the entity is the state residential school for the deaf or other entity charged with the evaluation and certification of interpreters. In these states, the state agency or organizational administrators have the authority to qualify deaf interpreters and in some cases assign them to court cases when necessary to ensure the deaf person is able to participate in the proceedings.

**b. Qualifications in National Center for State Courts’ Consortium States**

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<sup>154</sup> See <http://www.dars.state.tx.us/dhhs/beicert.shtml> (last accessed December 21, 2008).

<sup>155</sup> See <http://www.dars.state.tx.us/dhhs/beilvl.shtml> (last accessed December 21, 2008).

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

Court administrator's offices are often charged with drafting and implementing the rules related to all language interpreters, including ASL interpreters. If a state is one of the forty (40) members of the NCSC's Court Interpreting Consortium, the administrator's office will play a greater role in establishing and monitoring qualifications.<sup>157</sup> According to the NCSC:

The Consortium is a multi-state partnership dedicated to developing court interpreter proficiency tests, making tests available to member states, and regulating the use of the tests. Consortium resources achieve economies of scale across jurisdictional and organizational boundaries.

The Consortium addresses resource shortages by defining and implementing standards for identifying proficient, qualified interpreters. Without those standards, state courts risk employing unqualified interpreters, leaving equal access to justice by linguistic minorities an unfulfilled obligation.<sup>158</sup>

The NCSC is a champion of the effort to obtain language access to courts at the state level, and it recognizes the risk of leaving access to justice in the hands of unqualified interpreters.<sup>159</sup> The NCSC concerns itself primarily with the work of training spoken language interpreters to interpret and in educating courts about the proper ethical conduct of qualified interpreters. As a part of achieving economies of scale, the NCSC has foregone development of an ASL court interpreting examination. The NCSC, like the Director of the United States Administrative Office of the Courts, relies on the RID for assistance in determining the credentials properly required of a qualified court interpreter.

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<sup>157</sup> Member states include, as of 2008, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois/Cook County, Indiana, Kentucky, Maryland, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and Vermont.

<sup>158</sup> [www.ncsconline.org/D\\_Research/CourtInterp/1Consort-FAQ.pdf](http://www.ncsconline.org/D_Research/CourtInterp/1Consort-FAQ.pdf) (last accessed February 22, 2009).

<sup>159</sup> The NCSC, under contract, also currently administers the Federal Court Interpreting Examination for those languages tested by the Director of the United States Administrative Office of the Courts. See [www.ncsconline.org](http://www.ncsconline.org).

Member states normally have an interpreting program within the court administrator's office that serves as a resource for courts on all matters regarding interpretation. Not all of the NCSC states include ASL interpreters in their interpreting programs; however, the states that include ASL provide a basic orientation to legal interpreting and invite deaf interpreters to attend. Some states, such as California, Georgia, Minnesota, New Mexico and Pennsylvania, have provided intensive training to ASL court interpreters separate and apart from other language interpreters. New Jersey, a founding member of the NCSC, has a great deal of experience and sophistication in working with deaf interpreters. As a result, the administrator's office has developed materials and standards explaining the processes, procedures and rules for working with deaf interpreting team accommodations.<sup>160</sup>

NCSC states are concerned primarily with the quality of court interpreters. As a result, the programs administered in those states generally pertain exclusively to those legal interpreting functions taking place in court or in conjunction with court-ordered programs. These programs do not usually implement the full range of settings envisioned by traditional legal interpreting statutes. Recall that the scope of traditional legal interpreting statutes tends to be broad and includes law enforcement interpreting, interpreting in law offices, and interpreting in administrative or legislative settings. Because NCSC's major goal is to ensure that court interpreters are qualified, these other legal settings are usually not under the jurisdiction of the court administrator in NCSC states. Nevertheless, legal interpreters in NCSC states should be mindful of the statutory obligation to staff an out-of-court legal assignment with a deaf interpreter when indicated by the facts of the particular case.

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<sup>160</sup> *Id.* See Standards for Delivering Interpreting Services in the New Jersey Judiciary. Directive #3-04 (March 22, 2004).

**c. Qualifications under the Federal Court Interpreting Statute**

Interpreting in Federal courts is governed by the provisions of the Federal Court Interpreting Act and the regulations drafted by the Director of the United States Administrative Office of the Courts (“USAOC”).<sup>161</sup> The statute does not explicitly mention the use of deaf interpreters; however, it states that “[t]he presiding judicial officer, on such officer’s motion or on the motion of a party, may order that special interpretation services as authorized in section 1828 of this title be provided if such officer determines that the provision of such services will aid in the efficient administration of justice.”<sup>162</sup> The special interpretation services authorized in section 1828 refer to hiring multiple interpreters when there are unique linguistic needs and when there are lengthy or complicated matters.<sup>163</sup> Under the Federal Rules of Evidence, the court interpreter is qualified as an expert to interpret and by virtue of taking the oath, is an officer of the court.<sup>164</sup> As a part of the officer of the court duties, the interpreter can assist the court by advising as to the interpretation needs in the case.<sup>165</sup> In the event that a deaf interpreter is indicated because of unique linguistic issues, the court interpreter has the obligation to inform the court of the need for special interpretation services. In Federal matters in which the Court Interpreting Act applies, the parties to the proceeding have the right to ask the court through a formal motion to provide a deaf interpreter should one aid in the efficient administration of justice.

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<sup>161</sup> 28 U.S.C. §1827 (1994).

<sup>162</sup> 28 U.S.C. §1827(k)(1994)(emphasis added).

<sup>163</sup> 28 U.S.C. §1828 (1994).

<sup>164</sup> FED. R. EVID. 604.

<sup>165</sup> CARLA MATHERS, SIGN LANGUAGE INTERPRETERS IN COURT: UNDERSTANDING BEST PRACTICES 79-80 (2007).

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 1988 and give the director the authority to certify languages in court interpreting. The Regulations do not specifically include deaf interpreters. The USAOC regulations define a certified ASL interpreter as one who “holds a Legal Specialist Certificate from the Registry of Interpreters for the Deaf.”<sup>166</sup> In the event a legally certified interpreter is not reasonably available, the court is required to *voir dire* the interpreter and preference in appointment is given to an interpreter who holds the Comprehensive Skills Certificate.<sup>167</sup>

The scope of the Federal Court Interpreter Act is far more limited than most state provisions. The Federal act only applies in criminal proceedings or in civil matters initiated by the government such as forfeiture proceedings. While in some legal settings, deaf interpreters might be a reasonable accommodation under the ADA, the ADA does not apply to federal courts. Recognizing that without interpreters, access to courts for deaf Americans was illusory, in 1996, the Judicial Conference of the United States directed an internal memorandum to the Chief Judges of all United States District Courts ordering them to provide accommodations such as interpreters to deaf litigants.<sup>168</sup> The memorandum also required court administrators to maintain statistics regarding the use of ASL interpreters in federal proceedings to determine the extent of their use and compliance with the directive.

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<sup>166</sup> Interim Regulations of the Director of the Administrative Office of the United States Courts Implementing the Court Interpreters Amendments Act of 1988, § 5.

<sup>167</sup> *Id.* at § 15. The Comprehensive Skills Certificate has not been offered by the RID since 1986. The current certification is called the National Interpreting Certificate (NIC).

<sup>168</sup> Memorandum to all Chief Judges, United States Courts. Services to Persons with Communications Difficulties. Leonidas Ralph Meecham, Director. April 12, 1996.

Federal courts use deaf-hearing team interpreting when indicated by the facts of the case. In *Anderson v. Franklin County*, the trial court precluded a deaf witness' testimony because it considered the deaf-hearing interpreting team process to be unreliable.<sup>169</sup> On appeal, the district court's decision was affirmed only because the deaf witness' testimony was cumulative of other witnesses and consequently no prejudice was shown.<sup>170</sup> Had the deaf witness been essential to the case, the appellate court would have reversed the exclusion of the witness based upon the use of a deaf-hearing interpreting team. In *United States v. Bell*, a deaf witness' sister interpreted his testimony from sign language into Choctaw and required a Choctaw-English interpreter to relay her interpretation from Choctaw into English for the court and the jury.<sup>171</sup> Consequently, special interpreting services when indicated by unique language needs are not uncommon in the federal courts even without a specific provision mentioning deaf interpreters.

The common purpose of all of legal interpreting statutes, both state and federal, is to ensure the court that the legal interpreter has the requisite skills to interpret and is free from bias which would impair the ability to interpret neutrally for the court. Many statutes rely on a national testing system for the skills guarantee, an oath given to the interpreter that the interpretation rendered will be accurate, and a preliminary examination of the deaf person to ensure that he or she can understand the interpreter. Generally, a qualification process is mandated by the statute to ensure, through cross examination, that the interpreter will render an accurate and ethical interpretation. The statutes generally define what constitutes a legal setting and some define the qualifications required for each setting. Traditionally, deaf interpreters have

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<sup>169</sup> *Anderson v. Franklin County, Mo.*, 192 F.3d 1125, 1129 (8<sup>th</sup> Cir. 1999).

<sup>170</sup> *Id.* at 1130.

<sup>171</sup> *United States v. Bell*, 367 F.3d 452 (5<sup>th</sup> Cir. 2004).

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.<sup>172</sup> 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

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<sup>172</sup> See e.g., COLO. REV. STAT. ANN. §13-90-206 (2006).

interpreter would assist, improve or enhance the services, the statutes permit retention of a deaf interpreter. Even without a statutory provision, the obligation to recommend a deaf interpreter resides in the court interpreter's professional and ethical decision-making obligations. The statutes recognize this duty by suggesting that the deaf interpreter analysis is appropriate when the interpreter is not familiar with the deaf person's signing, or for other reasons, is unable to interpret effectively. To successfully exercise this obligation, the interpreter must possess a certain amount of self-awareness to acknowledge that a deaf interpreter would be able to assist, improve or enhance the interpretation. The court interpreter has a duty to advise the court of these issues and to recommend the services of a deaf interpreter when indicated by the facts of the case. While the unique characteristics of the deaf litigant will provide some of the rationale for the recommendation, more critical is the ability to engage in this honest self-assessment. Many statutes plainly afford the interpreter this tool by stating that a deaf interpreter will be provided when the court interpreter is unable to interpret accurately or is unfamiliar with the deaf person's communication style.<sup>173</sup> Hence, the court interpreter should undertake this analysis of whether a deaf interpreter would be able to assist, improve or enhance the quality of the interpretation in every instance and then convey that conclusion to the appropriate hiring authorities.<sup>174</sup>

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<sup>173</sup> See e.g., ARIZ. REV. STAT. §12-242(F)(2000); COLO. REV. STAT. ANN. §13-90-206 (2006); D.C. CODE ANN. §2-1905 (2001); KY. REV. STAT. ANN. ADMIN. PROC. AP IX §7 (Banks-Baldwin 2004); MASS. GEN. LAWS ANN. Ch. 221 §92A (2005); MONT. CODE ANN. §49-4-505(2007); NEB. REV. STAT. §20-154(2006).

<sup>174</sup> See also MICH. COMP. LAWS ANN. §393.502(e) (West 2007)(emphasis added)(stating that "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter."). Louisiana's statute is similar, stating that an "[i]ntermediary interpreter/transliterator means any person, including any hearing-impaired person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a hearing-impaired person and a qualified interpreter/transliterator." LA. REV. STAT. ANN. § 46.2362(4)(West 1982)(emphasis added).

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.<sup>175</sup> 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 interpretation.<sup>176</sup> These statutes focus more critically on the interpreter's ability to perform effectively rather than the specific characteristics presented by the deaf person. California's definition of intermediary interpreter contains such a standard for appointment: "An 'intermediary interpreter' means an individual who is deaf or hearing impaired, or a hearing individual who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language or between American Sign Language and other foreign languages by acting as an intermediary

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<sup>175</sup> See *Linton v. State*, No. PD-0413-08 (Tex. Crim. App. January 14, 2009), J. Johnson concurring, *reversing*, 2007 WL 2323929 (Tex. App. – Corpus Christi).

<sup>176</sup> See *e.g.*, GA. CODE ANN. §24-9-101(4) (1983).

between the individual who is deaf or hearing impaired and the qualified interpreter.”<sup>177</sup> Oklahoma’s definition is even broader suggesting that a deaf interpreter is one who is able to enhance communication.<sup>178</sup> 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.”<sup>179</sup> 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.

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<sup>177</sup> CAL. EVID. CODE § 754(e) (West 1995)(Emphasis added.).

<sup>178</sup> OKLA. STAT. ANN. tit. 63 § 2408 (West 2005).

<sup>179</sup> CAL. EVID. CODE § 754(g) (West 1995)(Emphasis added.).

Maine’s standard for appointing the deaf interpreter places the onus on the interpreter who can hear to alert the court to the need for a deaf interpreter: “If a qualified legal interpreter appointed under this subsection for the deaf person or hard-of-hearing person states that the interpretation is not satisfactory and that a qualified legal interpreter who is a deaf person or a hard-of-hearing person will improve the quality of interpretation, the presiding officer shall appoint a qualified legal interpreter who is a deaf person or a hard-of-hearing person to assist the qualified legal interpreter.”<sup>180</sup> Like the California provision, Maine’s standard does not marginalize the deaf person. Rather, the interpreter is obligated to recognize that the interpretation is not satisfactory and can be improved with the assistance of a deaf interpreter regardless of the personal characteristics of the deaf person.

The test has two prongs: 1) the interpretation is not satisfactory and 2) a deaf interpreter will improve the quality of the work. In some states, such as Louisiana, the test appears to require only one prong: that the deaf interpreter will be able to assist the court interpreter in rendering an accurate interpretation.<sup>181</sup> Hence, an argument exists that a deaf interpreter can be appointed to improve upon even a satisfactory interpretation if the accuracy will be improved or enhanced by using a deaf interpreter. In many of the statutes, however, the interpretation must both be unsatisfactory and a deaf interpreter must be able to improve the interpretation. Once the issue is raised by the interpreter, the court’s discretion to ignore the request is limited. The statute speaks in mandatory terms that the court shall appoint a deaf interpreter to assist once alerted to the need by the court interpreter.

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<sup>180</sup> ME. REV. STAT. ANN. tit.5 §48A(2)(B)(Emphasis added).

<sup>181</sup> LA. REV. STAT. ANN. §46.2362(4)(West 1982)(definitional section); OKLA. STAT. ANN. tit. 63 § 2408 (West 2005)(the deaf interpreter is able to enhance communication).

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.”<sup>182</sup> 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 unsatisfactory nature of the interpretation.

The second prong of the test indicating that a “deaf interpreter will improve the quality of the interpretation” is easy enough for the interpreter to concede. It is relatively painless for a court interpreter to agree that a deaf interpreter will improve or enhance the quality of even a satisfactory interpretation. However, for the interpreter to admit that he or she is unable to render a satisfactory interpretation is psychologically more challenging. From what is known of

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<sup>182</sup> MICH. COMP. LAWS ANN. §393.503(5) (West 2007)(Emphasis added); *see also* ARIZ. REV. STAT. §12-242(F)(2000)(stating that if effective communication is not occurring, the court shall permit an intermediary interpreter).

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.<sup>183</sup> 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 that a deaf interpreter better understands the nuances of communication with a person who is deaf.”<sup>184</sup> Because the interpreter indicated that the deaf interpreter would improve the quality of the interpretation, the court allowed it and a later appeal challenging the use of the deaf interpreter was unsuccessful.

Because the statutes give the authority to the interpreter to alert the court to the need for a deaf interpreter, the interpreter should feel comfortable in engaging in a full analysis of the communication style of the deaf person in order to properly appraise the court of its staffing needs. The court wants to provide a fair legal proceeding. When language or communication issues arise, courts will look to interpreters to provide information and resources. In *Anderson v. Franklin County*, discussed earlier in regards to federal courts, the court interpreter “concluded he could not do an adequate job” because the deaf witness did not use a standard form of sign

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<sup>183</sup> *In re Wickman*, 2007 WL 162573 (Mich. App. 2007).

<sup>184</sup> *Id.* at \*1 n.2.

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.<sup>185</sup>

In several states, the legal interpreting statute requires that the proceedings will be interpreted in a language the deaf person understands. This language supplies legal authority to appoint a deaf interpreter.<sup>186</sup> For example, the Nebraska oath provision states: "In any proceeding in which a deaf or hard of hearing person is testifying under oath or affirmation, the interpreter shall take an oath or affirmation that he or she will make a true interpretation of the proceeding in an understandable manner to the best of his or her ability."<sup>187</sup> The issue is whether the deaf person can understand the interpreter who can hear. These same renditions of the oath often include language indicating that the interpreter only has to interpret to the best of their ability. Some suggest that this diminishes the requirement for accuracy because each interpreter's ability will vary depending on the interpreter's skills and experience.

This conclusion, however, is not a logical requisite. The oath can be read in parity with

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<sup>185</sup> *Anderson v. Franklin County*, 192 F.3d 1125, 1129 (8<sup>th</sup> Cir. Mo. 1999). In *Anderson*, the deaf-hearing interpreting team was appointed, used for a portion of the pre-trial proceedings and then objected to by a formal pre-trial motion. After hearing testimony from the interpreting team, the trial court excluded the deaf witness from further trial testimony because it held the deaf-hearing interpreting team process was unreliable. On appeal, the court affirmed the lower court's decision to exclude the deaf witness only because his testimony was cumulative. The court noted that no prejudice was shown from the exclusion and if such a showing had been made, the witness would not have been excluded regardless of the deaf-hearing interpreting team accommodation.

<sup>186</sup> CAL. EVID. CODE § 754 (West 1995); TEX. CIV. PRAC. & REM. CODE ANN. §21.002(b)(Vernon 1987); *see also In re Byron*, 176 Cal.App.3d 822, 223 Cal.Rptr. 319 (5<sup>th</sup> Dist. 1986)(interpreting the language understandable to the deaf person provision of the California oath).

<sup>187</sup> NEB. REV. STAT. §2-155.01 (1977).

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. **Standards Require Deaf Interpreters When, by Intimate Association, the Deaf Interpreter Is in the Best Position to Communicate with the Deaf Litigant**

At times, due to idiosyncratic language patterns or the non-standard nature of the deaf person's communication style, or due to the combination of linguistic, environmental or social factors listed in the NAD-RSA Report and other literature discussed earlier, the person in the best position to effectively communicate with the deaf litigant is a deaf interpreter who is certified, trained and able to increase the likelihood of successful communication. Several states have explained this likelihood of successful communication as the deaf interpreter's intimate

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

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."<sup>189</sup> 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.<sup>190</sup> The directive cautions courts that the deaf interpreter should be *voir dire*d and should be administered the standard oath for interpreters.<sup>191</sup> 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

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<sup>188</sup> 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* New Jersey Guidelines.

<sup>189</sup> MASS. GEN. LAWS ANN. Ch. 221 §92A (2005).

<sup>190</sup> *See* New Jersey Guidelines 1 (Rev. 2004); New Jersey Directives 3-05. Standard 2.3 (2004).

<sup>191</sup> New Jersey Directives 3-05. Standard 2.3 (2004).

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.<sup>192</sup> California recognizes that the intermediary may be a person who can hear, such as a family member.<sup>193</sup> Colorado requires supervision from a professional interpreter.<sup>194</sup> Colorado makes this distinction clear by creating a discrete classification for non-professional intermediary interpreters whether deaf or hearing.<sup>195</sup> 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.<sup>196</sup> 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

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<sup>192</sup> New Jersey Directives 3-05. Standard 2.3 (2004).

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

<sup>194</sup> See notes and discussion *supra* section B.1.a.

<sup>195</sup> See notes and discussion *supra* section B.1.a.

<sup>196</sup> *United States v. Bell*, 367 F.3d 452 (5<sup>th</sup> Cir. 2004).

litigant in the case.<sup>197</sup> 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.<sup>198</sup> 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.”<sup>199</sup> 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 consultation with standard for determining whether a deaf interpreter will be provided. The Arizona statute states: “If the interpreter or the deaf person determines that effective communication is not occurring the court or appointing authority shall permit the interpreter or the deaf person to nominate a qualified intermediary interpreter to provide interpreting services between the deaf person and the appointed interpreter during proceedings.”<sup>200</sup> Arizona gives the

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<sup>197</sup> See e.g., ALA. CODE §12-21-131(h) (1988); ARIZ. REV. STAT. §12-242(F) (2007); CALIF. EVID. CODE § 754 (West 1995); ME. REV. STAT. ANN. tit. 5 § 48-A(1)(H)(West 2003).

<sup>198</sup> See Americans with Disabilities Act, 42 U.S.C. §12101 *et seq* (1990).

<sup>199</sup> ME. REV. STAT. ANN. tit. 5 § 48-A(1)(H)(West 2003)(emphasis added); see also N.M. STAT. ANN. §38-9-3 (1978).

<sup>200</sup> Ariz. Rev. Stat. §12-242. Section F (emphasis added).

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 incumbent upon the interpreter to prepare well in advance by meeting with the deaf person and counsel to determine the need for a deaf interpreter.

In New Jersey, the authority to determine that an interpretation is not satisfactory is also shared with the deaf litigant. In addition to the New Jersey legal interpreting statute, there are a series of administrative directives setting forth the standards to be used in a case requiring deaf interpreters.<sup>201</sup> The provision of the administrative directive containing the standard for appointing a deaf interpreter states:

If either a sign language interpreter meeting the requirements of Standard 2.2 or a person who is deaf or hard of hearing states that the interpretation is not satisfactory and that an intermediary would improve the quality of interpretation, an intermediary interpreter shall be assigned to assist the original interpreter. Any such interpreter must take the same oath that all interpreters take. If an intermediary interpreter is used who does not meet the requirements of Standard 2.2, the judge or hearing officer should also consider conducting a *voir dire* consistent with New Jersey Rule of Evidence 604.<sup>202</sup>

In New Jersey, a deaf litigant may alert the court that a deaf interpreter is necessary, even if the court interpreter fails to recognize that the interpretation is not satisfactory and an intermediary would improve its quality. The more comprehensive statutes incorporate the in consultation with standard and share the decision making authority with the deaf litigant or give

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<sup>201</sup> N.J. STAT. ANN. §34:1-69.8(e)(1984).

<sup>202</sup> *Id.* (Emphasis added).

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 (termed prelingual deafness) to the need for a deaf interpreter have been reported, can be thought of as a standard in the absence of a statutory provision on point, and will be explored in the next section.

**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.”<sup>203</sup> 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.”<sup>204</sup> 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

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

<sup>204</sup> *Linton*, at \*1.

understand an ASL interpretation and the English-based signing used by the interpreter exceeded the defendant's English reading grade level. Hence, the defendant's ability to understand, participate in the proceedings and confer with counsel was compromised.

The Texas court interpreting statute implements the constitutional right to confrontation including the right to have trial proceedings presented in a way that the accused can understand.<sup>205</sup> The trial court's error was to permit the court interpreter to use an English-based method of signing and to appoint a second "standard" interpreter to sit at counsel table and assist by clarifying the proceedings during breaks in the proceedings. On appeal, the court observed that: "Nothing in the record indicates how this second interpreter 'broke down' difficult concepts ..., nor does the record indicate that the second interpreter was successful in her attempt."<sup>206</sup> This 'remedy' was insufficient to provide the defendant with a thorough and immediate understanding of the proceedings. The court concluded that "given the complexity of [the defendant's] hearing impairment, we believe that the trial court erred in not providing [the defendant] with the assistance of a deaf-relay interpreter."<sup>207</sup> While the court attributed the communication difficulties to the defendant's prelingual deafness, it was clear that the interpreter was unable to interpret in a language understandable to the deaf litigant. The interpreter correctly indicated the difficulty to the court.

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<sup>205</sup> *Id.* at \*2, citing, *Salazar v. State*, 93 S.W.3d 339, 240 (Tex.App. – Texarkana 2002); TEX. CIV. PRAC. & REM. CODE ANN. §21.002(b)(Vernon 1987).

<sup>206</sup> *Linton*, 2007 WL 2323929 at \*4.

<sup>207</sup> *Id.* (Emphasis added.).

The oath provision in the Texas code contains the requirement that the interpretation should be in a language understandable to the deaf litigant.<sup>208</sup> 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."<sup>209</sup> 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."<sup>210</sup> 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

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<sup>208</sup> 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).

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

<sup>210</sup> *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.<sup>211</sup> 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.”<sup>212</sup>

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

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

<sup>212</sup> *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

that communication is not transpiring and that a deaf interpreter is needed in order to ensure that the interpretation is rendered in a language understandable to the deaf person. Interpreters should also be comfortable in explaining to counsel the need for an interpreter at the table to ensure that the defendant is able to understand, to participate and assist in the defense.

A concurring opinion was filed in *Linton* by one judge with personal experience working with deaf interpreters which reminds readers that on the proper facts a deaf interpreter is an absolute necessity. The concurring opinion provides specific guidance to counsel representing deaf people. The concurrence explained the process of ‘relay interpretation’ and stated “[a deaf interpreter] is absolutely necessary for communication between hearing individuals and some deaf individuals.”<sup>213</sup> The concurring opinion explained that for deaf individuals presenting characteristics as seen in the NAD-RSA Report, a deaf interpreter was an absolute necessity: “[D]eaf individuals may have additional challenges, such as mental retardation or mental illness, cerebral palsy, a low level of competence or a lack of education in commonly used modes of manual communication, or low levels of ability to read or write.”<sup>214</sup> The opinion concluded that “a need for intermediary interpretation is not common, but when it exists, it is a necessity, not an option.”<sup>215</sup>

In terms of standards to determine when a deaf interpreter is indicated, the concurring opinion noted that a trial court should affirmatively inquire of the interpreter as to whether there are any communication difficulties. The opinion recognized that some interpreters may not want

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<sup>213</sup> *Id.*, Johnson, J. concurring at 2 (emphasis added).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

to admit that there are communication difficulties for fear of appearing incompetent. The opinion explained that the communication difficulties that indicate a deaf interpreter should be retained may be related to the deaf person's limited fund of knowledge of the legal system. The opinion also warned trial judges of the "head-nod" syndrome which at times is used to feign understanding when a person does not want to appear unintelligent or unsophisticated, explained how to phrase a question to ensure a narrative response and cautioned judges against relying on yes-no questions which can more easily hide true understanding. On these facts, however, the judge agreed with the majority that Ms. Linton's interactions with the other driver, with the police, with the court and with counsel during the proceedings all indicated that she had a minimum level of understanding and was able to participate in the proceedings. As a result, the judge joined the majority in reversing the intermediate court of appeals.

In another case in which the issue of prelingual deafness was proposed by experts, the defendant was found incompetent and the case against him was dismissed. In *Graham v. Jenne*, testimony was taken from several experts to determine whether the defendant could participate in his defense. In discussing prelingual deafness, an expert in the field testified that "persons born deaf do not learn abstract concepts that are used in the legal system because their language has no signs for even the most basic legal terminology."<sup>216</sup> The expert further testified that in order to try Graham, the proceeding would have to be conducted slowly and methodically. While there was every indication that Mr. Graham was not mentally retarded, had no mental illness and was capable of learning, the experts testified that "his inability to process abstract concepts used

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<sup>216</sup> *Graham v. Jenne*, 837 So.2d 554, 558 (Fla. App. 4 Dist. 2003).

in a legal setting such as ‘judge’ or ‘jury.’”<sup>217</sup> 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, the opinion that ASL has no signs for basic legal terminology is suspect considering the amount of literature in print and in visual materials regarding legal terminology in ASL. Relying upon this expert’s testimony, the trial court found the defendant incompetent by equating prelingual deafness to mental retardation. On appeal, however, this determination was reversed.

A discussion of the standards for obtaining a deaf interpreter has shown that while there is some variety, there are many commonalities within the state statutes. Generally the initial duty is on the court interpreter to make the need known for the deaf interpreter. Sometimes that duty is shared with the deaf person. There are specific scripts that mirror the language of the statute and should be incorporated into the record made by the interpreter. Specifically, that 1) the interpreter is unable to abide by the oath and ethical mandates to accurately and effectively interpret into a language the deaf person can understand and/or 2) a deaf interpreter would be able to assist, improve or enhance the quality of the interpretation. Once apprised that the statutory test has been raised, the court is typically under an obligation to inquire into the nature of the issue and, in some states, is required to accede to the interpreter’s request. While it may be unrealistic to expect deaf litigants to know the scripts necessary to trigger the duty to provide a deaf interpreter, it is entirely reasonable to expect court interpreters to know the standards existing in the states in which they practice.

As has been discussed in earlier sections, there will be times when the deaf-hearing interpreting team accommodation fails to provide full access for the deaf litigant; however, a

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<sup>217</sup> *Id.* at 555.

deaf-hearing interpreting team should be the starting point when there are any communication issues brought to the attention of the court by the interpreter who can hear. Because of the unusual or unique communication process used with the deaf-hearing team interpreting process, it is normal to expect that there will be challenges on appeal to the use of the deaf-hearing interpreting team. These challenges generally fall into two categories which will be discussed in the next section.

C. **Legal Challenges to the Use of Deaf Interpreters Generally Fail**

Typically, when the deaf-hearing team accommodation is used in a trial for witness testimony against defendants who can hear, the relayed nature of the interpretation is objected to and litigated on appeal. The argument generally focuses on the defendant's ability to confront and cross examine the deaf witness through the deaf-hearing team accommodation. When the deaf-hearing team accommodation is used in a trial for the benefit of a deaf defendant, the argument generally focuses on the claim that there was some irregularity in the functioning of the deaf-hearing team or the composition of the team that prevented the deaf defendant from receiving a fair trial. This section will address cases that have raised these types of issues from defendants who can hear and from deaf defendants respectively.

1. **Appeals by Defendants who can Hear Objecting to the Deaf-hearing Interpreting Accommodation for Deaf Witnesses**

Defendants who can hear generally complain that the uniqueness of the process used by deaf-hearing teams violates their rights to a fair trial. In other words, the defendant's rights to confront and cross-examine the witness were impaired at trial because the examination was filtered through two interpreters. As noted earlier, deaf interpreters and objections to deaf interpreters are not new to the legal system.

In 1866, the Supreme Court of Indiana denied an appeal by a defendant who could hear in *Skaggs v. State*.<sup>218</sup> There, the court interpreter indicated that while he could sign, he could not establish communication with the deaf witness who had allegedly been sexually assaulted by the defendant. The defendant claimed that his right to confront the witness was compromised by the conduct of the deaf interpreter which was explained in the reported opinion as follows:

It appeared that a question, in relation to the offense charged, was propounded, through the interpreters, to the prosecuting witness, which shocked her innate modesty, and she fled precipitately from the presence of the court and jury into an adjoining room; that she was followed thither by Miss Coons,<sup>219</sup> without any direction from the court, and without any objection on the part of the appellant; that, in the seclusion of that room, Miss Coons speedily succeeded in pacifying her, and in getting her answer to the shocking question, and, in about one minute, they returned together into the courtroom; and that there, in the presence of the court and jury, and of the witness and appellant, Miss Coons, without having repeated the question to the witness, communicated her answer thereto, obtained from her in such seclusion, to the interpreter Wright, who gave such answer orally to the court and jury.<sup>220</sup>

While the defendant complained that the interpreter's conduct in following the witness out of the courtroom and obtaining her answer to counsel's question privately was "intolerable in a court of justice, and a palpable violation of his constitutional right to be brought face to face with the witness" the court disagreed because the defendant had neither objected at the time, nor been injured by the conduct.<sup>221</sup>

In more recent times, in *People v. Vandiver*, an Illinois case, the defendant who could hear challenged the use of deaf interpreters for a witness.<sup>222</sup> The challenge was two-pronged:

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<sup>218</sup> *Skaggs v. State*, 8 N.E. 695 (Ind. 1886).

<sup>219</sup> Miss Coons was the deaf interpreter, Mr. Wright was the interpreter who could hear.

<sup>220</sup> *Id.* at 697-98.

<sup>221</sup> *Id.* at 698.

<sup>222</sup> *People v. Vandiver*, 468 N.E.2d 454 (Ill.App.1 Dist. 1984).

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.<sup>223</sup> Second, the use of the two interpreters in a chain-type arrangement violated the defendant's Sixth Amendment right to confront witnesses.<sup>224</sup> 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.<sup>225</sup> 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.

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<sup>223</sup> 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).

<sup>224</sup> *Vandiver*, 468 N.E.2d at 457.

<sup>225</sup> *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 had difficulty testifying.<sup>226</sup> *Vasquez* involved a gang murder. The deaf witness was the mother of the victim. The mother had seen the rival gang members enter her home and shoot her son. At trial, she was one of two principal eye witnesses. The defendant contended that he had been denied his right to confront and cross examine witnesses “by the limited ability of the deaf-mute (sic) witness to comprehend questions and communicate responses.”<sup>227</sup> The interpreters’ use of a collaborative process also formed a basis for appeal.

Collaboration or collaborative interpreting means that when a deaf witness answers a question, prior to rendering an interpretation, the court interpreters confer privately with each other or with the deaf witness. Courts generally have two problems with collaboration: it takes far longer, and private off record discussions in open court are prohibited. First, while the process involving a deaf interpreter must by necessity incorporate flexibility, the system does have limitations with respect to time. Courts understand to some extent that trying a case involving interpreters takes longer. Working with a deaf interpreter elongates the process even further. When interpreters collaborate and confer, the proceedings can become unbearably long with the danger that the court and the parties will lose trust that the interpreting process is effective.<sup>228</sup>

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<sup>226</sup> *People v. Vasquez*, 2004 WL 348785 (Cal.App. 2 Dist.)(Unreported).

<sup>227</sup> *Id.* at \*2.

<sup>228</sup> DEBRA L. RUSSELL, INTERPRETING IN LEGAL CONTEXTS: CONSECUTIVE AND SIMULTANEOUS INTERPRETATION 194 (2002).

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.”<sup>229</sup> 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.”<sup>230</sup>

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<sup>229</sup> See discussion *supra* section 2.a.

<sup>230</sup> *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 act as a mediator” in ensuring that the interpreting team is able to process the message accurately.<sup>231</sup> Collaborative interpreting, both intra-team and with the deaf witness, has value when used properly with counsel and the court’s cognizance and permission as in *Vasquez*. Collaborative interpreting permits the deaf interpreter who is unclear as to the witness’ response to negotiate meaning directly with the witness or to confer with their colleague. When used sparingly, collaboration can ensure an accurate interpretation.<sup>232</sup> When approved in advance by the court, and used in moderation, collaborative interpreting is a viable technique for the interpreter to employ.<sup>233</sup> Otherwise collaboration can impede the process, try the patience of the court and attorneys and create distrust of the interpreters and the process.

## **2. Appeals by Deaf Defendants Objecting to the Deaf-hearing Interpreting Team Accommodation for the Proceedings**

Deaf defendants who are provided with a deaf-hearing team accommodation appeal for a variety of reasons typically related to irregularities in the process. In *In re Wickman*, the appeal was based on inconsistent provision of the deaf-hearing interpreting accommodation.<sup>234</sup> When the deaf interpreter had a scheduling conflict, the court went forward without the deaf interpreter

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<sup>231</sup> MASS. GEN. LAWS ANN. Ch. 221 §92A (2005).

<sup>232</sup> New Jersey Guidelines *supra* note 172 at 2.

<sup>233</sup> *Vasquez* 2004 WL 348785 at \*5.

<sup>234</sup> *In re Wickman*, 2007 162573 \*2 (Mich. 2007).

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.”<sup>235</sup> 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.<sup>236</sup> 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 proceedings. The court further cautioned counsel to make the issue of proper interpretation well before trial so that arrangements can be made to secure the appropriate compliment of interpreters.<sup>237</sup> This case placed the onus to inform the court of special interpreting needs on both the court interpreters and counsel.

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<sup>235</sup> *Id.*

<sup>236</sup> *Division of Youth and Family Services v. R.E.G.*, 2007 WL 1541902 (NJ 2007).

<sup>237</sup> *Id.*

In *People v. Rivera*, the deaf defendant was awarded a re-hearing for sentencing because he had been improperly sentenced as a recidivist.<sup>238</sup> The defendant had pleaded guilty to two prior felonies. At the re-hearing, it was discovered that the two prior pleas had been taken in the absence of proper interpreting accommodations, and the defendant did not understand the nature and consequences of the plea. The court interpreter recommended that a deaf-hearing interpreting team be utilized for the re-hearing. On appeal, the court explained that “because [the defendant] has never developed a working command of American Sign Language (“ASL”), his attorney and original interpreter found communication with him inadequate. The latter recommended the additional assignment of ... a reverse skills certified interpreter and the conference judge granted counsel’s motion for two interpreters.”<sup>239</sup> Through the use of the deaf-hearing team accommodation, the defendant was able to understand, communicate and fully understand the proceedings.<sup>240</sup> Here, both counsel and the interpreter properly carried out their duty to inform the court of the need for a deaf interpreter. When the proper accommodation was made, the matter was conducted in a manner that ensured the deaf defendant was able to participate, assist counsel and understand the nature of the proceeding.

#### D. **Spoken Language Interpreters Face Similar Issues**

The deaf community is not alone in facing unique language combinations and characteristics that strain traditional notions of the interpreting paradigm. Spoken language interpreters find themselves, with increasing frequency, confronted with speakers of rare

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<sup>238</sup> *People v. Rivera*, 480 N.Y.S.2d 426 (1984).

<sup>239</sup> *Rivera*, 480 N.Y.S.2d at 427.

<sup>240</sup> *Id.*

languages due to new and changing immigration patterns in the United States.<sup>241</sup> De Jongh estimates that in the 2000 census “approximately 2,000 unique languages were identified within the borders of the United States.”<sup>242</sup> 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.”<sup>243</sup> 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.”<sup>244</sup> 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.<sup>245</sup> 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

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

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

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

<sup>244</sup> *Id.*

<sup>245</sup> *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."<sup>246</sup> 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.<sup>247</sup> 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."<sup>248</sup>

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

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<sup>246</sup> *Id supra* note 189.

<sup>247</sup> *Id.* at 2.

<sup>248</sup> Victoria Kim, *American Justice in a Foreign Language*, LOS ANGELES TIMES, Feb. 21, 2009, available at <http://www.latimes.com/news/local/la-me-interpret21-2009feb21,0,5129254.story>.

small village in the mountains of Southern Mexico, was convicted of murder.<sup>249</sup> 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.<sup>250</sup> 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.<sup>251</sup> 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.<sup>252</sup> 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 with locating a Haitian Creole interpreter who spoke the proper dialect or a relay interpreter who could mediate between the dialects.

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<sup>249</sup> Carlton M. Clark, Hon. Lynn W. Davis, Steven M. Sandberg, *The Changing Face of Justice in Utah*, UTAH STATE BAR JOURNAL, Jan/Feb. 2001, at 1.

<sup>250</sup> *Jesus v. State*, 565 So.2d 1361 (Fla. App. 4 Dist., 1990).

<sup>251</sup> *Id.* at 1363.

<sup>252</sup> *State v. Jeudis*, 772 A.2d 715 (Conn. 2001).

In *Ramirez-Dominguez*, the defendant claimed that a providing a certified Spanish interpreter for a defendant whose native language was Mixteco violated his rights to a fair trial.<sup>253</sup> The defendant was an illiterate field worker. The record established that because he had some competency in Spanish, the provision of a certified Spanish interpreter for the majority of his trial did not violate his rights.

In *Ramirez-Dominguez*, the court did appoint a Mixteco interpreter to work with the Spanish interpreter using the relay interpreting process to ensure that the defendant was linguistically present:

Throughout the proceedings, the trial court appointed at least two court-certified Spanish interpreters and one court-qualified Spanish and Mixteco interpreter. All interpreters expressed their concern regarding Ramirez-Dominguez's "broken" Spanish because he was uneducated, and that his grammar and syntax did not "line-up" appropriately.<sup>254</sup>

While Ramirez-Dominguez complained that the combination of interpreters did not comport with the Constitution, it appears that his language skills in general were insufficient in either language and no interpreter was able to successfully accommodate him.

Like ASL interpreters, speakers of other language combinations do not always fall neatly into discrete categories. Language is not static. When non-English speakers pose unique language combinations, appeals will be filed.<sup>255</sup> While the challenge for court administrators dealing with rarely used spoken languages often lies in determining the specific language used, the internet has made huge strides in helping administrators determine inter-intelligibility of

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<sup>253</sup> *State v. Ramirez-Dominguez*, 165 P.3d 391 (Wash. 2007).

<sup>254</sup> *Id.* at 238.

<sup>255</sup> *See State v. Jeudis*, 772 A.2d 715 (Conn. 2001); *Jesus v. State*, 565 So.2d 1361 (Fla. App. 4 Dist., 1990).

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](http://www.brittanica.com); [azteca.net/aztec/lang.html](http://azteca.net/aztec/lang.html).”<sup>256</sup> 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.<sup>257</sup> Certainly, the days in which court administrators could comfortably assume that anyone with a Latino surname would be assigned a Spanish interpreter are gone.<sup>258</sup>

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.<sup>259</sup> 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

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<sup>256</sup> *In the Interest of J.B and B.B.*, \*1 n.1 2002 WL 1585898 (Iowa App.)(unpublished).

<sup>257</sup> Victoria Kim, *American Justice in a Foreign Language*, LOS ANGELES TIMES, Feb. 21, 2009, available at <http://www.latimes.com/news/local/la-me-interpret21-2009feb21,0,5129254.story>.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

increasingly been migrating to northern Mexico and the United States to find work. \*\*\* Even among the indigenous populations in Oaxaca, Mixe is spoken by few people. And the language has four to eight variants that have grown apart over centuries as they were passed down orally with no standardization. Different variants of Mixe can be as different as French is from Catalan or Romainan.....<sup>260</sup>

Prior to finding a university student in Mexico to interpret, two other interpreters who spoke Mixe were brought in to interpret the preliminary hearing. However, neither spoke the correct variant of Mixe. Hence, knowing the area one comes from in a region where Spanish is the dominant spoken language will not guarantee that a Spanish speaking interpreter will be able to effectively interpret for the litigant. Just like knowing that one is deaf and uses sign language will not guarantee that a single interpreter who can hear will be an effective accommodation. Flexibility and advance planning are critical when working with individuals presenting unique language combinations.

The challenge for court administrators dealing with the need for a deaf interpreter to assist the non-deaf interpreter often relates to the timing of the request and the costs involved in hiring several different interpreting teams. Many statutes indicate that when an interpreter who can hear determines that a deaf interpreter would assist, improve or enhance the interpretation, one will be appointed. In the typical situation, a case is scheduled, all parties are present, and the case is in a posture move forward. At this point, the court interpreter interviews the deaf person. If a problem is noted, the court interpreter must alert the court, and inform it that another, far more difficult to locate, specialist interpreter is necessary. Facing an impending postponement, counsel and the court are not likely to be pleased, may fault the hearing interpreter's skills, and may pressure the interpreter to go forward even though the interpretation may be substandard or in a language the deaf person does not understand. It is easy to understand why a court

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<sup>260</sup> *Id.*

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 require that the need for the deaf interpreter be determined at a time prior to the assignment. Best practices, fully supported by ethical mandates, already require the non-deaf interpreter to make an assessment in time for a properly skilled and credentialed deaf interpreter to be located. Additionally, statutory provisions already require the court to make a preliminary determination that the deaf person understands the appointed interpreter prior to commencing the proceedings. A paradigm shift on the part of scheduling interpreters in court is required and courts will have to take a more inclusive view of court interpreting than traditionally assumed under the spoken language interpreting model.

#### E. **Conclusion**

Deaf interpreters are an appropriate and reasonable accommodation in many legal settings. A significant population of deaf people exists in this country which research has demonstrated will be able to participate in the justice system to the level required by due process with the provision of a deaf interpreter. Even for individuals who do not exhibit the NAD-RSA characteristics, a deaf-hearing interpreting accommodation may be indicated if the team would be able to assist, improve or enhance the quality of even a satisfactory interpretation.

Deaf-hearing interpreting teams are authorized expressly or implicitly by a majority of state statutes and permitted as specialized interpreting services under the Federal statute. Additionally, courts have the inherent authority under the rules of evidence to try cases as they deem necessary for the efficient administration of justice. When a court interpreter, or

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.