

## Responding to Subpoenas

### I. Introduction

A number of issues face the interpreter who receives a subpoena to testify in court about a prior interpreted assignment. Foremost, there is the concern for confidentiality of interpreted assignments, and the knowledge that the interpreter who is asked to divulge assignment-related information is being commanded to breach this important ethical tenet. As well, most interpreters are not seasoned witnesses and the thought of testifying in any case is disconcerting. The following discussion should allay some of the concern and provide a roadmap for the interpreter who receives a subpoena.

### II. Why interpreters are subpoenaed

Interpreters who receive subpoenas to testify need to keep in mind a number of important legal principles in responding to the subpoena. First, attorneys have valid evidentiary reasons for calling the interpreter to testify about an assignment. It is important to understand the basis for these reasons. Attorneys are required call interpreters to testify as a preliminary foundational step in order to call the other participants in the conversation to the stand.

In order for any witness (except an expert witness) to testify at trial, the witness must have personal knowledge of the events about which they will testify. It would not be fair to the parties to let witnesses speculate about what might have happened or about what they were told had happened without actually having seen and witnessed the event itself. In an interpreted situation, neither the deaf nor the non-deaf party has personal knowledge of what the other person said except as repeated through the interpreter. Courts have generally solved this dilemma by having the interpreter testify about their skills, education, and qualifications. The interpreter must be able to testify that they interpreted the assignment accurately. Once that is done, the other witnesses can testify about what happened at the interpreted event. For example, suppose a deaf person goes to a financial planner for advice. The deaf person later sues the financial planner for giving bad advice. In order for each of them to testify at trial, the interpreter must first be called to lay the foundation for or 'authenticate' the interpretation. The

interpreter must state that they know how to interpret and they interpreted accurately between the financial planner and the deaf client. Once that is done, the court assumes that the deaf person and the financial planner actually accurately received each other's communication, then the deaf person can testify to their side of the story and the financial planner can testify to theirs. In that setting, the concern that the interpreter is conveying content-related information learned in confidence is reduced.

The personal knowledge rule is a staple of evidence law and many times attorneys will list every person present at a situation as a potential witness in order to protect themselves and make sure that all the evidence comes in at trial. Interpreters who are served with a subpoena should call the attorney and ask why they have been subpoenaed. If the interpreter's testimony is simply to authenticate, then the interpreter can prepare for the event knowing the scope of the examination will be his or her qualifications, experience, and skill.

### III. What to do when subpoenaed

It is natural for the interpreter to be concerned about confidentiality; as the ability to maintain client confidences is the bridge to the community we serve. Trust plays a vital part in the deaf community's willingness to permit a third party to be present in what can be an extremely private matter, and an interpreter should not flaunt that trust. At the same time, interpreters must be circumspect in recognizing the legal system's need for the interpreter to testify to a prior interpreted communication.

#### A. **Ensure the subpoena is valid**

The RID and the NAD are developing ethical guidelines that to protect an interpreter from a grievance based upon a breach of confidentiality as long as the interpreter is complying with a valid subpoena or other statutory reporting requirement, such as state abuse and neglect statutes. Interpreters who volunteer or seek out opportunities to testify are acting outside of the scope of their ethical role. Interpreters should only testify if and when summoned pursuant to valid court process.

Because this is an important requirement, the interpreter must first ensure that the subpoena is validly issued. Each jurisdiction has complicated rules regarding the process for delivering subpoenas (service). For example, in the District of Columbia, in a civil case,

a subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or the District of Columbia or an officer or agency thereof, fees and mileage need not be tendered. Superior Court Rules of Civil Procedure 45 (2001 Ed.).

There are usually other rules governing the requirements of a valid subpoena. Most jurisdictions will also provide a mechanism for the person subpoenaed to lodge an objection, called a motion to quash. The motion can usually be filed for a number of reasons, not only that the subpoena was invalidly served. If the process is not followed precisely, the interpreter can object that he or she was not served properly and does not have to comply. If there is any question about the validity of a subpoena, it is wise to discuss the requirements of the particular jurisdiction with a local litigation attorney. In any event, the interpreter should insist upon proper service in order to protect herself from later ethical challenge that she complied with an invalid subpoena.

#### **B. Preparing to testify**

Once satisfied that the subpoena is valid, there are several steps the interpreter can take to prepare to testify. First the interpreter should call the attorney to determine if the testimony is needed in order to authenticate, or if the attorney seeks the testimony for some other reason. Sometimes the attorney actually needs an expert witness instead of an authenticating witness. For example if the attorney wants the interpreter to testify that the deaf person either did or did not understand the event, this may be difficult for the interpreter to do. The interpreter may not feel comfortable in giving what is essentially an expert opinion on cognition and comprehensibility. It is appropriate to state that the interpreter is not qualified to give that kind of an opinion.

Sometimes, particularly in criminal cases, the attorney wants the interpreter to give an opinion on someone else's prior interpretation. Unless the interpreter is qualified to give a

linguistic opinion, this request is inappropriate. The interpreter should discuss what a linguistic opinion involves and suggest properly qualified linguists for the attorney to contact. Finally, sometimes the interpreter is subpoenaed because the court or the parties think that is the proper way to hire an interpreter and the order compels the interpreter to actually interpret the legal proceeding. In these cases, the interpreter should be prepared to educate the attorneys that the proper method to obtain interpreting services is through some kind of administrative contract. In any event, the interpreter must call the issuing party to determine the purpose for the subpoena in order to decide on the best course of action. If the interpreter is issued a valid subpoena though for an improper purpose, the interpreter should either contact a local attorney to discuss the matter, or comply with the subpoena and state the objections from the stand.

#### **C. Practical steps for preparation**

If the attorney does want the testimony in order to authenticate the interpretation, then the interpreter should review his or her calendar of the assignment and any notes that may have been taken during the assignment to refresh his or her recollection about the events. The subpoena may also require the interpreter to bring any such notes or records to court. If the subpoena does not require production of notes or records, it is best to leave them at home and rely upon memory when testifying, particularly if there are extraneous matters in the notes not solely related to the specific assignment.

Because the examination will focus on the interpreter's experience, education and skills, it is a good idea to print out and bring copies of a recent resume. Each party and the court should be provided with a copy. It may be helpful as well to bring copies of the interpreter's continuing education transcripts documenting recent education as well. The interpreter should review basic information about the RID or NAD testing system in order to explain your certification and the process by which it was obtained. It is also a good idea to review the mission statement of the RID and NAD in order to be able to explain, if asked, the purpose of the national organizations. Interpreters should know a working definition of the process of interpretation and transliteration and be prepared to explain it in a manner that a lay person can easily understand. In other words, avoid jargon ("feeding the interpreter" simply does not make sense to non-interpreters),

acronyms and other in-group terminology. Finally, the interpreter can and should obtain copies of any other relevant literature, practice papers, or brochures from the RID that may have relevance in the particular matter.

If the attorney calling the interpreter represents the deaf person, the interpreter may want to prepare a short stipulation for the deaf person to sign indicating that he or she agrees to the fact that the interpreter is going to present testimony. The document is not legally binding. In other words, if the deaf person refused to sign, the interpreter would still be required to testify. However, for peace of mind, a signed statement from the deaf person indicating that they consented to the interpreter as a witness is a useful tool to have in the file should there be later complications. If the deaf person is adverse to the party issuing the subpoena, it may be more difficult to obtain consent. In fact, it may cause more trouble than it is worth by implying that the interpreter should not be testifying at all. In any event, the interpreter should use his or her professional discretion in exercising this option.

It should go without saying that the interpreter should dress professionally in a suit and should arrive prior to the time on the subpoena. Generally witnesses are required to remain outside of the courtroom after the case is called and before they take the stand. Once called, the interpreter will take an oath to testify truthfully. It is important to remain calm. When a question is asked, take a moment to consider what the question is asking, and answer only that question. Do not rush, think about the question. Think about the answer, then state it clearly and audibly. What may seem like a very long time to a nervous witness is most likely a fleeting moment to everyone else. Do not volunteer information, if the examiner wants elaboration on a response, they will ask for it. Though it can be a nerve-racking experience to testify, it is also, without question, a learning experience. Treat it that way. Courts have such little experience with sign language interpreters that generally they will be learning about the profession and the field through the interpreter's testimony. It will be an opportunity to create a positive learning experience with interpreters for the court. Keep in mind, that the testimony may well be setting precedence for their expectations of all sign language interpreters. That is an obligation to take seriously.

#### IV. Conclusion

Once the interpreter understands the reasons why a subpoena could be issued, anxiety will be lessened and it becomes an easier task to prepare appropriately. Understanding that the bond with the deaf community requires interpreters to guard confidentiality assiduously, the interpreter can set about to determine the purpose for the subpoena. If the subpoena is valid, there are several ways for the interpreter to prepare for the testimony. Being prepared to testify means the interpreter will have reviewed the assignment, his or her credentials, and the professional aspects of the sign language interpreting field which may be subject to examination. Though it is natural, at first, to be concerned about receiving a subpoena to testify, as a practitioner, the interpreter should prepare for the eventuality and face it professionally as a part of the practice of interpreting.

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