

COURT ACCESS

for Individuals Who Are Deaf
and Hard of Hearing

A GUIDE



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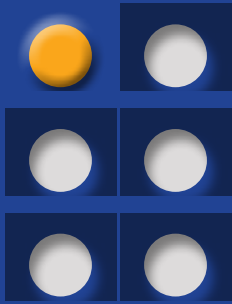
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TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | INTRODUCTION | 1 |
| II. | DEAF AND HARD OF HEARING INDIVIDUALS | 3 |
| | A. Identification..... | 3 |
| III. | THE LAW | 7 |
| | A. Effective Communication..... | 8 |
| IV. | AUXILIARY AIDS AND SERVICES | 11 |
| | A. The Law | 11 |
| | 1. Primary Consideration | 12 |
| | 2. Federal Courts | 13 |
| | B. Categories | 14 |
| | 1. Interpreters & Transliterators | 14 |
| | a. Types..... | 14 |
| | i. Sign Language Interpreters/Transliterators | 14 |
| | ii. Certified Deaf Interpreters | 15 |
| | iii. Tactile and Close-Vision Interpreters | 16 |
| | iv. Oral Transliterators..... | 17 |
| | v. Cued Speech Transliterators | 18 |
| | b. Modes of Interpretation..... | 18 |
| | c. Video Remote Interpreting | 19 |
| | d. Legal Requirements | 21 |
| | e. In Court | 22 |
| | 2. Communication Access Realtime Translation (CART) | 24 |
| | 3. Assistive Listening Systems..... | 25 |
| | a. Types..... | 26 |
| | i. FM Systems..... | 26 |
| | ii. Infrared Systems | 26 |
| | iii. Induction Loops | 27 |
| | 4. Telephone and Video Communications | 27 |

| | |
|---|----|
| V. INDIVIDUALS WHO ARE DEAF OR HARD OF HEARING IN COURT | 31 |
| A. The Law | 31 |
| B. Participants & Auxiliary Aids and Services..... | 32 |
| VI. BEST PRACTICES CHECKLISTS FOR ENSURING EFFECTIVE COMMUNICATION .. | 35 |
| A. State Court Administrative Office (SCAO) | 35 |
| B. Local Courts | 36 |
| C. Judges | 38 |
| 1. Before the Hearing | 38 |
| 2. At the Start of the Hearing..... | 38 |
| 3. During the Hearing | 39 |
| D. ADA/Section 504 Coordinators..... | 41 |
| E. Parties, Witness, Jurors Who Are Deaf or Hard of Hearing..... | 42 |
| F. Lawyers Representing Individuals Who Are Deaf or Hard of Hearing | 43 |
| G. Service Providers (Interpreters, CART captioner, etc.) | 44 |
| VII. APPENDICES | 47 |
| A. Appendix A | |
| Understanding the Needs of the Person Who Is Deaf or Hard of Hearing | 47 |
| B. Appendix B | |
| General Principles to Keep in Mind Regarding Persons Who Are Deaf or | |
| Hard of Hearing | 48 |
| C. Appendix C | |
| Sample Interpreter’s Oath..... | 49 |
| D. Appendix D | |
| Assessing Court Interpreter Qualifications: Sample Voir Dire | 50 |
| E. Appendix E | |
| Sample Judge’s Instruction: Interpreter’s Role | 52 |
| F. Appendix F | |
| Sample Judge’s Instruction to Witness: Interpreter’s Role | 53 |
| G. Appendix G | |
| Sample Judge’s Instruction to Jurors When Juror Is Deaf or Hard of Hearing: | |
| Interpreter’s Role | 54 |



I.

INTRODUCTION

Full and equal access to the courts is a fundamental right under the U.S. Constitution.¹ To effectuate that right, each participant in a court proceeding must be able to effectively communicate, that is to understand what is being communicated, to respond, and to be understood when responding. This includes criminal defendants, civil litigants, witnesses, jurors, prospective jurors, lawyers, judges, and spectators, among others. Yet individuals who are deaf or hard of hearing continue to encounter communication barriers that deny them an opportunity to participate fully in the judicial process.

This guide has been developed to serve as a resource for courts, court administrators and other personnel, judges, lawyers, and auxiliary aids and services providers to help ensure that individuals who are deaf or hard of hearing receive equal access to all that occurs in federal, state, and local courts across the country. The guide begins with a discussion of the terms deaf or hard of hearing individuals use to identify themselves. This is followed by an overview of the legal rights of deaf and hard of hearing court participants under the Americans with Disabilities Act (ADA), the Rehabilitation Act Section 504, and the Court Interpreters Act. An examination of the various types of auxiliary aids and services that enable deaf and hard of hearing court participants to communicate effectively follows. The guide concludes with recommended best practices for state court administrative offices, local courts, judges, ADA/Section 504 coordinators, deaf and hard of hearing court participants, lawyers, and service providers to ensure effective communication.

The American Bar Association (ABA) has policy that addresses accessibility of courthouses and court proceeding for persons with disabilities. In 1997, the ABA House of Delegates adopted a resolution recommending that “all courts be provided with qualified language interpreters, including sign language interpreters, in order that parties and witnesses with no or limited command of English and those who are deaf or hearing-impaired may fully and fairly participate in court proceedings.”² In 2002, the House adopted a resolution urging “all federal, state, territorial, and municipal courts to help ensure equal justice by making courthouses and court proceedings accessible to individuals with disabilities, including lawyers, judges, jurors, litigants, court employees, witnesses, and observers.”³

1 *Tennessee v. Lane*, 541 U.S. 509 (2004).

2 AMERICAN BAR ASSOCIATION, RESOLUTION 109 (Aug. 1997), http://www.americanbar.org/content/dam/aba/directories/policy/1997_am_109.authcheckdam.pdf.

3 American Bar Association, Resolution 112 (Feb. 2002), http://www.americanbar.org/content/dam/aba/directories/policy/2002_my_112.authcheckdam.pdf.



II.

DEAF AND HARD OF HEARING INDIVIDUALS

It is estimated that between 22 and 48 million Americans are deaf or hard of hearing.¹ Yet fewer than 20 percent of individuals with hearing loss seek professional help due to a variety of reasons, including denial or stigma. In fact, adults with mild to moderate hearing loss are least likely to seek treatment.

Individuals who are deaf or hard of hearing make up a very diverse community with varying levels of hearing, age of onset, cultural identities, and communication methods. Some are born deaf or hard of hearing, while others become deaf or hard of hearing later in life. Some communicate using American Sign Language (ASL), while others speak, speechread (also referred to as lip-read), use cued speech, and/or hear with hearing aids or cochlear implants. Others attempt to “get by” with what hearing they have.

IDENTIFICATION

Persons who are deaf or hard of hearing identify themselves by different terms that may reflect the degree to which they hear, the age of onset, or the community to which they belong. These terms include “deaf,” “hard of hearing,” “late-deafened,” “oral deaf,” or “deaf-blind.” For purposes of this guide, all such individuals will be collectively referred to as deaf or hard of hearing.

Deafness can be defined either audiological or culturally. Every person, regardless of his or her specific level of hearing, has multiple means of communication rather than one specific mode. For purposes of access to the courts, it is critical to identify the optimal means of communication to ensure that justice is served.

The term “deaf” (with the lowercase “d”) refers to the audiologic condition of not being able to hear. Onset can occur at birth or at any time in one’s life. The term typically signifies a person who has moderately severe to profound or total hearing loss. A deaf person may or may not use sign language such as ASL, and may speak, speechread, use cued speech, or use written/typed communication.

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”

¹ Jamie Berke, Hearing Loss – Demographics – Deafness Statistics, <http://deafness.about.com/cs/earbasics/a/demographics.htm> (June 18, 2014). See also Frank R. Lin, John K. Niparko & Luigi Ferrucci, *Hearing Loss Prevalence in the United States*, 171(20) JAMA ARCH. INTERN. MED. 1851-53 (Nov. 14, 2011) (estimating for 2001-08 that more than 48 million Americans over the age of twelve are deaf or hard of hearing).

By contrast, the term “Deaf” (with the uppercase “D”) refers to individuals who are part of the culturally Deaf community, and use sign language as the primary means of communication. That community has its own history, values, social beliefs, behavioral norms, and practices. Many Deaf individuals’ first or primary language is ASL, not English. ASL has its own vocabulary and grammar that differs from English.

“Hard of hearing” typically describes a person who has mild-to-moderate hearing loss. He or she may not have sought treatment for the hearing loss. The onset of this level of hearing loss can occur early or later in life.

A number of factors contribute to hearing loss in adults. These include age, genetics, exposure to noise, and chronic diseases such as diabetes, kidney, and heart disease. One of the first indications of hearing loss is an inability to hear and understand speech in noisy or acoustically poor environments. Hearing loss becomes more common as we age. Age-related hearing loss is generally a slow progressive process that affects both ears equally.

Because many individuals who are hard of hearing individuals grew up in the hearing world and are or were able to speak, they often depend on spoken and/or written language. They typically speak and may use speechreading to supplement their hearing. Many use hearing aids. Some use additional hearing assistive technology systems (HATS), such as hearing loops and FM and infrared systems, to help with understanding speech. Some learn and use ASL or signed English, a form of sign language based on English that uses English syntax. Others use cued speech—a visual communication system that uses handshapes in combination with mouth movements of speech—as a method to reduce variability with speechreading alone.

“Late-deafened” generally describes individuals who grew up with a standard level of hearing and acquired language and speech skills before becoming deaf in adolescence or beyond. Late-deafened may occur suddenly or gradually as a result of genetics, an accident, illness, medication, surgery, or other factors. These individuals usually understand written language and rely on visual representations of English to communicate. They may learn to sign, typically in signed English, and possibly in ASL as well. Many use speechreading, hearing aids or cochlear implants, HATS, written/typed communication, and other forms of communication.

“
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”

“Oral deaf” describes a deaf person whose preferred mode of communication is verbal and auditory. Many of these individuals are taught to speechread. Those who grew up in the United States typically use English as their first language. Oral deaf individuals may use hearing aids when possible and/or HATS.

“Deaf-Blind” individuals vary in the type, degree, and age of onset of vision and hearing loss they experience. There are between 70,000 and 100,000 deaf-blind individuals in the United States.² Their modes of communications depend on their level of vision and hearing. For instance, a deaf individual who has low vision may use ASL or signed English, but may need to see the signing at close range. A blind individual who is hard of hearing may rely more on hearing aids or cochlear implants to hear what is being said. Persons who are deaf and blind may use their hands to read braille or to “feel sign language” by resting their hands on the signing person’s hands and tracking their handshapes and movements (referred to as tactile signing).

² Letter from National Association of Regulatory Utility Commissions (NARUC) to the Honorable John D. Rockefeller, Chairman, Senate Committee on Commerce, Science and Transportation and to the Honorable Kay Bailey Huchison, Ranking Member, Senate Committee on Commerce, Science and Transportation (July 13, 2010).



III.

THE LAW

Title II of the Americans with Disabilities Act (ADA) provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹ A “public entity” includes “any . . . instrumentality of a State or States or local government.”² Because courts are components of either a state or local government, they are public entities, and therefore must ensure that their services, programs, and activities are accessible to people with disabilities.

Section 504 of the Rehabilitation Act (Section 504) prohibits any program or activity receiving federal financial assistance, or conducted by any Executive agency or the U.S. Postal Service, from excluding participation by, denying benefits to, or discriminating against a qualified individual with a disability solely because of a disability.³ A “program or activity” covers all the operations of “a department, agency, special purpose district, or other instrumentality of a State or of a local government.”⁴ The Act applies to state and local courts that receive federal financial assistance and requires those recipients to ensure communications access for persons with disabilities.

Both the ADA and Section 504 apply to any type of state or local court proceeding, including civil, criminal, traffic, small claims, domestic relations, probate, juvenile, family, and other specialized courts. The application of these federal laws extends to programs and services conducted or offered by court systems, including interactions with court personnel, educational activities, and marriage ceremonies performed by court personnel or magistrates acting in their capacity as government officials. Neither the ADA nor Section 504 apply to federal courts.⁵

Federal courts are governed by the Court Interpreters Act of 1978 and judicial poli-

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”

1 42 U.S.C. § 12132.

2 *Id.* § 12131(1)(B).

3 29 U.S.C. § 794(a).

4 *Id.* § 794(b)(1)(A).

5 42 U.S.C. § 12131(1)(B); 29 U.S.C. § 794(b)(1)(A).

cy. Under the Act, a certified interpreter (or otherwise qualified interpreter if no certified interpreter is available) must be appointed at court expense in judicial proceedings instituted by the United States if the presiding judicial officer determines that a hearing impairment inhibits a party's (includes a defendant in a criminal case) comprehension of the proceedings or communications with counsel or the presiding judicial officer, or a witness's comprehension of questions and presentation of testimony.⁶ A "presiding judicial officer" is any judge of a U.S. district court and includes bankruptcy judges, magistrate judges, and U.S. attorneys with respect to grand jury proceedings.⁷ If the presiding judicial officer determines that a party, witness, or other participant in a judicial proceeding has a hearing impairment, the Act permits the appointment, at court expense, of a certified or otherwise qualified sign language interpreter—whether or not the proceeding is instituted by the United States.⁸ As adopted in September 1995, the official federal policy of the Judicial Conference of the Administrative Office of the United States Courts requires all federal courts to "provide reasonable accommodations to persons with communications disabilities."⁹

Many states have laws, regulations, and court rules that specifically require the provision of services to enable access for qualified persons with disabilities who are participating in court activities. For example, the California Rules of Court state: "It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system."¹⁰ Florida's Rule of Judicial Administration 2.540 provides: "Qualified individuals with a disability will be provided, at the court's expense, with accommodations, reasonable modifications to rules, policies, or practices, or the provision of auxiliary aids and services, in order to participate in programs or activities provided by the courts of this state."¹¹ The court may deny a request only if it determines that the "requested accommodation would create an undue financial or administrative burden on the court or would fundamentally alter the nature of the service, program, or activity."¹²

EFFECTIVE COMMUNICATION

The U.S. Department of Justice (DOJ) has issued regulations to enforce Title II of the ADA.¹³ State and local governments must "take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others,"¹⁴ unless doing so would fundamentally alter the nature of the service, program, or activity or result in undue financial and administrative burdens.¹⁵ In other words, "whatever is written or spoken must be as clear and understandable to people with disabilities as it is for people who do not have disabilities."¹⁶ This

6 28 U.S.C. § 1827(d)(1)(A), (B) (2006).

7 *Id.* § 1827(i).

8 *Id.* § 1827(l).

9 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13-14 (Mar. 12, 1996).

10 CAL. RULES OF COURT, RULE 1.100(b) (2007).

11 FLA. R. JUD. ADMIN., RULE 2.540(a) (2010).

12 *Id.* at Rule 2.540(e)(3).

13 28 C.F.R. pt. 35.

14 28 C.F.R. § 35.160(a)(1) (2005).

15 *Id.* § 35.164.

16 DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, ADA BEST PRACTICES TOOL KIT FOR STATE AND LOCAL GOVERNMENTS UNDER TITLE II OF THE ADA, CH. 3, GENERAL EFFECTIVE COMMUNICATION REQUIREMENTS UNDER TITLE II OF THE ADA 1 (2007), available at www.ada.gov/pcatoolkit/chap3toolkit.htm.

requirement is referred to as “effective communication.” Its purpose is to ensure that individuals with disabilities can receive information from, and convey information to, the public entity. Courts must ensure that a person who is deaf or hard of hearing can both understand what is being said in the proceeding and make himself or herself understood. Providing summaries of what happened during or after the proceeding is not sufficient under the ADA.

Under Title II, deferral programs that are intended as an alternative to incarceration, as well as other court-ordered treatment programs, must provide effective communication. Accordingly, state and local courts should only refer individuals with disabilities to programs that provide effective communication and must ensure that they have the same access to all programs offered to non-disabled individuals.¹⁷

Many state laws, regulations, and court rules contain provisions requiring communications access in the courts for persons who have hearing impairments as well as those who cannot readily understand or communicate using the spoken English language.¹⁸ For example, in its statute on the appointment of interpreters for individuals who are deaf or hard of hearing individuals, the Colorado General Assembly declared:

Courts must ensure that a person who is deaf or hard of hearing can both understand what is being said in the proceeding and make himself or herself understood.

[I]t is the policy of this state to secure the rights of persons who are deaf or hard of hearing and cannot readily hear or understand or communicate in spoken language and who consequently cannot equally participate in or benefit from proceedings of the courts or any board, commission, agency, or licensing or law enforcement authority of the state unless qualified interpreters or auxiliary services are available to assist them.¹⁹

Alabama requires courts to appoint a qualified interpreter for a deaf or hard of hearing person who is a complainant, defendant, or witness to interpret the proceeding and his or her testimony or statements and to assist in preparation with counsel.²⁰ Many of the same underlying issues that apply to create accommodations for deaf and hard of hearing persons also apply to persons with Limited English Proficiency.²¹

¹⁷ 28 C.F.R. pt. 35, Section-by-Section Analysis, *Subpart E—Communications*.

¹⁸ See, e.g., Ky. REV. STAT. § 30A.410 (2015); Md. CODE, COURTS AND JUDICIAL PROCEEDINGS, § 9-114 (2012); Wis. STAT. ANN. § 885.38 (2007).

¹⁹ COLO. REV. STAT. ANN. § 13-90-201 (2009).

²⁰ ALA. CODE 1975 § 12-21-131(c) (2013).

²¹ See ABA Standards for Language Access in Courts (Feb. 2012), available at http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/language_access.html.



IV.

AUXILIARY AIDS AND SERVICES

Auxiliary aids and services for persons who are deaf or hard of hearing are effective methods of making aurally delivered information available to them, and include but are not limited to:

- Qualified interpreters (on-site or through video remote interpreting services)
- Notetakers
- Communication Access Realtime Translation (CART)
- Written materials
- Assistive listening devices
- Assistive listening systems
- Text telephones (TTY)
- Telecommunications relay services (TRS) or video relay services (VRS)¹

The type of aids and/or services that are necessary to ensure effective communication will vary based on “the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.”² For example, a participant who uses sign language and reads well may request CART, a service that converts speech to text in realtime, during most court hearings, but would require a sign language interpreter for any proceedings where the participant must communicate in court, such as when testifying. For persons who use sign language, qualified sign language interpreters trained in legal procedure and terminology are typically the most effective auxiliary aid or service. For other persons, an oral interpreter may be needed to facilitate speechreading. Amplified or modified sound equipment, a courtroom with appropriate acoustic properties, and/or assistive listening systems may be appropriate auxiliary aids for persons who rely on what hearing they have, aided or unaided by hearing aids or cochlear implants.

THE LAW

Auxiliary aids and services are devices or services that may assist in the provision of effective communication for individuals with disabilities.³ Under Section 504, recipients of federal financial assistance that employ 15 or more persons must “provide appropriate auxiliary aids and services to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons in a program or activity receiving Federal financial assistance.”⁴ Under Section 504, courts must provide qualified interpreters for persons with hearing or speaking impairments, including witnesses for their testimony, in both civil and criminal

¹ 28 C.F.R. § 35.104(1). See also 28 C.F.R. pt. 42, subpt. G, § 42.503(f) (Section 504).

² *Id.* § 35.160(b)(2).

³ 28 C.F.R. §§ 35.104, 35.160.

⁴ 28 C.F.R. pt. 42, subpt. G, § 42.503(f).

court proceedings and must pay for those services.⁵ Further, where courts appoint counsel for indigent defendants, they must assign qualified interpreters (certified, where possible by recognized certification bodies) to aid communication between the defendant and the attorney for all phases of the preparation and presentation of the case.⁶ Some states require interpreters to possess appropriate licensure of certification by recognized bodies.⁷ Even where not required, certified interpreters are recommended.

Similarly, pursuant to Title II of the ADA, state and local courts are required to furnish appropriate auxiliary aids and services “where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity,”⁸ unless courts can demonstrate that doing so “would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.”⁹ Courts that can so demonstrate “shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.”¹⁰

An “undue burden” means “significant difficulty or expense relative to the operation of a public entity’s program.”¹¹ Only the head of the public entity or his or her designee (no lower than a Department head)—after considering all resources available for use in the funding and operation of the service, program, or activity—can make the decision that the particular aid or service would result in a fundamental alteration or undue burdens.¹² That decision must be accompanied by a written statement of the reasons for reaching that conclusion.¹³ Information about the existence and location of accessible services, activities, and facilities must also be provided.¹⁴ “In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.”¹⁵ State and local courts may not charge individuals who are deaf or hard of hearing for the use of an auxiliary aid or service.¹⁶

Primary Consideration

A common barrier to communications access is a failure to provide the appropriate type of auxiliary aid or service needed by the particular person who is deaf or hard of hearing. These individuals are most familiar with their disability, and therefore in the best position to determine what type of auxiliary aid or service will be effective. The DOJ regulations require public entities to give “primary consideration” to the request of the individual with

⁵ 45 Fed. Reg. 37,630, 37,631 (June 3, 1980).

⁶ *Id.* at 37,630.

⁷ See, e.g., CAL. EVID. CODE § 754(f); 32 ME. REV. STAT. ANN. § 1524-B.

⁸ 28 C.F.R. § 35.160(b)(1).

⁹ *Id.* § 35.164.

¹⁰ *Id.*

¹¹ U.S. DEP’T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL COVERING STATE AND LOCAL GOVERNMENT PROGRAMS AND SERVICES II-4.3200, available at <http://www.ada.gov/taman2.html#II-4.3200>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* § 35.163(a).

¹⁵ *Id.* § 35.160(b)(2).

¹⁶ *Id.* § 35.130(f).

the disability when deciding what auxiliary aid or service is necessary to ensure effective communication.¹⁷ This means that the public entity must honor the person’s choice unless it can demonstrate that (1) another equally effective means of communication is available, or (2) use of the chosen means would result in a fundamental alteration in the service, program, or activity or an undue financial and administrative burden.¹⁸ If the person’s choice would result in a fundamental alteration or an undue burden, the public entity still must provide an alternative aid or service that provides effective communication if one is available.¹⁹

“Public entities are required to give “primary consideration” to the request of the individual with the disability when deciding what auxiliary aid or service is necessary to ensure effective communication.”

Giving “primary consideration” may include taking into account a request for specific interpreters with whom the deaf or hard of hearing participant is comfortable and able to communicate with effectively. Courts should be prepared to consider and contact such interpreters. This is particularly true for individuals who are deaf-blind or deaf with other disabilities, as they have unique communication needs.

The modality of delivering interpreter services is also a factor in the “primary consideration” and “equally effective communication” framework. With the increasing use of video remote interpreting (VRI) services, where the interpreter is in a remote location outside of the courtroom and viewable to the deaf litigant, witness, or juror by way of video screen, courts must consider the deaf individual’s ability to effectively communicate through this service and should not require its use where the individual has indicated its ineffectiveness. If a deaf person requests an in-person interpreter, the court should provide one unless it is an undue burden to do so. (*See infra* for discussion of VRI in the courtroom).

Federal Courts

With regard to federal courts, the Administrative Office of the United States Courts has prepared written guidelines—at the direction of and adopted by the Judicial Conference of the United States in March 1996—requiring each federal court “to provide, at judiciary expense, sign language interpreters or other appropriate auxiliary aids or services to participants in federal court proceedings who are deaf, hearing-impaired, or have other communications

¹⁷ *Id.*; U.S. DEP’T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL II-7.1100.

¹⁸ U.S. DEP’T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL II-7.1100.

¹⁹ U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION, EFFECTIVE COMMUNICATION 6 (Jan. 2014), available at <http://www.ada.gov/effective-comm.htm>.

disabilities.”²⁰ Court proceedings “include trials, hearings, ceremonies and other public programs or activities conducted by a court.”²¹

Federal courts must give primary consideration to a participant’s choice of auxiliary aid or service unless another equally effective means of communication is available, or the participant’s choice would result in a fundamental alteration in the nature of the court proceeding or an undue financial or administrative burden.²²

CATEGORIES

Interpreters & Transliterators

An interpreter conveys spoken or signed communications from one language to another. In the context of working with individuals who are deaf or hard of hearing, ASL interpreters render information between spoken English and ASL. Trilingual interpreters communicate using ASL, English and a third language, such as Spanish.

A transliterator facilitates communication between spoken language and other methods of communication, including signed English or cued speech or oral English. Transliterators differ from interpreters, who generally receive information in one language and interpret the information into a different language. Cued speech and oral English transliterators are further explained in the section below.

TYPES

There are different types of interpreters and transliterators to meet the varied needs of deaf and hard of hearing persons.

Sign Language Interpreters/Transliterators

Sign language is a visually interactive language that conveys meaning by simultaneously combining shape, orientation and movement of the hands, arms and/or body, and facial expressions. Because sign language interpreting involves using facial expressions and other body movements, judges should not restrict the use of facial grammar and body movements by interpreters or participants who are deaf or hard of hearing. A sign conveys not only a word, but also the equivalent of a tone both contextually and acoustically. There is no one universal sign language throughout the world. Accordingly, a person who is deaf or hard of hearing for whom English is not their native language will need to have an interpreter who is knowledgeable in the sign language he or she uses.

In the United States, most deaf and hard of hearing people who use sign language use either

²⁰ JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICIES AND PROCEDURES, vol. 1, ch. III, pt. H, at 37-39 (Guidelines for Providing Services to the Hearing-Impaired and Other Persons with Communications Disabilities), available at <http://nad.org/issues/justice/courts/communication-access-federal-courts>.

²¹ *Id.*


²² *Id.*

ASL or a signed variant that more closely tracks the English language. ASL is a visual-gestural language created by the Deaf community that is distinct from English in that it features its own vocabulary, grammar, idioms, and syntax. For example, the ASL version of “Tonight, I ate dinner” is Now+Evening +Dinner+Eat+Finish. Signed forms of English are made up of arbitrary signs and symbols that represent English words. These include Signed Exact English (SEE) and Pidgin Signed English (PSE). SEE involves a virtually verbatim translation of English words and phrases by signs, including signs for letters to fingerspell words for which there are no signs. PSE combines many signs from ASL with a sentence structure closer to English. Highly trained interpreters should be able to effectively provide interpreting services in ASL, SEE, or PSE. Interpreters vary in their skills and ability to match the signing style and level of understanding of each individual who is deaf or hard of hearing.

The Registry of Interpreters for the Deaf (RID) is the certifying entity for ASL interpreters and offers a number of certifications for interpreters and transliterators, including National Interpreter Certification (NIC) Advanced or Master, Oral Skills Certification, and Specialist Certificate: Legal (SC:L) for legal settings. Some states also use a performance-based interpreter exam to determine which interpreters are qualified to work in legal settings. Texas, for example, requires licensed court interpreters to take a written exam that measures candidates’ English comprehension and knowledge of court-related terms, as well as an oral exam that measures interpreting skills and is administered in three parts.²³

For all court proceedings, effort should be made to secure interpreters possessing SC:L, which demonstrates proficiency not only in generalist interpreting skills, but also in legal interpreting. If an interpreter possessing SC:L is not available, courts should secure interpreters who have professional certification or licensure (e.g., NIC Advanced or Master, Comprehensive Skills Certificate (CSC), Certification of Interpretation and Certification of Transliteration (CI/CT), National Association of the Deaf Certification: Level V); 80 hours of training for interpreting in legal settings; and experience interpreting in legal settings (particularly where such experience is supervised). RID operates a search function to enable courts to find qualified interpreters in the local area.²⁴

Some deaf and hard of hearing people have special needs that a conventional sign language interpreter cannot meet. The two dominant kinds of specialized sign language interpreters are Certified Deaf Interpreters and tactile and close-vision interpreters, which are explained below.



There are different types of interpreters and transliterators to meet the varied needs of deaf and hard of hearing persons.

²³ <http://www.txcourts.gov/jbcc/licensed-court-interpreters/exams.aspx>.

²⁴ <https://myaccount.rid.org/Public/Search/Interpreter.aspx>.

Certified Deaf Interpreters

Some individuals who are deaf or hard of hearing lack fluency in a standard ASL dialect, or have limited familiarity with ASL due to any number of reasons. They may use a foreign sign language, idiosyncratic non-standard signs or gestures recognized by only those who communicate with the individual regularly (“home signs”), or signs particular to a given region, ethnic or age group. Other factors may affect these individuals’ ability to communicate in ASL such as delayed language acquisition, minimal or limited communication skills, mental health conditions, substance abuse, learning disabilities, developmental disabilities, cognitive impairments, blindness or limited vision, or limited education.

These individuals may require both a conventional sign language interpreter and a Certified Deaf Interpreter (CDI), sometimes called “relay or intermediary interpreters.” CDIs are individuals who are deaf or hard of hearing and have been certified as interpreters by RID. They have excellent communication skills in both ASL and English, as well as extensive knowledge and understanding of being deaf, the Deaf community, and/or Deaf culture. CDIs may also have specialized training and/or experience in the use of gesture, mime, props, drawings, and other tools to enhance communication. They are recommended in situations involving deaf children and victims of crimes, including sexual assault, where there is a need for increased sensitivity.

CDIs work in partnership with a sign language interpreter, who can hear to facilitate communication. “Each interpreter receives the message in one communication mode (or language), processes it linguistically and culturally, then passes it on in the appropriate communication mode.”²⁵ The hearing sign language interpreter typically interprets from spoken English to ASL, and from there, the CDI interprets the ASL message linguistically and culturally in the language or communication mode most readily understood by the individual who is deaf or hard of hearing. That individual communicates information to the CDI, who relays that information in ASL to the hearing sign interpreter, who renders the message into spoken English. This team approach provides the individual who is deaf or hard of hearing with linguistic and cultural access that is as accurate as possible. CDIs who receive a speaker’s message visually relay it to the deaf-blind individual through touch or at close visual range.

When using CDIs in a court proceeding, each interpreter should be sworn in separately by the court because CDIs will require the use of a conventional sign language interpreter to convey the oath administered by the court.

Technically, providing CDI services through video remote interpreting (VRI) is not recommended due to the gestural nature of CDI work and the need for exceptionally clear visual communication. However, utilizing a CDI in the courtroom who teams up with a sign language interpreter who is available through VRI may be feasible, as long as the VRI system is functioning reliably and clearly enough to ensure effective communication between the interpreters.

²⁵ REGISTRY OF INTERPRETERS FOR THE DEAF, STANDARD PRACTICE PAPER: USE OF A CERTIFIED DEAF INTERPRETER 1 (1997), available at <https://drive.google.com/file/d/0B3DKvZMfFLdbXFLVfFsbmRzTVU/view>.

Tactile and Close-Vision Interpreters

Individuals who are deaf or hard of hearing and have little or no functional vision often communicate through a tactile form of sign language, in which information is conveyed through touch. For this mode of communication, the deaf-blind participant and the interpreter must be able to touch hands at all times. The deaf-blind individual's hand is placed lightly on the interpreter's hand to feel the signs or finger spelling. When able to do so (or with the assistance of another interpreter), the interpreter conveys information about the surroundings (e.g., how many people are in the room, where they are seated, what certain people are doing) along with the interpreted message. While tactile forms of ASL, PSE, SEE, and other sign languages tend not to differ substantially from the standard forms, the interpreter must have additional training to convey the information in tactile form.

Individuals who are deaf or hard of hearing with limited vision or a limited visual field may be able to see signs only at a close distance, and therefore require a "close-vision" interpreter. Like a tactile interpreter, a close-vision interpreter uses a standard sign language communication method, but adapts it to fit within the deaf or hard of hearing participant's field of vision. As part of the adaptation, a close-vision interpreter must sit a short distance from the deaf or hard of hearing participant. This distance varies widely based on the individual needs of the participant. Communication will not be effective if the interpreter is positioned incorrectly. VRI is not recommended for close-vision interpreting.

Tracking is another form of close-vision interpreting. It is similar to "tactile" interpreting, but is used with the deaf-blind participant cradling the wrist of the interpreter's dominant signing hand. Tracking allows the deaf-blind participant to focus more on the dominant signing hand. Both tracking and tactile signing require extensive training. Neither can be accomplished through VRI, the nature of which makes it impossible for the interpreter and participant to touch hands.

Oral Transliterators

Some individuals who are deaf or hard of hearing, including those who have been so since birth, do not know sign language and use spoken language as their primary mode of communication. They can understand verbal communications based on reading the movement of the speaker's lips, a technique called "speechreading" or "lip-reading," and may respond orally. These individuals may supplement speechreading with the use of what hearing they have, with or without hearing aids, cochlear implants, assistive listening systems, or other such devices. However, simply because an individual uses a hearing aid, cochlear implant, or other listening devices does not mean that he or she prefers oral communications.

Certain communication settings do not lend themselves to speechreading. For instance, in a courtroom it is impractical for a person who is deaf or hard of hearing person to speechread due to the many speakers involved, including the attorneys on both sides, witnesses, the judge, the bailiff, and the court clerk. These settings often require the use of an oral transliterator, also called an oral interpreter, who is positioned directly in front of the person who is deaf or hard of hearing and moves his or her lips "to silently replicate what speakers say in an

easy, speechreadable, clear and consistently-visible manner.”²⁶

Oral transliterators are also used when the speech of a person who is deaf or hard of hearing is difficult to understand or unintelligible to the average listener. Translitterators are specially trained to understand such speech and convey the content, intent, and emotion of the participant’s verbal communications to others. This requires strong speechreading skills.²⁷ Oral transliterators do not edit the content or meaning of the message.²⁸ They remain true to the individual’s intent, integrating facial expressions, body movements, and natural gestures that match the message’s intent and support its meaning.²⁹

RID offers an oral transliteration certificate, as well as a Specialist Certificate: Legal (SC:L) for legal settings. An oral transliterator is a trained professional. For court purposes, the oral transliterator must be qualified to perform such interpreting functions in a courtroom, which includes being familiar with legal terminology. Oral transliteration can be provided through the same equipment as VRI, provided that it is appropriately positioned and has clear video transmissions.

Cued Speech Translitterators

Cued speech is a visual mode of communication that uses eight hand shapes in different positions in close proximity to the face, combined with mouth movements of speech, to represent the phonemes (the smallest sound unit in a language that is capable of conveying a distinct meaning), of spoken English. Only five to 26 percent of what is spoken can be speechread. To assist in addressing this challenge, cued speech can be used to signal all sounds in conjunction with speechreading. Users of cued speech are able to both read lips and observe the handshape representing each phoneme.

The national certifying body for cued speech translitterators is the Testing, Evaluation & Certification Unit, Inc. (TECUnit).³⁰ It establishes and maintains national standards for the profession of cued language transliteration. Becoming a qualified cued speech translitterator requires years of experience, and must be combined with legal training to be qualified to transliterate in a legal setting. Fluency in sign language does not mean that a person is fluent in cued speech or vice versa. This is why specific certification is integral to determining the qualifications of an interpreter or /translitterator.

Cued speech transliteration can be provided through the same equipment as VRI, provided it is appropriately positioned and has clear video transmissions.

MODES OF INTERPRETATION

It is important to understand that there are different modes of interpretation, including consecutive interpretation, simultaneous interpretation, and sight translation. These modes

²⁶ REGISTRY OF INTERPRETERS FOR THE DEAF, STANDARD PRACTICE PAPER, ORAL TRANSLITERATION 1 (2007), available at <https://drive.google.com/file/d/0B3DKvZMfFLdRjdraloZSG1iSG8/view>.

²⁷ *Id.*

²⁸ *Id.* at 2.

²⁹ *Id.*

³⁰ <http://www.tecunit.org>.

vary according to the role of the deaf individual in a legal proceeding and the pace of the proceeding.

Consecutive interpretation is recommended when a deaf individual is actively engaged in communications during a legal proceeding. With this mode of interpretation, the interpreter renders an interpretation only after the individual finishes communicating. Interpreters often take notes to aid in recollection. However, when the individual's communication is too long for the interpreter to recall, the interpreter will signal the speaker to pause to permit a consecutive interpretation up to that point. Consecutive interpretation is the primary method used by Certified Deaf Interpreters (CDIs) in circumstances where a deaf party is participating in the legal proceeding as a witness or as part of a conversation.

There are different modes of interpretation, including consecutive interpretation, simultaneous interpretation, and sight translation.

Simultaneous interpretation is recommended for most situations where the deaf individual is observing what is occurring in the legal proceeding and not actively engaged as a witness or in a conversation. This interpretation mode involves interpreting continuously at the same time the individual is communicating. The individual does not pause or stop communicating for the interpreter. The majority of court interpreting is simultaneous. Everything communicated by the judge, counsel, jurors, and witnesses during the proceeding is interpreted simultaneously. When a deaf individual in a legal proceeding requires a CDI, simultaneous interpreting may only be appropriate for those portions where the deaf individual is not expected to participate as a witness.

Sight translation is recommended where a deaf individual is testifying or otherwise responding to questions and is expected to respond on a matter regarding a document but may not be fluent in the written language of the document. In such situations, translation of the document into ASL may be necessary. Sight translation is a hybrid form of interpreting and translating. The interpreter provides an oral translation of a document. The interpreter may not have advance notice of the document and need only be given a brief time to examine it.

VIDEO REMOTE INTERPRETING

Interpreter services can be delivered in person or remotely. As previously mentioned, the DOJ regulations implementing Title II include qualified interpreters through video remote interpreting (VRI) in its listing of auxiliary aids and services.³¹ With VRI, the interpreter or transliterator works from a location outside the courtroom while everyone else is in the courtroom. The interpreter hears the voices of the people speaking in the courtroom through

³¹ 28 C.F.R. § 35.104(1).

a microphone or a telephone and then renders the message into sign language via a video camera, which transmits the visual message to the deaf or hard of hearing participant on a video display. When the participant signs to the camera, the interpreter views it on a video screen at the location outside the courtroom and then speaks the aural interpretation into a microphone or telephone, which transmits the audible message to the courtroom.

Prior to the start of a proceeding, the judge will inform everyone that an interpreter will be at a remote location and will appear in court via video-conference. The judge should ask whether the parties and counsel consent to having the interpreter participate by VRI, and should allow an opportunity for the interpreter and deaf or hard of hearing person to communicate in order to ensure an appropriate match, meaning that they can understand each other, and therefore can communicate effectively.

VRI can be particularly useful in rural areas or in situations where there is an immediate need for interpreters.

Public entities that choose to use VRI must ensure that they provide: “[r]eal-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images”; sharply delineated images that are large enough to display the interpreter’s face, arms, hands and fingers and the participant’s face, arms, hands, and fingers, regardless of his or her body position; a clear, audible transmission of voices; and adequate training for staff using the equipment in court or elsewhere on how to quickly and efficiently set up and operate the VRI.³² The images cannot be choppy, blurry, or grainy. There can be no lags or irregular pauses in communication. Any deficits in the technology will adversely affect communications in the courtroom, in violation of federal laws.

VRI can be particularly useful in rural areas, where qualified onsite interpreters are not readily available, or in situations where there is an immediate need for interpreters, such as arraignments for defendants in custody or for temporary restraining orders. VRI can reduce expenses by eliminating travel and mileage costs.

However, VRI is not effective in all circumstances, such as for lengthy or complex proceedings or those that involve substantive rights, testimony, cross-examination, production of evidence, multiple or pro se deaf or hard of hearing participants, or children who are deaf or hard of hearing. Legal settings that require onsite interpreters include trials, contested hearings, guilty pleas, mental commitment evaluations and/or proceedings, depositions, preliminary and evidentiary hearings, and witness testimony.³³

³² *Id.* § 35.160(d)(1)-(4).

³³ Registry of Interpreters for the Deaf, Standard Practice Paper: Video Remote Interpreting 10 (2010), available at <https://drive.google.com>.

VRI is also not effective if the deaf or hard of hearing participant has vision loss that impedes his or her ability to see the screen. Further, some individuals who are deaf or hard of hearing may experience difficulty following ASL on a two-dimensional flat screen. ASL is a three-dimensional language. The space surrounding the signer is incorporated to describe places and persons not present. Some states such as California have created guidelines on the appropriate use of VRI in the courtroom.³⁴

LEGAL REQUIREMENTS

State and local courts cannot require persons who are deaf or hard of hearing to bring an interpreter with them, but rather must provide an impartial and qualified interpreter when necessary for effective communication.³⁵ Nor can courts require an individual who is accompanying the deaf or hard of hearing person in court to interpret or facilitate communication for that person, except in an emergency involving an imminent threat to an individual's or the public's safety or welfare where no interpreter is available, or where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees, and reliance on that adult is appropriate.³⁶

State and local courts must provide an impartial and qualified interpreter when necessary for effective communication.

The ADA and Section 504 require that individuals needing interpreting or transliterating services receive them from “qualified” interpreters. The U.S. Department of Justice (DOJ) defines a “qualified interpreter” as one who, via a VRI service or an on-site appearance, “is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.”³⁷ “Receptively” means understanding what the person with the disability is saying, while “expressively” means having the skill needed to convey the information back to the person.

Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued speech transliterators. A qualified interpreter must: be fully fluent in the communication method used by the participant; be understood by the participant; interpret impartially, expressing the speaker's voice, tone, and emotion; and render any specialized vocabulary accurately so that the meaning of the communication is clear and conceptually correct.

[com/file/d/0B3DKvZMfIFldTkk4QnM3T1JRR1U/view.](http://www.courts.ca.gov/documents/CIP-ASL-VRI-Guidelines.pdf)

34 RECOMMENDED GUIDELINES FOR VIDEO REMOTE INTERPRETING (VRI) FOR ASL-INTERPRETED EVENTS, ADMINISTRATIVE OFFICE OF THE COURTS: COURT INTERPRETERS PROGRAM, JUDICIAL COUNCIL OF CALIFORNIA, available at <http://www.courts.ca.gov/documents/CIP-ASL-VRI-Guidelines.pdf>.

35 28 C.F.R. § 35.160(c)(1).

36 *Id.* § 35.160(c)(2)(i)-(ii).

37 *Id.* § 35.104.

By contrast, family members typically lack the techniques, skills, training, and experience needed to effectively and accurately interpret a court proceeding, and are not familiar with court terminology and protocols. Even if otherwise skilled, family members have a personal relationship to the individual with a disability, are not neutral, and therefore would not be able to interpret impartially.³⁸ The same reasoning applies to friends.

The DOJ requires interpreters to be qualified, but not necessarily certified.³⁹ Any interpreter or transliterator in high risk situations, such as during medical appointments or emergencies, legal meetings and judicial appearances, should hold professional certification. The Registry of Interpreters for the Deaf (RID) is a national membership organization that promotes excellence in the delivery of interpreting services among diverse users of signed and spoken languages through professional development, networking, advocacy, and standards.⁴⁰ RID has state chapters of professionals who provide interpreting and transliterating services for people who are deaf or hard of hearing.⁴¹ As previously discussed, RID offers a variety of national certifications in interpreting and transliterating.⁴²

State laws and regulations may impose additional requirements in the form of mandatory licensure and/or specific court interpreter standards. For instance, California defines a “qualified interpreter” in court settings as one who “has been certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired.”⁴³ Some states defer issues of interpreter qualifications to a state agency or entity for the deaf and hard of hearing. For example, in Colorado the Commission for the Deaf determines qualifications.⁴⁴

IN COURT

For court proceedings, interpreters and transliterators should be fluent in and conversant with the requisite legal terminology to ensure effective communication. Accordingly, courts should first seek out interpreters who hold the RID Specialist Certificate: Legal (SC:L) certification, as this is strongly recommended to ensure the interpreter is qualified to interpret in legal proceedings. Persons who hold SC:L have demonstrated specialized knowledge of legal settings and greater familiarity with language used in the legal system. Some states, such as California,⁴⁵ set forth specific qualifications for interpreters in legal settings.

In most court hearings or proceedings, the services of several qualified interpreters are necessary to ensure effective communication. Interpreting requires a high level of concentration and complex mental processing. As a general rule, for any hearing or proceeding exceeding one hour at least two interpreters need to work as a team, switching places at regular intervals (20-30 minutes) to reduce fatigue and monitoring the other interpreter’s work for

38 U.S. DEP’T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL II-7.1200.

39 *Id.*

40 <http://www.rid.org>.

41 <http://rid.org/membership/affiliate-chapters/>.

42 For a full list of the national certifications available for interpreters and transliterators, visit <http://rid.org/rid-certification-overview/>.

43 CAL. EVID. CODE § 754(f).

44 COLO. REV. STAT. § 13-90-202(8).

45 CAL. GOV. CODE § 68566.

accuracy. Doing so helps ensure the accuracy of the interpretation and reduces the potential for errors in the interpretation.

Several interpreters may also be necessary if there are multiple deaf or hard of hearing persons in the courtroom. Each interpreter may take on a specific role. The role of the interpreter and who he or she is interpreting for must be clear, consistent, and maintained throughout the proceeding. Other factors that affect the number of interpreters in court include the role of the deaf or hard of hearing person in court, as well as his or her mode of communicating and interpreting needs.

The first tenet of the National Association of the Deaf-RID Code of Professional Conduct is: “Interpreters adhere to the standards of confidential communication.”⁴⁶ They hold a position of trust in their role as linguistic and cultural facilitators of communication. Information related to an assignment can be shared only on a confidential and “as-needed” basis.⁴⁷ Interpreters must maintain data, invoices, records, and other information associated with a party who is deaf or hard of hearing in a manner that protects confidentiality.⁴⁸ They must inform the party if a federal or state laws require disclosure of confidential information.⁴⁹

“
Interpreters and transliterators should be fluent in and conversant with the requisite legal terminology to ensure effective communication.”

Proceedings interpreters interpret all aspects of the open court process, including witness testimony and all open court dialogue.⁵⁰ As officers of the court, they swear an oath to interpret accurately and protect the integrity of the interpreted proceedings.⁵¹ The proceeding interpreter should not be affiliated with one side of the case or the other, and should be provided with case information necessary to prepare for the proceeding.

Counsel or table interpreters sit at the counsel table next to the party who is deaf or hard of hearing to facilitate privileged communications that may arise between the party and his or her attorney.⁵² These interpreters also monitor the interpretations of the proceedings interpreters for accuracy, alerting counsel to any errors and enabling counsel to object to preserve the right to appeal based on a faulty interpretation.⁵³ Because table interpreters do not inter-

⁴⁶ http://student.gtc.edu/silent/images/rid-nad_codeofethics.pdf.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ NATIONAL CONSORTIUM OF INTERPRETER EDUCATION CENTERS, BEST PRACTICES: AMERICAN SIGN LANGUAGE AND ENGLISH INTERPRETATION WITHIN LEGAL SETTINGS 25 (Mar. 2009), available at http://www.interpretereducation.org/wp-content/uploads/2011/06/LegalBestPractices_NCIEC2009.pdf.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 26.

pret open court proceedings, they do not need to take an oath in court.⁵⁴

Interpreters and participants who are deaf or hard of hearing should always be consulted about positioning in the courtroom. Interpreters must be able to hear the proceedings and see the participant. However, they should not block the view of the judge, jury, or counsel. Where multiple participants will be using one interpreter, the interpreter must be able to see and be visible to all participants. If this is not possible, such as when both the judge and an attorney use sign language, the court must provide additional interpreters. Interpreters must be in the participant's line of sight, so that he or she can view both the interpreter and the rest of the proceedings.

Communication Access Realtime Translation (CART)

Communication Access Realtime Transcription (CART) is a service that converts speech to text (word-for-word) in real time. It is beneficial to individuals who are deaf or hard of hearing, particularly those who do not sign, can read, and are fluent in English. The National Court Reporters Association provides certifications in realtime reporting or CART services.⁵⁵

A CART captioner types everything that is said into a stenotype machine, using machine shorthand. Computer software converts the shorthand into realtime captions instantaneously, which can be displayed on laptops, computers, tablets, mobile devices, and screens. For certain individuals who are deaf-blind and communicate primarily through braille, it may be necessary to connect CART services to a braille device that allows them to receive the same information in tactile form.

CART technology relies on a specially prepared dictionary of words so that the shorthand can be translated into written English. Words that are not in this dictionary will not be readily captured and displayed, but will require additional work from the CART captioner to render. For court proceedings, CART captioners should be given the opportunity to review the case file and other relevant documents in order to identify and input in their CART dictionary words that will be used during the proceeding, such as technical or legal terms, the proper names of the parties and experts, and any unusual or slang terms.

The role of the CART captioner is to facilitate communication, as opposed to the role of the official court reporter to provide a verbatim record of the proceeding. CART captioners must stay in that role and refrain from “counseling, advising, or interjecting personal opinions except



CART is a service that converts speech to text (word-for-word) in real time.

⁵⁴ *Id.* at 25.

⁵⁵ <http://www.ncra.org/Certifications>.

as required to accomplish the task at hand.”⁵⁶ They must also refrain from working in the dual capacity of official court reporter and CART captioner. However, when no other option exists, the National Court Reporters Association’s Code of Professional Ethics states that the role to be performed is that of the official reporter, with all present being entitled to read the display screen.⁵⁷ Note that CART captioners must be fair and impartial and disclose any potential conflicts of interest, such as assignments involving a participant who is a friend, relative or business associate, or inability to be impartial.⁵⁸

Individuals who use CART services in court proceedings rely on the realtime translation to follow what is happening. Accordingly, the text must be as intelligible and accurate as possible at all times. Judges should monitor the translation to determine whether effective communication is occurring.

To function effectively, the CART captioner must be positioned so he or she can hear the entire proceeding. Furthermore, the translation must be displayed so that all participants can see it. Multiple laptops or screens or a single large screen may be necessary. Because CART captioners typically bring specialized equipment for one participant, the court will need to inform the captioner if there will be multiple participants. Confidential information, such as a private sidebar, must be displayed only to the intended participant(s). The court may need to arrange for more than one CART captioner in a one-captioner-to-one-participant scenario if confidential proceedings are anticipated.

CART services can be provided remotely. From a remote location, the captioner listens to what is being said in court by speakers using microphones—through a telephone line or via the Internet—and provides realtime captioning through an Internet feed that is connected to a computer monitor in the courtroom. Courts will need a dedicated high-speed Internet access line or a strong and consistent wireless (wifi) signal. The audio telephone connection between the CART captioner and the courtroom must have excellent sound quality.

Pursuant to federal court policy, CART is to be used “solely to assist in communication” and not “in lieu of conventional means of producing the official record.”⁵⁹ The policy states that CART “should be provided for only as long as and for the specific purposes required by the participant: for example, only for the duration of the deaf witness’s testimony.”⁶⁰

Assistive Listening Systems

Individuals who have some residual hearing and experience difficulty hearing speech without amplification may use assistive listening systems to facilitate effective communication. These systems are designed to amplify and make clearer what is being said. They do this through use of microphones, transmitters, receivers, and headsets, making what is said sound

⁵⁶ NATIONAL COURT REPORTERS ASSOCIATION, CODE OF PROFESSIONAL ETHICS, Section III - Communication Access Realtime Translation (CART) Provider in a Legal Setting, available at <http://www.ncra.org/About/content.cfm?ItemNumber=8645>.

⁵⁷ *Id.*

⁵⁸ NATIONAL COURT REPORTERS ASSOCIATION, CART PROVIDERS MANUAL, available at <http://www.ncra.org/files/MCMS/94406E4B-BC9B-402B-A534-7D970D31DCE8.pdf>.

⁵⁹ JUDICIAL CONFERENCE OF THE U.S., *supra* note 20, at 37-39.

⁶⁰ *Id.*

closer to the listener. Assistive listening systems are used to minimize background noise and reduce the effect of distance between the speaker and the listener.

Each individual responds differently to the various types of assistive listening systems depending on his or her level of hearing (unaided or aided), as well as on the particular technological device he or she is accustomed to using. Before any proceeding begins, the court must ensure that the system used is compatible with the deaf or hard of hearing participant's hearing aid or cochlear implant. The system must provide a clear, uninterrupted signal for the duration of the proceeding. Static or signal interruption sounds, such as those coming from a cell phone or radio, can impede the system's effectiveness. Courts should adhere closely to the system's guidelines for operation to ensure effective use.

Assistive listening systems typically fall into three main types: FM systems; infrared systems; and induction loops.

When video and/or audio recordings will be used in the proceeding, the court should ask participants whether they can understand them with the use of their assistive listening system or device. If the answer is “no,” the court should either obtain a transcript in advance or require that captions be provided.

TYPES

Assistive listening systems typically fall into three main types: FM systems; infrared systems; and induction loops. Each type is explained below.

FM Systems

Frequency modulation (FM) systems use radio waves to transmit sound and are portable. Audio input from a microphone, a television, an audio player, or any electronic sound source is fed into an FM transmitter, which broadcasts the audio input through radio signals that are received by pocket-sized receivers. The receivers are tuned to the specific frequency used in the transmission. Persons who use hearing aids with telecoils (T-Coils) can plug a neck-loop or silhouette inductor directly into the receiver. Persons who use hearing aids without T-Coils, as well as those who do not use hearing aids, can use headphones or earbuds that are connected to the receiver. Cochlear implant users can connect a patch cord from the FM receiver to the external processor for the implant.

The FM system can be picked up outside the room in which the system is located. Systems can run in adjacent rooms if they are transmitting on different frequencies. Signals from nearby radio sources that use the same or similar frequencies can interfere with the signal transmission. Confidentiality is an issue because anyone who knows the frequency the transmitter is broadcasting on can tune in to listen.

When using microphones with FM systems, they must be placed a specific distance from the speaker's mouth to produce a clear, consistent signal. Every speaker should have his or her own microphone—the judge, attorneys, and witnesses—instead of passing one microphone from speaker to speaker. FM microphones pick up and amplify the rustle of papers and other surrounding noises, which is distracting for the FM system user.

Infrared Systems

Infrared systems (IR) work by using infrared light waves that are beamed from one or several IR transmitters to small specialized receivers. They do not work in direct sunlight. To function, there must be a direct line of sight between the transmitter and the receiver. Receivers include stethophones that hang from the ears, a headset type that fits over the ears, and a small pocket-size type. Stethophones and headsets can receive the IR signal directly. Users and non-users of hearing aids (with or without T-Coils) or cochlear implants can use the pocket-size receivers. Cochlear implants can connect to the IR receiver through a DAI patch cord.

Unlike FM systems, IR systems do not broadcast beyond the room in which the transmitter is located. Thus, confidentiality is not an issue. Adjacent rooms can operate IR systems simultaneously without any interference.

Induction Loops

Induction loops are typically installed in the ceiling or floor of the particular room, although portable systems are available. Electricity flows through a wire or cable connected to a power amplifier that works with a microphone. The microphone picks up the speaker's voice and converts it to electric energy, which is strengthened by the amplifier. The energy is processed through the wire or cable and creates an electromagnetic field. The electromagnetic signals are picked up by a receiver with (T-Coils) and sent directly to personal hearing aids equipped with T-Coils or cochlear implants, or to pocket-sized induction receivers connected to a headset or earpiece.

To receive the signal, the receiving units must be within the loop. Because there is some "spill over" of the signal, rooms next to or directly above or below the loop system cannot use the same system because they would work at cross-purposes. This "spill over" can result in someone outside the room with a receiving unit being able to listen in, which raises confidentiality issues.

Telephone and Video Communications

Any public entity that communicates by telephone must provide effective communication to persons with disabilities.⁶¹ A public entity must use text telephones (TTYs) or equally effective telecommunications systems to communicate with persons who are deaf or hard of hearing.⁶² Public entities that use an automated-attendant system (e.g., voicemail and messaging) or an interactive voice response system for receiving and directing incoming tele-

⁶¹ 28 C.F.R. § 35.161.

⁶² *Id.* § 35.161(a).

phone calls must provide effective realtime communication using auxiliary aids and services (e.g., TTYs and all forms of Federal Communications Center-approved telecommunications relay systems).⁶³

To place telephone calls, people who are deaf or hard of hearing may use a variety of equipment such as videophones (VPs), text telephones (TTYs), amplified telephones, or captioned telephones. While many of these devices are used by individuals who are deaf or hard of hearing to call one another, they can also be used to call any person using the conventional telephone. VPs can be used by individuals who are deaf or hard of hearing to communicate with hearing people through a sign language interpreter acting as the relay operator. Individuals using VPs can communicate directly only with those who have a VP.

A TTY is a telephone that has a small screen and a keyboard on which a message can be typed to be received by another TTY. A TTY or a computer with TTY capability is required at both ends of the conversation in order to communicate. Amplified telephones are used by hard of hearing persons who are able to use their residual hearing to carry on conversations on regular telephone calls. Users can turn up the volume as necessary to hear speech clearly.

A public entity must use text telephones (TTYs) or equally effective telecommunications systems to communicate with persons who are deaf or hard of hearing.

Captioned telephones are a form of relay assisted telephone system where the person who is deaf or hard of hearing is able to speak directly to the hearing person by telephone, but relies on the captioning to understand what the hearing person is saying. When a person with a captioned telephone dials, the phone calls the hearing person and automatically connects to a captioning service that transcribes everything the hearing person says into captions, which appear on the captioned telephone display screen.

Individuals who are deaf or hard of hearing may also use telecommunications relay services (TRS) or video relay services (VRS). A public entity must respond to telephone calls from a TRS in the same manner that it responds to other telephone calls.⁶⁴ With TTY relay services (one form of TRS), the relay operator uses both a standard telephone and a TTY.⁶⁵ The operator types what the telephone user says on a TTY, the TTY user reads the message

⁶³ *Id.* § 35.161(b).

⁶⁴ *Id.* § 35.161(c).

⁶⁵ *Id.*

and types a response, and the the operator reads the response to the telephone user.⁶⁶ For persons with speech disabilities, TRS provides speech-to-speech transliteration. Captioned telephones inherently utilize a form of TRS. With VRS, the relay operator communicates the voice message in sign language to the computer video terminal user and voices the sign language messages to the standard telephone user.⁶⁷

Where public telephones are provided in a courthouse or a building in which a court service, program, or activity is provided, there should be equivalent telecommunications access for individuals who are deaf or hard of hearing. This necessarily requires the provision of different devices that are accessible to different people, including a VP, TTY, and a telephone with amplification or volume control. Court staff should expect to receive relay calls from persons who are deaf and are using such devices, and should be trained on these issues

⁶⁶ *Id.*

⁶⁷ *Id.*



V.

INDIVIDUALS WHO ARE DEAF OR HARD OF HEARING IN COURT

THE LAW

As previously discussed, under the ADA Title II regulations the effective communication requirement extends to applicants, participants, members of the public, and companions with disabilities.¹ Individuals who are deaf or hard of hearing and participate in the judicial process include parties before the court (criminal defendants and civil litigants), witnesses, jurors, prospective jurors, and companions of persons with business in the court,² as well as attorneys³ and judges.

A companion with a disability is “a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.”⁴ For instance, a deaf parent of a minor in a juvenile proceeding is a companion. The duty to provide auxiliary aids and services extends to companions with disabilities, whether or not the individual accompanied has a disability.⁵

Note that the legal duty of public entities to provide necessary auxiliary aids and services is not limited to individuals with a direct interest in the proceedings or outcome.⁶

Courtroom spectators with disabilities are entitled to appropriate auxiliary aids or services that will afford them an equal opportunity to follow the court proceedings, unless a fundamental alteration in the service, program, or activity or undue financial and administrative burdens would result.⁷ If an auxiliary aid or service would result in a fundamental alteration or undue burdens, the court must take any other action that would not result in such an alteration or such burdens but would ensure, to the maximum extent possible, that individuals with disabilities receive the benefits or services provided by the public entity.⁸ As with any other individual who requires effective communication in the courtroom, the court should have information available for any person seeking to be a spectator to make the request for effective communication.

“
Courtroom spectators with disabilities are entitled to appropriate auxiliary aids and services.
”

1 28 C.F.R. § 35.160(a)(1).

2 28 C.F.R. pt. 35, Appendix A to Part 35 - Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, Subpart E-Communications.

3 *Mosier v. Kentucky*, 675 F. Supp. 2d 693, 700 (E.D. Ky. 2009).

4 28 C.F.R. § 35.160(a)(2).

5 *Id.* § 35.160(b)(1).

6 See U.S. DEP'T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL Supp. II-7.1000 (1994), available at <http://www.ada.gov/taman2up.html>.

7 *Id.*

8 28 C.F.R. § 35.164.

In *Prakel v. Indiana*,⁹ an Indiana federal court was asked to decide if a deaf spectator was entitled to reimbursement for the cost of interpreter services at his mother’s pretrial criminal proceedings in county court. The court determined that Mr. Prakel was a qualified individual with a disability because he was a member of the public who wished to attend court proceedings that were open to the public, rejecting defendants’ argument that, as a spectator rather than a party or witness, he was not covered by Title II.¹⁰ The court relied on Title II regulations providing that a “public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public and companions with disabilities are as effective as communications with others.”¹¹

The court also noted that the U.S. Supreme Court has recognized that members of the public have constitutional rights to attend public criminal proceedings, as well as a right to access such proceedings.¹² Each of the criminal proceedings Mr. Prakel sought to attend were open to the public. The court concluded that defendants violated Title II by failing to provide interpreter services for Mr. Prakel, or to propose another auxiliary aid or service, in an effort to ensure effective communication to enable him to access the proceedings.¹³ The court declined to allow plaintiffs to expand the scope of the litigation to address whether all deaf spectators in every court in Indiana are entitled to interpreters upon request, based on plaintiffs’ failure to timely file a motion to amend their complaint, as this would involve “vastly greater financial and administrative burdens.”¹⁴

The duty of federal courts to provide appropriate auxiliary aids and services extends to parties, attorneys, and witnesses who are deaf, hearing-impaired, or have other communications disabilities.¹⁵ This duty does not cover spectators.¹⁶ However, courts can elect to provide auxiliary aids or services in situations where they determine such aids or services to be appropriate. For example, a court may provide an interpreter to the deaf spouse of a criminal defendant during the trial.¹⁷ Jurors with a communications disability who are determined by the trial court to be qualified to serve under the Jury Selection and Service Act should be provided with appropriate auxiliary aids or services.¹⁸

PARTICIPANTS & AUXILIARY AIDS AND SERVICES

This section provides some general rules concerning auxiliary aids and services for the different roles that participants who are deaf or hard of hearing may play.

Civil litigants may require auxiliary aids and services for the entire time that court is in ses-

⁹ 100 F.Supp.3d 661 (S.D. Ind. 2015).

¹⁰ *Id.* at 681.

¹¹ *Id.* (citing 28 C.F.R. § 35.160(a)(1)).

¹² *Id.* (citing *Tennessee v. Lane*, 541 U.S. 509, 527 (2004), and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-15 (1986)).

¹³ *Id.* at 684.

¹⁴ *Id.* at 671.

¹⁵ JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICIES AND PROCEDURES, vol. 1, ch. III, pt. H, at 37-39 (Guidelines for Providing Services to the Hearing-Impaired and Other Persons with Communications Disabilities), available at <http://nad.org/issues/justice/courts/communication-access-federal-courts>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

sion, including voir dire, opening and closing arguments, and any discussions with the judge outside the presence of the jury, as well as when the attorneys and parties are interacting with court personnel, even if the judge is not present. However, the court is not responsible for providing auxiliary aids and services when the deaf or hard of hearing party is not present for the proceeding, whether in person or remotely. If the court has appointed an attorney or a guardian ad litem for the deaf or hard of hearing party, it may be necessary for the court to provide auxiliary aids or services to effectuate communications between the court-appointed attorney or guardian ad litem and the deaf or hard of hearing party.

Criminal defendants may require auxiliary aids and services for the entire time that court is in session, including all hearings, all portions of a trial, and any time that a defendant has a constitutional or otherwise legally protected right to appear and/or participate. As with parties in civil cases, the court does not have to provide auxiliary aids and services when the defendant is not in court. Courts must assign qualified interpreters to aid communication between the defendant and the attorney for all phases of the preparation and presentation of the case, particularly when the defendant is represented by a court-appointed attorney.¹⁹

Witnesses may require auxiliary aids and services for all testimony they provide in court, as well as any other communications or interactions they have with the court before or after their testimony, such as grand jury testimony or court services for victims. Care should be taken to ensure communications access is provided at all times to witnesses who are victims of crimes and their families who wish to remain present throughout the proceeding.

Spectators are entitled to auxiliary aids and services during court proceedings open to the public unless a fundamental alteration in the service, program, or activity or undue financial and administrative burdens would result.²⁰ However, the court is not required to provide auxiliary aids and services for personal interactions between spectators and others, nor when spectators are not in court.

Jurors and prospective jurors may require auxiliary aids and services for all interactions with the court and with other jurors. This includes any time that the jury is expected to be in the courthouse, including during voir dire, court proceedings, and deliberations, as well as interactions with the bailiff.

Lawyers may require auxiliary aids and services for all interactions with the judge and any court personnel. Attorneys will require auxiliary aids and services not only for all hearings and trials, but also for discussions in chambers and for sidebars. This entitlement to court-provided auxiliary aids and services extends to lawyers' staff when they are participating in court proceedings.

Judges may require auxiliary aids and services for all court proceedings, including interactions with attorneys, parties, jurors, and court personnel.

Court personnel may require auxiliary aids and services for all interactions in the court.

¹⁹ 45 Fed. Reg. 37,630 (June 3, 1980).

²⁰ See U.S. DEP'T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL Supp. II-7.1000 (1994), available at <http://www.ada.gov/taman2up.html>. See *Prakel v. Indiana*, 100 F.Supp.3d 661 (S.D. Ind. 2015).



VI.

BEST PRACTICES CHECKLISTS FOR ENSURING EFFECTIVE COMMUNICATION

Every participant plays a critical role in ensuring effective communication. This section provides recommendations, in the form of checklists, as to what each participant can do.

STATE COURT ADMINISTRATIVE OFFICE (SCAO)

- ✓ Create a statewide court rule or other uniform policy appropriate for the state's court system for providing auxiliary aids and services to deaf or hard of hearing court participants throughout the court system.¹
- ✓ Post the rule or policy on the agency's public website in an easy-to-find location.
- ✓ Designate a court ADA/504 coordinator to handle requests for accommodations, including auxiliary aids and services.²
- ✓ Offer trainings and provide educational materials to judges, magistrates, commissioners, court administrators, and court personnel regarding communication access.³

1 The rule or policy should include the following information: what the law requires; who is entitled to aids and services; what types of proceedings are covered; what types of aids and services are offered; what the procedure is for requesting aids and services; what to do when an aid or service is not working; what the procedure is for appealing the accommodation provided; and how to file a grievance or complaint to address problems and concerns. In states where each county manages accommodations and auxiliary aids and services, a statewide court rule or policy should provide general requirements clearly setting forth each county's responsibility.

2 28 C.F.R. § 35.107(a) (requiring a public entity that employs more than 50 people to: designate "at least one employee to coordinate its efforts to comply with and carry out its responsibilities" and make available to all interested individuals the name, office address, and telephone number of this coordinator of accessibility). See also 45 C.F.R. §84.7(b) (Section 504); JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICIES AND PROCEDURES, vol. 1, ch. III, pt. H, at 37-39 (Guidelines for Providing Services to the Hearing-Impaired and Other Persons with Communications Disabilities), available at <http://nad.org/issues/justice/courts/communication-access-federal-courts> (requiring each federal court to identify a specific office or individual(s) to serve as access coordinator from whom participants in court proceedings may request auxiliary aids or services).

3 Topics to cover include what the law and court rules and policies require; what constitutes effective communication; how to obtain and use various types of auxiliary aids and services; and the proper etiquette for interacting with persons who are deaf or hard of hearing.

LOCAL COURTS

- ✓ Develop procedures to implement the SCAO rule or policy.⁴
- ✓ Post the procedures on the court’s website in an easy-to-find location, in prominent places throughout the courthouse, and in all notices posted in the courthouse.
- ✓ Include the rule/policy and procedures in all mailed communications from the court, as well as in all court documents that compel or instruct individuals to appear before the court (e.g., warrants, subpoenas, traffic tickets, jury summons).
- ✓ Ensure that all interpreters, transliterators, and captioners are qualified.
- ✓ Create a directory of qualified providers of auxiliary aids and services and update it every six months to ensure that requests can be granted in a timely manner.⁵
- ✓ Collaborate with individuals who are deaf or hard of hearing and advocacy and consumer groups to advise on communication access issues.
- ✓ Offer local training to judges, arbitrators, mediators, courthouse and courtroom personnel, court-appointed attorneys and other professionals regarding communication access.
- ✓ Designate a court ADA/504 coordinator to handle requests for accommodations, including auxiliary aids and services.
- ✓ Adopt, publish and implement a grievance procedure to address complaints and concerns.⁶
- ✓ Make every effort to provide the auxiliary aid or service requested by the participant who is deaf or hard of hearing without substitution.⁷
- ✓ Assess courtrooms to remove any barriers that would impede effective communication such as noise, lighting, sightlines, and positioning.
- ✓ Install visual alarms in hallways, restrooms, lobbies, courtrooms, and deliberation rooms.

4 In the event local courts set their own policies, develop policies and procedures that are consistent with the SCAO directive for providing auxiliary aids and services to participants who are deaf or hard of hearing.

5 See, e.g., MINN. GEN. R. PRAC., RULE 8.01 (1997) (requiring State Court Administrator to publish and maintain a statewide roster of interpreters). See, e.g., North Carolina’s directory of sign language interpreters/translitterators at <http://www.ncdhs.gov/dsdhh>; N.C. Gen. Stat. Ann. § 8B-6 (2015) (requiring that copies of directory be sent to all 100 clerks’ offices). Your state may have a commission for the deaf and hard of hearing or a state association of the deaf that may be able to assist. In addition, every state has a protection and advocacy organization (often called “Disability Rights [your State name]”), which may have information on how to secure various appropriate auxiliary aids and services, and which service providers are better than others. Note that in some states the Commission for the Deaf and Hard of Hearing is responsible for certifying and qualifying interpreters, and creates a statewide database of interpreters.

6 28 C.F.R. § 35.107(b) (requiring a public entity that employs 50 or more persons to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action prohibited by Title II). See also 45 C.F.R. § 84.7(b) (Section 504).

7 *Id.* § 35.160(b)(2) (requires public entities to give “primary consideration” to the request of the individual with the disability in deciding what auxiliary aid or service is necessary to ensure effective communication); U.S. DEP’T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL II-7.1100 (provides that a public entity must honor the person’s choice unless it can demonstrate that (1) another equally effective means of communication is available, or (2) use of the chosen means would result in a fundamental alteration in the service, program, or activity or an undue financial and administrative burden).

- ✓ Provide a visual method of calling individuals who are deaf or hard of hearing in the courthouse/courtroom.
- ✓ Ensure that auxiliary aids and services are provided at the first court appearance.
- ✓ Coordinate with law enforcement to ensure that custodial facilities will provide advance notice to courts of the need for auxiliary aids and services before a party who is deaf or hard of hearing appears in court.
- ✓ Ensure that all court-mandated programs, trainings, classes, and services are accessible to individuals who are deaf or hard of hearing.⁸
- ✓ Maintain an adequate supply of readily available interpreters capable of appearing in an expedited manner with little advance notice.
- ✓ Ensure that all interpreters adhere to a code of professional conduct. Some states have requirements for the conduct of all court interpreters,⁹ and those standards should be applied where appropriate. For instance, some states have used the *Model Code of Professional Responsibility for Interpreters in the Judiciary*¹⁰ as guidance when drafting their own codes. Other states have sign language interpreter licensure with relevant professional and ethical conduct requirements. Even when no such state requirements exist, at a minimum, sign language interpreters should comply with the NAD-RID Code of Professional Conduct for interpreters, coauthored by the Registry of Interpreters for the Deaf and the National Association of the Deaf,¹¹ or the National Association of Judiciary Interpreters and Translator's (NAJIT) Code of Ethics and Professional Responsibilities.¹²
- ✓ Ensure that text telephones (TTY), telecommunications relay services (TRS), video relay services (VRS), or equally effective telecommunication systems are used to communicate by telephone with individuals who are deaf or hard of hearing and persons with speech impairments.
- ✓ Train court personnel who handle incoming calls on how to communicate using TTY, TRS, VRS, or other telecommunication systems.

8 Courts that receive federal funds have a responsibility under Section 504 to ensure that the court-mandated program entity to which a party is referred fulfills its obligation to provide effective auxiliary aids and services. See Wash. REV. CODE § 2.42.120(3) (2008) (stating: "If a hearing impaired person participates in a program or activity ordered by a court as part of the sentence or order of disposition, required as part of a diversion agreement or deferred prosecution program, or required as a condition of probation or parole, the appointing authority shall appoint and pay for a qualified interpreter to interpret exchange of information during the program or activity.").

9 See, e.g., Kentucky Professional Code of Responsibility for Interpreters, <http://courts.ky.gov/courtprograms/CIS/Documents/CodeofProfessionalResponsibility.pdf>; Karen L. Richards, *Vermont Court Interpreter Manual* 46 (2009), available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Language%20Access/LEP%20Resources/Vermont%20Court%20Interpreter%20Manual%20Final.ashx>; WASH. REV. CODE ANN. RULES GEN. RULE 11.2(d) (1987).

10 William E. Hewitt, *Court Interpretation: Model Guides for Policy and Practice in State Courts* (1995).

11 http://student.gtc.edu/silent/images/rid-nad_codeofethics.pdf (The Code contains seven core tenets:

1. Adhere to standards of confidential communication.
2. Possess the professional skills and knowledge required for the specific interpreting situation.
3. Conduct yourself in a manner appropriate to the specific interpreting situation.
4. Demonstrate respect for consumers.
5. Demonstrate respect for colleagues, interns, and students of the profession.
6. Maintain ethical business practices.
7. Engage in professional development).

12 <http://ethics.iit.edu/ecodes/node/3570>.

JUDGES

Before the Hearing

- ✓ To the extent feasible and within the discretion of the judge, allow interpreters, transliterators, and captioners to view case files and exhibits, photos, or other records that will be introduced into evidence before the proceeding.¹³
- ✓ Allow interpreters to meet with the participant who is deaf or hard of hearing, preferably in the presence of the attorney whenever possible, before the proceeding to ensure that they can effectively communicate with one another.¹⁴
- ✓ Meet with interpreters and other service providers before the proceeding to address communication needs of persons who are deaf or hard of hearing, logistics (e.g., seating, sightlines, lighting, sound systems, number of interpreters, breaks), ground rules, and any concerns.
- ✓ Develop an understanding of the interpreter's code of professional conduct to identify and correct any deviations.

At the Start of the Hearing

- ✓ Inform participants who are deaf or hard of hearing of their right to participate in and understand the proceedings.
- ✓ Ask participants who are deaf or hard of hearing whether they are able to understand and communicate with the requested auxiliary aids and services and to inform you if they are having difficulty.
- ✓ Ask participants who are deaf or hard of hearing if they need an interpreter if you observe they are having difficulty understanding or communicating.
- ✓ Advise everyone in the courtroom of the presence of interpreters and clarify their role in your introductory comments.¹⁵
- ✓ Instruct the jury as to the interpreter's or CART captioner's role.
- ✓ Instruct jurors that they must rely on the interpretation rather than on what they believe they heard the witness say in his/her own language.
- ✓ Advise everyone to speak clearly, at a moderate speed that the interpreter or other providers can accommodate, and at a volume that can be heard. Give reminders as necessary.

¹³ Doing so allows them to become familiar with names, parties, and technical, legal or specialized vocabulary. The more information providers have about the case in advance the better they can do their jobs and avoid misinterpretations.

¹⁴ Doing so allows interpreters to identify the needs of the participant, as well as any possible signing differences and other concerns.

¹⁵ Instruct everyone in the courtroom that interpreters are neutral and impartial, and have a duty to interpret everything that is being said without editing, adding, omitting, explaining, summarizing, or providing personal input. See Appendix E (sample instruction).

- ✓ Instruct everyone that only one person may speak at a time.
- ✓ Inform everyone that only the judge may respond to requests for repetition or rephrasing.
- ✓ Qualify interpreters or CART captioners for the record and administer an oath.¹⁶
- ✓ Ask all parties to stipulate that the interpreter's or CART captioner's qualifications are satisfactory.
- ✓ Administer an oath calling upon interpreters for jurors who are deaf or hard of hearing to swear that they will not interfere with the jury's deliberations or reveal its confidences.
- ✓ Ask interpreters and/or transliterators whether they are able to communicate effectively with the participant who is deaf or hard of hearing.
- ✓ Ask interpreters and/or transliterators whether they are aware of any conflicts of interest they may have.¹⁷
- ✓ Advise interpreters and/or transliterators of their obligation to any impediments to performance and any errors they have made.

During the Hearing

- ✓ Schedule breaks during the proceeding on an as-needed basis for interpreters, transliterators, and captioners. Instruct providers to notify the court when they need breaks.
- ✓ Be flexible regarding the positioning of interpreters, transliterators, captioners, and participants.¹⁸
- ✓ Never ask interpreters to explain or restate what the participant who is deaf or hard of hearing says.
- ✓ Advise each witness of the interpreter's role immediately after the witness is sworn and before questioning begins.¹⁹

¹⁶ See Appendix C (sample oath). Qualifying interpreters should be done through voir dire inquiry on the record as to their education, training, certifications, skills, and experience. See Appendix D.

¹⁷ For instance, do interpreters/translitterators: know the parties involved in the proceeding personally or professionally; have personal knowledge about the proceeding; have interpreted/transliterated in preparation or a phase of the proceeding; have served in an investigative capacity for any party; or have a financial interest or stake in the outcome of the proceeding. See, e.g., WASH. REV. CODE ANN. RULES GEN. RULE 11.2(d) (1987) (Code of Conduct for Interpreters) ("No language interpreter shall render services in any matter in which the interpreter is a potential witness, associate, friend, or relative of a contending party, unless a specific exception is allowed by the appointing authority for good cause noted on the record. Neither shall the interpreter serve in any matter in which the interpreter has an interest, financial or otherwise, in the outcome. Nor shall any language interpreter serve in a matter where the interpreter has participated in the choice of counsel.").

¹⁸ Positioning is critical to ensure effective communication. Interpreters, transliterators, and captioners must be able to hear the proceeding and see and be seen by the participant who is deaf or hard of hearing.

¹⁹ See Appendix F.

- ✓ Instruct jurors that they must treat as evidence only what is provided by the interpreter in English.²⁰
- ✓ Instruct jurors not to accord less weight to the testimony of witnesses who are deaf or hard of hearing merely because their testimony is provided by an interpreter.²¹
- ✓ Speak directly to the participant who is deaf or hard of hearing and not to the interpreter.²² Speak naturally and avoid shouting or distorting normal mouth movements.
- ✓ Use first-person, not third-person, references when addressing a participant who is deaf or hard of hearing.
- ✓ Anticipate that the participant who is deaf or hard of hearing may not look at you.²³
- ✓ Treat prospective or chosen jurors who are deaf or hard of hearing as equally competent and able.²⁴
- ✓ Monitor the efficacy and functioning of the auxiliary aid or service provided.²⁵
- ✓ Be prepared to pause the proceedings if the auxiliary aid or service is unavailable or ineffective until the situation can be resolved.

20 Even if a juror believes that the interpreter may have made a mistake, the juror must ignore the error and make deliberations on the basis of the official interpretation. The only evidence is what the interpreter renders. Jurors cannot rely on their own interpretation of what the witness who is deaf or hard of hearing says.

21 Some states have special jury instructions to this effect. See, e.g., Alaska Civil Pattern Jury Instructions, Art. 1, Rule 1.06A Credibility of Witnesses - Witness Who Testifies Through Interpreter (2013), available at <http://courts.alaska.gov/rules/juryins.htm>. See also Rule 1.06B Credibility of Witnesses - Witness Who Testifies Using American Sign Language (instructing jurors to avoid attempting to interpret the signs of a deaf person or an interpreter, as guessing about what is intended to be communicated by a sign, gesture, or facial expression may be inaccurate).

22 This is referred to as “direct speech.”

23 Interpreters, translators, and captioners relay information visually. To benefit from having any of these services in the courtroom, the participant must look at them, rather than at the speaker.

24 There should be no presumptions as to such jurors’ ability or inability to serve in this capacity based solely on their being deaf or hard of hearing.

25 Among the indications that the interpreter or transliterator may not be providing effective communication are when the deaf or hard of hearing participant appears confused, appears to be asking questions of the interpreter or transliterator, has a blank expression, or does not respond appropriately to questions or other situations. You can test the participant’s understanding by asking open-ended questions rather than “yes”/“no” questions.

ADA/SECTION 504 COORDINATORS

- ✓ Know what the ADA, Section 504, and court rules and policies require with regard to communication access for participants who are deaf or hard of hearing.
- ✓ Evaluate the current state of accessibility for deaf and hard of hearing persons.
- ✓ Familiarize yourself with the different types of auxiliary aids and services for participants who are deaf or hard of hearing.
- ✓ Attend trainings on how to properly interact with individuals who are deaf or hard of hearing.
- ✓ Collaborate with participants who are deaf or hard of hearing and advocacy groups to develop and improve policies and procedures.
- ✓ Ask comprehensive questions to make sure you understand clearly what kind of auxiliary aid or service participants who are deaf or hard of hearing need.²⁶
- ✓ Appoint multiple interpreters for proceedings that last longer than one hour, are complex, or involve multiple participants who deaf or hard of hearing.
- ✓ Ensure the judge is aware that there will be auxiliary aids and services in the courtroom, and review best practices.
- ✓ Provide the interpreter, transliterator, or captioner with a point of contact on the day of the proceeding.
- ✓ Test all assistive listening systems and devices before the proceeding.
- ✓ Learn about new technologies for individuals who are deaf or hard of hearing.
- ✓ Retain qualified interpreters, transliterators, and captioners.²⁷
- ✓ Perform an audit of the courts' compliance with the effective communication duty.
- ✓ Survey participants who are deaf or hard of hearing after the proceeding about whether they were provided with effective communication.
- ✓ Be prepared to provide auxiliary aids and services on short notice.

²⁶ Deaf and hard of hearing individuals vary in their communication needs. Courts have an obligation to match the particular needs of the participant. While some participants may specify the auxiliary aid or service they require, others may not. For specific questions, see Appendix A.

²⁷ The best providers will have professional certification in their field specific to legal settings and many years of experience providing services in legal settings. For a full list of the national certifications available for interpreters and transliterators, visit <http://rid.org/rid-certification-overview/>. CART providers achieve national certification through the National Court Reporters Association (NCRA). In particular, the Certified CART Provider (CCP) designation is awarded upon passing a written knowledge test and a realtime dictation test. See <http://www.ncra.org/Certifications/content.cfm?ItemNumber=16006&navItemNumber=16007>.

PARTIES, WITNESS, JURORS WHO ARE DEAF OR HARD OF HEARING

- ✓ Understand your legal rights to full and equal access to the courts.
- ✓ Inform your attorney, if any, of your need for auxiliary aids and services.
- ✓ If you are not represented by an attorney, request from the court auxiliary aids and services as far in advance as possible and be specific.²⁸
- ✓ Confirm in advance of the proceeding that the court will be providing the auxiliary aids and services.
- ✓ Arrive early to make sure the auxiliary aids and services are in place and functioning.
- ✓ Meet with the service provider before the proceeding to get used to each other's communication styles and identify possible concerns.
- ✓ Inform the judge or court staff immediately if the auxiliary aid or service is not effective or not functioning.
- ✓ Direct any questions you may have to the court or an attorney through the interpreter. The interpreter cannot answer questions, but can only interpret them.

²⁸ It may take some time for the court to identify and secure appropriate auxiliary aids and services for a proceeding. Many service providers request two weeks' advance notice. Making your request far in advance broadens the pool of available providers, increasing the likelihood that the court will find the best qualified service provider or the most effective devices.

LAWYERS REPRESENTING INDIVIDUALS WHO ARE DEAF OR HARD OF HEARING

- ✓ Consult with your client and/or your witnesses to determine which auxiliary aid or service is appropriate to ensure effective communication.
- ✓ Inform the court as to the type of auxiliary aid or service your client and/or witnesses need to ensure effective communication, and request such aid or service as early as possible (at least two weeks in advance).
- ✓ Provide information in advance to an interpreter, transliterator, or captioner about the facts of the case, the length and nature of the proceeding, the role of the participant who is deaf or hard of hearing, and the participant's stated or inferred communication needs, and any concerns you may have.
- ✓ Permit interpreters, transliterators, or captioners to view case files and exhibits, photos, or other records that will be introduced into evidence before the proceeding.²⁹
- ✓ Monitor whether your client and/or witnesses respond to the proceedings as anticipated and inform the court immediately if it appears that an auxiliary aid or service may be ineffective or not functioning.
- ✓ Make timely objections as to the quality of the auxiliary aid or service as soon as you are aware of any problem.
- ✓ Provide auxiliary aids and services for confidential communications with clients.³⁰
- ✓ Speak directly to your client who is deaf or hard of hearing and not to the interpreter.
- ✓ Attend trainings to ensure cultural competence when representing deaf and hard of hearing clients.
- ✓ Inform the court well in advance if you will need a continuance so the service providers can be canceled in a timely manner.

²⁹ Doing so allows them to become familiar with names and technical vocabulary. The more information they have about the case in advance the better they can do their jobs.

³⁰ The court is not required to provide auxiliary aids and services for communicating with your client outside of court. Attorneys have a duty to ensure effective communication with their clients and to zealously advocate for their clients' best interests.

SERVICE PROVIDERS (INTERPRETERS, CART CAPTIONER, ETC.)

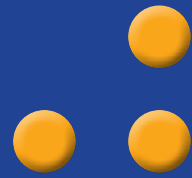
- ✓ Request to review case files and exhibits, photos, or other records that will be introduced into evidence to help ensure an accurate and effective interpretation.³¹
- ✓ Contact the court early for information about the nature and length of the proceeding, number and roles of participants who are deaf or hard of hearing, participants' communication needs, and point of contact.
- ✓ Prepare for the qualifying or voir dire process by bringing copies of relevant documentation such as certifications and trainings.
- ✓ Arrive at the court or other designated location early so as to check in with the appropriate officer and set up necessary equipment (e.g., CART).
- ✓ Meet with the participant who is deaf or hard of hearing before the proceeding to assess the participant's communication needs, confirm that you understand one another, and explain your neutral role.
- ✓ Request a meeting with the judge and attorneys before the proceedings to clarify your role, discuss interpretation procedures and logistics (e.g., seating, sightlines, lighting), address potential problems, and provide any recommendations on how to ensure effective communication for participants who are deaf or hard of hearing.
- ✓ Decline assignments that you are not qualified for or that pose a conflict of interest.³²
- ✓ Inform the court immediately if you think the communication is not effective.³³
- ✓ Inform the court immediately of any impediments to performance (e.g., background noise, poor lines of sight, people speaking at once, equipment failure, high rate of speech).
- ✓ Inform the court immediately of any error you have made in interpreting and correct the error. If you become aware of an error after the testimony has been completed, request a bench or side bar conference with the court and lawyers.
- ✓ When necessary, ask permission from the judge to have questions or testimony repeated or to use a dictionary or other aid when uncertain how to interpret a term.

31 NATIONAL CONSORTIUM OF INTERPRETER EDUCATION CENTERS, BEST PRACTICES: AMERICAN SIGN LANGUAGE AND ENGLISH INTERPRETATION WITHIN LEGAL SETTINGS 25 (Mar. 2009), available at http://www.interpretereducation.org/wp-content/uploads/2011/06/LegalBestPractices_NCIEC2009.pdf.

32 Given the risk and potential consequences of error, a first-time service provider should never be assigned to criminal proceedings or to a full civil trial. Service providers who wish to gain experience in legal settings should start with simple, brief hearings where the participant will not have a strong influence on the outcome.

33 Some states have court rules that require interpreters who have any reservation about their ability to satisfy an assignment competently to immediately convey that reservation to the parties and to the court. See, e.g., WASH. REV. CODE ANN. RULES GEN. RULE 11.2(c) (1987).

- ✓ Refer to yourself (an interpreter) in the third person (i.e., “the interpreter” or “this interpreter”) when you need to speak directly to the judge on your own behalf.
- ✓ Attend educational programs, seek mentoring opportunities, and engage in independent study to further develop knowledge and skills and keep abreast of trends in the profession.
- ✓ Keep informed about alternative providers in your area and how to contact them in the event you are unavailable or not qualified for the assignment.
- ✓ Maintain confidentiality of assignment-related information.



VII.

APPENDICES

APPENDIX A

Understanding the Needs of the Person Who Is Deaf or Hard of Hearing

1. WHAT TYPE OF AUXILIARY AIDS OR SERVICES DO YOU NEED?

Interpreters & Transliterators

ASL Interpreters

- Signed English Interpreters
- Certified Deaf Interpreters
- Tactile Interpreters
- Tracking Interpreters
- Close-Vision Interpreters
- Oral Transliterators
- Cued Speech Transliterators

Communication Access Realtime Translation (CART)

Assistive Listening Systems

- Induction Loops
- FM Broadcast
- Infrared System

2. WHAT KIND OF PROCEEDING ARE YOU PARTICIPATING IN?

- Civil
- Criminal
- Family
- Traffic
- Court-mandated programs, services, or trainings
- Other settings

How long is the proceeding expected to last?

3. WHAT WILL YOUR ROLE BE IN THE PROCEEDING?

- Party
- Defendant
- Juror/Prospective Juror
- Witness
- Family Member
- Spectator
- Lawyer
- Legal Staff
- Judge
- Courtroom Personnel
- Other Capacity as Court Participant

APPENDIX B

General Principles to Keep in Mind Regarding Persons Who Are Deaf or Hard of Hearing

1. How well a person speaks is *not* a reliable indicator of how well he or she hears. A person with clear speech may still be profoundly deaf, as he or she may have become deaf after learning to speak or learned to speak while being deaf.
2. How well a person communicates one-on-one is *not* a reliable indicator of how well he or she communicates in a group setting or in a courtroom.
3. Each person who is deaf or hard of hearing has different communication needs, and no two persons are the same.
4. The same person may request a different auxiliary aid or service for different types of proceedings.
5. Respect the specific auxiliary aid or service requested by the individual who is deaf or hard of hearing.
6. The efficacy of a given auxiliary aid or service varies based on the nature, length, or complexity of the proceeding, as well as the participant's role in it.

APPENDIX C

Sample Interpreter's Oath

“Do you solemnly swear or affirm that you will interpret accurately, completely, and impartially, using your best skill and judgment in accordance with the standards prescribed by the code of ethics for interpreters, and follow all official guidelines established by this court for legal interpreting or translating and the discharge of all of the solemn duties and obligations of legal interpretation and translation?”¹

¹ Karen L. Richards, *Vermont Court Interpreter Manual 11* (2009), available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Language%20Access/LEP%20Resources/Vermont%20Court%20Interpreter%20Manual%20Final.ashx>.

APPENDIX D

Assessing Court Interpreter Qualifications: Sample Voir Dire¹

1. What credentials do you hold?
2. What certifications do you hold?
3. How long have you been an interpreter?
4. What specialized training have you had?
5. Describe your formal legal training
6. How many times have you interpreted in court?
7. For what types of proceedings?
 - i. Civil
 - ii. Criminal
 - iii. Family
 - iv. Traffic
 - v. Other settings
8. Have you interpreted for this type of proceeding before? When? How many times? To what extent?
9. Have you ever been disqualified from interpreting in any court proceeding?
10. Do you understand your duties under the Code of Ethics (RID-NAD Code of Professional Conduct *and* National Association of Judiciary Interpreters & Translator's (NAJIT) Code of Ethics and Professional Responsibility) as it applies to legal interpreters?
11. Do you have any potential conflicts of interest with respect to this proceeding?
 - i. Are you familiar with, related to, or close acquaintances with anyone in this proceeding?
 - ii. Have you worked for anyone in this proceeding?
 - iii. Have you ever interpreted for anyone in this proceeding?
 - iv. Are you a potential witness in this proceeding?
 - v. Are there any professional or personal issues that may influence your interpretation?
 - vi. Do you have a stake in the outcome of the proceeding?

¹ See The Supreme Court of Ohio, *Working with Interpreters for Deaf or Hard of Hearing Persons in the Courtroom: A Bench Card for Judges* (2007), http://www.supremecourt.ohio.gov/Publications/interpreter_services/DeafHOHbenchcard.pdf; Karen L. Richards, *Vermont Court Interpreter Manual* 39 (2009), available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Language%20Access/LEP%20Resources/Vermont%20Court%20Interpreter%20Manual%20Final.ashx>.

12. Should interpreting errors occur, how do you intend to inform the court?
13. Have you had an opportunity to meet with the participant who is deaf or hard of hearing?
14. Did you and the participant agree that you can effectively communicate with one another?
15. Are there any dialect or idiomatic differences that will hinder communication?

APPENDIX E

Sample Judge's Instruction: Interpreter's Role

“An interpreter will be present during the proceedings to facilitate communication between the individual who is deaf or hard of hearing and the court, the attorneys, and other parties. His/her role is to accurately, completely, and impartially interpret questions and statements directed to the deaf or hard of hearing party, defendant, or witness by counsel or the judge. The interpreter has a duty to interpret everything that is being said without editing, adding, omitting, summarizing, or providing explanations or personal opinion. He/she is not a party in the proceeding, does not work for either party, has no interest in the case, and is completely neutral.

Interpreters speak in the first person to ensure that the court record accurately reflects that the deaf or hard of hearing person's statements are voluntary and of his/her own free will and not the interpreters' conclusion.

The interpreter cannot answer questions, give advice, express personal opinions, communicate conclusions, engage in conversations with the parties, the attorneys, the witnesses or participants who are deaf or hard of hearing, or provide assistance in any other way except to facilitate communication. The interpreter should always address the judge if an intervention is necessary, such as to ask for clarification when he or she did not hear or understand what the speaker has said or to consult a dictionary. If the person who is deaf or hard of hearing cannot communicate effectively with the interpreter, he/she should let the judge know.

Does anyone have any question about the role or responsibilities of the interpreter?”

APPENDIX F

Sample Judge’s Instruction to Witness: Interpreter’s Role

“I want you to understand the role of the interpreter. The interpreter is here only to interpret the questions that you are asked and to interpret your answers. The interpreter will say only what we or you say and will not edit, add, omit, or summarize anything.

The interpreter will say in English everything you say in your language, so do not say anything you do not want everyone to hear.

If you do not understand a question that was asked, request clarification from the person who asked it. Do not ask the interpreter.

Remember that you are giving testimony to this court, not to the interpreter. Therefore, please speak directly to the attorney or me, not to the interpreter. Do not ask the interpreter for advice.

Please speak in a loud, clear voice so that everyone and not just the interpreter can hear.

If you do not understand the interpreter, please tell me. If you need the interpreter to repeat something you missed, you may ask for it to be repeated, but please make your request to the person speaking, not to the interpreter.

Finally, please wait until the entire question has been interpreted in your language before you answer.

Do you have any questions about the role of the interpreter? Do you understand the interpreter?”

APPENDIX G

Sample Judge's Instruction to Jurors When Juror Is Deaf or Hard of Hearing: Interpreter's Role

““A juror who is deaf or hard of hearing will be using an interpreter. The interpreter's role is to enable the juror who is deaf or hard of hearing to participate fully as a juror by giving him or her full access to everything being said. The interpreter's sole function is to make possible full communication between the deaf or hard-of-hearing juror and the other jurors. Jurors should talk directly to the juror who is deaf or hard of hearing as if no interpreter were present.

The interpreter is required to:

- Interpret everything accurately and never leave out, add, or change anything being said.
- Keep confidential everything that is ever said during the jury's conversations and deliberations, so that anything can be discussed openly in the presence of the interpreter.
- Be unbiased and free of conflicts of interest.

When you are talking among yourselves outside the courtroom, do not talk to or try to involve the interpreter directly. The interpreter is not allowed to participate in your conversations or subsequent deliberations in any way.

The interpreter is not a member of the jury and should not offer personal opinions, legal advice, or play any other active role in the deliberation process.

The interpreter is not a party in this case, and has no interest in it and therefore is completely neutral.

Jurors should speak one at a time.

Does anyone have any questions about the role of the interpreter?

””



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