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To Whom It May Concern;

The Registry of Interpreters for the Deaf, Inc. (RID) is the fast-growing national professional association of sign language interpreters/transliterators. RID's membership includes more than 20,000 practitioners in its national, state and local affiliate chapters.

Interpreters/transliterators are sometimes called to testify in court. There are numerous reasons why this is not an ideal situation, as the following indicate:

1. By testifying, interpreters/transliterators may jeopardize their livelihood, and the result can include economic trauma.

Professional interpreters who are members of RID are bound by a Code of Ethics, which specifies that the information processed during an assignment remain confidential. To do so opens the interpreter to adjudication under the RID Ethical Practices System, which has a series of sanctions including revocation of certification and/or suspension of membership in the organization.

The Code of Ethics was formulated with input from seasoned professionals and consumers with countless years of experiences with interpreters. Confidentiality is highly valued by both professionals and consumers. Trust of confidence for interpreters is hard to gain. If lost, it is virtually impossible to regain. There is no doubt that the court has a strong commitment to confidentiality as well and can understand the importance of this aspect of the situation.

Information about the strengths and weaknesses of interpreters finds it way to many deaf consumers in a particular area/region. The American Deaf community has and will continue to shy away from interpreters who talk about assignments. This can result in a loss of assignments and/or income.

2. Interpreters/transliterators memory of a given situation may be faulty.

Interpreters are not in the same position as the interested principals in an interpreting situation. Their concentration and focus is on processing information. They only hold items in memory long enough to facilitate the communication process. They are not concentrating on the situation as the principals are. In addition, having many assignments can lead to confusion as to what occurred at which assignment. As a result, retention of information is highly less likely, and may be contradictory or defective.

Interpreters, in most situations, should only be asked questions regarding facts concerning their credentials and whether or not they were present and interpreting at the time in question. The nature of the assignment means, in most cases, that the interpreter is severely, if not completely, limited from ascertaining if the consumer understood the situation. The principals in the assignment, who were concentrating on the dialogue, would have a much better ability to determine that.

3. Interpreters do not have ownership of a conversation.

The ownership of a conversation belongs to the participants, not the interpreter. Interpreters are in a situation to facilitate communication. Thus, the proper place to obtain information in a given situation is from the participants, not the interpreter.

We hope this information proves helpful in detailing why it is not ideal, and can even be damaging to an interpreter to be asked to reveal information about an assignment.

Sincerely,

Clay Nettles
Executive Director

Testifying In Court and the Ethical Practices System

by Clay Nettles

For some time, there has been a rising number of interpreters who have been subpoenaed or otherwise compelled to testify in court. As the profession increases in numbers and stature, there is little doubt this trend will continue.

As members know, there are no exceptions to the Code of Ethics. Tenet # 1 states: *Interpreters/transliterators shall keep all assignment-related information strictly confidential.*

Thus, there is the potential for a member to have a grievance filed against them. However, as the administrator of the Ethical Practices System, this writer believes there is information that members should be aware of.

In nearly seven years of administration of the EPS, this writer can state that there have been NO cases filed with regard to the aforementioned. Additionally, this writer has reviewed cases from the various stages of the Ethical Practices System dating back to the 1970s. While unable to state categorically that there have been no cases filed related to this subject, none have been noted in all of the files available for review. To the best of this writer's knowledge, no interpreters have ever had their certification or membership revoked as a result of testifying in court. There was a case in 1997 where a judge imposed sanctions on interpreters who billed for services (February, March, April 1997, *VIEWS*), but RID has not sanctioned interpreters for testifying in court.

No one can speak for the members of the Ethical Practices Committees. However, this writer strongly believes that any member who makes an honest, good faith effort to avoid testifying will have that considered as mitigating information by an EPS committee. In the end the courts have the force of law behind them, and the consequences of ignoring or deliberately disobeying can be very harsh.

Consequently, members compelled to testify should take the matter very seriously and let the authorities know that testifying could possibly jeopardize their livelihood, that they do not have ownership of a conversation or situation, and that their memory may indeed be muddled or faulty as a result of not being a principal in a given situation. They should do so both orally and in writing. Furthermore, they should document all efforts to avoid testifying.

Should members need a letter from RID stating these points, we will be happy to provide same. In addition, we have several articles on the topic that may be helpful in such instances. Just call the National Office and request the information and letter regarding testifying in court and it will be sent to you immediately. ■

Ethical Practices System Cases

From time to time, RID publishes the results of Ethical Practices System (EPS) cases which result in sanctions against members.

At this time, a number of cases are pending in the four levels of the EPS. Accordingly, there are no recent cases to publish at this time.

We anticipate some being fully adjudicated and available for publishing in the near future. ■

Mediation Training Moves Forward

As noted in the November issue of *VIEWS*, the Ethical Practices Oversight Committee (EPOC) met October 7-10 and selected candidates for the first mediation training which is scheduled for January.

Over 150 application packets were mailed out from the National Office for this program. Fifty-five applications were completed and submitted. This is a very high number, especially considering that each applicant was required to submit a deposit of $150. Forty-four women and eleven men applied. Of those, eight were deaf and forty seven were hearing.

After a thorough review, eighteen individuals were selected for the training. Among those selected were four men and fourteen women. The eighteen include six deaf individuals and twelve hearing individuals. Four from Region I were selected, two from Region II, four from Region III, two from Region IV, and five from Region V. The persons selected are well distributed to evenly cover the nation.

The EPOC (Maureen Wallace, Chair, Jan Radatz and Dan Langholtz) and Board Liaison Pam Brodie will also be participating in the training.

Much of the funding of this training, which is projected to cost more than $40,000, comes from the yearly Ethical Practices System charge to Certified and Associate members.

According to Dr. Peter Maida, a nationally renowned expert in the field of mediation, RID is the first national organization to attempt to implement a national mediation program. RID is pleased to be in such a position, thanks its members for the foresight to fund this effort, and hopes that the ultimate effect is to strengthen working relationships between interpreters and consumers. ■

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A MONTHLY PUBLICATION OF THE REGISTRY OF INTERPRETERS FOR THE DEAF

To Be or Not to Be a Court Interpreter

By Sue Eadie, CSC, CT, CLIP

What does it take to be a court interpreter? Each of you who is considering entering the field of legal interpreting should evaluate the skills you bring to the endeavor. Examine your motivation, legal expertise, degree of assertiveness, nerve, and patience. Ask yourself, what qualifies me to be a court interpreter? Review your answer after a few months to be sure.

As an interpreter entering my nineteenth year, I thought I'd seen most all there was to see. I've been with a deaf woman, the victim of a stabbing and a gang rape who had to go through the most humiliating medical examination and evidence gathering procedure one can imagine. I've interpreted police line-ups with deaf victims trying to identify their assailants. I've interpreted for a deaf parent whose child took part in the gang murder of an old woman who wouldn't give the kids a dollar, so they beat her to death by kicking her in the head. I've had to voice testimony of a mother who tied her son to the rod in the clothes closet and beat him with a stick. Three bailiffs escorted me out of a courtroom

Shirley Herald develops questions for the Legal Task Force in July '94. See story on page 10.

because a new father whose infant son tested positive for drugs at birth had his custody revoked, and he went berserk, blaming the messenger, me. I've had to use the "F" word to a judge, as that is what my client said to the judge. (I had to talk myself out of a contempt of court charge.) I've gone into lock-ups with rapists and murderers to interview a deaf inmate. I've gone into prisons to assess the needs of Deaf inmates and talked with a "gentleman," whom I later found out was in prison for raping a woman at gun point. These examples highlight the experiences one legal interpreter faces on a daily basis. The job requires nerves of steel, patience, compassion, and a considerable knowledge of the legal system.

Recently, I received a subpoena to testify as to what I interpreted during an interrogation of a deaf minor by a police detective. In trying to avoid testifying, I learned some valuable lessons that I'd like to share with you in case you are ever in a similarly unfortunate position.

What can an interpreter do when faced with a similar situation? Explain to the prosecutor or defense attorney that it is a violation of your

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Contractual Waiver of Interpreter Confidentiality

By Alice J. Baker, Supporting Member, University of Virginia School of Law

The RID Code of Ethics requires interpreters to keep the contents of all interpreted communications strictly confidential. This ethical provision is supported primarily by the principle that the conversation belongs only to the participants, and that the interpreter therefore does not have the "ownership" of the conversation that ...tifies the decision to reveal its ...tents. Confidentiality is also justified by concerns that a party's fear of disclosure by the interpreter may have a chilling effect on socially desirable communications. These conversations may not occur in the absence of assurances of confidentiality, similar to a client's consultation with a lawyer, or a patient's visit to a doctor or psychotherapist. Again, in these settings, the decision to disclose the contents of the communication is seen as belonging to the clients, and not to the interpreter.

Since the right to determine disclosure belongs in any case to the client, the question arises whether the client should be able to waive confidentiality; that is, whether the interpreter should be permitted to disclose the contents of interpreted communications, when it is certain that neither client objects to the interpreter's disclosure. The Code of Ethics does not expressly address the question of whether the confidentiality provision is waivable by the client. Certain other ethical provisions, such as the duty of competence, are expressly made waivable. Others, such as the duty not to advise, counsel, or offer

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Interpreting in Legal Settings

By Nancy Frishberg, CSC

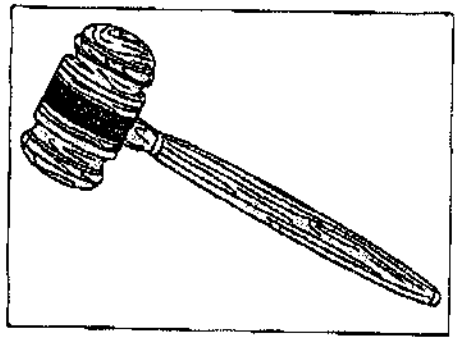
This article was reprinted with permission from Interpreting: An Introduction, A publication of the Registry of Interpreters for the Deaf.

When we think of providing interpretation services in a legal context, we usually think of court. However, there are numerous other environments in which interpreters may provide service, including, but not limited to: police interrogations, attorney-client consultations, meeting in correctional institutions or with probation officers, and during the taking of depositions (in some states called "examinations before trial" or EBTs) and administrative hearings. Trial courts in which interpreters may appear include criminal, civil, municipal, family, surrogate and appellate courts. Although states may have different names for courts, they are conceptually the same; for example, in New Jersey, the Family Court Division of the Superior Court hears matters involving juveniles, dissolutions (divorce) and domestic violence, among others. Other states may have separate courts for each type of matter, such as juvenile and matrimonial court.

Provision of Interpreter Service: Legal Obligations

Each state differs in how broadly it authorizes the presence of interpreters in court and other legal settings (see Legal Rights of Hearing Impaired People, Chapter Nine, Dubow, et al, 1982). The United States Constitution, Amendment VI, guarantees criminal defendants the right to a fair trial, to confront witnesses against them, and to the assistance of counsel. Federal laws (e.g., the 1973 Rehabilitation Act, Section 504) protect the rights of deaf individuals to interpreter services in criminal proceedings. However, in municipal, civil, and administrative proceedings, the right to an interpreter may or may not be a provision of state statutes or case law. It is incumbent upon interpreters to familiarize themselves thoroughly with the laws that govern their state and to remain aware of any changes in state or federal legislation which affects their status in legal settings. See Appendix C for a summary of state statutes providing for interpreters for deaf persons.

Payment for interpreter services in non-criminal cases may be an issue. In some states the court is required by law to pay for services provided in any court or court-supported service (e.g. probation). In others, the issue of payment beyond criminal proceedings is not clearly defined and, as a result, interpreter services are sometimes assessed as part of court costs. Where statutes are ambiguous, the decision is left to the discretion of the court.



Unless interpreters are being paid by a referral agency, it behooves interpreters to make contact with the court prior to the assignment to negotiate payment. There will be occasions when a written contract is advantageous, especially for an extended assignment, such as a lengthy trial. Interpreters who wait until the close of an assignment to negotiate or request payment may encounter resistance on a variety of payment issues, such as travel-time fees in addition to mileage reimbursement, a fee for waiting time, reimbursement for tolls and parking, as well as the expected hourly fee. When negotiating the fee for services, interpreters should be sure to speak with someone who is authorized to approve or deny payment.

Legal Language

For interpreters to be effective in the legal realm, they must possess not only a high level of competence in American Sign Language (and/or signed English) and spoken English, but they must understand English as it is spoken in legal contexts. That is, they must understand not only individual legal terms (e.g. the difference between breaking and entering and burglary) but the structure and purpose of legal language as well. For example, in order to interpret accurately both direct and crossexaminations, interpreters must understand the rules for questioning a witness. Questions posed by attorneys are often awkwardly constructed and purposefully vague; interpreters must be able to retain ambiguities to render faithful interpretations. Ramifications of incorrect interpretations are far reaching, and include the possibility of a mistrial. Interpreters should begin preparing for their first court appearance long before they enter a courtroom to interpret. Observing court proceedings and paying strict attention to the content and style of courtroom discourse is one good way to begin preparing. Observing and working with experienced legal interpreters is another. Finally, taking criminal justice courses at a local college or university and participating in special RID approved courses on legal interpreting is an excellent way to gain insight into legal issues and court procedures.

A Brief Look at Deaf Litigants

As in other interpretation settings, deaf people from all walks of life appear in court for many reasons. Some of these individuals are highly skilled American Sign Language users and require or prefer using the services of an American Sign Language/English interpreter. Others use signed English or another manual code for English and require or prefer using the services of a qualified Signed English/spoken English transliterator. Beyond deaf people with sophisticated ASL and/or English language skills, there is another group of deaf people who sometimes appear in court. These are individuals with minimal language competence (MLC). MLC deaf people require special consideration to enable them to communicate with and receive information or direction from the court. In most matters involving an MLC deaf person, interpreters can most ably assist the court by working in a team context of one deaf and one hearing interpreter. Even when special consideration is given, however, the MLC deaf person is often unable to access court proceedings or assist counsel to any meaningful degree given their limited understanding of the process or action.

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Testifying to the Prior Provision of Interpretation Service

From the Legal Curriculum developed by California State University, Northridge. The curriculum will soon be available for purchase at RID.

The RID Code of Ethics precludes interpreters from sharing information gained during an interpreting assignment. However, there may be times when you are compelled to testify. If you find yourself in such a situation, here are a few things to keep in mind and some suggestions for dialoguing with the attorney who has subpoenaed you.

1. You are covered by privilege when interpreting between a D/deaf person and his/her attorney. Such communications are privileged because any communication between a client and his/her attorney is generally privileged. The fact that you were a party to such communications means that no one except the D/deaf person can compel you to testify about such communications.

2. Know what is considered privileged communication within your state or the state in which you'll be interpreting. Normally, lawyer/client, psychiatrist/patient, priest/penitent, and husband/wife relationships are privileged (or covered by the "cloak of confidentiality," as it is commonly called). These people cannot be compelled to testify against one another under most circumstances.

3. You are NOT covered by privilege when interpreting between a prosecutor and the State's witness. The prosecutor is not the witness's attorney and is providing no defense for the witness. That means if defense counsel wishes, s/he can call you to testify regarding what transpired between the prosecutor and the witness. Since it is imperative that you meet with the witness and the prosecutor prior to interpreting, this is potentially a Catch-22 situation that you may not be able to avoid. If you are compelled by the defense to testify, consider making a statement for the record as to the inappropriateness of testifying. Here is a sample statement:

Your Honor, the interpreter would like to make a statement for the record with regard to counsel's request. (permission granted.)

I understand, You Honor, that defense counsel may call me to testify as to what was said between the prosecutor and the State's witness. With all due respect to counsels, Your Honor, it is not appropriate to call me to testify. Here's why. I am here, Your Honor, as an official court interpreter. That necessitates that I

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Legal Task Force - Question Writers Wanted

By Sue Eadie, CSC, CT, CLIP, Chair - Legal Task Force

The Legal Task Force (LTF) is working to develop the new RID Legal Interpreting Test. The LTF has three new members, Gay Koenemann, CSC, Prov: SC:L, Lynda Remmel, CSC, SC: L and Reginald Egnatovitch, CDI-P. It is a thrill to work with such a talented team. We had one face-to-face meeting during July of this year. At that meeting, we discussed the status of the question pool and question writing drives. We revisited the examination blueprint and test specifications. The bulk of our time was spent conducting a content review of the questions in the pool. We wrote some more questions in areas underrepresented in the question pool and developed a plan for obtaining additional items. We also established criteria for eligibility requirements to stand for the test.

At the start of the meeting, we had a total of 120 test questions. Our goal is to have a pool of 200 questions. We have conducted several question item writing campaigns. The task is more difficult than it sounds and we have not received as many items as we had anticipated or that members promised. The majority of the items have come from interpreters in California. We want this test to be a national test, so if you want to be a test question writer, please contact me at (510) 839-2781 home or at (510) 763-6177 Fax with your name, phone, a good time to reach you, and your certification and experience level.

After a technical review of the 120 test questions, only 83 remained as appropriate test questions. We need at least 100-125 test questions in the area of language, the judicial system, and team interpreting.

We revisited the blueprint and test specifications. On the basis of the feedback we received at the last RID convention, we consolidated some areas and clarified others. We looked at the technical specifications, including weight given to various content areas and cognitive levels, numbers and types of questions.

The Task Force developed five categories of eligibility to stand for the test.

Category 1: Current SC:L.

Category 2: CLIP, CLIP-R, or Prov: SC:L.

Category 3: CSC or CI or CT or MCSC, BA or BS in any field or AA in interpreting.

Category 4: AA degree in any field, CSC or CI and CT or MCSC;
5 years general interpreting experience (post RID Certification);
75 hours documented legal interpreting experience; or
50 hours of formal legal training.

Category 5:
No general education required;
CSC or CI and CT or MCSC;
5 years general interpreting experience (post RID Certification),
100 hours documented legal interpreting experience or
75 hours of formal legal training.

We devoted the last part of the meeting to drafting a few test questions and developing a plan for obtaining additional items. The LTF developed lists of legal interpreters, previously unidentified, as possible item writers. Knapp & Associates sent test item packets to identified interpreters. Interpreters met with a task force member who assisted them in writing items. This produced only twenty more questions.

As the Chair of the LTF, I feel frustrated. We have not made the progress I had anticipated on the development of this test. My goal was to have the written test up and running by this time. I still dream of presenting the completed test at the Convention in New Orleans next summer. At this point, I get the message that the members do not support a Legal Interpreting Test. PLEASE, prove me wrong and respond by participating in test question development.

When I assumed my position as Chair of this task force, I had plenty of free time to spend on the project. I anticipated a two year commitment. That timeline has come and gone. Currently enrolled in my first year of law school, I attend school at night while working days. My availability is considerably less than when I was appointed to chair this task force. However, I am committed to completing this project. Please, RID members, show your support for this vital certification. Let's make sure that this Certification debuts at the 1994 RID convention. □

Standards of Court Conduct and Professional Responsibilities: Major Roles of the Court Interpreter

The two most significant functions of the court interpreter occur in the courtroom where interpretation is provided for the non-English speaking witness on the stand or for the defendant at counsel table.

The former role is clearly defined in Section 752 of the California Evidence Code. Therein the law states that a court interpreter shall be sworn to interpret "when a witness is incapable of hearing or understanding the English language or is incapable of expressing himself in the English language so as to be understood directly by counsel, court and jury." Section 752 (B) further defines this kind of interpreter as an expert witness through reference to Section 730 et seq. of the Evidence Code. However, by the very nature of this role, the court interpreter is further obligated to aid in discharging the affairs of the court in an unbiased and expeditious manner. In this sense, his obligations surpass the normal function of the expert witness, and they approximate the services of the court clerk or other attaches. These sections of the Evidence Code indicate the requirements for the use of an interpreter in both civil and criminal matters.

The other primary need for an interpreter in the courtroom arises when a non-English speaking defendant must be apprised of the nature of the proceedings and communicate with counsel. Article I, Section 14 of the California Constitution, as amended in November, 1974, mandates that "a person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." This section is the source of the defendant's right to an interpreter. Consistent with this constitutional right, the interpreter appointed for a non-English speaking defendant should be required to faithfully interpret all English testimony to the defendant and all communication between attorney and client without disrupting the proceeding in court. Concurrent with these duties, the interpreter should assist in expediting court proceedings. As such, the court has a clear interest to see that the non-English speaking defendant is provided with an interpreter at all stages of the proceedings, and further, that such interpreter executes his professional responsibilities properly.

From the Legal Curriculum developed by California State University, Northridge. The curriculum will soon be available for purchase at RID. □

United States Courts

Code of Ethics for Official Court Interpreters

1. The official court interpreter, as an officer of the Court, shall be a person of high moral principles and integrity, honest, conscientious, trustworthy and of emotional maturity. In addition - he must be exceptionally well qualified as a linguist to be appointed to that office.

2. The interpreter shall interpret accurately and faithfully to the best of his ability, always conveying the thought, intent and spirit of the speaker. He should speak in a clear, firm and well modulated voice and use inflections only when called for. At times, because of the difficulty of translation, he may have to paraphrase a statement to adjust his presentation to the level of understanding of the person concerned. However, he must always request permission to do so.

3. In order to give faithful and accurate translation when called upon, and to establish proper rapport, the interpreter shall first determine what the person's educational, cultural and regional background is. Also, whether or not he or she has a speech impediment, is hard of hearing, or has any other physical or psychological problems. Knowledge of these facts will help the interpreter to be more effective.

4. The interpreter must familiarize himself with the case as much as possible prior to going into the courtroom. He should find out whether or not technical language will be used or whether the case involves a particular area where he may have to brush up on certain terms. The very least he should do in preparing himself, is to study the indictment charges to avoid possible translation problems during the formal court proceedings.

5. The interpreter shall maintain an impartial attitude during the course of interpreting. He must never interject his own words, phrases or views into his interpretation, unless, because of difficulty of translation, he is specifically instructed by the Court or permission is granted to do so. He should be particularly careful not to allow the inflections of his voice to be interpreted as partiality.

6. The interpreter shall always guard confidential information and not betray confidence which have been entrusted to him by parties

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Represent RID's Viewpoints at the Federal Government Level!

The United States Department of Education has an ongoing need for individuals to assist in the review and evaluation of grant applications, and to participate in on-site review of funded projects. These functions are among the most important elements of the discretionary funding process and are designed to ensure that the projects funded meet established selection criteria, designated priorities, and other statutory and regulatory requirements.

The Department of Education is continually updating its Review Register and recruiting additional individuals to serve as panelists and to participate in on-site reviews. Upon approval, the individual is added to the Review Register and is commissioned to serve for a period of three years.

If you would like to be considered for a position that reviews grants related to interpreter training programs and other interpreter related projects, please contact the *National Office for an application* and further information.

Baker Cont'd...(from page 1)
opinions, are expressly made nonwaivable. That waivability is not expressly mentioned in the confidentiality provision is noteworthy, especially in light of the fact that it is generally considered in the field to be the most important provision.

In this article, I consider whether, and to what extent, waiver of interpreter confidentiality should be permitted under the Code of Ethics, and some of the problems raised by a waiver doctrine.

I. Should the Parties to the Conversation Be Permitted to Waive Interpreter Confidentiality?

Example #1: Patient sues Doctor for medical malpractice after suffering injury caused by ingesting tetracycline with milk products. Patient claims that Doctor failed to warn him not to take tetracycline with milk products. Both parties may agree that it is in the interest of justice to allow the interpreter to testify to the contents of Doctor's instructions to Patient.

I have long believed that interpreters ought to be allowed to disclose the contents of conversations that they have interpreted under waiver from both parties. As long as the parties, who "own" the conversation, do not object to the interpreter's disclosure, it is difficult to see why the interpreter should not testify, so long as a knowing and written waiver is obtained from both parties.

II. Under What Circumstances Should Waiver Be Permitted?

The paradigm case, described above, has two characteristics that make us comfortable about allowing waiver. First, the agreement to waive confidentiality is made in writing. Requiring that an agreement be in writing protects the parties in three ways. It performs an evidentiary function, providing certainty about the desire of the parties. It performs a ritual function of bringing home to the person making the written agreement the reality of the waiver. And it provides definiteness by channeling the agreement into a standard mode so that it is clear whether a waiver agreement has been made.

Second, the waiver agreement is made after the conversation has already taken place. Again, having an ex post agreement protects clients. Since the conversation has already taken place we are certain that the party to the conversation knows precisely what he is waiving. And because the conversation was protected at the time it happened, we are confident that the conversation was not chilled ex ante by fears of future disclosure.

The question then becomes how far we are willing to extend this analysis. If we permit express contracts to waive confidentiality after the fact, do we allow parties to enter into ex ante contracts waiving confidentiality? If we permit written, express contracts waiving confidentiality, do we also imply contracts to waive confidentiality in appropriate circumstances?

a. Should We Allow the Parties to a Conversation to Contract in Advance that the Interpreter May Disclose the Contents of the Conversation?

Example #2: Buyer and Seller plan a mediated negotiation to resolve a dispute over the sale of widgets, as an alternative to trial. Both parties agree in advance that if a disagreement arises as to the terms of the negotiated agreement, the interpreter may testify to the contents of the negotiation at future mediations or at trial.

In the case in example #2, the parties know in advance that their dispute may go to trial, and that there may be serious evidentiary problems if the interpreter is not permitted to testify. They may want to agree before the fact to permit a disinterested neutral to testify to the contents of their negotiated transaction.

In this case, the parties have all the protection afforded by an agreement in writing. But some of the protections of the ex post contract are lost. Suppose that after the conversation, Buyer decides that it is to her disadvantage to have the interpreter testify. Not only may it be factually difficult or impossible to revoke the waiver, the very fact of attempting a revocation may work to her detriment by implying to the judge that Buyer has something to hide. These concerns may make us less willing to permit ex ante agreements allowing the interpreter to disclose.

b. Should We Imply Agreements to Waive Confidentiality?

It is also possible to imply an agreement to waive confidentiality from the behavior of the parties, or by the contents of other contracts to which they are subject.

Example #3: Interpreter and both clients are full-time employees of a government agency. All are subject to a standard agency employment contract that requires all employees to cooperate in any investigation of alleged employee misconduct. Both clients are aware that the interpreter is subject to the disclosure requirement.

In the case in example #3, one can argue that the clients waived confidentiality in advance, at least regarding investigations of employee misconduct, by the fact of using an interpreter they knew was subject to a disclosure requirement. If they wanted to ensure confidentiality, they should have hired an outside interpreter, who would not be subject to the disclosure requirement. On this view, disclosure should be allowed..

On the other hand, we need to be aware that most interpreting service is in fact provided by agencies, and that our clients rarely have absolute discretion to select their own interpreters. Taken to an extreme, this view would permit an interpreting agency to abrogate all confidentiality simply by placing a disclosure clause in its employment contracts.

Example #4: Agency, which provides 85% of the interpreting service in the community, has a clause in its employment contracts requiring interpreters to disclose to any agency official, or authorized investigating agent, the contents of any interpreted conversation.

Of course, it is difficult to imagine either that an agency would attempt to insert such a clause into its general employment contracts, or that interpreters would agree to this as a general condition of employment. But the concerns raised by this city-wide specter are the same in the small agency context, when a single interpreter is under a disclosure requirement with regard to a specified set of clients.

To the extent that discrete agencies have legitimate needs for interpreter disclosure, these needs can be better met by content-specific disclosure rules, rather than an implied waiver of all confidentiality. It is legitimate to require an interpreter to disclose the contents of communications made in furtherance of crime or fraud, or where there is a serious threat of bodily injury to a third party if the interpreter does not disclose. It is legitimate to require an interpreter to disclose suspected ongoing child abuse to the appropriate authorities. It is not legitimate to permit a hiring agency contractually to abrogate all confidentiality for interpreted transactions merely by inserting a disclosure clause in the interpreter's employment contract. ◻

Frishberg Cont'd ...(from page 6)

Implications of Legal Interpreting

At first glance, an interpreting assignment may seem self-contained, that is, it may seem to have no future legal implications. However, interpreters must be aware of certain characteristics of an assignment which could lead to an arrest, a police investigation, or a court hearing. Here us an example. An interpreter between the Department of Social Services (DSS) and a deaf mother who is alleging child abuse by the child's father. During the meeting between the DSS worker and the mother, the interpreter hears no specialized legal vocabulary and no attorneys are present. How could the matter have legal ramifications? In some states, if the mother's allegations are substantiated by the DSS, a district attorney, or (prosecuting) investigator is brought in to investigate filing criminal charges against the father, especially if the allegations involve sexual abuse. The mother may be advised to seek a restraining order from the court, barring the father from further contact with the mother and child. Once the case is activated in court, the DSS file and statements made by the mother through an interpreter would be available to the father's defense attorney. The qualifications of the interpreter and the fidelity of the interpretation could come under the attorney's, and perhaps eventually, the court's, scrutiny. Here is another example. An interpreter is contacted by the staff at an hospital emergency room during the night and asked to interpret for a deaf woman in the emergency room. Upon arrival, the interpreter discovers the deaf woman has been raped and several tests will be administered. The doctor informs the interpreter that the police have been contacted and they will take a statement from the victim. A statement is a formal narrative of facts (H. Black, 1983). It may be spoken or signed and then is translated into written form. When a victim gives a statement to the police, it becomes part of the police record. If there are errors in the interpretation of the statement, when the case comes to court, discrepancies between live testimony and the police report could call into question not only the victim's testimony but the interpreter's qualifications as well. It could mean the difference between a conviction or an acquittal for the defendant. Interpreters must always use discretion when accepting assignments, but they must be especially mindful of the potential ramifications of interpreting in legal or quasi-legal matters. For interpreters, the impact on one's professional credibility cannot be overstated.

Privileged Communications

Privileged communications are statements made by persons protected by state law from "forced disclosure on the witness stand" (H. Black,1983). Certain professionals, such as attorneys, clergy, and doctors (depending on the state) are protected by privilege (also called "cloak of confidentiality"). Interpreters, when in the presence of those protected by privilege, are also exempt from forced disclosure, unless all of those who hold the privilege request the interpreter to testify as to what was said during privileged communications. In this situation, the interpreter has no legal ground for refusing to testify. The RID Code of Ethics can and should be used as a basis for asking to be excused from testifying; however, the code holds no legal status and could be struck down. In situations not covered by privilege (such as police interrogations), the interpreter may want to request that the interpretation be videotaped. The videotape then becomes the record of the interpretation. If later asked to testify, the interpreter could refer the requesting party (usually counsel) to the videotape. This strategy may save the interpreter from testifying. □

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remain in a completely impartial position. If counsel compels me to testify, I would be constrained to violate the code of professional responsibility under which I function and would have to ask to be removed from further involvement in this matter. Additionally, Your Honor, if I am required to testify, this provides defense counsel and the jury with the advantage of hearing testimony twice, an advantage they would not have were the witness not D/deaf.

The rules of privilege vary from state to state. Some states (such as New Jersey) include relationships other than the traditional. Never assume a privilege exists in one state just because it did in another, except for the attorney/client privilege which is covered in virtually all states. However, if a person unnecessary for the transmittal of information between client and attorney is present, the privilege may be nullified. KNOW WHEN THE PRIVILEGE DOES NOT APPLY.

If you've spoken with a D/deaf defendant in a setting in which no attorney was present, you were not covered by privilege at that time and could be compelled to testify at a later date. Sometimes this cannot be avoided (e.g., if you interpreted for a D/deaf victim who reported an assault at the police station). Regardless of the fact that you considered yourself to be an impartial party and regardless of the mandates of the RID Code of Ethics, you are vulnerable to being called to testify when such circumstances prevail.

Never lose sight of the fact that as a currently certified interpreter you are functioning under a code of ethics designed and promulgated by a professional organization. You could and should use the RID (or other) Code as a defense against testifying, but you must recognize its limitations in protecting you. It is not legally binding in a court of law and cannot keep you from testifying (unless noted in the statute or rules of evidence or by some legal authority, such as a State Supreme Court).

If you find yourself compelled to testify regarding interpretation services you've provided in the past, there are numerous arguments you can use in hopes of the request being withdrawn. □

When Might It Be Appropriate for an Interpreter to Testify?

Alice Baker, CSC, CLIP, University of Virginia Law School

Interpreters subpoenaed to testify about interpreting situations are presented conflicting demands from two authorities: the Code of Ethics demands strict confidentiality; the law requires testimony, on pain of contempt. This is one area in which I believe both the Code of Ethics and statutory law are in need of modification. Because of space constraints, I will address only the first issue.

When might it be appropriate for an interpreter to testify?

Situation 1:

A Deaf woman buys a new car, offering her old car as a trade-in. She and the salesman orally agree on a trade-in price of $450. "Hearsay!" cries the salesman. "She never heard me say that." If an interpreter is not allowed to testify, the Deaf client faces an insuperable hearsay barrier to introducing evidence of what the other party to the conversation actually said. (In an actual case on which this example is based, the language was Italian, and the interpreter had no ethical conflict.)

Note that the hearsay problem above gives doctors de facto immunity against medical malpractice for giving patients the wrong oral instructions about use of medication and for failure to disclose the dangers or side effects of recommended treatments.

Situation 2:

An interpreter realizes in the middle of a transaction that he is interpreting a drug deal.

To analyze this case, I think of the purpose behind the Code of Ethics, which is that people have a right to their conversations. Because people have a right to their conversations, we don't usurp that right by telling other people about conversations not our own. Because people have a right to their conversations, we don't edit or inject opinions. I firmly believe that Deaf and hearing people have the same right to talk to each other that Deaf-Deaf and hearing-hearing interlocutors do.

Deaf people do not, however, have the same right to deal drugs that hearing people do. A Deaf (or hearing) client does not have the right to make me an unwitting co-conspirator in an activity of which I do not approve. A client does not have the right knowingly to risk jail time for me. These activities are an abuse of rights, and the Code of Ethics should not be used to support them.

Situation 3:

Lawyers, who are governed by a strict and legally recognized requirement of confidentiality, are not bound by confidentiality when defending themselves against malpractice lawsuits, and in certain other legal transactions that arise from their representation (suing deadbeat clients, for instance.)

Confidentiality should be waived when the former client makes the interpreter's performance itself the subject of a lawsuit, as in malpractice cases.

Recommended revisions to confidentiality requirements

For the record, I do not advocate having interpreters testify in most situations. Clearly, there are occasions when an interpreter's testimony gives one side an unfair advantage. I would like to see statutes passed protecting interpreters from having to testify.

However, I believe that our requirement of confidentiality should be relaxed in at least three situations:

(1) when the interpreter's testimony is needed to overcome a hearsay objection;

(2) when the interpreter's testimony is otherwise in danger of accomplice liability for a crime; and

(3) when the interpreter's own performance is the subject of the lawsuit.

As a final point, I can hardly believe that the original framers of the Code of Ethics intended to subject interpreters to criminal liability for adhering to its tenets. Perhaps as law-abiding citizens, we should amend the confidentiality provision to include an "unless disclosure is mandated by law or is necessary to avoid assisting a criminal or fraudulent act by a client," language I have borrowed in part from the Model Rules of Professional Conduct for lawyers.

Editor's Note:
Your comments are encouraged.

More on Testifying

by Daniel E. Levin, IC, TC

In the September-October, 1990 issue of Views there was an article by Gay Belliveau, CSC, titled "Testifying: Interpreters and Non-privileged Communication". The author explored various concerns about interpreters being called to testify, touched on some points about non-privileged situations, and suggested some arguments for persuading a lawyer to drop his/her demand that you testify. The suggestions were based on ethical and interpreting issues.

The purpose of this article is to provide some legally based (as opposed to interpreter based) arguments that may help you in persuading an attorney to drop his or her request for you to testify about specific statements made during the interpreting session.

Legally based arguments against interpreters' testifying

Most often, the attorney wants the interpreter to testify as to the contents of the interpreting session. While we automatically consider ourselves conduits of the conversations (in that questions are asked and answered by and between the deaf and hearing parties and not asked or answered by us), the attorney may consider us to be the one actually asking the questions and receiving the answers and that we then subsequently relay or repeat them. This, in the attorney's legal way of thinking, makes the hearing recipient of the interpretations a third party. Third party testimony of content is normally considered "hearsay". Hearsay evidence is defined as testimony based on what a witness has heard from another person rather than on direct personal knowledge. In this case, the other person is the interpreter. So the reasoning is: since the hearing person does not know sign language, he has no direct personal knowledge of what was said; i.e., hearsay.

However, the "hearsay rule" of evidence has several exceptions. To make hearsay evidence admissible, it must be shown that it falls into one of these exceptions. There have been cases where appeals courts have held that contents of an interpreting session, testified to by the hearing party (such as a police officer), were admissible as exceptions to the hearsay rule. Understanding this concept and being able to relate it, along with citing the cases involved, (or showing this article) may give the attorney a legal basis for not needing you to testify as to content.

In cases where the deaf person is either a plaintiff or defendant (called a "party opponent") incriminating statements ("Statements against interest") made by the deaf person or his/her agent are admissible as exceptions to the hearsay rule. The interpreter is considered to be an agent of the person he or she is interpreting for. Therefore, any interpreted statements "against interest", such as admissions or confessions, can be testified to by the hearing recipient of the interpretation (such as a police officer) and may not require the interpreter to testify. The following Missouri case is just one example where an appeals court rules this way; State v. Randolph, 698 S.W.2d 535 (Mo. App. 1985):

> "Police officer's testimony as to interpreter's translation of deaf mute murder defendant's confession and statement that he understood his Miranda rights was admissible as a statement against interest by a party opponent, where the translator was competent and had no motive to lie, and defendant had accepted his services as a 'language conduit.' "... ..."Agency is one of the theories relied on in holding that a witness may testify to an interpreter's translation of a party opponent's statements. The interpreter is considered to be the agent of the party opponent."

Other cases exist that support this agency theory: United States v. DaSilva, 725 F.2d828, 831-32[6-7] 2d Cir. 1983, State v. Letterman, 47 Or.App. 1145,616P.2d 505, United States v. Beltran, 761 F.2d 1 1st Cir. 1985, and Commonwealth v.Vose, 157 Mass. 393, 32N.E.355. This exception is also recognized in VI Whigmore on Evidence 1810 at 376 (1976 ed).

Another exception to the general hearsay rule is "circumstantial guarantees of trustworthiness". In Letterman (cited above) the court decided that:

> "Police officer's testimony concerning out-of-court statements of defendant, a deaf mute, as translated to him by an interpreter during interview after defantant's arrest were admissible in prosecution for burglary in light of fact that testimony had excellent circumstantial guarantees of trustworthiness as defendant had strong interest in accuracy of interpretation of his conversation, interpreter's qualifications were unassailable, interpreter was familiar with defendant and his level of communication, (interpreter) testified to accuracy of interpretation, and was subject to cross-examination on her methods, and defendant did not challenge accuracy of translation"...

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Yet another exception is "necessity". s is discussed in a New York preme Court case, People v. Perez, 38 N.Y.S. 2d (Sup. 1985):

"The necessity exception to the general rule is applicable where (1) such testimony is necessary for the evidence to be brought before the jury, and (2) the use of the interpreter was essential to the conversation, and (3) the interpreter testified as to the accuracy of the translation."

As you can see, there is case law hat supports interpreters thinking hat they should not have to be put n the position of testifying as to the ontents of their interpreting assignments, particularly when they involve deaf defendants. Keep in mind, however, that even if your jurisdiction accepts these arguments and allows the officer to testify as to content, the interpreter still must be prepared to testify as to their qualifications, understanding, accuracy of their translations, and even the Code of Ethics as was discussed in State v. Spivey, 710 S.W. 2d 295 (Mo. App. 1986):

> Police officer's testimony concerning statements of defendant, a prelingually deaf person, to police through medium of sign language interpreter was admissible in murder prosecution in which the interpreter testified that he was required to be neutral and was bound by the code of ethics to communicate only what comes from the sender and in which defendant did not attack accuracy of interpreter's interpretation nor his qualifications to do so.

Although testifying, or even just the thought of it, can be frightening, interpreters as professionals must anticipate and be prepared for the possibility of testifying in court as part of their professional responsibilities, just as other experts and professionals in the justice system do. With experience, confidence, and good preparation, testifying appropriately should become just another aspect of your professional duties.

Daniel E. Levin, IC,TC is a freelance interpreter and Chicago Police Officer.

Testifying: Interpreters and Nonprivileged Communication

by Gay A. Bellilveau, CSC/Prov. SC:L

I was in the lobby of the Superior Court, musing. I hadn't yet met the fellow for whom I'd be interpreting, the only eyewitness to an exceedingly gruesome event, and I was a bit apprehensive. I would need some time with him and the prosecutor prior to going before the court.

The prosecutor, the witness, and I met in a small, dingy room—about the size of a jail cell, I thought—so the two of them could go over the line of questioning the prosecutor intended to pursue. After about 30 minutes we emerged, ready to face the jury. And, as it turned out, the defense attorney. She got right to the point: she wanted me to know that she was reserving the right to call me to testify as to what was said between the prosecutor and the witness. Impossible, I thought; as an official court interpreter, I'm covered by privilege.

This was the problem: the gentleman for whom I was interpreting was the State's witness, not the defendant. Therefore, the prosecutor was not his attorney. Consequently, no relationship of privilege existed between the prosecutor and the witness and, therefore, no privilege existed for me. Hearing this, I took a deep breath and attempted to convince the attorney to reconsider. She listened carefully and then reiterated her intent to call me. I paused, searched my mind for additional arguments, and finally told her I intended to make a statement for the record as to the inaptness of her calling me to testify. She smiled and headed to court.

Ultimately, I made the statement I said I would and the defense attorney didn't call me to testify. But once again I had learned a good lesson: *know the legislation under which you're functioning—then know a helluva lot more.*

The RID Code of Ethics precludes interpreters from sharing information gained during an interpreting assignment. Still, there may be times when you are compelled to testify. If you find yourself so compelled, here are a few things to keep in mind and some suggestions for dialoguing with the attorney who has subpoenaed you.

1. You are covered by privilege when interpreting between a deaf person and his/her attorney. Such communication is privileged because any communication between a litigant and his/her attorney is generally privileged. The fact that you were a party to such communication means that no one except the deaf person can compel you to testify.
2. Know what is considered privileged communication in your state. Normally, lawyer/client, psychiatrist/patient, priest/penitent, and husband/wife relationships are privileged (or covered by the "cloak of confidentiality," as it is commonly called). These people cannot be compelled to testify against one another under most circumstances.
3. As noted, you are not covered by privilege when interpreting between a prosecutor and the State's witness. The prosecutor is not the witness' attorney and is providing no defense for the witness. That means if defense counsel wishes, s/he can call you to testify regarding what transpired between the prosecutor and the witness. Since it is imperative that you meet with the witness and the prosecutor prior to interpreting, this is potentially a Catch-22 situation. If, as in this example, you are compelled by the defense to testify, consider making a statement for the record as to why it is not appropriate for you to testify. Here is a sample statement:
   - *Your Honor, the interpreter requests permission to make a statement for the record. (Permission granted.)*
   - *I understand, Your Honor, that defense counsel may call me to testify as to what was said between the prosecutor and the State's witness. With all due respect to counsel, Your Honor, it is not appropriate to call me to testify. Here's why. I am here, Your Honor, as an official court interpreter. That necessitates that I remain in a completely impartial position. If counsel compels me to testify, I would be constrained to violate the code of professional responsibility under which I function and would have to ask to be removed from further involvement in this matter.*

   It would then be in the court's discretion as to whether or not you would testify.
4. Rules of Evidence, which often outline when privilege exists, vary from state to state. Some states recognize relationships other than the traditional—for example, victim assistance counselor and victim may constitute a relationship of privilege. Never assume privilege exists, except for the attorney/client privilege which is covered in virtually all states. Note, however, that if a person unnecessary for the transmittal of information between a litigant and his/her attorney is present, the privilege may be nullified. **Know when the privilege does *not* apply.**
5. If you've spoken with a deaf defendant in a setting in which no attorney was present, you were not covered by privilege at that time and could be compelled to testify at a later date. Sometimes this cannot be avoided. For example, if you interpret for a deaf suspect who is being questioned by the police, and counsel is not present, you are not covered by privilege. Likewise, if you interpret for a deaf victim who is making a complaint to the police, you are not covered.
6. Keep in mind that you function under a code of ethics designed

and promulgated by a professional organization. You could and should use the RID Code as a defense against testifying, but you must recognize its limitations in protecting you. The RID Code is not legally binding in a court of law (unless so noted by statute or rules of evidence or by some legal authority, such as a state Supreme court).

If you find yourself compelled to testify regarding interpretation services you've provided in the past, here are some arguments you can use in hopes of the request being withdrawn:

First and foremost, remain calm. Do not argue, panic, or become defensive. Simply state your case, using your own words and style.

To begin, acknowledge that you were not covered by privilege during the interpreting assignment about which you've been subpoenaed to testify. However, you have several reasons for asking the (prosecutor, defense attorney) to withdraw his/her request and you would appreciate the opportunity to discuss them with her/him:

1. The incident took place 'x' (weeks, months, years) ago. Since that time you have interpreted on (several, numerous, dozens) of occasions, potentially making your recollection of the matter hazy.
2. An attorney requesting you to testify may, for example, be seeking information related to a person's communicative abilities or their emotional state at the time you interpreted. Unless you are a linguist or a mental health professional, you may argue that you are not qualified to testify as an expert witness on these matters. You would, however, be glad to refer the attorney to a colleague who could more appropriately respond. Naturally, your colleague would only be able to speak in general terms, but having another resource may be advantageous for both you and the attorney: you may be excused from testifying and the attorney may have a qualified expert witness to call. Simply avoiding the attorney's need for an expert witness may result in the attorney compelling you to testify.
3. Since the police were present during the taking of the (statement, complaint), there is nothing you could add that is not already reflected in the police report.
4. Revealing confidential information gained during an assignment could cause irreparable damage to your professional reputation within the deaf community by calling into question your ability to maintain confidences. That you have been compelled to testify may be meaningless to a community vulnerable to the integrity of an interpreter's word that s/he will not reveal information gained during an assignment.
5. By making this request, the attorney compels you to violate your professional code of conduct. As a certified interpreter and member of the National Registry of Interpreters for the Deaf, you are bound to follow the canons of this code, including the canon which prohibits the sharing of confidential information (RID Code, Section 1).
6. Indicate that you may be unwilling to prepare your testimony with the attorney prior to the proceeding in which you must testify. If you do not prepare with the attorney, s/he will not know what testimony to expect from you, and s/he may decide to withdraw the request.

Your own attorney may be able to provide you with additonal arguments, as may other experienced legal interpreters.

Ask the attorney to kindly think carefully about the request s/he is making in light of the various arguments you have presented. Then reiterate your desire that the request be withdrawn.

If deslte your best arguments, the attorney refuses to withdraw the subpoena, provide testimony, but don't give any more information than is requested. Keep in mind that if and when you testify you will do so under oath. Don't testify that you do not remember something which, in fact, you do. By doing so, you may perjure yourself.

Ask the deaf litigant's attorney to explain to the individual the predicament with which you're faced. Since you won't be signing while you testify, if possible, ask that another interpreter be brought in to interpret while you're on the stand.

If you are compelled to testify, don't take it personally. As Brad Block, Esq. (Milwaukee), so pointedly explained to a group of legal interpreters, the attorney's primary responsibility is to protect the best interest of the person for whom he or she is working. If by respecting your wishes, the attorney's ability to do his/her job effectively is compromised, responsibility toward the litigant will supercede your request. Block adds that since privilege actually belongs to the deaf person, an attorney cannot compel you to testify without the permission of the deaf individual. In that case, although testifying may be an uncomfortable experience, you will not be violating the wishes of the deaf person him or herself.

Finally, this: whenever possible, particularly in criminal matters, avoid speaking with the deaf person out of the presence of his/her attorney. If you interpret at the police station, ask to be videotaped. Then, if an attorney insists on providing the jury with information about what happened while you were interpreting, being on videotape *may* save you from having to testify in person. Remember, an ounce of prevention is worth a pound of cure.

For more information on interpreting in legal environments . . .

See *Interpreting: An Introduction* by Nancy Frishberg, which has been recently revised and includes an updated section on legal work settings. See "Products Available from *RID*" *on pages 24–25.*