To Testify or Not To Testify: That is the Question

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The interpreter had just arrived home from a long day of interpreting when a knock was heard at the door. A man with an envelope asked, "Are you Beverly Sutphin?" "Why, yes...yes I am." "These are for you" the man says while handing her an official-looking envelope.

You have now been personally served with a subpoena to appear in court to testify regarding your interpreting of a prior non-privileged assignment. You are hit with numerous emotions including panic, fear, anger and astonishment. What on earth do you do now? You are not a legal interpreter. You have never stepped inside a courtroom to interpret in your life. So, the first question is "why me?" The second question is "where is the phone number for the RID?"

The question of interpreters being compelled to testify is very close to my heart and practice. In part, because I have been personally subpoenaed to testify with respect to prior interpreting, and in part, because I have personally subpoenaed interpreters to testify in cases in which I was representing deaf clients. The question of why a subpoena causes so much consternation, fear, paranoia and stress to interpreters is the subject of this article.

Fear of Grievance Procedures

Many interpreters fear that deaf consumers will file grievance procedures against them for breaching the confidentiality provisions of the RID Code of Ethics if they comply with a subpoena. The RID has stated its position in the December 1999, issue of *VIEWS*. In it, Clay Nettles presents his views "as administrator of the Ethical Practices System" regarding the number of RID grievances believed to have been filed against interpreters who were compelled to testify in court regarding prior interpreting work.

Mr. Nettles found no instance in which punitive action was taken against an interpreter, such as revocation of certification, as a result of being compelled to testify in court. This is as it should be. As Mr. Nettles notes, "No one can speak for the members of the Ethical Practices Committee. 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."

Apparently, RID's view is that if the interpreter actively protests the issuance of the subpoena, this should be viewed by the members of the EPS as a factor in favor of foregoing punitive action if a complaint were filed. I would take the analysis one step further and suggest that an interpreter ought to be privileged from defending a grievance based upon complying with a valid subpoena. In other words, immunity from defending a grievance ought to be conferred on interpreters who are compelled by court order to testify regarding prior interpreting services. Placed between the proverbial rock and a hard spot, interpreters should not be forced to choose between jail and their professional credential.

It is the suggestion that interpreters should actively avoid testifying in court that concerns me. The advice given to interpreters that they "should let the authorities know that testifying could possibly jeopardize their livelihood . . . and that their memory may indeed be muddled or faulty as a result of not being a principal in a given situation" strikes me as bordering on suggesting that the interpreter fabricate testimony. I do not believe that this is a defensible position for the national association of interpreters to take. Rather, I would suggest that an interpreter should be candid in discussing testifying with an attorney who has issued a subpoena. I do not mean that interpreters should volunteer to testify in any case; however, if validly subpoenaed, the interpreter should not fudge or attempt to present their recollection as anything other than what it is or is not. The resultant dangers of perjury should the interpreter actually lie on the stand, or obstruction of justice should the interpreter's actions impede an investigation are simply too great of a risk to take.

On the contrary, if interpreters and consumers understood the reasons why they are called to testify, it would make the entire situation much more palatable. Additionally, the national organization should focus its efforts on educating the consumers with whom we work about the intricacies of being compelled to testify and the harsh results of refusing.

When Interpreters May Be Called to Testify

An interpreter can be called to testify regarding any non-privileged interpreting assignment, any self-generated conversation with a deaf or hearing person, or any privileged assignment in which the privilege has been validly waived by the holder. In the context of an attorney-client relationship, a privileged communication is defined as communications made by a client to an attorney for the purpose of obtaining legal representation which is protected from compelled disclosure unless the privilege is waived by the holder. Other privileges exist that vary by state to protect certain other relationships in which open honest communication without fear of sanction are valued. Only one state, to my knowledge to date, has instituted a general privilege for interpreters that protects them from compelled disclo-

sure of any assignment-related information.

Most interpreting assignments and all casual conversation before, during and after an assignment fall into the category of non-privileged communications for which the interpreter, regardless of the RID Code of Ethics, can be compelled to testify. Hence, even if the interpreter vows never to step into court as a legal interpreter, the danger of being called to testify remains. Many interpreters erroneously believe that the way to avoid being called to testify is not to interpret in court; however, it is the non-attorney-client assignments, the conversations outside of the role of interpreting with deaf consumers, and, the regular grist of the interpreting mill that frequently provides the basis for being compelled to testify in court. In fact, if the interpreter were working in the setting in which a valid attorney-client privilege existed, the interpreter could not be called to testify to the contents of the communication, absent a waiver by the deaf consumer.

Why Interpreters Are Called to Testify

To understand why interpreters are called to testify, one must understand a bit about the rules of evidence in court. Testimonial evidence must be reliable. Testifying from personal experience and knowledge gives evidence a more trustworthy and reliable character. Additionally, the opposing attorney has the opportunity to challenge the basis for the eye witness' recollection and perception. Once one begins to testify about an issue they know only second-hand because someone told them, the reliability of the testimony decreases. The original maker of the statement needs to be present in court instead of the repeater of the statement. If the original maker of the statement is in court, the opposing attorney has the opportunity to examine the person about the circumstances surrounding the making of the statement. This is one rationale for not admitting hearsay evidence in court unless it meets other independent guarantees of reliability.

Suppose the statement is "I saw John run the red light." If you only have the repeater in the courtroom, the testimony is "She told me she saw John run the red light." The right of cross-examination means, among other things, that the attorney should have the opportunity to challenge the eye witness' ability to remember the incident and test their ability to perceive the circumstances surrounding it. In this case, the attorney would want to question the witness about whether there was enough daylight to see clearly, whether she might be mistaken regarding the exact identity of the car or the driver, whether she was standing close enough to see, whether she wears glasses and if she was wearing them at the time she said that the car ran the red light. The opportunity to ask these questions is foreclosed if the maker of the statement is not in the courtroom, and if only the repeater is present. As a result, generally hearsay, repeating another's statement, is deemed too unreliable to be admitted into evidence.

What does this have to do with interpreting? Take the example of a deaf person who goes to the police station and gives a statement to an officer through an interpreter. At trial, the attorney cannot force the deaf person to take the stand and testify because of the Fifth Amendment's privilege against self-incrimination. The officer could take the stand, however, unless bilingual, because the officer has no personal knowledge of the deaf person's statement and would simply be repeating the interpreter's statements. The interpreter is the only person who has personal knowledge of the statements made by the deaf person and by the officer. Assuming the interpreter is competent and the interpretation was accurate, the officer should be able to repeat the interpreted statement.

Most case law analyzes the above situation according to the agency theory and usually holds that the interpreter is a "joint agent" of both the police officer and the deaf person because the interpreter is a necessary medium of communication. And if most police officers used RID certified interpreters to mediate their interrogations, the analysis might just end there. However, it is more often the situation in which the police officer uses a bilingual officer (or semi-bilingual officer) to interpret the interrogation. In this case, the accuracy of the interpretation and the skills of the officer are truly in question. In actuality, the accuracy of the deaf person's statement is at issue.

The attorney should have the opportunity to question the interpreter regarding the content and accuracy of the interpreted communication. The attorney should be able to fully explore the issue of bias, particularly when the interpreting is done by a representative of the state. The attorney should be able to inquire regarding the interpreter's skills, credentials, education and qualifications to interpret the statement. The attorney should be able to demonstrate for the court that the interpreter's work product is unreliable for a myriad of reasons. If the police hired a competent interpreter, the interpreter should not be penalized through professional ethics proceedings for providing this critical testimony. It is not the skilled RID certified interpreter who is generally the subject of controversy here. As has been pointed out, it is generally the non-professional interpreter who may have made serious and egregious errors in the interpretation who is the witness in the proceedings.

Why Attorneys Subpoena Interpreters

Attorneys are ethically obligated to present a zealous defense. The defendant has a constitutional right to have every available defense presented. If the attorney does not present every defense, the defendant can and will file post-conviction proceedings claiming ineffective assistance of counsel. Although some attorneys are unpleasant, the vast majority of attorneys who seek to subpoena interpreters are simply trying to present every possible defense to which the client is constitutionally entitled. This is particularly true if the interpreter was not a qualified, certified inter-

preter who may very well have misunderstood the deaf person's comments and misinterpreted vital communications. There is usually no other way to get the information because there is no other person who has personal knowledge of the circumstances. Consequently, interpreters supply a critical missing link in the process of ensuring a fundamentally fair trial. If a state passed a statute providing for a blanket privilege covering all interpreted situations, the legal system would be deprived of valuable truth-gathering testimony. Deaf people might be wrongfully convicted since the privilege would apply to the semi-skilled as well as the professional interpreter. The result is the same if interpreters, by design, feign the inability to remember the content of interpreted assignments. Finally, the power of a court order is an awesome thing to choose to disobey. It is inconceivable to me that the Deaf community would require a subpoenaed interpreter to choose between either losing their license through a grievance procedure or face a jail cell for contempt. The time to come to a consensus about these issues is now, not when that knock comes on your door, and you find yourself face to face with a process server. ■

VIEWS *October 2002*