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Fulfilling Your Professional Responsibilities: Representing a Deaf Client in Texas Recent Development.

Matthew S. Compton

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RECENT DEVELOPMENT

FULFILLING YOUR PROFESSIONAL RESPONSIBILITIES: REPRESENTING A DEAF CLIENT IN TEXAS

MATTHEW S. COMPTON

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I. INTRODUCTION

When a deaf person,¹ like a hearing person, needs help with a legal matter, the deaf person can seek legal advice from an attorney. To find an attorney, the deaf and hearing persons can look through the phone book, search the Internet, or ask friends, family members, or co-workers for a referral. However, when a deaf person first contacts an attorney's office, the deaf person's experience is likely very different from that of the hearing person.

The deaf prospective client's first challenge is speaking with the attorney's receptionist.² If the deaf person has a TTY³—conceptually, a text telephone—the deaf person can call the attorney's office using a telecommunications relay service (TRS).⁴ The deaf caller types on a TTY keyboard, which is attached to a telephone line, and gives the TRS operator—called a communications assistant (CA)⁵—the telephone number for the

1. TEX. CIV. PRAC. & REM. CODE ANN. § 21.001 (Vernon 1997) (applying a broad definition to the term “deaf person” [as] an individual who has a hearing impairment . . . that inhibits the person's comprehension of proceedings or communication with others,” implying that the inhibition pertains to a spoken language); accord TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(1) (Vernon Supp. 2007) (same).

2. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006) (relating experiences reported by deaf persons seeking legal counsel).

3. See generally U.S. Department of Justice, Civil Rights Division, Disability Rights Section, Access for 9-1-1 and Telephone Emergency Services, <http://www.ada.gov/911ta.htm> (last visited May 12, 2008) (“A TTY is a device that is used in conjunction with a telephone to communicate with persons who are deaf, who are hard of hearing, or who have speech impairments, by typing and reading text.”). A synonym for TTY is TDD or Telecommunications Device for the Deaf. See 47 U.S.C. § 225(a)(2) (2000) (defining “TDD” as “Telecommunications Device for the Deaf”).

4. See generally 47 U.S.C. § 225(a)(3) (2000) (defining the term “telecommunications relay services” as services that enable deaf, hearing impaired, and speech impaired persons—who have the necessary equipment—to make a telephone call to, or receive a telephone call from, a hearing person); FCC Consumer Facts, Telecommunications Relay Services, <http://www.fcc.gov/cgb/consumerfacts/trs.html> (last visited May 12, 2008) (describing how a “Text-to-Voice TTY-based TRS” works); Public Utility Commission of Texas, Relay Texas Call Types, <http://www.puc.state.tx.us/relay/relay/calltypes.cfm> (last visited May 12, 2008) (describing types of relay calls and stating the telephone relay service in Texas, known as Relay Texas, can be reached by dialing 711 or 800-RELAY-TX (800-735-2989)).

5. See generally 47 C.F.R. § 64.601(7) (2007) (defining a “Communications assistant (CA) [as a] person who transliterates or interprets conversation between two or more end users” of voice or video relay services, which presumes the CA is a hearing person who can speak English).

attorney's office. Typically, the CA places the call, and when answered, asks if the receptionist has received a relay call before.⁶ If not, the CA explains that the CA will speak what the caller types, and, conversely, will type to the caller what the receptionist speaks.⁷ Because only one party can transmit to the CA at a time, the CA asks the receptionist to say "go ahead" when done speaking.⁸ Because the conversation takes place sequentially through the CA, and because the deaf caller's communication speed is limited by typing speed and English proficiency, the call will likely take more than twice as long as a voice call between hearing persons.⁹

Fortunately, recent technological changes have greatly improved a deaf caller's ability to telecommunicate.¹⁰ If the deaf person has access to Video Relay Service (VRS),¹¹ the deaf person's call to

6. *See generally* Rochester Institute of Technology Libraries, FAQ About Telecommunications Relay Services (TRS), <http://wally.rit.edu/depts/ref/research/deaf/FAQTRS.htm> (last visited May 12, 2008) (describing the procedure for a New York TRS call); Relay New Mexico, Frequently Asked Questions, http://www.relaynm.org/index.php?option=com_content&task=view&id=14&Itemid=27 (last visited May 12, 2008) (describing the procedure for a TRS call using Relay New Mexico). Relay Texas uses similar procedures.

7. *See* Public Utility Commission of Texas, Relay Texas Call Types, <http://www.puc.state.tx.us/relay/relay/calltypes.cfm> (last visited May 12, 2008) (describing how the CA speaks to the hearing person what the deaf person types and types to the deaf client what the hearing person speaks).

8. Public Utility Commission of Texas, Relay Texas Etiquette, <http://www.puc.state.tx.us/relay/relay/etiquette.cfm> (last visited May 12, 2008). Although the FCC uses the term "communications assistant," the Public Utility Commission refers to them as "Relay Agents." *Id.*

9. *See* FCC Consumer Facts, Video Relay Services, <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited May 12, 2008) (contrasting slow, text-based TRS with much faster video-based video relay service); Rochester Institute of Technology Libraries, FAQ About Telecommunications Relay Services (TRS), <http://wally.rit.edu/depts/ref/research/deaf/FAQTRS.htm> (last visited May 12, 2008) (acknowledging, though understating, that TTY calls take longer than voice calls).

10. *See* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 71 Fed. Reg. 30,818, 30,819 (May 31, 2006) (reporting that Video Relay Service (VRS), which began in January 2002, "provides a degree of 'functional equivalency' that is not attainable with text-based TRS by allowing those persons whose primary language is ASL to communicate in sign language"); *id.* at 47,141, 47,142 (Aug. 16, 2006) ("VRS calls reflect a degree of 'functional equivalency' unimaginable in a solely text-based TRS world.").

11. *See generally* 47 C.F.R. § 64.601(17) (2007) (defining video relay service (VRS) as a subset of TRS); FCC Consumer Facts, Video Relay Services, <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited May 12, 2008) (describing VRS: what it is, how it works, and its benefits); Public Utility Commission of Texas, Video Relay Service

the attorney's office will be both faster and easier for each party to understand.¹² The deaf person can use a web camera attached to a home computer or television, with some additional hardware connected to a high-speed Internet connection, to make the call.¹³ First, the deaf caller enters the law firm's telephone number in a field on the video screen, establishes a video link with the VRS CA—a sign language interpreter—and signs to the CA to place the call.¹⁴ The CA places a voice telephone call to the law firm, advises the receptionist that the receptionist is receiving a video relay call, and begins interpreting the conversation.¹⁵ The CA sees the deaf caller sign in real-time, and the CA simultaneously voices in English what the deaf caller signs in American Sign Language (ASL).¹⁶ Likewise, the CA simultaneously interprets to the deaf caller in ASL what the receptionist speaks in English.¹⁷

(VRS), <http://www.puc.state.tx.us/relay/relay/vrelay.cfm> (last visited May 12, 2008) (describing how VRS works).

12. Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 71 Fed. Reg. 30,818, 30,819 (May 31, 2006) (providing a robust definition of VRS and describing how VRS allows much faster communication than does a text-based traditional TRS call); FCC Consumer Facts, Video Relay Services, <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited May 12, 2008) (describing VRS's benefits including faster calls because "VRS allows those persons whose primary language is ASL to communicate in ASL, instead of having to type what they want to say"); Sorenson VRS, Video Testimonials, <http://www.sorensonvrs.com/srvsvideos/texas.php> (last visited May 12, 2008) (showing a video wherein deaf twin brothers describe how much faster calls are using VRS than TTY and showing a VRS call including the caller, the VRS CA, and the call recipient); *see also* 47 C.F.R. § 64.601 (2007) (defining various terms used to describe telecommunications relay services).

13. Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 71 Fed. Reg. 30,818, 30,819 (May 31, 2006).

14. *See* Sorenson VRS, What is Sorenson VRS?, <http://www.sorensonvrs.com/what/index.php> (last visited May 12, 2008) (showing the steps in a video relay call).

15. *See* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 71 Fed. Reg. 47,141, 47,142 (Aug. 16, 2006) (describing how the CA executes a VRS call); FCC Consumer Facts, Video Relay Services, <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited May 12, 2008) (describing how a deaf or hearing caller can use VRS).

16. National Institute on Deafness and Other Communication Disorders, American Sign Language, <http://www.nidcd.nih.gov/health/hearing/asl.asp> (last visited May 12, 2008) ("American Sign Language (ASL) is a complete, complex language that employs signs made with the hands and other movements, including facial expressions and postures of the body. It is the first language of many deaf North Americans . . .").

17. Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007) (noting that some CAs are tri-lingual: they can translate ASL into both English and Spanish, and vice versa). In practice, when a person calls

With VRS, the receptionist can quickly schedule an initial consultation with the deaf person with relatively little, if any, communication difficulty.¹⁸

However, the communication difficulty increases immediately when the prospective deaf client arrives at the attorney's office. Usually, the receptionist is not fluent in sign language,¹⁹ and the deaf person is not able to hear or speak English. The deaf person may offer the receptionist a written note giving the deaf person's name, but the receptionist will likely respond with just a gesture to be seated and perhaps a short note. When the deaf person meets the attorney, the communication barrier becomes particularly problematic. The attorney is probably not fluent in ASL,²⁰ the deaf person cannot hear—and usually cannot speak—English, and lip-reading²¹ may be ineffective. Before the attorney can decide whether to represent this prospective client, the attorney must know at least the nature of the prospective client's problem.²²

Relay Texas, the CA will identify themselves as “agent” and a number, for example, “Hello, this is agent 107.” However, when a person calls a VRS provider, the CA usually identifies themselves as “interpreter,” rather than “agent,” and then gives the caller the CA's identifying number. *Id.*

18. See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 71 Fed. Reg. 47,141, 47,142 (Aug. 16, 2006) (recognizing that “VRS calls [achieve] a degree of ‘functional equivalency’” with voice calls that was previously impossible using text-based systems like TTYs and text relay services); Public Utility Commission of Texas, Video Relay Service (VRS), <http://www.puc.state.tx.us/relay/relay/vrelay.cfm> (last visited May 12, 2008) (recognizing VRS's “enormous[]” popularity because of greatly improved communication compared to “a text-based TRS call”).

19. See ROSS E. MITCHELL ET AL., HOW MANY PEOPLE USE ASL IN THE UNITED STATES? WHY ESTIMATES NEED UPDATING 1, 10 tbl.2 (2005), available at http://research.gallaudet.edu/Publications/ASL_Users.pdf (suggesting methods to better determine how many Americans use ASL, noting the lack of accurate information, and listing sources that estimate ASL users from 100,000 to 15,000,000). Most estimates range from 100,000 to 500,000, *id.* at 10 tbl.2, which means less than two in one thousand people in the United States population use ASL.

20. See Hearing Loss Web, Deaf Lawyers Slowly Moving into the Mainstream, <http://www.hearinglossweb.com/Issues/Employment/lawyer.htm> (last visited May 12, 2008) (noting that in 2000 there were “fewer than 100 deaf attorneys nationwide”).

21. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 172 (1994) (arguing that, although commonly used, “[t]he term ‘lip reading’ . . . is a misnomer” in part because about 70% of spoken sounds do not show on the lips). Speechreading is a better term because a speechreader combines the speaker's lip movements, facial expressions, body language, and the conversation's context to make an educated guess as to what the speaker is saying. *Id.*

22. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a), reprinted in TEX. GOV'T

However, the deaf person's legal problem has at least two facets not present in a typical hearing person's legally identical situation: attorney-client communication, and the attorney's conflict between the attorney's own financial interest and effective communication with the deaf client.

First, the deaf person and the attorney need to discuss the client's problem, but they literally do not speak the same language. To communicate, the attorney may offer to write or type notes to the deaf person.²³ However, the deaf person may not be able to read and write English proficiently.²⁴ Moreover, the deaf person may reason that, without an interpreter, the attorney-client meeting will take longer, and if the attorney is billing by the hour, the deaf person will have to pay more. In response, the deaf person may ask the attorney to provide a sign language interpreter to help them communicate effectively and more efficiently.²⁵

Second, even though the deaf person may need a sign language interpreter for effective communication, the attorney may not want to pay for the interpreter.²⁶ If the attorney does not under-

CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (prohibiting a lawyer from representing a client "in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless" the lawyer satisfies other conditions).

23. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006); *see also* DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 para. 8 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (documenting a deaf client's allegation that her lawyer wrote notes to her rather than provide a qualified interpreter).

24. *See* Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 195 (1994) ("[T]he majority of prelingually deaf individuals read at a fourth grade level . . ."). Other sources note the lack of definitive, comprehensive literacy data for deaf adults but generally support a likely fourth grade reading level for deaf adults. *See* Gallaudet Research Institute, Gallaudet University, Literacy & Deaf Students, <http://gri.gallaudet.edu/Literacy/> (last visited May 12, 2008) (reporting that the median deaf seventeen- and eighteen-year-old student in school has a reading level of a fourth grade hearing student).

25. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006).

26. DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JOSEPH DAVID CAMACHO, ESQUIRE, ALBUQUERQUE, NEW MEXICO UNDER THE AMERICANS WITH DISABILITIES ACT, DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-49-37 para. 3 (Aug. 9, 2007), <http://www.ada.gov/albuquerque.htm> (quoting Mr. Camacho's letter to his deaf client in which he refused to provide an

stand the importance of an interpreter to effective communication or does not understand the Americans with Disabilities Act (ADA)²⁷ requirements, the attorney may refuse to take the deaf person as a client because of the cost of an interpreter.²⁸ Some attorneys will accept a deaf client only if the client agrees to pay for the interpreter.²⁹ Other attorneys insist that deaf clients provide their own interpreter, such as a friend or family member.³⁰ In each case, the attorney's financial interest in not hiring an interpreter is directly adverse to the client's need for legal services based on effective attorney-client communication.

interpreter at meetings with his deaf client: "I have never had to pay to converse with my own client."); Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006) (relating experiences reported by some Deafness Resource Specialists (DRSs) wherein attorneys refused to provide interpreters for deaf clients). *See generally* Texas Department of Assistive and Rehabilitative Services, DHHS Specialist Program, <http://www.dars.state.tx.us/dhhs/specialistpgm.shtml> (last visited May 12, 2008) (summarizing the duties of a Deafness Resource Specialist (DRS) including advocacy for Deaf and "as liaisons between [Deaf] consumers and service providers" such as law firms).

27. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in 42 U.S.C. §§ 12101-12213, 47 U.S.C. § 225, 47 U.S.C. § 611 (2000 & Supp. IV 2004)).

28. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006).

29. *Id.* As one example, in March 2007, a well-established Texas family law firm refused to represent a deaf client unless the client provided an interpreter for attorney-client meetings. Unfortunately, this type of situation is an all too common occurrence. *Id.*; *see also* DEP'T OF JUSTICE, SETTLEMENT AGREEMENT UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 BETWEEN THE UNITED STATES OF AMERICA AND THE LAW OFFICE OF COHEN AND JAFFE, LLC: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-52-111 para. 7 (July 3, 2006), <http://www.ada.gov/cohenjaffe.htm> (documenting an instance of a similar practice wherein "[t]he Law Office passed along the charges for the interpreter [to the client]").

30. DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JOSEPH DAVID CAMACHO, ESQUIRE, ALBUQUERQUE, NEW MEXICO UNDER THE AMERICANS WITH DISABILITIES ACT, DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-49-37 para. 3 (Aug. 9, 2007), <http://www.ada.gov/albuquerque.htm> (quoting Mr. Camacho who told his deaf client: "[Y]ou have a very intelligent son who can [interpret] for you."). His client's son was nine years old. *Id.* Ironically, Mr. Camacho's client was suing a hospital for failing to provide her with sign language interpreters when her son was hospitalized. *Id.*; *see also* Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 130 (2000) (lamenting that some attorneys use "unqualified interpreters, including family members" rather than hire a qualified interpreter).

Without effective communication, attorneys cannot properly represent their clients,³¹ and thus cannot fulfill their professional responsibilities to their clients.³² For example, attorneys cannot provide clients with “an informed understanding” of the clients’ legal rights and duties and tell them what they need to do, “zealously assert[] the client[s]’ position,” or effectively communicate to their clients the results of the attorneys’ examination of the clients’ affairs.³³ Failing to accomplish these functions might constitute ineffective representation³⁴ and would certainly not improve the quality of legal service for deaf clients.³⁵

The purpose of this Recent Development is to highlight the recent changes in Texas laws that affect attorneys representing deaf clients in Texas.³⁶ This work addresses the professional responsibilities that attorneys should fulfill and the laws they must obey. Part I introduced some of the problems deaf clients face when seeking legal representation. Part II addresses the deaf population, federal laws, Texas laws, and rules of professional conduct forming the legal background for attorney-client

31. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (identifying one of counsel’s duties to a criminal defendant as the “dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution”); *Sanchez v. State*, 122 S.W.3d 347, 354 (Tex. App.—Texarkana 2003, pet. ref’d) (“An attorney must be able to communicate with his or her client in order to effectively represent the client. Therefore, we conclude the requirement of effective assistance of counsel forms a basis for the requirement of an interpreter.”). The defendant in *Sanchez* was not deaf but “could not speak English.” *Id.* at 353.

32. See TEX. DISCIPLINARY R. PROF’L CONDUCT 1.03, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (emphasizing the importance of reasonably informative and timely communication between attorney and client).

33. See *id.* preamble ¶ 2 (listing the functions lawyers perform for their clients).

34. See *Cooper v. State*, 565 N.W.2d 27, 30 (Minn. Ct. App. 1997) (relating that an “attorney’s failure to provide an ASL interpreter at two-thirds of their pretrial meetings . . . fell below an objective standard of reasonableness because” a deaf client cannot fully participate in the case if the client cannot understand the communications, but to find ineffective assistance, the complainant must prove to the court that, but for the attorney’s conduct, the outcome would have been different).

35. See TEX. DISCIPLINARY R. PROF’L CONDUCT preamble ¶ 5 (urging lawyers to “seek improvement of . . . the quality of [legal] service”).

36. Although deaf and hard of hearing persons experience numerous communication challenges in legal situations, this Recent Development’s scope does not address many of those problems, including those facing deaf jurors, deaf witnesses, or the much larger hard of hearing community. The scope of this Recent Development includes some of the problems facing the culturally deaf—a distinct subset within the much larger population of those with some degree of hearing loss.

relationships. Part III analyzes the problems faced by deaf clients and suggests how attorneys can better serve them. Part IV concludes with recommendations intended to improve attorney-client communications and encourage more attorneys to represent clients who are deaf, particularly those that are culturally deaf—a distinct subset within the much larger population of those with some degree of hearing loss.

II. BACKGROUND

A. *Who Are the Deaf?*

For those unfamiliar with hearing loss, the terms deaf and hard of hearing may seem almost interchangeable. In fact, both terms refer to persons with some hearing loss. However, the terms identify two separate communities: the deaf and the hard of hearing. In greatly simplified terms, deaf persons cannot recognize spoken words even with hearing aids whereas hard of hearing persons can.³⁷ Within the population of those who are deaf, there is a further bifurcation: the culturally hearing and the culturally deaf.³⁸

1. Culturally Hearing

The “culturally hearing” can be described as those persons who learned a spoken language and participated in a hearing society before they lost their hearing.³⁹ In fact, to “Deaf,”⁴⁰ a culturally hearing person is one that is not “culturally deaf.”⁴¹ The

37. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 171 & n.57 (1994) (explaining the complexities of assessing and quantifying hearing loss).

38. See Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 160 (1994) (reporting that the “culturally deaf” have their own community).

39. See *id.* (describing persons who “utilize speech and lipreading as the[ir] primary method of communication [as] culturally hearing”).

40. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 128 n.1 (2000) (characterizing the deaf community and adding “[t]he Deaf Community (with a capital ‘D’)” self-identifies as a separate culture).

41. See *id.* (identifying two separate groups of persons within the population of those who are profoundly deaf: “those who consider themselves members of the Deaf Community and those who do not”; in other words, the culturally deaf and the culturally hearing); Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's*

culturally deaf are a small minority.⁴² Most people are born hearing and are raised by hearing parents.⁴³ After months of listening to parents and others speak, children begin to use their own voices to mimic the sounds they have heard.⁴⁴ Hearing children hear their own voices and use that feedback to modify their voices until the sounds they make resemble those they hear. This critically important language acquisition process takes place roughly from birth to a very young age.⁴⁵ Children who lose their hearing before acquiring a spoken language may be referred to as “prelingually deaf.”⁴⁶ Most children born deaf are born to hearing parents who do not sign.⁴⁷ The deaf child’s parents are

Obligation to Comply with the A.D.A., 8 J.L. & HEALTH 155, 159 (1994) (proffering that the deaf population is bifurcated: “those who are members of the deaf community and those who are not”).

42. See Gallaudet University Library, Deaf Population in U.S. States, <http://library.gallaudet.edu/deaf-faq-stats-states.shtml> (last visited May 12, 2008) (showing estimates of persons “[u]nable to hear normal conversation,” based on 1994–1995 U.S. Census Bureau data, at less than 1% in all fifty states). Gallaudet University, located in Washington, D.C., is a liberal arts university with a “140 year-old international reputation as the premier university for undergraduate students who are deaf or hard of hearing.” Gallaudet University, Prospective Students, <http://www.gallaudet.edu/x1843.xml> (last visited May 12, 2008).

43. See National Institute on Deafness and Other Communication Disorders, Statistics about Hearing Disorders, Ear Infections, and Deafness, <http://www.nidcd.nih.gov/health/statistics/quick.htm> (last visited May 12, 2008) (reporting that less than three in 1,000 U.S. children are born deaf, but 90% of those children were born to hearing parents).

44. See Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community’s Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 159 (1994) (relating how a baby begins learning a spoken language even before it can speak).

45. Compare *id.* (suggesting birth to age three is the critical language acquisition period), with Anna-Miria Mühlke, *The Right to Language and Linguistic Development: Deafness from a Human Rights Perspective*, 40 VA. J. INT’L L. 705, 710 (2000) (citing the expert who “first introduced the idea that the critical period for linguistic development is approximately between two and thirteen years of age”). Mühlke also discusses “[l]inguistic [d]evelopment in [d]eaf [c]hildren” and warns that the group most at risk of abnormal linguistic development is comprised of “children who are either born profoundly deaf or become so before they have acquired spoken language.” Anna-Miria Mühlke, *The Right to Language and Linguistic Development: Deafness from a Human Rights Perspective*, 40 VA. J. INT’L L. 705, 712 (2000).

46. See Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community’s Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 159 (1994) (dividing deaf persons into two groups that correlate to their onset age of deafness: prelingual or postlingual); Anna-Miria Mühlke, *The Right to Language and Linguistic Development: Deafness from a Human Rights Perspective*, 40 VA. J. INT’L L. 705, 712 (2000) (defining the terms “prelingually deaf” and “postlingually deaf”).

47. See generally GALLAUDET RESEARCH INSTITUTE, REGIONAL AND NATIONAL

probably not familiar with hearing loss.⁴⁸ When the parents seek medical advice on how to help their child live with deafness, their doctor may be more likely to recommend a cochlear implant⁴⁹ or an oral program⁵⁰ that involves “mainstreaming” (or inclusion) rather than an ASL school for Deaf.⁵¹ Mainstreaming is having the deaf child attend school with hearing peers, but with special teachers in the classroom using either an oral or ASL approach.⁵²

SUMMARY REPORT OF DATA FROM THE 2004–2005 ANNUAL SURVEY OF DEAF AND HARD OF HEARING CHILDREN AND YOUTH 7 (2005), available at http://gri.gallaudet.edu/Demographics/2005_National_Summary.pdf (reporting the national percentage of deaf and hard of hearing children and youth whose “[f]amily members do not regularly sign” in the home at 69.3%).

48. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006).

49. See generally National Institute on Deafness and Other Communication Disorders, Cochlear Implants, <http://www.nidcd.nih.gov/health/hearing/coch.asp> (last visited May 12, 2008) (describing a cochlear implant as a device with a microphone that picks up sound—but bypasses the eardrum and its connecting bones—and directly stimulates the auditory nerve).

50. See Anna-Miria Mühlke, *The Right to Language and Linguistic Development: Deafness from a Human Rights Perspective*, 40 VA. J. INT'L L. 705, 720 (2000) (presenting the ideological differences between advocates of oralism and sign language education and noting that oral programs aim “to develop speech reception and speech production skills that will permit children to acquire the language of the country in which they live, to learn through the use of spoken language in school, and to function later as independent adults through the use of speech communication in society.” (citation omitted)). In the United States, the oral method may trace its roots to German property law which required individuals to perform “an oral legal act . . . to claim their title and inheritance.” *Id.* at 716. In contrast, ASL can trace its roots to Christianity and French deaf education. *Id.* at 715. Some schools now offer bilingual education where the deaf child learns “sign language as the first . . . language . . . and then uses [ASL] as the language of instruction for [English], mainly in its written version”). *Id.* at 718.

51. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006).

52. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 376 (5th Cir. 2003) (describing one school district’s teaching method where “hearing-impaired students are ‘mainstreamed’ (educated in regular classrooms)”; Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 198 (“Mainstreaming refers to integrating students with disabilities into the general education classroom for part of the day, typically during non-academic periods, for social interaction. A mainstream situation usually occurs when students with disabilities are placed in general education classrooms with ‘appropriate instructional support’ during certain periods of the day.” (footnotes omitted)); accord Judith M. Gerber & Sheryl Dicker, *Children Adrift: Addressing the Educational Needs of New York’s Foster Children*, 69 ALB. L. REV. 1, 44 n.227 (2005) (“Mainstreaming is placing a student whose main placement is a separate special education class in a general education class for a portion of the day.”). Inclusion—which is different from mainstreaming—is where “students with disabilities attend regular

In an oral program, children with hearing loss learn to read, write, and speak English as their first language.⁵³ The children are taught to “hear” English by developing their residual hearing using hearing aids, assistive listening devices,⁵⁴ and lip reading.⁵⁵ Typically, an oral program’s goal is for children to speak and recognize spoken words.⁵⁶ Children in an oral program probably will not be taught ASL; they will be culturally hearing. An oral program may be a good option for a child with partial hearing loss whose parents want their child to live in a culturally hearing society.⁵⁷

When people lose their hearing after having acquired a spoken language, they may be referred to as “postlingually deaf,” which includes those who lose their hearing as they grow older.⁵⁸

classrooms for most of the day, usually with the homeroom being a general education classroom.” Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 198–99. Mainstreaming and inclusion, placing children in the “[l]east restrictive [educational] environment,” stems at least in part from federal education funding requirements. See 20 U.S.C. § 1412(a)(5)(A) (2000) (“To the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled . . .”).

53. See Rhode Island Department of Elementary and Secondary Education, Office of Special Populations, Rhode Island Auditory-Oral Program, http://www.ride.ri.gov/Special_Populations/Programs_Services/Deaf%20and%20Hard-of-Hearing.aspx (last visited May 12, 2008) (describing their auditory-oral educational program to enable deaf children “to learn to use listening and talking as their primary way of communicating and learning”).

54. See Anna-Miria Mühlke, *Right to Language and Linguistic Development*, 40 VA J. INT’L L. 705, 719–22 (2000) (discussing the use of lipreading and its focus on residual hearing in deaf education in oralism, an ideological and political stance toward deaf education); see generally National Association of the Deaf, Benefits of Assistive Listening Systems, <http://www.nad.org/site/pp.asp?c=foINKQMBF&b=180440> (last visited May 12, 2008) (describing several types of assistive listening devices, including hearing aids).

55. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can’t Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 172 (1994) (arguing that, although commonly used, “[t]he term ‘lip reading’ . . . is a misnomer” in part because about 70% of spoken sounds do not show on the lips). Speechreading is a better term because a speechreader combines the speaker’s lip movements, facial expressions, body language, and the conversation’s context to make an educated guess as to what the speaker is saying. *Id.*

56. See Auditory-Oral Educational Approach, <http://www.deafinfx.com/DeafEd/OptionsGuide/Oralism.html> (last visited May 12, 2008) (reciting oral program goals).

57. See *id.* (listing oral program challenges, benefits, and drawbacks).

58. Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community’s Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 159–60 (1994) (“The single largest subgroup [of culturally hearing] is comprised of the elderly who have lost hearing as they advanced in age.”).

Irrespective of age, more than 90% of Texans are able to hear normal spoken conversations; less than 6% of Texans have difficulty hearing a normal conversation.⁵⁹ Given Texas's population, the number of Texans with partial hearing loss is estimated at more than 3.8 million.⁶⁰ Hard of hearing persons face their own communication difficulties obtaining and using legal services, but this Recent Development's scope is limited to some of the legal issues faced by the culturally deaf.

2. Culturally Deaf

The culturally deaf, sometimes designated as Deaf,⁶¹ are “those who see themselves as a linguistic and cultural group.”⁶² They are a rather small group, probably numbering less than 60,000 in Texas.⁶³ They communicate using ASL, attend activities together, and are likely to be prelingually deaf—to have lost their hearing before they acquired a spoken language.⁶⁴ Few were born to deaf parents who were fluent in ASL and who could teach them ASL from birth.⁶⁵ A deaf child's parents, whether hearing or deaf, must choose how their child will be educated. For children with near total hearing loss, a sign language program may be a better

59. Gallaudet University Library, Deaf Population in U.S. States, <http://library.gallaudet.edu/deaf-faq-stats-states.shtml> (last visited May 12, 2008) (providing estimates for deaf persons, over sixteen years old, based on 1994–1995 U.S. Census Bureau data and noting that exact figures on hearing loss are difficult to obtain).

60. Texas Department of Assistive and Rehabilitative Services, Frequently Asked Questions about Deaf and Hard of Hearing Issues, <http://www.dars.state.tx.us/dhhs/dhhsfaqs.shtml> (last visited May 12, 2008).

61. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 128 n.1 (2000) (characterizing the deaf community and adding “[t]he Deaf Community (with a capital ‘D’)” self-identifies as a separate culture).

62. *Id.*

63. See Gallaudet University Library, Deaf Population in U.S. States, <http://library.gallaudet.edu/deaf-faq-stats-states.shtml> (last visited May 12, 2008) (estimating the number of deaf Texans over the age of sixteen to be 56,587).

64. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 128 n.1 (2000) (noting most culturally deaf persons “were born deaf or lost their hearing before reaching adulthood”).

65. See GALLAUDET RESEARCH INSTITUTE, REGIONAL AND NATIONAL SUMMARY REPORT OF DATA FROM THE 2004–2005 ANNUAL SURVEY OF DEAF AND HARD OF HEARING CHILDREN AND YOUTH 4 (2005), available at http://gri.gallaudet.edu/Demographics/2005_National_Summary.pdf (reporting the national percentage of deaf and hard of hearing children and youth whose parents are both hearing, and thus most likely not fluent in ASL, at 83.4%).

choice than an oral program, but it is unquestionably a different path.⁶⁶ Children who learn ASL as their first language, who attend a school for the deaf where other children use ASL, and who are taught about Deaf culture will almost certainly be culturally deaf.⁶⁷ However, most deaf children are mainstreamed in the public school system;⁶⁸ some have an interpreter in class with them to interpret what the teacher is saying.⁶⁹ There is a vigorous debate, with strong underlying emotions and wide-ranging effects, as to whether an ASL or oral program is better for the child.⁷⁰ Regardless of the language education approach, the

66. See Anna-Miria Mühlke, *The Right to Language and Linguistic Development: Deafness from a Human Rights Perspective*, 40 VA. J. INT'L L. 705, 720 (2000) (drawing contrasts between sign language and oral program educational methods for deaf children).

67. See Comparative Chart: Deaf and Ethnic Cultures, http://www.deafculture.com/ethnic_culture/ (last visited May 12, 2008) (comparing Deaf community characteristics to ethnic group characteristics to show the existence of a Deaf culture and listing Deaf activities such as Deaflympics, Deaf tours, Deaf art, and Deaf schools).

68. See 20 U.S.C. § 1412(a) (2000) (conditioning some federal education funding to states on their placing deaf children in classes with their non-disabled peers).

69. See TEX. EDUC. CODE ANN. § 29.304(a) (Vernon 2005) (requiring teachers of deaf students to be proficient in sign language or to use a sign language interpreter). Chapter 29, Subchapter I of the Education Code discusses programs for deaf students in Texas. *Id.* § 29.

70. See TEX. EDUC. CODE ANN. § 29.302 (Vernon 2005) (allowing deaf students in Texas public schools to be taught using either oral or sign language systems, thereby avoiding the conflict between oral and ASL advocates); Anna-Miria Mühlke, *The Right to Language and Linguistic Development: Deafness from a Human Rights Perspective*, 40 VA. J. INT'L L. 705, 719–25 (2000) (using a trench warfare metaphor to describe the ideological battle between oralists and Deaf culturists); Defining Deaf Culture, <http://www.deafculture.com/definitions/> (last visited May 12, 2008) (commenting on the conflict between oral and ASL advocates by reporting “[d]eaf people in the United States have staunchly resisted the unstinting attempts of oralists to eradicate the use of sign language and assimilate them into the hearing mainstream”). The angry protests by students and faculty at Gallaudet University, seen by many Deaf as the bastion of deaf culture, over the selection of a culturally hearing president are vivid evidence of the sometimes bitter divide between Deaf culture and an oral tradition aimed at integration in a hearing culture. The Gallaudet University Board of Trustees had selected Jane Fernandes as the next university president. “She was born deaf. She, however, grew up in an oral tradition, learning to read lips and speak. She was 23 when she started to learn sign. . . . I think some still hold that against her.” *Talk of the Nation: As Deaf Culture Changes, So Do the Questions* (NPR radio broadcast Oct. 12, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6189253>; see also CNN.com, *Gallaudet Classes Resumed Monday as Protests Continue*, <http://www.cnn.com/2006/EDUCATION/10/15/gallaudet.protest.ap/index.html> (last visited May 12, 2008) (reporting that Jane Fernandes, the president-select of Gallaudet University, commenting on the student protests and 82% faculty vote against her selection, stated that opposition to her selection was due to a belief that she was not “deaf enough” to serve as president because she was raised using an oral tradition and is culturally hearing, rather than raised using ASL and culturally deaf). On October 29,

hearing impaired community bifurcation is clear: culturally hearing or culturally deaf.⁷¹ A few Deaf are bicultural, but that is the exception rather than the rule. For the culturally deaf, most learn English as a second language; their first language is ASL.⁷²

Because ASL stands for American Sign Language, ASL must be American English expressed using hand motions, right? Wrong!⁷³ English signed word for word, using English grammar, English pronouns, and English language concepts is known as Manually Coded English (MCE) or Signed English.⁷⁴ Postlingually deaf persons may prefer MCE if they are proficient in English and do not know ASL.⁷⁵ However, ASL has its own grammar, its own

2006, the Board of Trustees rescinded her selection and on December 10, 2006, selected Robert Davila, who is culturally deaf, to serve as interim president. Katherine Geyer, *She's In, She's Out as Gallaudet President*, WORCESTER TELEGRAM & GAZETTE, Dec. 17, 2006, at A1.

71. See Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 159–60 (1994) (characterizing the deaf population as either culturally deaf or culturally hearing).

72. *Id.* at 160. For the most part, those whose first language is ASL communicate well, whereas those prelingually deaf with delayed language acquisition experience weakness in all aspects of their communication capabilities. E-mail from Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, to Matthew S. Compton (Jan. 1, 2008, 19:24:34 CST) (on file with the *St. Mary's Law Journal*).

73. See TEX. EDUC. CODE ANN. § 29.301 (Vernon 2005) (“American Sign Language’ [is] a complete, visual, and manual language with its own grammar and syntax.”); *Cooper v. State*, 565 N.W.2d 27, 29 (Minn. Ct. App. 1997) (“ASL is not simply English communicated through hand movements, but a significantly different language.”).

74. Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 164 (1994) (“Manually Coded English (MCE) or Signed English is word for word English signed on the hands.”).

75. See *id.* (“Manually Coded English (MCE) . . . is word for word English signed on the hands [and] is preferred in many professional settings by highly educated deaf people and by late deafened adults and hard of hearing people who have learned to sign.”). Highly educated deaf may be equally fluent in ASL and MCE and so choose MCE when communicating with hearing or culturally hearing persons. See *id.* at 161, 164 (noting the duality in the Deaf community and the preference for MCE in professional settings). Late deafened adults who are proficient in English may choose to learn MCE rather than ASL because MCE is English expressed in signs, and ASL is an entirely new language with different vocabulary, grammar, and concepts. *Id.* at 161–62. The profound difference between MCE and ASL is further demonstrated by the separate certifications available for ASL (Certificate of Interpretation) and MCE (Certificate of Transliteration). See REGISTRY OF INTERPRETERS FOR THE DEAF, GENERALIST CERTIFICATION (CI AND CT) EXAMINATION INFORMATION BULLETIN 11–12 (2006), available at http://www.rid.org/UserFiles/File/pdfs/GENERALIST_CERTIFICATION.pdf (describing the rating criterion for the CI and CT tests). During the CT test, the successful candidate will mouth the English words in their English sentence form. *Id.* at 12. During

vocabulary, and its own—very different—use of pronouns.⁷⁶ If a sign language interpreter were to convert a deaf person's signs into the words that the signs represented without changing the grammar and concepts into English—a process called transliteration⁷⁷—an English speaker might find it very difficult to understand what the deaf person was trying to communicate. For example, “[i]n English, you’d say: Have you visited Gallaudet? In ASL, you’d sign: Touch Finish Gallaudet You?”⁷⁸ Likewise, when deaf persons who are fluent in ASL—but not English—read English, they are reading a foreign language⁷⁹ with completely different grammar, and a vocabulary at least two to four times the size of their own working vocabulary.⁸⁰ Because of these differences, and because of the educational challenges faced by many culturally deaf persons, Deaf are likely to have difficulty

the CI test, the candidate must use mouth movements that “reflect appropriate adult ASL usage;” mouth movements in “exact English word order will not pass the [t]est”). *Id.* at 13. The CI and CT tests will be discontinued in December 2008, in favor of a new testing system. Registry of Interpreters for the Deaf, Eligibility, <http://www.rid.org/education/testing/index.cfm/AID/87> (last visited May 12, 2008).

76. See TEX. EDUC. CODE ANN. § 29.301 (Vernon 2006) (“‘American Sign Language’ [is] a complete, visual, and manual language with its own grammar and syntax.”); Carla A. Halpern, *Listening in on Deaf Culture*, STANDARDS, <http://www.colorado.edu/journals/standards/V5N2/AWARD/halpern2.html> (last visited May 12, 2008) (“The one spoken language which has the closest grammatical similarity to ASL is Nava[j]o . . .”).

77. Michele LaVigne & McCay Vernon, *An Interpreter Isn’t Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 870–71 (“Transliteration is the means by which spoken English is converted *word for word* into visual English.”).

78. *All Things Considered: Technology No Longer Distances Deaf Culture* (NPR radio broadcast May 1, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5374451>.

79. See National Institute on Deafness and Other Communication Disorders, American Sign Language, <http://www.nidcd.nih.gov/health/hearing/asl.asp> (last visited May 12, 2008) (declaring that “ASL . . . is a language completely separate from English”).

80. See R. MARTIN MCGUIRE ET AL., TOWARDS A ONE-WAY AMERICAN SIGN LANGUAGE TRANSLATOR 5, http://www.gvu.gatech.edu/ccg/publications/faceandgesture04_mcguire.pdf (“ASL has approximately 6000 commonly used signs.”); ProLingua Executive Language Services, Vocabulary Estimator, http://www.prolingua.co.jp/vocab_est_e.html (last visited May 12, 2008) (asserting that most American adults have a 12,000–18,000 word working vocabulary but most professionals, including college graduates, have an 18,000–24,000 word working vocabulary); AskOxford.com, Ask the Experts, Frequently Asked Questions, How many words are there in the English language?, <http://www.askoxford.com/asktheexperts/faq/aboutenglish/numberwords?view=uk> (last visited May 12, 2008) (“[T]here are, at the very least, a quarter of a million distinct English words If distinct senses were counted, the total would probably approach three quarters of a million.”).

reading and writing English; conversely, many hearing English speakers have difficulty learning ASL.⁸¹ Although there are culturally deaf professionals of exceptional educational accomplishment, the median seventeen- and eighteen-year-old deaf student has a reading level of a fourth grade hearing student.⁸² Comprehensive literacy data for deaf adults is not available.⁸³

Another characteristic of Deaf adults and children, when communicating with a hearing person, is their tendency to nod their heads and smile even when they do not understand what hearing persons say to them.⁸⁴ The reasons for this may resemble your own when ordering off of a foreign language menu in an exotic restaurant from a thick-accented waiter—you do not wish to seem ignorant, rude, or out of place.⁸⁵ Because Deaf have their own language with its own grammar and vocabulary, and because they may not have fully learned the English language, attorneys who communicate with culturally deaf clients using written English may not be achieving effective communication, may be violating their professional responsibilities, and may not be complying with applicable laws.⁸⁶

81. R. MARTIN MCGUIRE ET AL., TOWARDS A ONE-WAY AMERICAN SIGN LANGUAGE TRANSLATOR 1–2, http://www.gvu.gatech.edu/ccg/publications/faceandgesture04_mcguire.pdf (last visited May 12, 2008).

82. Gallaudet Research Institute, Gallaudet University, Literacy & Deaf Students, <http://gri.gallaudet.edu/Literacy/> (last visited May 12, 2008).

83. *Id.* One reading expert “concluded that the average adult reads at the eighth grade level” because “the average difficulty of the [fifty state sample of] newspaper articles is at the eighth grade level.” *Bartlett v. N.Y. State Bd. of Law Exam’rs*, No. 93 Civ. 4986 (SS), 2001 U.S. Dist. LEXIS 11926, at *45 (S.D.N.Y. Aug. 15, 2001).

84. Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can’t Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 191 (1994) (“It is common for a deaf person to nod his or her head in agreement without fully understanding the nature of the assent.”); *see also* *Stanley v. Lazaroff*, 82 F. App’x 407, 413 (6th Cir. 2003) (quoting a defense expert witness who noted the deaf defendant “might smile and nod but may not really understand what was being asked”).

85. *See* *People v. Alexander*, No. A106840, 2005 Cal. App. Unpub. LEXIS 5721, at *20 (Cal. Ct. App. June 30, 2005) (citing ASL expert’s testimony that “deaf people often act as though they understand what is being stated so as to conform or to be accepted”); Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can’t Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 191 (1994) (reporting that Deaf may act like they understand a question or statement from a hearing person when they do not); *see also* *Stanley v. Lazaroff*, 82 F. App’x 407, 413 (6th Cir. 2003) (quoting a defense expert witness who noted the deaf defendant “might smile and nod but may not really understand what was being asked”).

86. *E.g.*, DEP’T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED

B. *Laws Particularly Affecting Deaf*

1. Federal Laws and the ADA

Our laws are rooted in principles; a founding premise of the United States is that “all men are created equal.”⁸⁷ Deaf are subject to the same laws as every other person, but some laws affect deaf persons differently. For example, the Sixth Amendment provides that each person is entitled to be represented by an attorney in criminal prosecutions.⁸⁸ In 1963, *Gideon v. Wainwright*⁸⁹ extended that protection by providing a court-appointed, and taxpayer funded, attorney for criminal defendants unable to afford an attorney.⁹⁰ Later that same day, the Court further extended this due process protection to the “first direct appeal as of right.”⁹¹ It was not until 1978, however, that Congress passed the Court Interpreters Act,⁹² which requires federal courts to provide interpreters for hearing impaired and

STATES OF AMERICA AND JOSEPH DAVID CAMACHO, ESQUIRE, ALBUQUERQUE, NEW MEXICO UNDER THE AMERICANS WITH DISABILITIES ACT, DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-49-37 para. 10 (Aug. 9, 2007), <http://www.ada.gov/albuquerque.htm> (“[Finding] that Mr. Camacho failed to provide [his client] with effective communication”); DEP’T OF JUSTICE, SETTLEMENT AGREEMENT UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 BETWEEN THE UNITED STATES OF AMERICA AND THE LAW OFFICE OF COHEN AND JAFFE, LLC: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-52-111 paras. 15, 16 (July 3, 2006), <http://www.ada.gov/cohenjaffe.htm> (finding that “the Law Office violated the ADA” and that “the Law Office failed to provide [the deaf client] with effective communication” despite the Law Office’s assertions to the contrary); DEP’T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 paras. 8, 20 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (rejecting an attorney’s assertion that his communication methods with his deaf client, which included “pen and paper, fax, lipreading,” and the use of a telephone relay service and an unqualified interpreter, yielded effective communication, and finding that the attorney violated the Americans with Disabilities Act).

87. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

88. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

89. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

90. *Id.* at 344 (“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”).

91. *Douglas v. California*, 372 U.S. 353, 356–57 (1963); *see also Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) (describing the advancement of due process protection for indigent defendants).

92. Court Interpreters Act, Pub. L. No. 95-539, § 2(a), 92 Stat. 2040, 2040–42 (codified as amended at 28 U.S.C. § 1827 (2000)).

non-English speaking defendants “to ensure that the defendant can comprehend the proceedings and communicate effectively with counsel.”⁹³

Enabling effective communication in federal courts improved legal protections for deaf persons, but there were still widespread barriers to their access to public accommodations and public services because of communication barriers.⁹⁴ In part to achieve more effective communication for the deaf,⁹⁵ Congress passed the Americans with Disabilities Act of 1990 (ADA)⁹⁶ “[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability.”⁹⁷ The ADA addresses discrimination in five separate titles. Title V contains miscellaneous provisions; Titles I–IV are discussed below.

Title I⁹⁸ prohibits “discrimination against individuals with disabilities”⁹⁹ by a “covered entity” such as an employer.¹⁰⁰ An employer with fewer than fifteen employees is not a “covered entity”¹⁰¹ and is not subject to the requirements of Title I.¹⁰² However, this small employer exception applies *only* to the employer-employee relationship requirements within Title I.¹⁰³

Title II¹⁰⁴ prohibits discrimination by any “public entity”¹⁰⁵ which includes “any State or local government”¹⁰⁶ or any of their political subdivisions.¹⁰⁷

93. *United States v. Febus*, 218 F.3d 784, 791 (7th Cir. 2000); *see also* 28 U.S.C. § 1827(b)(1) (2000) (implementing the interpreter requirements).

94. *See* 42 U.S.C. § 12101(a)(3) (2000) (finding discrimination against the disabled in “public accommodations, . . . communication, . . . and access to public services”).

95. *See id.* § 12101(b) (listing the legislation’s purpose).

96. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in 42 U.S.C. §§ 12101–12213, 47 U.S.C. § 225, 47 U.S.C. § 611 (2000 & Supp. IV 2004)).

97. 104 Stat. 327, 327 (1990).

98. 42 U.S.C. §§ 12111–12117 (2000).

99. *Id.* § 12101(b)(1). This prohibition applies to the entire Act. *Id.* § 12101(b).

100. *Id.* § 12111(2).

101. *Id.* § 12111(5)(A).

102. 42 U.S.C. § 12112(a) (2000).

103. *Id.* § 12111 (limiting the scope of the term “employer” to “[a]s used in this subchapter”).

104. *Id.* §§ 12131–12165.

105. *Id.* § 12131(1).

106. *Id.* § 12131(1)(A).

107. 42 U.S.C. § 12131(1)(B) (2000 & Supp. IV 2004).

Title III¹⁰⁸ prohibits discrimination by any public accommodation, which explicitly includes a law office.¹⁰⁹ Even a sole practitioner lawyer is covered by Title III; the Title I small employer exception does *not* apply to public accommodations.¹¹⁰ As a public accommodation, a lawyer must not deny legal services to any disabled person, such as a deaf client, “because of the absence of auxiliary aids and services,”¹¹¹ including sign language interpreters,¹¹² unless the lawyer can show that doing so “would result in an undue burden.”¹¹³ A lawyer cannot refuse to take a client because the client is deaf.¹¹⁴ Further, a lawyer may not charge the deaf client, either directly or as a surcharge, for the cost of an interpreter.¹¹⁵

Titles I–III each prohibit “discrimination against individuals with disabilities.”¹¹⁶ The ADA defines “‘disability’ . . . with respect to an individual [as] a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”¹¹⁷ Profound deafness has been determined to be such an impairment.¹¹⁸

108. *Id.* §§ 12181–12189.

109. *Id.* § 12181(7)(F).

110. *Id.* § 12111 (limiting the scope of the term “employer” to “[a]s used in this subchapter” meaning the small employer exception in Title I does not apply to Title III).

111. 28 C.F.R. § 36.303(a) (2007).

112. *Id.* § 36.303(b)(1).

113. 42 U.S.C. § 12182(b)(2)(A)(iii) (2000); 28 C.F.R. § 36.303(a) (2007).

114. 28 C.F.R. § 36.301(a) (2007) (forbidding a public accommodation from screening out disabled individuals “unless such criteria . . . [are] necessary for the provision of the . . . services . . . being offered”).

115. *Id.* § 36.301(c) (prohibiting charging the disabled for the costs to provide auxiliary aids).

116. *E.g.*, 42 U.S.C. § 12101(b)(1) (2000) (listing elimination of such discrimination as the first of four purposes for enactment).

117. *Id.* § 12102(2) (providing a baseline definition; but, each of the individual titles further refines what constitutes an individual with a disability within its respective title).

118. *E.g.*, *Duffy v. Riveland*, 98 F.3d 447, 454–55 (9th Cir. 1996) (determining that a deaf inmate qualifies as a “handicapped person” under the ADA); *Martin v. Ind. Heart Hosp.*, No. 1:06-cv-1298-RLY-WTL, 2007 U.S. Dist. LEXIS 37206, at *9–10 (S.D. Ind. May 21, 2007) (noting that plaintiff’s hearing impairment entitled him to communication accommodations); *United States v. York Obstetrics & Gynecology, P.A.*, No. 00-8-P-DMC, 2001 U.S. Dist. LEXIS 2884, at *6 (D. Me. Jan. 30, 2001) (reporting the jury’s finding that the defendant violated the ADA by failing to provide a sign language interpreter for a deaf husband “when he accompanied his wife to the defendant obstetrical practice for pre-natal visits”); *Soto v. City of Newark*, 72 F. Supp. 2d 489, 493 n.3 (D.N.J. 1999) (citing *Duffy*, 98 F.3d at 454–55, for the proposition that deafness is a disability).

Title IV¹¹⁹ establishes requirements for telecommunications relay services (TRS)¹²⁰ and closed-captioning for public service announcements.¹²¹

In these titles, the ADA provides the federal framework for improving the deaf person's communications access to employers, states, public accommodations, and telecommunications; subsequent Texas laws have added additional improvements.

2. Texas Laws

Before the recent improvements in Texas laws,¹²² deaf persons¹²³ were more likely to experience ineffective communication in court proceedings.¹²⁴ Prior to 2001, Texas courts did not have enforceable uniform standards for sign language interpreters and the quality of interpreting varied widely; thus, some Deaf were not able to understand court proceedings.¹²⁵ Both civil and criminal trial courts were required to use an interpreter for a deaf

119. 47 U.S.C. §§ 225, 611 (2000).

120. 47 U.S.C. § 225 (2000) ("Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals.").

121. *Id.* § 611 ("Closed-Captioning of Public Service Announcements.").

122. *See* Act of May 24, 2005, 79th Leg., R.S., ch. 614, §§ 1–12, 2005 Tex. Gen. Laws 1564, 1564–67 (current version at TEX. GOV'T CODE ANN. §§ 57.001–.027 (Vernon Supp. 2007)), TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon Supp. 2007), TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon Supp. 2007)) (amending various statutes relating to appointment of certified interpreters); Act of May 28, 2001, 77th Leg., R.S., ch. 1139, § 1, 2001 Tex. Gen. Laws 2537, 2537–41 (current version at TEX. GOV'T CODE ANN. §§ 57.001–.051 (Vernon 2005 & Supp. 2007)) (establishing certification and licensing standards for court interpreters).

123. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 21.001 (Vernon 1997) (applying a broad definition to the term "'deaf person' [as] an individual who has a hearing impairment . . . that inhibits the person's comprehension of proceedings or communication with others," implying that the inhibition pertains to a spoken language rather than to a manually signed language); TEX. EDUC. CODE ANN. § 54.205 (Vernon 2006 & Supp. 2007) (offering a similar definition of "'[d]eaf person' [as one] whose sense of hearing is nonfunctional . . . for understanding normal conversation" even after medical intervention); TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(1) (Vernon Supp. 2007) (giving a functionally identical definition as the Texas Civil Practice and Remedies Code); TEX. GOV'T CODE ANN. § 57.001(4) (Vernon Supp. 2007) (substituting the term "[h]earing-impaired individual" but using the same definition as that of "deaf person" in the Texas Civil Practice and Remedies Code and Texas Code of Criminal Procedure).

124. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006).

125. *See* HOUSE COMM. ON JUDICIAL AFFAIRS, BILL ANALYSIS, Tex. H.B. 2735, 77th Leg., R.S. (2001) (noting the lack of "a statewide standard for interpreters" in Texas courts and the resulting effect on deaf participants).

witness or party, but courts could use any interpreter that they felt was qualified regardless of the interpreter's professional certification level. Also, there was no provision for either a civil or criminal penalty to prevent an unqualified interpreter from interpreting in a court proceeding.¹²⁶ The Texas Commission for the Deaf and Hard of Hearing (TCDHH) *recommended* levels of certification for different legal settings.¹²⁷ For example, TCDHH recommended a Board for Evaluation of Interpreters (BEI) Level III interpreter for an uncontested divorce, and a BEI Level IV interpreter for a contested divorce, but the recommendations were not enforceable except by rescinding the interpreter's certification.¹²⁸ A BEI certified interpreter or a Registry of Interpreters for the Deaf (RID)¹²⁹ certified interpreter without prior legal interpreting experience would not have been statutorily prevented from interpreting in a particular legal setting,¹³⁰ and if the interpreter's lack of legal experience impaired the deaf person's ability to understand and participate in the court proceeding, the decision whether to continue interpreting was left largely to the training and conscience of the interpreter.¹³¹ Uncertified interpreters, without formal training and not bound by professional standards, were left solely with the guidance of their consciences.¹³² In 2001, House Bill 2735 tasked TCDHH with

126. *But see* Act of May 28, 2001, 77th Leg., R.S., ch. 1139, § 1, secs. 57.026–.027, 2001 Tex. Gen. Laws 2537, 2539 (current version at TEX. GOV'T CODE ANN. §§ 57.026–.027 (Vernon Supp. 2007)) (creating civil and criminal sanctions for any person who interprets for a deaf person in a court proceeding unless “the person [interpreting] is a certified court interpreter”).

127. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006).

128. *Id.*

129. *See generally* Registry of Interpreters for the Deaf, About RID, <http://www.rid.org/aboutRID/index.cfm> (last visited May 12, 2008) (giving a history of the Registry of Interpreters for the Deaf and describing its philosophy, mission, and goal).

130. *See* TEX. R. EVID. 604 (making an interpreter subject to qualification as an expert by the court).

131. *See* REGISTRY OF INTERPRETERS FOR THE DEAF, NAD-RID CODE OF PROFESSIONAL CONDUCT 1 (2005), *available at* <http://www.rid.org/UserFiles/File/pdfs/codeofethics.pdf> (suggesting that a key principle for interpreters “is the notion that the interpreter will do no harm”). The Texas Department of Assistive and Rehabilitative Services (DARS) imposes the NAD-RID Code of Professional Conduct on interpreters it certifies. Texas Department of Assistive and Rehabilitative Services, Code of Professional Conduct, <http://www.dars.state.tx.us/dhhs/codeofethics.shtml> (last visited May 12, 2008).

132. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist,

establishing standardized requirements for interpreters in court proceedings,¹³³ authorized both civil and criminal courts to appoint certified interpreters, and required courts to make such appointments on the motion of a party or witness.¹³⁴ Thankfully, the protections for deaf persons in court proceedings have been further improved by recent changes in Texas laws.

These recent changes have removed some of the barriers to effective communication in specific circumstances. Texas House Bill 2200, signed June 17, 2005, amended the Texas Government Code,¹³⁵ the Texas Civil Practice and Remedies Code,¹³⁶ and the Texas Code of Criminal Procedure.¹³⁷ Most of the changes were effective September 1, 2005.¹³⁸ TCDHH was effectively abolished and its functions transferred to the new Office for Deaf and Hard of Hearing Services (DHHS) in the Department of Assistive and Rehabilitative Services (DARS).¹³⁹ However, the more stringent interpreter qualifications for court proceedings were not effective until September 1, 2006.¹⁴⁰

Today, Texas law provides improved protections for deaf persons in a number of court proceedings¹⁴¹ and clearly affords

Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006).

133. Act of May 28, 2001, 77th Leg., R.S., ch. 1139, § 1, secs. 57.001, .021-.023, 2001 Tex. Gen. Laws 2537, 2537-39 (current version at TEX. GOV'T CODE ANN. §§ 57.001-.023 (Vernon Supp. 2007)).

134. *Id.* § 1, sec. 57.002(a)-(b), 2001 Tex. Gen. Laws 2537, 2538 (current version at TEX. GOV'T CODE ANN. § 57.002 (Vernon Supp. 2007)).

135. Act of May 24, 2005, 79th Leg., R.S., ch. 614, §§ 1-9, secs. 57.001-.002, .021-.027, 2005 Tex. Gen. Laws 1564, 1564-66 (current version at TEX. GOV'T CODE ANN. §§ 57.001-.027 (Vernon Supp. 2007)).

136. *Id.* § 10, sec. 21.003, 2005 Tex. Gen. Laws 1564, 1566 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon Supp. 2007)).

137. *Id.* § 11, 2005 Tex. Gen. Laws 1564, 1566 (current version at TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon Supp. 2007)).

138. *Id.* §§ 12-13, 2005 Tex. Gen. Laws 1564, 1566-67.

139. HOUSE JUDICIARY COMM., BILL ANALYSIS, Tex. H.B. 2200, 79th Leg., R.S. (2005).

140. Act of May 24, 2005, 79th Leg., R.S., ch. 614, § 12(b), sec. 21.003, 2005 Tex. Gen. Laws 1564, 1566-67 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon Supp. 2007), TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon Supp. 2007)). One reason for the delayed implementation of the more rigorous interpreter standards was to give the sign language interpreter community time to qualify for the new standards. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006).

141. *See* TEX. GOV'T CODE ANN. § 57.001(7) (Vernon Supp. 2007) (enumerating

better protections than are otherwise required under federal law.¹⁴² Moreover, the new laws provide for publicly funded interpreters, which can reduce the costs to attorneys when representing deaf clients. Although the specific language of the two codes varies somewhat, there is considerable substantive commonality between the Texas Code of Criminal Procedure and the Texas Civil Practice and Remedies Code. Some of the commonalities below are recent changes, others are not. Today, both codes:

- require court-appointed interpreters to have either an RID legal certificate or a BEI court interpreter certificate in order to be qualified,¹⁴³
- prohibit the start of any proceeding requiring a court-appointed interpreter until the “interpreter is . . . not [more than] ten feet from and in full view of the deaf person,”¹⁴⁴
- authorize the court to set a reasonable fee for the interpreter to be paid by the public,¹⁴⁵
- require the interpreter to promise under oath to render a “true interpretation . . . of all the proceedings” and of the “deaf person’s answer to questions,”¹⁴⁶
- confer communication privilege to the interpreter for certain communications although the conditions by which the privilege attaches differ,¹⁴⁷

legal settings that constitute a “[c]ourt proceeding’ [as] an arraignment, deposition, mediation, court-ordered arbitration, or other form of alternative dispute resolution”).

142. *See* *United States v. Johnson*, 248 F.3d 655, 663 (7th Cir. 2001) (“The United States Supreme Court has yet to recognize the right to a court-appointed interpreter as a constitutional one.”). Theoretically, the Court Interpreters Act requires federal judges (but not state judges) to appoint an interpreter for a deaf person. 28 U.S.C. § 1827(d)(1) (2000). However, the qualifying language allowing the court to appoint *any* interpreter it deems competent severely dilutes the protections. *See id.* (permitting the court, “when no certified interpreter is reasonably available, . . . [to use] an otherwise qualified interpreter”).

143. TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon Supp. 2007).

144. TEX. CODE CRIM. PROC. ANN. art. 38.31(d) (Vernon Supp. 2007); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 21.004 (Vernon 1997) (applying same requirement).

145. TEX. CODE CRIM. PROC. ANN. art. 38.31(f) (Vernon Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 21.006 (Vernon 1997).

146. TEX. CODE CRIM. PROC. ANN. art. 38.31(e) (Vernon Supp. 2007); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 21.005(a) (Vernon 1997) (using nearly identical language).

147. TEX. CODE CRIM. PROC. ANN. art. 38.31(b) (Vernon Supp. 2007) (holding an interpreter to the same privilege standard as a lawyer); TEX. CIV. PRAC. & REM. CODE

- allow the video recording of both the deaf person's testimony and the corresponding interpreter's interpretation, and allow the recording to be placed in the appellate record,¹⁴⁸ and
- omit any income or financial circumstances test as a condition for the court to appoint an interpreter.¹⁴⁹

Although the two codes provide similar protections for deaf persons, they also have important differences, in part, due to their different subjects. The principal differences pertain to the specific proceedings requiring a court-appointed interpreter and the events that trigger the appointment.

The Texas Civil Practice and Remedies Code requires a court-appointed interpreter for a deaf party or witness not only in a civil trial but also in a deposition.¹⁵⁰ The code creates the entitlement for a court-appointed interpreter, but does not explicitly indicate which party is responsible for requesting the interpreter.¹⁵¹

The Texas Code of Criminal Procedure is different. It entitles a deaf defendant or witness to a qualified interpreter for a broad range of proceedings including "an arraignment, hearing, examining trial, or trial."¹⁵² However, a party must notify the court that an interpreter is needed,¹⁵³ although the court may provide an interpreter *sua sponte* under other authority.¹⁵⁴ Additionally, after the indictment, information, or complaint has been filed against a deaf defendant, on the defendant's motion the court must appoint an interpreter not just for in-court proceedings, but also for "communications concerning the case between the defendant and defense counsel."¹⁵⁵ Thus, the statutory provision

ANN. § 21.008 (Vernon 1997) (applying a communication privilege to a sign language interpreter "under circumstances in which the communication would be privileged and the deaf person could not be required to testify about the communication").

148. TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 21.007 (Vernon 1997). Although Article 40.09 of the Criminal Code was repealed, the provision to include an electronic recording in the appellate record is available. See TEX. R. APP. P. 38.5 (allowing a party to submit a transcript of an electronic recording of the trial to the appellate court).

149. TEX. CODE CRIM. PROC. ANN. art. 38.31 (Vernon Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. §§ 21.001-.008 (Vernon 1997 & Supp. 2007).

150. TEX. CIV. PRAC. & REM. CODE ANN. § 21.002(a) (Vernon 1997).

151. *Id.* § 21.002.

152. TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2007).

153. *Id.*

154. TEX. GOV'T CODE ANN. § 57.002(b) (Vernon Supp. 2007).

155. TEX. CODE CRIM. PROC. ANN. art. 38.31(b) (Vernon Supp. 2007).

lifts the burden of paying for the proceeding interpreter¹⁵⁶ off of the deaf defendant's attorney. This benefit is significantly broader than that provided in civil proceedings under the Texas Civil Practice and Remedies Code.¹⁵⁷

The Texas Government Code directs courts to "appoint a certified court interpreter" if requested by a party¹⁵⁸ or on the court's own motion¹⁵⁹ for "a civil or criminal proceeding in the court."¹⁶⁰ Under the code, a "[c]ourt proceeding" includes an arraignment, deposition, mediation, court-ordered arbitration, or other form of alternative dispute resolution."¹⁶¹ The Texas Government Code also creates entitlements for publicly funded interpreters for deaf persons in other venues such as when taking a state examination¹⁶² and in certain proceedings before county, city, school district, and other political subdivisions of the state.¹⁶³ The proceedings for which a governing body must supply an interpreter include those where the deaf person's "legal rights, duties, or privileges [are being decided] by the governing body after an adjudicative hearing,"¹⁶⁴ and "[i]n a contested case [before] a state agency."¹⁶⁵ By requiring qualified interpreters in legal proceedings and furnishing court-appointed interpreters under certain conditions, these changes in the law reduce the likelihood that rights of Deaf will be infringed in a proceeding where they could neither understand what was taking place nor

156. See Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006) (differentiating between a proceeding interpreter, who interprets the proceedings, and a table interpreter, who sits with the deaf party and the attorney and interprets only between the attorney and the client).

157. Compare TEX. CODE CRIM. PROC. ANN. art. 38.31(b) (Vernon Supp. 2007) (providing a court-appointed interpreter for "communications concerning the case between the defendant and defense counsel"), with TEX. CIV. PRAC. & REM. CODE ANN. §§ 21.001-.009 (Vernon 1997 & Supp. 2007) (addressing matters pertaining to interpreters for the deaf in civil matters but containing no express provision for a court-appointed attorney for attorney-client meetings), and TEX. GOV'T CODE ANN. §§ 57.001-.051 (Vernon 2005 & Supp. 2007) (allowing a court, *sua sponte*, to appoint an interpreter without express limitation, but not expressly authorizing a table interpreter).

158. TEX. GOV'T CODE ANN. § 57.002(a) (Vernon Supp. 2007).

159. *Id.* § 57.002(b).

160. *Id.* § 57.002(a).

161. *Id.* § 57.001(7).

162. TEX. GOV'T CODE ANN. § 558.002(a) (Vernon 2004).

163. *Id.* § 558.003.

164. *Id.* § 558.003(a).

165. *Id.* § 2001.055(a).

present their own position. To a similar end, the Texas Family Code provides for a court-appointed interpreter for both a deaf juvenile and a hearing juvenile's deaf parent or guardian for "any proceeding under [the Juvenile Justice Code]."¹⁶⁶

The changes in the Texas Family Code, Texas Government Code, Texas Code of Criminal Procedure, and Texas Civil Practice and Remedies Code may improve deaf clients' ability to participate in their own legal matters, but only if their attorneys exercise the clients' rights under the new laws. The deaf clients' attorneys must ensure their clients receive the benefits and protections provided by these new laws as part of fulfilling their professional responsibilities.

3. Texas Disciplinary Rules of Professional Conduct

The Texas Disciplinary Rules of Professional Conduct (the Rules) are rules defining proper conduct for attorneys practicing in Texas.¹⁶⁷ Some of the Rules take on special significance when an attorney represents a deaf client.

First, a brief review of the scope of the Rules. The Rules are not intended to give disappointed clients the legal basis for a civil action against their lawyers nor do the Rules define what constitutes a breach of lawyers' duty to their clients.¹⁶⁸ The Rules are not supposed to be used as offensive weapons,¹⁶⁹ and most duties imposed do not attach until the lawyer-client relationship has been formed.¹⁷⁰ Finally, the Rules are imperatives as to professional discipline; the official comments are not.¹⁷¹ The comments are, however, intended to help lawyers fashion their conduct based on the illustrations and explanations presented

166. TEX. FAM. CODE ANN. § 51.17(e) (Vernon Supp. 2007) (requiring the court to appoint a qualified interpreter "if a party notifies the court that the child, [or] the child's parent or guardian . . . is deaf").

167. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 10, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) ("The Texas Rules of Professional Conduct define proper conduct for purposes of professional discipline.").

168. *Id.* preamble ¶ 15 ("[N]othing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.").

169. *Id.* ("[T]he purpose of these rules can be abused when [used] by opposing parties as procedural weapons.").

170. *Id.* preamble ¶ 12.

171. *Id.* preamble ¶ 10.

therein.¹⁷² Although law school graduates must pass a professional responsibility examination before they may be licensed in Texas,¹⁷³ attorneys are governed primarily by their own conscience in understanding and complying with the Rules.¹⁷⁴ The Rules also rely on attorneys encouraging each other to comply with the Rules.¹⁷⁵ As a last resort, the Rules also provide for disciplinary proceedings to promote their enforcement.¹⁷⁶

Second, a brief review of some of the lawyer's responsibilities under the Rules. A lawyer must "zealously assert[] the client's position,"¹⁷⁷ "seek[] a result advantageous to the client,"¹⁷⁸ "evaluat[e the] client's affairs and report[] about them to the client,"¹⁷⁹ maintain appropriate client confidences,¹⁸⁰ "zealously pursue [the] client[']s interests within the bounds of the law,"¹⁸¹ and "maintain communication with [the] client concerning the representation."¹⁸² Further, the Rules also encourage lawyers to serve the disadvantaged and even suggest that lawyers have a responsibility to do so.¹⁸³ In serving clients, lawyers practice law as a privilege, not a right, and that privilege comes with responsibilities.¹⁸⁴ A lawyer is a public citizen, but is one with a greater responsibility than the average citizen "for the quality of justice."¹⁸⁵ Thus, lawyers should always strive to improve the

172. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 10.

173. TEX. R. GOVERN. BAR ADM'N V (West 2007).

174. See TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 11 ("Compliance with the rules . . . depends primarily upon understanding and voluntary compliance . . .").

175. *Id.*

176. *Id.*

177. *Id.* preamble ¶ 2.

178. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 2, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

179. *Id.*

180. *Id.* preamble ¶ 3.

181. *Id.*

182. *Id.*

183. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 6 ("Every lawyer . . . should find time to participate in or otherwise support the provision of legal services to the disadvantaged.").

184. *Love v. State Bar of Tex.*, 982 S.W.2d 939, 945 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("[T]he right to practice law is a very great privilege. With this privilege comes an equal dose of responsibility." (alteration in original) (quoting *State Bar of Tex. v. Moore*, 932 S.W.2d 132, 138 n.4 (Tex. App.—El Paso 1996), *vacated*, 938 S.W.2d 717 (Tex. 1997))).

185. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 1.

quality of legal service they provide.¹⁸⁶ One way lawyers can do this is to learn about the problems faced by those seeking legal representation, and then use their time and means to combat those problems.¹⁸⁷

Now, consider how a lawyer's conduct—acting as an advisor, advocate, negotiator, intermediary, evaluator, or other role¹⁸⁸—might take on special significance when representing a deaf client. For instance, in an advisory role, “a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications” for the client's situation.¹⁸⁹ As evaluators, lawyers examine their clients' matters and communicate the results of the examination to their clients.¹⁹⁰ Because clients often make important decisions based on the information produced by their lawyers' specialized legal evaluations, lawyers must communicate that information to clients regularly and effectively.¹⁹¹

To represent a deaf client properly under the Rules, a lawyer must communicate well with the client.¹⁹² But how can a lawyer inform or explain a matter if the lawyer does not actually understand the problem the deaf client has tried to communicate because of a lack of effective communication? And what if that ineffective communication is traceable to a conflict between the lawyer's responsibility to the client and the lawyer's own interests?¹⁹³ A conflict that impairs a lawyer's loyalty to the client may harm the client if the lawyer is “[unable] to consider, recommend[,] or carry out an appropriate course of action for

186. *Id.* preamble ¶ 5 (encouraging lawyers to improve “the quality of service rendered by the legal profession”).

187. *See id.* (urging lawyers to “be mindful of deficiencies in the administration of justice” and to work to abate those deficiencies).

188. *Id.* preamble ¶ 2 (listing roles lawyers undertake when representing clients).

189. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 2, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

190. *Id.*

191. *See id.* preamble ¶ 3 (admonishing attorneys to keep their clients informed).

192. *See id.* 1.03 (requiring a lawyer to “keep [the] client reasonably informed” and “explain . . . matter[s] to the extent reasonably necessary to permit the client to make informed decisions”). Curiously, the rule seems directed solely at communications from the lawyer to the client. *Id.* & cmts. 1–5.

193. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 7 (“Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests.”).

[that] client because of the lawyer's own interests" and that inability "materially and adversely affect[s] the lawyer's . . . action[s] that reasonably should be pursued on behalf of the client."¹⁹⁴ An attorney faces such a situation when representing a deaf client.

III. ANALYSIS

By choosing to represent a client in Texas, an attorney is obligated to competently and diligently represent that client.¹⁹⁵ Although one might hope attorneys would not need such a reminder, an attorney is supposed to obey the law both as the client's representative and as the client's legal services provider.¹⁹⁶ Furthermore, the attorney must seek to understand the client's situation, evaluate the client's legal rights and duties, and give the client accurate legal advice as to the best course for the client to pursue.¹⁹⁷ At every step, the attorney must be able to communicate effectively with the client.¹⁹⁸

Communicating effectively with a deaf client may require different communication resources than those needed for communicating with a hearing client, but the resources to overcome the challenge are readily available.¹⁹⁹ For deaf prospective clients, it is too often a significant challenge—and sometimes an insurmountable challenge—to get *any* attorney to represent them. When a deaf person tries to hire an attorney, the experience is often painfully predictable—almost like a sad script. The deaf person contacts the firm to make an appointment with an attorney and asks the firm to provide an interpreter. The firm, often the receptionist but sometimes an attorney, tells the deaf

194. *Id.* 1.06 cmt. 4.

195. *Id.* 1.01, preamble ¶ 3.

196. *Id.* preamble ¶ 4.

197. *Id.* preamble ¶ 2.

198. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) (identifying counsel's duties to a criminal defendant as the "duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution"); Sanchez v. State, 122 S.W.3d 347, 354 (Tex. App.—Texarkana 2003, pet. ref'd) ("An attorney must be able to communicate with his or her client in order to effectively represent the client."). Defendant Sanchez was not deaf but "could not speak English." *Id.* at 353.

199. *See* 28 C.F.R. § 36.303(b)(1) (2007) (listing examples of "auxiliary aids and services" for hearing-impaired persons such as "[q]ualified interpreters, . . . written materials, . . . [and] telecommunications devices for deaf persons").

person the firm will not represent them unless the deaf person provides an interpreter.²⁰⁰ Frustrated, the deaf person either calls another law firm or calls a Deafness Resource Specialist (DRS).²⁰¹ The DRS, acting as a liaison between the deaf person and the law firm, gives the attorney relevant parts of the ADA and encourages the law firm to obey the law and represent the deaf prospective client.²⁰² In many cases, the attorney will assert that handwritten notes will suffice, and if not, the client should provide an interpreter.²⁰³ If the deaf person insists that the attorney provide an interpreter, too often the attorney refuses to represent the deaf prospective client.²⁰⁴

200. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

201. Texas Department of Assistive and Rehabilitative Services, DHHS Specialist Program, <http://www.dars.state.tx.us/dhhs/specialistpgm.shtml> (last visited May 12, 2008) (summarizing the duties of a Deafness Resource Specialist (DRS) including advocacy for Deaf and acting "as liaisons between [Deaf] consumers and service providers" such as law firms). The DRS works for a private service provider under a contract managed by the Office of Deaf and Hard of Hearing Services (DHHS) in the Texas Department of Assistive and Rehabilitative Services. *Id.* Texas is divided into eleven geographical regions. *Id.*; Texas Department of Assistive and Rehabilitative Services, DHHS Contractors, <http://www.dars.state.tx.us/dhhs/list.shtml> (last visited May 12, 2008) (showing the regions on a Texas map, listing the counties in each region, and listing service contractors in each region).

202. Telephone Interview with Melissa Bell, Deafness Resource Specialist for Region IV, funded by Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Tyler, Tex. (Dec. 11, 2006).

203. E-mail from Donald Landry, Deafness Resource Specialist for Region V, funded by Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, to Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services (Dec. 20, 2006, 11:59:22 CST) (on file with the *St. Mary's Law Journal*) (reporting experiences with attorneys who refuse to provide interpreters for deaf clients and instead rely on handwritten notes to communicate with the deaf client).

204. Telephone Interview with Melissa Bell, Deafness Resource Specialist for Region IV, funded by Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Tyler, Tex. (Dec. 11, 2006) (relating one deaf client's frustration after being refused by six different firms because each firm refused to provide an interpreter); E-mail from Mark Dickson, Deafness Resource Specialist for Region IV, funded by Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, to Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services (Dec. 20, 2006, 17:03:00 CST) (on file with the *St. Mary's Law Journal*) (reporting a similar experience with an attorney who adamantly refused to provide an interpreter for a deaf client).

A. *Choosing to Represent a Deaf Client*

When deciding whether to represent a deaf prospective client, attorneys may consider a number of factors. The first factors—actually, legal and ethical requirements—should be obeying the law and fulfilling their professional responsibilities. Regrettably, however, attorneys may first consider other factors when deciding whether to represent a deaf person. First, attorneys may believe that representing a deaf client will be too difficult because they have never represented a deaf client before. But, attorneys already know how to communicate with hearing clients, and with some preparation, attorneys can effectively communicate with deaf clients. Second, attorneys may believe that some other attorney would be better suited to represent the deaf client. If ASL was a common second language among attorneys, attorney-client communication with Deaf might not be a problem, but that is not the case. Few lawyers know ASL;²⁰⁵ in fact, there may be only a few hundred deaf lawyers in the entire United States.²⁰⁶ Unfortunately, attorneys refusing to represent a deaf person are more the rule than the exception; the “let someone else do it” attitude seems widespread.²⁰⁷ However, attorneys who choose not to represent prospective clients because they are deaf violate the ADA²⁰⁸ and the spirit of the Texas Disciplinary Rules of Professional Conduct.²⁰⁹

Looking for justification not to represent a deaf person, attorneys might seek shelter in the Texas Disciplinary Rules of

205. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006).

206. See DeafAttorneys.com, <http://www.deafattorneys.com/WP/?p=72> (last visited May 12, 2008) (announcing on Aug. 17, 2006, that the website “has registered its 115th member and 30th current law student”).

207. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Oct. 5, 2006) (regretting continued incidents of attorneys refusing to represent Deaf unless they provide an interpreter).

208. 42 U.S.C. § 12182(a) (2000) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . services . . . of any place of public accommodation . . .”). A law office is a public accommodation. *Id.* § 12181(7)(F).

209. TEX. DISCIPLINARY R. PROF’L CONDUCT preamble ¶ 4, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (“A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”).

Professional Conduct. After all, the Rules allow attorneys to decline representation under certain circumstances.²¹⁰ First, an attorney should not accept any new client if the attorney is too busy to properly represent the client.²¹¹ But, if the prospective client was hearing, or was deaf but agreed to provide an interpreter, would the attorney take the case? If so, then the attorney *must* represent the deaf person as well;²¹² to do otherwise is illegal discrimination.²¹³ Second, an attorney may decline representation if the attorney is not competent in a particular area of law.²¹⁴ For example, if a deaf person asks a patent attorney to represent the deaf person in a divorce, the patent attorney may legitimately decline to represent the deaf prospective client, but only if the attorney would have also declined to represent a similarly situated hearing person.²¹⁵

210. *Id.* 1.15(a) (allowing a lawyer to decline representation to avoid violating Rule 3.08 or in the case of the lawyer's impaired condition). Other rules allow a lawyer to decline representation for certain conflicts. *E.g.*, *id.* 1.06 (addressing conflicts of interest in general).

211. *Id.* 1.01(b).

212. 42 U.S.C. § 12182(a) (2000) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . services . . . of any place of public accommodation . . ."). A law office is a public accommodation. *Id.* § 12181(7)(F).

213. *See* DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 para. 20 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (finding Mr. Tirone violated the ADA by failing to provide a qualified sign language interpreter for a deaf client). Mr. Tirone used his client's untrained relative as an interpreter, and handwritten notes, to communicate with his deaf client. *Id.* para. 8. Mr. Tirone had to compensate his client, publish a public notice that he will provide a qualified sign language interpreter on request at no charge to the client, and conspicuously post the same notice in his office. *Id.* paras. 21, 22.

214. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a) ("A lawyer shall not accept or continue employment in a legal matter which the lawyer knows . . . is beyond the lawyer's competence . . .").

215. 42 U.S.C. 12182(b)(1)(A)(i) (2000) ("It shall be discriminatory to subject an individual or class of individuals on the basis of a disability . . . to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity."); 28 C.F.R. § 36.301(a) (2007) (forbidding a public accommodation from screening out disabled individuals "unless such criteria . . . [are] necessary for the provision of the . . . services . . . being offered"); *see* Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 324, 328 (2004) (discussing "[e]fforts to [p]rovide [c]ompetent [r]epresentation" and reporting that some "lawyers decline to do certain types of work . . . because they do not like doing it or feel they cannot perform the work competently"). Essentially, a lawyer may decline to represent a client based on the type of work but not on the disability of the person.

Third, an attorney may decline representation if doing so would “result in an unreasonable financial burden on the lawyer.”²¹⁶ But, as discussed below, the cost for an attorney to pay for an interpreter when representing a deaf client is not likely to rise to the level of an “unreasonable financial burden” under the Texas Disciplinary Rules of Professional Conduct²¹⁷ or an “undue burden” under the ADA.²¹⁸ Although the ADA and the Rules permit an attorney to not represent a deaf person in some limited circumstances, when those few circumstances are not present, the attorney cannot lawfully refuse to represent the deaf person.²¹⁹ Moreover, the Rules specifically encourage lawyers to represent underserved persons and improve “the quality of service rendered by the legal profession.”²²⁰

One way an attorney can improve legal service is by learning how to effectively represent a deaf client.²²¹ Accepting a deaf person as a paying customer is not only required by law, but is a step towards improving legal services by representing a person from a traditionally underserved group.²²² Similarly, every attorney has a professional responsibility to diligently represent each client.²²³ Because attorney-client communication is crucial to diligent representation, an attorney has a professional responsibility to ensure, particularly for a deaf client, that the attorney-client communication and the client-court proceeding communication are meaningful and effective throughout that legal representation.

216. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(b)(6).

217. *Id.* 1.15(b)(6), 6.01(b).

218. 42 U.S.C. § 12182(b)(2)(A)(iii) (2000); 28 C.F.R. § 36.303(a) (2007).

219. *See* 42 U.S.C. § 12182(b)(2)(A)(iii) (2000) (prohibiting, generally, public accommodations from denying services based on an individual's disability). A law office is a public accommodation. *Id.* § 12181(7)(F).

220. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 5.

221. *See id.* (“As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession.”). If an attorney learns how to improve communication with a deaf client, and in fact communicates more effectively, presumably the attorney will be better able to represent the client and thereby provide higher quality legal service.

222. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006) (relating that Deaf sometimes give up seeking paid legal representation because they cannot find an attorney to represent them unless they provide an interpreter).

223. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 3.

To have legal representation and to be represented by an attorney as a criminal defendant is guaranteed by the Bill of Rights.²²⁴ If a criminal defendant was left without the aid of counsel, that person might be arraigned, tried, and convicted based on bad or irrelevant evidence.²²⁵ “[T]he right to counsel is the right to the effective assistance of counsel.”²²⁶ Counsel’s duty is to assist the defendant, consult with the defendant, and keep the defendant informed as to the progress of the case.²²⁷ Counsel also has an “overriding mission of vigorous advocacy of the defendant’s cause.”²²⁸ But if the defendant is unable to effectively communicate with counsel, the right to counsel is, at best, undermined.²²⁹ The communication does not have to be perfect,²³⁰ but a communication problem should not prevent persons from defending themselves.²³¹

Besides counsel’s duty to assist a criminal defendant, an attorney has a legal duty to comply with the ADA for all clients, both criminal and civil. Under Title III, a lawyer’s office is a public accommodation.²³² As such, a lawyer must provide the same services to deaf persons as to non-deaf persons; to do otherwise would constitute illegal discrimination²³³ unless doing

224. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

225. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

226. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

227. *Id.* at 688.

228. *Id.* at 689.

229. *See Sanchez v. State*, 122 S.W.3d 347, 354 (Tex. App.—Texarkana 2003, pet. ref’d) (“An attorney must be able to communicate with his or her client in order to effectively represent the client.”).

230. *See Phillips v. Miller*, No. 01 Civ. 1175 (DF), 2001 U.S. Dist. LEXIS 19793, at *34 (D.N.Y. Dec. 3, 2001) (quoting *Ferrell v. Estelle*, 568 F.2d 1128 (5th Cir. 1978), *opinion withdrawn on other grounds*, 573 F.2d 867 (5th Cir. 1978)) (“[T]he Constitution ‘does not require that every defendant comprehend the English language with the precision of a Rhodes Scholar or appreciate the nuances of a witness’ expressions or behavior with the skill of a doctor of psychology.’”).

231. *See People v. Rivera*, 480 N.Y.S.2d 426, 434 (N.Y. Sup. Ct. 1984) (citing *Powell v. Alabama*, 287 U.S. 45, 71 (1932)) (concluding that convicting a disabled person who cannot defend himself due to a disability is unjust).

232. *See* 42 U.S.C. § 12181(7)(F) (2000) (including an “office of an accountant or lawyer” as a public accommodation under Title III).

233. *See id.* § 12182(a) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . services . . . of any place of public accommodation . . .”). A law office is a public accommodation. *Id.* § 12181(7)(F). Illegal discrimination includes failing to provide auxiliary aids and services needed by the

so would fundamentally alter the nature of the service.²³⁴ Even a solo practitioner must comply with all applicable Title III requirements.²³⁵ Further, a lawyer cannot screen clients to avoid serving deaf persons.²³⁶ When representing a deaf client, a lawyer may not add a surcharge to the client's bill for the cost of providing an interpreter,²³⁷ but may bill the deaf client for the additional time it takes to conduct their meeting.²³⁸ In their attorney-client communications, the lawyer must provide appropriate auxiliary aids and services to ensure effective communication.²³⁹ However, a lawyer can provide alternatives if a particular auxiliary aid or service would create an undue burden on the lawyer.²⁴⁰ But, proving an accommodation creates an undue burden is a question of fact for which the lawyer bears the burden.²⁴¹

disabled person. *See id.* § 12182(b)(2)(A)(ii)–(iii) (prohibiting discrimination including “failure to take [necessary] steps” to accommodate the disabled).

234. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 n.38 (2001) (deciding that PGA Tour must allow Martin to use a golf cart because using the cart did not fundamentally alter the game). The Court did not need to consider whether the requested accommodation was reasonable or necessary, the other two elements of the requirement in 42 U.S.C. § 12182(b)(2)(A)(ii) (2000), because neither was contested. *Id.*

235. *See* 42 U.S.C. § 12111 (2000) (limiting the scope of the small employer exception to “[a]s used in this subchapter,” meaning that the small employer exception in Title I does not apply to Title III).

236. 28 C.F.R. § 36.301(a) (2007).

237. *Id.* § 36.301(c); *see also* DEP'T OF JUSTICE, SETTLEMENT AGREEMENT UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 BETWEEN THE UNITED STATES OF AMERICA AND THE LAW OFFICE OF COHEN AND JAFFE, LLC: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-52-111 para. 18 (July 3, 2006), <http://www.ada.gov/cohenjaffe.htm> (requiring the Law Office to prominently post a notice in its offices that: “Individuals with disabilities shall not be charged for auxiliary aids or services, including interpreters”); DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 para. 21 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (advertising that Mr. Tirone would not charge a deaf client for providing an interpreter).

238. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,564 (July 26, 1991) (stating that “[t]he Department [of Justice] does not intend [28 C.F.R.] § 36.301(c) to prohibit professionals who bill on the basis of time from charging individuals with disabilities” for the extra time needed to provide those services).

239. 28 C.F.R. § 36.303(c) (2007).

240. 42 U.S.C. § 12182(b)(2)(A)(iii) (2000).

241. *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997); *see also* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,567 (July 26, 1991) (implying that the undue burden analysis is highly fact specific and indicating the analysis is “applied on a case-by-case basis”).

If a deaf person believes the attorney will not provide effective communication because the attorney refuses to provide an interpreter for their meetings, the deaf complainant would have to prove²⁴² several elements: (1) the deaf person is disabled under the ADA;²⁴³ (2) the lawyer's office is a public accommodation;²⁴⁴ (3) the complainant requested an interpreter; and (4) an interpreter is a necessary accommodation.²⁴⁵ If the complainant carries the complainant's burden, the lawyer has to prove that providing an interpreter would fundamentally alter the nature of the service and would be an undue burden.²⁴⁶ Although a lawyer might argue that the "unreasonable financial burden" provision in the Texas Disciplinary Rules of Professional Conduct should apply by analogy,²⁴⁷ such an argument will likely fail. The ADA already provides factors in Title I²⁴⁸ which the Department of Justice and courts have applied to complaints under Title III to determine what constitutes an undue burden.²⁴⁹ Those factors include the size of the firm, the firm's resources, and the financial impact on the firm.²⁵⁰ For most firms, the interpreter costs for representing

242. See *Johnson*, 116 F.3d at 1059 (discussing the plaintiff's burdens of proof).

243. See 42 U.S.C. § 12102(2)(A) (2000) (defining disability as "a physical . . . impairment that substantially limits one or more of the major life activities of [an] individual").

244. *Id.* § 12181(7)(F).

245. *Id.* § 12182(b)(2)(A)(iii); see also *Johnson*, 116 F.3d at 1059 ("The plaintiff has the burden of proving that [an accommodation] was requested and that the requested [accommodation] is reasonable.").

246. 42 U.S.C. § 12182(b)(2)(A)(iii) (2000); see also *Johnson*, 116 F.3d at 1059 (stating that if the plaintiff proves the plaintiff requested a modification and the modification was reasonable, "the defendant must make the requested modification unless the defendant . . . [proves] that the requested modification would fundamentally alter the nature of the public accommodation"). The court also instructed that Title III's "fundamental alteration [defense] is merely a particular type of undue hardship" and "undue hardship . . . is an affirmative defense." *Johnson*, 116 F.3d at 1059.

247. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(b)(6), 6.01(b), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

248. 42 U.S.C. § 12111(10) (2000).

249. See *Johnson*, 116 F.3d at 1059 ("[The] fundamental alteration [defense of Title III] is merely a particular type of undue hardship [defense under Title I]."); see also *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 56 Fed. Reg. 35,544, 35,567 (July 26, 1991) (reporting that Congress intended that Title I's factors in 28 C.F.R. § 36.104 that define "undue hardship" also be used to determine what constitutes an "undue burden" under Title III).

250. 42 U.S.C. § 12111(10)(B) (2000) (listing the Title I factors to consider in an undue hardship analysis). Courts have applied Title I's undue hardship factors to Title III

one deaf client is probably not an undue burden.²⁵¹ Whether a particular modification or accommodation would result in an undue burden is determined on a case-by-case basis²⁵² and is likely to turn on the “plaintiff’s or defendant’s circumstances and not on the general nature of the accommodation.”²⁵³

In contesting an accommodation, a lawyer may defend by arguing mistake or misunderstanding of the requirements, but that argument will also likely fail.²⁵⁴ If a client or prospective client complains and prevails, the client may be awarded injunctive relief²⁵⁵ and attorney’s fees,²⁵⁶ but not punitive damages,²⁵⁷ and the lawyer may be fined up to \$50,000.²⁵⁸ But those will not be the only complaint costs. The lawyer will spend time, expend emotional stamina, and suffer psychological distraction. Each of these additional costs threatens to degrade the quality of service the lawyer normally provides to other clients, and degraded service to current clients could threaten future business. In sum, the costs to defend against a complaint are likely to be more than the cost of providing an interpreter.

But avoiding complaint costs, complying with the law, and serving a person from an underserved group are not the only

undue burden or fundamental alteration analysis. *E.g.*, *Johnson*, 116 F.3d at 1059–60 (applying Title I factors to Title III fundamental alteration analysis).

251. *See* DEPT OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 para. 21 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (requiring Mr. Tirone’s small private practice firm to provide interpreters when representing deaf clients). Mr. Tirone “assert[ed] . . . that he effectively communicated with [his deaf client],” which the Department found that he did not, but he apparently did not argue that providing an interpreter was an undue burden. *Id.* para. 8.

252. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,567 (July 26, 1991).

253. *Johnson*, 116 F.3d at 1060.

254. *See* *Brown v. Lopez*, No. 04-02-00664-CV, 2003 Tex. App. LEXIS 6893, at *5–6 (Tex. App.—San Antonio Aug. 13, 2003, no pet.) (concluding that the defendant restaurant owner’s “mistake or misunderstanding” in failing to accommodate the plaintiff is not a permitted defense under the ADA).

255. 42 U.S.C. § 12188(b)(2)(A)(i) (2000).

256. *Id.* § 12205; *see also* *Burnley v. City of San Antonio*, 470 F.3d 189, 191, 200 (5th Cir. 2006) (affirming the employee’s award of attorney’s fees associated with her ADA claim that “the City failed to reasonably accommodate her disability”).

257. 42 U.S.C. § 12188(b)(4) (2000).

258. 42 U.S.C. § 12188(b)(2)(C) (2000) (limiting a civil penalty to “\$50,000 for a first violation” and “\$100,000 for any subsequent violation”). A single proceeding counts as one violation, even if multiple discriminatory acts are found. *Id.* § 12188(b)(3).

reasons for choosing to represent a deaf person. A deaf person almost certainly has hearing family members and friends. Those hearing parents, brothers, sisters, extended family members, co-workers, and friends are prospective clients. Because Deaf are often intentionally or unintentionally mistreated, an attorney that takes good care of a deaf client may get referral business from hearing family and friends. Irrespective of reasons for representing a deaf client, in order to effectively communicate with the deaf client, the attorney will benefit from knowing what communication resources are available and how to use them.

B. *Communication Resources*

The resources available to an attorney to communicate with a deaf client are referenced in Title III as “auxiliary aid[s] or service[s]”²⁵⁹ and illustrated by the Department of Justice.²⁶⁰ Those auxiliary aids and services include “[q]ualified interpreters, . . . written materials, . . . [and] other effective methods”²⁶¹ such as video relay services. Like communications resources for hearing persons, each aid or service has its own capabilities and limitations: there is not one that fits every need, and different ones have different costs. To communicate effectively with a deaf client, an attorney needs to use the appropriate resource for the situation.

1. Text Relay Service (TRS)

The right resource for attorneys to use to speak with deaf clients when a telephone would be used to call hearing clients is a telephone. But how can a deaf client talk with a hearing attorney using the attorney’s regular telephone? They can talk through a relay service, but only if the client has the necessary communications equipment such as telephone assistive equipment, a videophone, a computer with Internet access, or a web-enabled device. There are primarily two types of relay services: text and video.

259. 42 U.S.C. § 12188(a)(2), (b)(2)(A)(ii) (2000); 28 C.F.R. § 36.303 (2007).

260. *See* 28 C.F.R. § 36.303(b) (2007) (listing services and devices that can aid communication between an attorney and a deaf client).

261. *Id.* § 36.303(b)(1).

a. Traditional Relay

If the deaf client has a text telephone device,²⁶² the attorney can dial 711 for Relay Texas,²⁶³ give the communications assistant (CA) the deaf client's telephone number, and the CA will connect the attorney to the deaf client. The attorney speaks to the CA and the CA types to the deaf client and vice versa.²⁶⁴ Even if the deaf client and the CA are both fast typists, text relay communication is a very slow process. If the deaf person has difficulty typing or understanding written English, it may take the attorney ten or more minutes to ask, and for the deaf client to answer, a question that might be asked and answered by hearing persons in less than one minute.²⁶⁵ The attorney may have to spell names of people, places, and things to the CA.²⁶⁶ Meanwhile, the deaf person is trying to read English and mentally convert it into ASL grammar, vocabulary, and pronoun concepts.²⁶⁷ Unless the deaf person is fluent in English, the deaf person may type English words formed into sentence fragments using a combination of English and ASL grammar, pronouns, and concepts.²⁶⁸ Unless the attorney asks for

262. 47 C.F.R. § 64.601(15) (2007) (equating "text telephone" with the abbreviation "TTY" and pronouncing "TTY supersedes the term 'TDD'"). Among Deaf, the use of the term "text telephone" is discouraged; most refer to their text telephone equipment as a TTY. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

263. See 47 C.F.R. § 64.601(1) (2007) (defining 711 as "[t]he abbreviated dialing code for accessing relay services anywhere in the United States"); Public Utility Commission of Texas, Relay Texas Call Types, <http://www.puc.state.tx.us/relay/relay/calltypes.cfm> (last visited May 12, 2008) (advising Relay Texas users to dial 711 or 1-800-735-2989 to place a Relay Texas call).

264. Public Utility Commission of Texas, About Relay Texas, <http://www.puc.state.tx.us/relay/about/about.cfm> (last visited May 12, 2008) (describing a text relay call).

265. Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007) (regretting the frustratingly slow pace of many text relay calls); see also Federal Communications Commission, Video Relay Services, <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited May 12, 2008) (noting that a video relay service conversation "can take place much more quickly than with text-based TRS").

266. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006) (relating typical challenges using text relay service).

267. Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007) (describing the language translation process an ASL deaf caller experiences trying to talk with an English speaker).

268. *Id.*

some translation, the CA reads to the attorney what the deaf client types.²⁶⁹ The attorney may have to ask the question and then try to re-explain it several times before the deaf client understands the question. For these reasons, a traditional text relay service is best used only for simple communications such as setting appointments.

b. Internet Protocol (IP) Relay

If the deaf client has a computer and Internet access, an Internet Protocol (IP) relay service can be used in lieu of a traditional relay service.²⁷⁰ Rather than use a TTY to call over a voice telephone line, the deaf client uses a computer to connect to a website that is monitored by a CA.²⁷¹ After accessing the website, the deaf client enters the number to dial and may enter optional information such as particular dialing instructions or a preferred language.²⁷² One important benefit of IP relay service to a deaf person is that calls can be placed or received while away from home or the office using a mobile web-enabled device such as a BlackBerry.²⁷³ However, other than using a web access device and Internet service rather than a TTY and a telephone line, IP relay service operates much the same as a traditional text relay service.²⁷⁴

269. 47 C.F.R. § 64.604(a)(2)(ii) (2007). CAs must be “competent . . . in typing, grammar, spelling, [and] interpretation of typewritten ASL.” *Id.* § 64.604(a)(1)(ii). Text relay CAs are only required to have some “familiarity with hearing and speech . . . languages” and thus may have little training or experience with ASL to English translation. *Id.* Unless the attorney asks for ASL to English translation, the text relay CA is prohibited from performing any language translation. *Id.* § 64.604(a)(2)(ii).

270. *See* Federal Communications Commission, IP Relay Service, <http://www.fcc.gov/cgb/consumerfacts/iprelay.html> (last visited May 12, 2008) (describing IP relay service including its benefits and how it works).

271. *Id.*

272. *See, e.g.*, IP-Relay.com, <http://www.ip-relay.com/> (last visited May 12, 2008) (offering IP relay service); Sprint IP Relay, <https://www.sprintip.com/index.jsp> (last visited May 12, 2008) (providing the web page at which a deaf person can place an IP relay call).

273. *See* Federal Communications Commission, IP Relay Service, <http://www.fcc.gov/cgb/consumerfacts/iprelay.html> (last visited May 12, 2008) (announcing IP relay service as “a new TRS option” that enables deaf persons to use a web-enabled device to access a traditional TRS call center to make a TRS CA assisted voice telephone call and listing some of the IP relay service benefits).

274. Federal Communications Commission, Telecommunications Relay Services, <http://www.fcc.gov/cgb/consumerfacts/trs.html> (last visited May 12, 2008) (noting the similarities between IP relay and text-based relay services). “IP Relay is not required by the FCC, but is offered by several TRS providers.” *Id.*

2. Video Relay Service (VRS)

When compared to a text relay service, a video relay service (VRS) offers faster, more accurate communications.²⁷⁵ If the deaf person has access to VRS,²⁷⁶ and the attorney needs to call the deaf client, the attorney can call a toll free number for a VRS provider, give the CA the deaf client's phone number, and the CA places the call.²⁷⁷ If the deaf client answers, the CA tells the attorney to begin the conversation.²⁷⁸ VRS provides important communication capabilities:

- VRS is always available;²⁷⁹
- VRS providers do not charge attorneys or clients to call;²⁸⁰
- VRS CAs must maintain confidentiality of calls;²⁸¹
- VRS CAs must not “intentionally [alter] a relayed conversation”;²⁸²

275. See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 71 Fed. Reg. 30,818, 30,819 (May 31, 2006) (lauding VRS's superiority to text-based relay service in part because VRS allows a deaf person to sign and see in ASL and the hearing person to speak and hear in English); Federal Communications Commission, Video Relay Services, <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited May 12, 2008) (lauding VRS's much improved communication speed compared to text relay service); Video Relay Services Consumer Association, <http://www.vrsc.org/faq.php> (last visited May 12, 2008) (answering frequently asked questions about VRS including what it is and how it works).

276. See generally Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 71 Fed. Reg. 47,145, 47,145 (Aug. 16, 2006) (“Title IV of the Americans with Disabilities Act of 1990 (ADA) requires common carriers offering ‘telephone voice transmission services’ to also provide TRS throughout the area in which they offer service so that persons with hearing and speech disabilities will have access to the telephone system.”).

277. See Public Utility Commission of Texas, Video Relay Service (VRS), <http://www.puc.state.tx.us/relay/relay/vrelay.cfm> (last visited May 12, 2008) (describing VRS).

278. See *id.* (describing how video relay service works).

279. 47 U.S.C. § 225(d)(1)(C) (2000) (increasing deaf persons' access to telecommunications by imposing a “require[ment] that telecommunications relay services operate every day for 24 hours per day”).

280. See *id.* § 225(d)(3)(B) (spreading the costs of telecommunications relay services, which includes both text and video relay services, across all subscribers for all types of services); Federal Communications Commission, Video Relay Services, <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited May 12, 2008) (“VRS providers are compensated for their costs from the Interstate TRS Fund, which the Federal Communications Commission (FCC) oversees.”). An examination of your telephone bill will show the fee labeled something like “Universal Service Fund.” Public Utility Commission of Texas, About Relay Texas, <http://www.puc.state.tx.us/relay/about/about.cfm> (last visited May 12, 2008).

281. 47 U.S.C. § 225(d)(1)(F) (2000); 47 C.F.R. § 64.604(a)(2)(i) (2007).

282. 47 U.S.C. § 225(d)(1)(G) (2000); 47 C.F.R. § 64.604(a)(2)(ii) (2007).

- VRS CAs must be “interpreter[s] who [are] able to interpret effectively, accurately, and impartially”;²⁸³
- VRS CAs can simultaneously translate between English and ASL so both the deaf client and the hearing attorney can communicate at a normal conversation speed with each communicating in his or her primary language;²⁸⁴ and
- VRS CAs can “express the mood of both parties.”²⁸⁵

These capabilities make VRS a faster and more user-friendly communication resource than text-based relay service.²⁸⁶

However, despite its capabilities, VRS has some limitations:

- VRS access is not free: the deaf client must have the necessary video relay equipment, like a computer with a suitable video camera or a videophone, and high speed Internet service; most Deaf do not yet have high speed Internet service at home,²⁸⁷ but more Deaf are getting VRS;²⁸⁸
- VRS is only intended to be used as a modified method for making a telephone call and is not to be used in lieu of hiring an in-person or remote interpreter;²⁸⁹

283. 47 C.F.R. § 64.601(10) (2007).

284. Federal Communications Commission, Video Relay Services, <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited May 12, 2008); Public Utility Commission of Texas, Relay Texas Video Relay Service, <http://www.puc.state.tx.us/relay/relay/vrelay.cfm> (last visited May 12, 2008).

285. Public Utility Commission of Texas, Relay Texas Video Relay Service, <http://www.puc.state.tx.us/relay/relay/vrelay.cfm> (last visited May 12, 2008).

286. Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 71 Fed. Reg. 30,818, 30,819 (May 31, 2006).

287. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006) (surmising that the principal reason most Deaf cannot access VRS from their homes is the cost of high speed Internet access).

288. *See* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 70 Fed. Reg. 51,649, 51,649 (Aug. 31, 2005) (reporting 1.8 million VRS minutes used in April 2005, “a ten-fold increase in the past two years, and more than the number of interstate [text relay] minutes”).

289. Reminder That Video Relay Service (VRS) Provides Access to the Telephone System Only and Cannot Be Used as a Substitute for “In-Person” Interpreting or Video Remote Interpreting (VRI), 70 Fed. Reg. 59,346, 59,347 (Oct. 12, 2005) (reminding the public that VRS may not “be used as a substitute for using an in-person interpreter or [Video Remote Interpreting]”). VRS providers are not authorized to complete calls that “would not, absent one of the parties’ hearing disability, entail the use of the telephone.” *Id.* The FCC has warned it will “take whatever enforcement action is necessary and appropriate against such misuse.” *Id.*

- VRS, like an ordinary telephone, does not give either party any visual feedback from the other party; neither party can see the other's facial expressions or body language;²⁹⁰
- VRS CAs have no context when the call begins and may initially misinterpret some parts of the call;²⁹¹
- VRS CAs must meet FCC minimum standards as interpreters,²⁹² but are not required to have any legal interpreting training or experience—although some do—so the quality of legal subject matter interpreting can vary significantly between individual interpreters;²⁹³
- VRS CAs do not have to disclose their certification level;²⁹⁴
- VRS CAs are not allowed to be sworn to give a “true interpretation”;²⁹⁵
- VRS CAs may not keep any record of the content of the call once the call has ended;²⁹⁶ and

290. See Brian A. Zemil, *More Courts Embrace Videoconferencing*, LITIG. NEWS 5 (Nov. 2006), available at <http://www.abanet.org/litigation/litigationnews/home.html> (follow “Issue Archive” hyperlink; then follow “November 2006” hyperlink) (quoting Janice V. Mitrius who noted some videoconferencing limitations including the inability to “meaningfully observe and react to opposing counsel and to the judge’s cues, which may decrease the likelihood of success”).

291. Compare Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007) (explaining that some words have multiple meanings and, without conversational context, an interpreter may render an incorrect interpretation), with Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 130 (2000) (“Interpreters should be given time to establish communication with the client and to obtain background information about the case.”). The background information provides the conversational context so that the interpreter can render a contextually correct interpretation. Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007).

292. 47 C.F.R. § 64.604(a)(1)(iv) (2007).

293. Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007).

294. See generally TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon 1997) (requiring an interpreter to hold a national or state certificate in order to be qualified to interpret, for example, a civil deposition). Because a VRS CA cannot disclose the CA’s certification level, which prevents the CA from showing the CA meets the qualification standard, a VRS CA cannot interpret a civil deposition that could otherwise be taken over the telephone. A similar problem exists in a criminal case. TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon Supp. 2007).

295. TEX. CIV. PRAC. & REM. CODE ANN. § 21.005 (Vernon 1997) (compelling an interpreter wishing to interpret a court proceeding to take an oath to “make a true interpretation”). Because a VRS CA cannot be sworn, they cannot interpret a civil deposition that could otherwise be taken over the telephone. A similar problem exists in a criminal case. TEX. CODE CRIM. PROC. ANN. art. 38.31(e) (Vernon Supp. 2007).

296. 47 U.S.C. § 225(d)(1)(F) (2000).

- VRS CAs are located in call centers in various states, and many CAs do not meet Texas certified court interpreter standards.²⁹⁷

Given VRS's capabilities and limitations, when should attorneys use VRS to communicate with deaf clients that have VRS access in their home or office? Attorneys should use VRS when they would otherwise use the telephone to call a hearing client²⁹⁸ and the conversation subject matter is not too complex. Some subjects that would be appropriate for a telephone call to a hearing client may be too complex for a VRS call to a deaf client.

Deaf clients, like hearing clients, trust their attorneys to protect their interests. To do that, attorneys must get key facts, opinions, and impressions from deaf clients, research the law and the facts, and then explain to their clients their legal rights and duties in a way they can understand.²⁹⁹ If deaf clients do not understand their attorneys' questions, they may give an incomplete or unintentionally misleading answer. But why is a VRS call more likely to have communication errors than a face-to-face conversation using a qualified interpreter? Because the VRS CA has no conversation context at the beginning of the call and the CA is not required to have *any* legal interpreting training or experience.³⁰⁰ Given that the FCC only requires VRS CAs to be

297. Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007).

298. *Cf.* Reminder That Video Relay Service (VRS) Provides Access to the Telephone System Only and Cannot Be Used as a Substitute for "In-Person" Interpreting or Video Remote Interpreting (VRI), 70 Fed. Reg. 59,346, 59,347 (Oct. 12, 2005) (reminding the public that VRS may not "be used as a substitute for using an in-person interpreter or [Video Remote Interpreting]"). VRS providers are not authorized to complete calls that "would not, absent one of the parties' hearing disability, entail the use of the telephone." *Id.*

299. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 2, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (including in a lawyer's responsibilities: "examining a client's affairs" and "provid[ing] a client with an informed understanding of the client's legal rights and obligations and explain[ing] their practical implications").

300. 47 C.F.R. § 64.604(a)(iv) (2007) ("TRS providers are responsible for requiring that VRS CAs are qualified interpreters. A 'qualified interpreter' is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary."). At VRS's inception, the FCC chose not to allow "each state [to] determine its own minimum qualifications" but rather "appl[ie]d the Department of Justice's [Title II and Title III] definition of qualified interpreter to [VRS]." *In re* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, 15 F.C.C.R. 5140, 5161-62 (2000).

“qualified interpreters,” does not require them to hold a certification that would qualify them to be certified court interpreters in a Texas court proceeding,³⁰¹ and VRS CAs cannot be sworn, an attorney should never propose or accept using VRS for a deposition or any other court proceeding.³⁰²

Although VRS is not appropriate for a court proceeding, it may work well to discuss matters that are easily communicated in situations where the interpreter’s qualifications must not be proven, a lesser quality of interpretation can be tolerated, and the interpreter does not have to be sworn. However, attorneys should not use VRS as a “no cost” alternative to hiring a qualified interpreter for a face-to-face meeting with their deaf clients³⁰³ because, for other than simple matters, VRS may not provide effective attorney-client communication.

3. Video Remote Interpreting (VRI)

Another communication resource for attorney-client communication is video remote interpreting (VRI).³⁰⁴ Like VRS, to access VRI a person must have high speed Internet access and either a computer with a web camera or a videophone.³⁰⁵ Also like VRS,

301. Compare 47 C.F.R. § 64.604(a)(iv) (2007) (authorizing VRS providers to set their own VRS CA standards so long as the VRS CA “is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary”), with TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon 1997) (requiring court-appointed interpreters to have either a RID legal certificate or a BEI court interpreter certificate in order to be qualified), and TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon Supp. 2007) (same).

302. See TEX. GOV’T CODE ANN. § 57.026 (Vernon Supp. 2007) (prohibiting anyone without the required court interpreter certificate from interpreting any “court proceeding”); *id.* § 57.001(7) (“‘Court proceeding’ includes an arraignment, deposition, mediation, court-ordered arbitration, or other form of alternative dispute resolution.”).

303. See Reminder That Video Relay Service (VRS) Provides Access to the Telephone System Only and Cannot Be Used as a Substitute for “In-Person” Interpreting or Video Remote Interpreting (VRI), 70 Fed. Reg. 59,346, 59,347 (Oct. 12, 2005) (reminding the public that VRS may not “be used as a substitute for using an in-person interpreter or [Video Remote Interpreting]”).

304. Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Misuse of Internet Protocol (IP) Relay Service and Video Relay Service, 71 Fed. Reg. 31,131, 31,134 (June 1, 2006) (“VRI is a commercial service that is used when an interpreter cannot be physically present to interpret for two or more persons who are together at the same location.”).

305. e-Michigan Deaf and Hard of Hearing People, Video Remote Interpreting, http://www.michdhh.org/assistive_devices/video_remote_interp.html (last visited May 12, 2008) (describing how video remote interpreting works).

the VRI caller connects with the interpreter—waiting at a call center—via the Internet.³⁰⁶ Unlike VRS, VRI is a fee-for-service business that is an alternative to an in-person interpreter.³⁰⁷ Attorneys with the requisite VRI equipment in their office can use the remote interpreter—instead of an in-person interpreter—when meeting with deaf clients in their office.³⁰⁸ Using VRI, attorneys avoid the costs for an in-office interpreter's travel time and minimum charge. If a deaf client misses an appointment, the attorney may not have to pay for unused VRI minutes. In areas where there are no suitable interpreters, for short, one-time meetings, or for an immediate need when no on-site interpreters are available, VRI may be an attractive alternative to hiring an in-office interpreter to communicate with a deaf client.³⁰⁹

4. Written Materials

Attorneys communicate with clients using written materials that clients need to read and understand: letters, e-mail, text messages, documents, petitions, affidavits, motions, and more. Title III recognizes written materials as a means of communicating with deaf clients,³¹⁰ but a material's simplicity or complexity may affect its use. A reading-challenged client may understand a letter, e-mail, or text message that conveys a rather simple message. But some legal documents contain abstract concepts presented in

306. *See* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Misuse of Internet Protocol (IP) Relay Service and Video Relay Service, 71 Fed. Reg. 31,131, 31,134 (June 1, 2006) (stating that VRI uses video conferencing equipment and a remotely located interpreter).

307. *Id.* (relating that VRS is funded by taxpayers but VRI is paid for by the user). "The Commission continues to receive anecdotal evidence that VRS is being used in circumstances that do not involve access to the telephone system, and therefore are not appropriate for a relay service. VRS is not to be used as a substitute for in-person interpreting services or for Video Remote Interpreting (VRI)." *Id.*

308. *E.g.*, DeafActionCenter.org, Video Remote Interpreting, <http://www.deafactioncenter.org/services/videoremote.html> (last visited May 12, 2008) (offering VRI to any who desire to use it and suggesting that it is appropriate for doctors to use in patient consultations). Similarly, lawyers may use VRI for client consultations. *Id.*

309. *E.g., id.* (touting the benefits of VRI over in-person interpreting). United States VRI providers include, for example: Birnbaum Interpreting Services, <http://www.bisvri.com/>; CSD Interpreting Online, <http://www.csdinterpretingonline.com/>; DeafAction Center.org, <http://www.deafactioncenter.org/services/videoremote.html>; Deaf Link, <http://www.deaflink.com/>; Sign Language Interpreting Services, Ltd., <http://www.slisva.com/id7.html>; and Sorenson Video Remote Interpreting, <http://www.sorensonvri.com/>.

310. 42 U.S.C. §§ 12188(a)(2), (b)(2)(A)(ii) (2000).

complex sentence structures and syntax.³¹¹ Even a well-educated hearing person may have trouble reading such materials.³¹² A deaf person whose primary language is ASL, and who has trouble understanding plain written English, will probably have even more trouble reading and understanding legal documents.³¹³ If the attorney uses a pen and paper or types on a computer to explain the documents,³¹⁴ the attorney may produce simpler explanations but still has not changed the communication medium to overcome the client's difficulty reading and comprehending English.³¹⁵ In the process, the attorney is almost certainly accruing more billable time than if the attorney provided a qualified interpreter.³¹⁶

311. *E.g.*, *In re Grand Union Co.*, 204 B.R. 864, 873 (Bankr. D. Del. 1997) (“The bar date notice, a four page, over 1,000 word document, couched with legalese, is a complex legal document, and clearly is not easily comprehensible by a lay-person.”).

312. *See generally* *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 555 (1984) (musing that lay persons may not understand legal terms).

The varied responses to respondents' question on *voir dire* testify to the fact that jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges.

Id.

313. *See* Gallaudet Research Institute, Gallaudet University, Literacy & Deaf Students, <http://gri.gallaudet.edu/Literacy/> (last visited May 12, 2008) (reporting that the median deaf seventeen- and eighteen-year-old student in school has a reading level of a fourth grade hearing student).

314. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,567 (July 26, 1991) (“In some situations, an effective alternative to use of a notepad or an interpreter may be the use of a computer terminal upon which the representative of the public accommodation and the customer or client can exchange typewritten messages.”). The caveat “[i]n some situations” is significant; attorneys should use typed or written notes sparingly if their deaf client has difficulty reading English. *See* Gallaudet Research Institute, Gallaudet University, Literacy & Deaf Students, <http://gri.gallaudet.edu/Literacy/> (last visited May 12, 2008) (noting deaf students' literacy disadvantage compared to their hearing student peers).

315. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,567 (July 26, 1991) (warning public accommodations not to use “inappropriate or ineffective auxiliary aids” that, as applied to deaf persons, would not provide effective communication). The response to comments continues: “It is not difficult to imagine a wide range of communications involving areas such as health, legal matters, and finances that would be sufficiently lengthy or complex to require an interpreter for effective communication.” *Id.*

316. *See* DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 para. 8 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (documenting the complainant's allegation that she incurred higher costs because her lawyer failed to get a qualified interpreter).

While that cost shifting might not be prohibited,³¹⁷ it increases the financial incentive for the attorney to not provide an interpreter. That incentive exacerbates the conflict between an attorney's financial interests and a client's need for effective communication. The attorney can charge more, for the increased time needed to communicate the same information, and pay nothing—by not hiring an interpreter—for using a less effective means of communication. However, if an attorney gives a deaf client written material that the deaf client has trouble understanding, and the attorney does not provide a qualified interpreter to ensure effective communication with the client, the attorney may be subject to discipline.³¹⁸ The client's interests may also be harmed because the attorney did not provide a qualified interpreter.

5. Qualified Interpreter

A qualified interpreter is a critically important resource for Deaf in legal settings, including attorney-client communications. A qualified interpreter can turn otherwise ineffective attorney-client communications into effective communications by communicating with the parties in their respective primary language using familiar vocabulary, grammar, and concepts. When an attorney meets with a client, the attorney has a responsibility to know and comply with the laws governing that meeting.³¹⁹ For a deaf client, the attorney

317. See *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 56 Fed. Reg. 35,544, 35,564 (July 26, 1991) (stating that “[t]he Department [of Justice] does not intend § 36.301(c) to prohibit professionals who bill on the basis of time from charging individuals with disabilities” for the extra time needed to provide those services).

318. See DEP’T OF JUSTICE, SETTLEMENT AGREEMENT UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 BETWEEN THE UNITED STATES OF AMERICA AND THE LAW OFFICE OF COHEN AND JAFFE, LLC: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-52-111 paras. 6, 17 (July 3, 2006), <http://www.ada.gov/cohenjaffe.htm> (alleging that the deaf client “was unable to understand the settlement agreement” because the Law Office did not provide a qualified interpreter and requiring the Law Office to take remedial action “as necessary to ensure effective communication with individuals with disabilities” including providing sign language interpreters); DEP’T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 para. 21 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (reciting the remedial action imposed on a lawyer who failed to ensure effective communication with his deaf client).

319. TEX. DISCIPLINARY R. PROF’L CONDUCT preamble ¶ 4, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

is responsible for providing effective communication,³²⁰ and to understand, the deaf client often asks for an interpreter. An attorney can use a qualified interpreter from an interpreting agency or a qualified independent interpreter.

a. Interpreting Agency

Finding an interpreter through an interpreting agency in most metropolitan areas should be possible.³²¹ Ideally, the attorney can get a preferred interpreting agency's name from another law firm or from a local deaf organization that uses interpreter services for the deaf.³²² Absent such a referral, the attorney may look for agencies in the telephone directory or on the Internet.³²³ When selecting a particular agency, the attorney should ask the agency about its capabilities, rates, and references as they pertain to legal interpreting.³²⁴ If the agency has experienced, certified legal interpreters, the agency should be willing to describe its interpreters' qualifications, their experience levels, and suitable references.³²⁵ If the agency does not explicitly state that it has interpreters with either a (national) Registry of Interpreters for the Deaf (RID) legal certificate or a (Texas) Board for the Evaluation of Interpreters (BEI) court interpreter certificate, the

320. 42 U.S.C. § 12182(b)(2)(A)(iii) (2000); 28 C.F.R. § 36.303(c) (2007).

321. See Texas Department of Assistive and Rehabilitative Services, DHHS Contractors, <http://www.dars.state.tx.us/dhhs/list.shtml> (last visited May 12, 2008) (showing the regions on a Texas map, listing the counties in each region, and listing services contractors in each region). Deaf interpreter businesses often list their companies in the business telephone directory listings under "Deaf Organizations & Services" or "Translators & Interpreters" categories. YellowPages.com, <http://www.yellowpages.com> (last visited May 12, 2008). Enter "deaf" and the Texas city for a listing of deaf businesses and organizations including deaf interpreter agencies. *Id.* Also, DHHS is required to "maintain a list of certified court interpreters and other persons the department has determined are qualified to act as court interpreters and shall send the list . . . on request, to other interested persons." TEX. GOV'T CODE ANN. § 57.021 (Vernon Supp. 2007).

322. See YellowPages.com, <http://www.yellowpages.com> (last visited May 12, 2008) (listing deaf interpreter agencies: enter "deaf" and the Texas city for a listing of businesses and organizations associated with Deaf).

323. See *id.* (listing deaf organizations: enter the Texas city and either "deaf" or "interpreter" for a listing of deaf-related businesses including deaf interpreter agencies).

324. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006) (suggesting questions to ask an interpreting agency).

325. *Id.* (recommending that law firms check references from deaf interpreter agencies before selecting a particular agency).

attorney should ask that question until the agency gives an unambiguous response.³²⁶ Also, the attorney may want to ask whether the agency covers its interpreters with workers compensation insurance for injuries and with liability insurance for interpreting errors or omissions.³²⁷

Besides possibly providing insurance for its interpreters, an interpreting agency may offer other benefits over an independent interpreter. When an attorney has an agency provide an interpreter at a specific time and place, the agency is responsible for providing another qualified interpreter in case the first interpreter is unable to make the scheduled appointment.³²⁸ Independent interpreters sometimes miss scheduled appointments because they often get impromptu assignments. These spontaneous jobs may last much longer than anyone expected and may prevent the independent interpreter from making a scheduled appointment. In contrast, an agency is typically responsible for providing a replacement interpreter. Further, if the scheduled interpreter is not the right match for the deaf client because of certification level or language type, the agency should provide a replacement interpreter that meets the deaf client's communication needs.³²⁹ Because an established agency may know many of the deaf persons in its service area, an agency is more likely to provide an appropriately skilled interpreter the first time.³³⁰

When it is time to schedule a meeting with a deaf client, the attorney should tell the agency that an interpreter is needed to help the attorney discuss legal matters with a deaf client.³³¹ The agency should ask whether the meeting will be an attorney-client discussion or if the meeting will be a deposition or some type of dispute resolution. Is the agency prying? No. It needs to know whether the meeting will be a "court proceeding"³³² as it needs to

326. *Id.*

327. *Id.*

328. *Id.*

329. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

330. *Id.*

331. *Id.*

332. *See* TEX. GOV'T CODE ANN. § 57.001(7) (Vernon Supp. 2007) (defining a "[c]ourt proceeding [as] an arraignment, deposition, mediation, court-ordered arbitration, or other form of alternative dispute resolution").

send an interpreter with the appropriate qualifications.³³³ An appropriately qualified interpreter should arrive a few minutes before the scheduled meeting time.³³⁴ When the interpreter arrives, “trust, but verify”³³⁵ is a prudent policy. The attorney should ask the interpreter about the interpreter’s legal interpreting qualifications, ask to see a copy of any certification,³³⁶ and conduct a short voir dire of the interpreter. The interpreter voir dire process is discussed below. If the attorney has questions about the interpreter’s qualifications, the attorney should immediately address those with the agency. After the meeting, the attorney should follow-up with the agency. If the interpreter seemed to have difficulty interpreting the meeting, the agency needs to know. Likewise, if the client and the attorney believe the interpreter interpreted well, the attorney should ask for the same interpreter at future meetings with that client.³³⁷ The same interpreter is likely to make fewer interpreting errors and take less time to understand that specific client because the interpreter already has some experience with that client’s signing³³⁸ and the context of

333. *See id.* § 57.026 (prohibiting an uncertified person from interpreting a court proceeding); *id.* § 57.027 (establishing criminal and administrative penalties for persons who violate state interpreting laws).

334. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

335. Foreign and Domestic Issues, 23 WKLY. COMP. PRES. DOC. 1424 (Dec. 3, 1987) (reporting President Reagan’s conversation with journalists in which he offered his “trust, but verify” philosophy towards making and monitoring agreements with the Soviets to reduce the number of nuclear weapons). Similarly, although an attorney may extend trust to an interpreter based on the interpreter’s stated qualifications, it is prudent to verify the interpreter’s actual capabilities.

336. *See* REGISTRY OF INTERPRETERS FOR THE DEAF, NAD-RID CODE OF PROFESSIONAL CONDUCT 5 (2005), available at <http://www.rid.org/UserFiles/File/pdfs/codeofethics.pdf> (encouraging certified interpreters to “[a]ccurately represent [their] qualifications, such as certification, . . . and provide documentation when requested”).

337. Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007). Some commentators assert that the deaf client is the one that should decide whether the interpreter interpreted suitably for the client. *E.g.*, Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can’t Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 177 (1994) (“[T]he person for whom the sign language interpreter is interpreting is the only person qualified to judge whether the interpreter is adequate.”).

338. *See* NATIONAL CENTER FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 134 (2002), available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf (counseling courts that the interpreter has a responsibility to conduct a brief

the client's legal situation.³³⁹ The attorney may be able to reduce interpreter costs, reduce the client's attorney costs, and provide more effective communication by using the same interpreter for each meeting.³⁴⁰

b. Independent Interpreter

Using the same interpreter for each meeting helps both the attorney and the client, but the attorney does not have to hire an interpreter through an agency. Besides working for agencies, many interpreters also do freelance work: they work directly for doctors, lawyers, schools, and others, and may charge less per hour than an agency.³⁴¹ To find an independent interpreter, an attorney may get a recommendation from another law firm or from a deaf-related organization. If that is not practicable, the Office for Deaf and Hard of Hearing Services (DHHS) maintains a list of interpreters on its website.³⁴² By entering a city name into a website form, an attorney can display a list of interpreters within the city; the list includes the interpreters' qualification levels. However, the list lacks information that an agency would probably have. Specifically, the list does not show: availability—which interpreters are available for freelance work and which are not; proficiency—which interpreters have not interpreted regularly for many years; suitability—which interpreters have prickly personalities; or reliability—which interpreters are dependable.³⁴³ Besides

communication test and determine whether the interpreter “can[] communicate effectively with the [deaf] person”). Such a communication test is an important preparatory step before a client meeting or court proceeding. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 130 (2000) (favoring establishment of client-interpreter communication before beginning a meeting).

339. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 130 (2000) (“Interpreters should be given time to establish communication with the client and to obtain background information about the case.”).

340. Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007).

341. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

342. Texas Department of Assistive and Rehabilitative Services, BEI Interpreter Search, <http://www.dars.state.tx.us/dhhs/beiterpsearch.shtml> (last visited May 12, 2008).

343. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

the list's limitations, the attorney assumes more responsibility when hiring an independent interpreter. If the interpreter does not show up for the appointment, the attorney will have to find a suitable replacement on short notice—likely at greater expense—or reschedule the meeting.³⁴⁴ If the independent interpreter arrives promptly but is not able to communicate effectively with the deaf client, the attorney may still have to pay the interpreter.³⁴⁵ Also, an independent interpreter may be less likely than an agency to have insurance coverage against personal injury or interpreting error.³⁴⁶ However, if attorneys can find certified, proficient, reliable independent interpreters that they can use each time for the same client, they may reduce their interpreting costs.³⁴⁷

When arranging to use an independent interpreter, the attorney should tell the interpreter the attorney needs to discuss legal matters with a deaf client.³⁴⁸ The interpreter, just like an agency, should ask about the type of meeting to be sure the interpreter has the appropriate certification.³⁴⁹ If the attorney has not done so in the interpreter selection process, the first time the attorney uses the interpreter, the attorney should ask about the interpreter's legal interpreting qualifications, ask to see a copy of the certification, and conduct a short voir dire of the interpreter.³⁵⁰ The interpreter voir dire process is discussed below. If the attorney has questions about the interpreter's qualifications or the appropriate certification level for the planned meeting, the attorney may need to ask the Office for Deaf and Hard of Hearing Services (DHHS) for guidance.³⁵¹ After the attorney-client meeting, if the client and the attorney believe the interpreter interpreted well, the attorney can use the same interpreter at

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

349. *Id.*

350. *Id.*

351. Texas Department of Assistive and Rehabilitative Services, Contact Us, <http://www.dars.state.tx.us/contact/index.shtml> (last visited May 12, 2008) (listing DHHS's phone number as 800-628-5115).

future meetings with that client.³⁵² If not, the attorney can ask for another recommendation, repeat the independent interpreter search process, or use an agency, but in no case should an attorney use an unqualified interpreter.³⁵³

6. Unqualified Interpreter

Using an unqualified interpreter to interpret for a deaf client may be tempting to some attorneys.³⁵⁴ After all, a deaf client may be accompanied to the attorney's office by a hearing friend or family member who has some signing ability.³⁵⁵ An attorney might assume the deaf client asked the hearing person to accompany them, observe that the two are able to communicate, and decide that the hearing person can provide effective attorney-

352. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 177 (1994) (“[T]he person for whom the sign language interpreter is interpreting is the only person qualified to judge whether the interpreter is adequate.”).

353. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 130 (2000) (asserting that attorneys should never use a client's friend or family member to interpret “even if the deaf client requests that they do so”); Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 171 (1994) (“Family members, especially in a legal setting, should *not* be asked (or allowed) to interpret.”).

354. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006); see also DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JOSEPH DAVID CAMACHO, ESQUIRE, ALBUQUERQUE, NEW MEXICO UNDER THE AMERICANS WITH DISABILITIES ACT, DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-49-37 para. 3 (Aug. 9, 2007), <http://www.ada.gov/albuquerque.htm> (quoting Mr. Camacho asking his client to use her nine year-old son to interpret their meetings); DEP'T OF JUSTICE, SETTLEMENT AGREEMENT UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 BETWEEN THE UNITED STATES OF AMERICA AND THE LAW OFFICE OF COHEN AND JAFFE, LLC: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-52-111 para. 6 (July 3, 2006), <http://www.ada.gov/cohenjaffe.htm> (“[T]he Law Office relied on [the client's] mother to facilitate communications between the client and attorney.”); DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 para. 19 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (finding “inappropriate” a lawyer's use of a deaf client's sister—who was not a qualified interpreter—to interpret some of the attorney-client communications).

355. Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 129 (2000) (“Friends or family members of a client who is deaf should *never* be used as ‘interpreters’ even if the deaf client requests that they do so.”). The friend or relative may “violate the client's right to confidentiality, . . . [or] have an interest different from and even adverse to that of the deaf client.” *Id.*

client communication.³⁵⁶ The deaf client, however, is likely to ask for an interpreter if the client needs an interpreter for effective communication.³⁵⁷ Some attorneys, despite their clients' requests, have refused to hire a qualified interpreter and have required their deaf clients to provide a family member or friend to interpret.³⁵⁸ A recalcitrant attorney may see paying for an interpreter as a problem, but an unqualified interpreter comes fully equipped with a complete package of problems.³⁵⁹

Many of the problems an unqualified interpreter may cause are due to the person's lack of professional training.³⁶⁰ The unqualified interpreter has not been taught the many aspects of

356. See DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 para. 19 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (finding "inappropriate" a lawyer's use of a deaf client's sister—who was not a qualified interpreter—to interpret some of the attorney-client communications even though the sister accompanied the deaf client to the meetings).

357. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006); see DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JOSEPH DAVID CAMACHO, ESQUIRE, ALBUQUERQUE, NEW MEXICO UNDER THE AMERICANS WITH DISABILITIES ACT, DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-49-37 para. 3 (Aug. 9, 2007), <http://www.ada.gov/albuquerque.htm> (relating the deaf client's repeated requests for an interpreter).

358. DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JOSEPH DAVID CAMACHO, ESQUIRE, ALBUQUERQUE, NEW MEXICO UNDER THE AMERICANS WITH DISABILITIES ACT, DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-49-37 para. 3 (Aug. 9, 2007), <http://www.ada.gov/albuquerque.htm> (relying on the deaf client's nine year-old son to interpret); DEP'T OF JUSTICE, SETTLEMENT AGREEMENT UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 BETWEEN THE UNITED STATES OF AMERICA AND THE LAW OFFICE OF COHEN AND JAFFE, LLC: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-52-111 para. 15 (July 3, 2006), <http://www.ada.gov/cohenjaffe.htm> (relying on the adult deaf client's mother to interpret); DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (relying on the adult deaf client's sister to interpret).

359. *E.g.*, DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (finding that an attorney violated the ADA for failing to provide effective communication with a deaf client due in part to relying on an unqualified interpreter).

360. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

the proper role of an interpreter.³⁶¹ Unqualified interpreters may be biased or prejudiced towards one or more parties, and may allow that bias to affect their interpreting.³⁶² They may have a conflict of interest which they do not disclose.³⁶³ They may ineptly paraphrase communications that need to be interpreted precisely.³⁶⁴ Unqualified interpreters may try to protect deaf clients by omitting or shading inculpatory statements; likewise, they may harm deaf clients by omitting or shading exculpatory statements.³⁶⁵ They may not understand the deaf client very well, or may not know how to sign something to the deaf client, but may “fake it” to avoid embarrassment.³⁶⁶ While interpreting, an unqualified interpreter may replace or augment the attorney’s advice to the deaf client with the interpreter’s own ideas,³⁶⁷ but the deaf client assumes all the advice came from the attorney. Also, the deaf client may encourage the unqualified interpreter to act as the client’s advocate. The unqualified interpreter may act as an advocate without realizing that doing so violates the proper role of an interpreter.³⁶⁸ On the other hand, the unqualified interpreter may choose not to advocate for the deaf client—who is expecting the unqualified interpreter to do so—without informing

361. *See generally* REGISTRY OF INTERPRETERS FOR THE DEAF, NAD-RID CODE OF PROFESSIONAL CONDUCT (2005), available at <http://www.rid.org/UserFiles/File/pdfs/codeofethics.pdf> (illustrating appropriate standards and inappropriate behaviors for interpreters).

362. *See id.* at 3 (proscribing bias that affects interpreting).

363. *See id.* at 4 (directing interpreters to “[d]isclose to parties involved any actual or perceived conflicts of interest”).

364. *See* BATTERED WOMEN’S LEGAL ADVOCACY PROJECT, INC., USING AN INTERPRETER IN COURT 3 (2004), available at <http://www.bwlap.org/TAPs/terp2.pdf> (recounting problems others have experienced using interpreters in court).

365. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006); *see also* BATTERED WOMEN’S LEGAL ADVOCACY PROJECT, INC., USING AN INTERPRETER IN COURT 3–4 (2004), available at <http://www.bwlap.org/TAPs/terp2.pdf> (reporting similar problems using interpreters in court).

366. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

367. *Contra* REGISTRY OF INTERPRETERS FOR THE DEAF, NAD-RID CODE OF PROFESSIONAL CONDUCT 3 (2005), available at <http://www.rid.org/UserFiles/File/pdfs/codeofethics.pdf> (instructing interpreters to “[r]efrain from providing counsel, advice, or personal opinions”).

368. *See id.* (defining the “Code of Professional Conduct” for interpreters).

the deaf client.³⁶⁹ If a deaf client accepts, or even recommends, an unqualified interpreter to interpret attorney-client communications, the attorney should politely refuse. Using an unqualified interpreter does not excuse the attorney's responsibility to provide effective communication.³⁷⁰

C. Communication Situations

1. General Communication Matters

Attorneys are responsible for ensuring effective communication with their clients.³⁷¹ Without effective communication, attorneys cannot fulfill their professional responsibilities to their clients.³⁷² The Department of Justice strongly encourages public accommodations to consult with disabled persons to determine what type of auxiliary aid will work best for them.³⁷³ But, an attorney that cannot sign might have trouble discussing auxiliary aids and alternatives with a deaf client. Regardless of the deaf client's expressed choice, the Department of Justice does not require a public accommodation to provide the disabled person's first choice of "auxiliary aid or service."³⁷⁴ Nevertheless, the lawyer, except in the case of an "undue burden,"³⁷⁵ must "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."³⁷⁶ Unless the

369. See BATTERED WOMEN'S LEGAL ADVOCACY PROJECT, INC., USING AN INTERPRETER IN COURT 3 (2004), available at <http://www.bwlap.org/TAPs/terp2.pdf> (recounting problems others have experienced using interpreters in court, including the deaf person relying on the interpreter to advocate for them).

370. See 42 U.S.C. § 12182(b)(2)(A)(iii) (2000) (defining discrimination by a public accommodation as failing to provide "auxiliary aids and services").

371. See 28 C.F.R. § 36.303(c) (2007) ("A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."); see also TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 3, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) ("A lawyer should maintain communication with a client concerning the representation.").

372. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

373. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,567 (July 26, 1991).

374. 28 C.F.R. § 36.303(f) (2007).

375. *Id.*

376. *Id.* § 36.303(c).

matters the attorney *and the client* need to discuss are both short and simple, and the client agrees to forego an interpreter, the lawyer should provide a qualified interpreter when meeting with a deaf client if the client asserts that the client cannot understand the attorney without an interpreter.³⁷⁷

When meeting with a deaf client, or any other client, an attorney must be careful not to jeopardize the attorney-client privilege,³⁷⁸ or reveal a client's confidential information.³⁷⁹ No careful attorney would discuss confidential matters, privileged or not, with a hearing client when outsiders could overhear the conversation. The attorney could whisper to reduce the radius at which others could eavesdrop, move to a private setting, or discuss the matter later. However, there is a difference between "earshot" and eyesight. When an attorney uses an interpreter to speak to a deaf client, anyone who understands ASL and who can see either the interpreter's or the client's signs is able to "listen in" on the conversation.³⁸⁰ The eavesdropper may be across the courtroom, down the hallway, or even outside the office window. For confidential conversations using an interpreter, the attorney must make sure no one else can see the conversation regardless of where the conversation is occurring.³⁸¹

2. Commonalities in Civil and Criminal Proceedings

Attorneys sometimes speak with clients in their law offices, but often also speak with and for clients in court proceedings.³⁸² Those proceedings may involve civil or criminal matters. For both

377. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,567 (July 26, 1991) (rebutting the notion that interpreters are only required in the "most extreme situations" by musing that "[i]t is not difficult to imagine a wide range of communications involving areas such as health, legal matters, and finances that would be sufficiently lengthy or complex to require an interpreter for effective communication").

378. TEX. R. EVID. 503.

379. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(1)(ii), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

380. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

381. *Id.*

382. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶¶ 1-2 (characterizing a lawyer as a client's representative, advocate, and negotiator in court proceedings and meetings with others).

civil and criminal proceedings, there are some communication commonalities when representing a deaf client, including:

- impartiality of interpreter,
- voir dire of interpreter,
- briefing the court,
- communications test,
- interpreter oath,
- problems with the interpreter,
- interpreter position,
- applying the Rule to an interpreter,
- multiple deaf parties,
- video recording, and
- appeals in general.

a. Impartiality of Interpreter

The Texas Disciplinary Rules of Professional Conduct make attorneys responsible for protecting their client's interests,³⁸³ and a biased interpreter could adversely affect a client. Occasionally, a deaf client may believe the client's interests will be adversely affected by the interpreter's lack of impartiality.³⁸⁴ A deaf client might reasonably believe this because the deaf community is not very large; there are not very many sign language interpreters,³⁸⁵ and even fewer sign language interpreters that are qualified for court proceedings.³⁸⁶ If the deaf client previously had a bad experience with an interpreter, the client may be justifiably concerned about the interpreter's potential bias or prejudice.³⁸⁷ If

383. *Id.* 1.01(b), preamble ¶ 2.

384. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

385. *E.g.*, Texas Department of Assistive and Rehabilitative Services, BEI Interpreter Search, <http://www.dars.state.tx.us/dhhs/beiterpsearch.shtml> (last visited May 12, 2008) (listing roughly 134 sign language interpreters in San Antonio).

386. *E.g.*, *id.* (listing only about thirty Level III or higher sign language interpreters in San Antonio and only eight with court interpreter certificates).

387. *See* Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 132 (2000) (recommending pre-proceeding discussions to address "any conflicts based on previous interpreting for litigants or attorneys in the case"). *See generally* BATTERED WOMEN'S LEGAL ADVOCACY PROJECT, INC., USING AN INTERPRETER IN COURT 3 (2004), available at <http://www.bwlap.org/TAPs/terp2.pdf> (recounting problems others have experienced using interpreters in court, including bias).

the interpreter feels bias or prejudice towards the deaf client such that the interpreter cannot interpret accurately and impartially, the interpreter should disclose the conflict and probably withdraw.³⁸⁸ Regardless of whether the interpreter discloses any conflict, the attorney should protect the client's interests.³⁸⁹ To protect client interests from the consequences of ineffective communication due to a biased interpreter, the attorney can ask the client directly, using a typed or written note, if the interpreter has provided effective communication or if the deaf client believes the interpreter cannot provide effective communication.

b. Voir Dire of Interpreters

To ensure effective communication with a deaf client in a court proceeding, the deaf client's counsel should ask the court for a short voir dire of each court-appointed interpreter.³⁹⁰ By conducting a voir dire of the interpreter, the attorney can ask questions that the court might have overlooked and can help the court better determine the interpreter's qualifications. The trial judge qualifies experts including interpreters,³⁹¹ and for sign language interpreters, the court has objective qualification criteria to help qualify the interpreter. Specifically, a person may not interpret a court proceeding in Texas without the required

388. See REGISTRY OF INTERPRETERS FOR THE DEAF, NAD-RID CODE OF PROFESSIONAL CONDUCT 4 (2005), available at <http://www.rid.org/UserFiles/File/pdfs/codeofethics.pdf> (directing interpreters to "[a]void . . . conflicts . . . that . . . interfere with the effectiveness of interpreting"). Texas interpreters certified by the Board for Evaluation of Interpreters (BEI) are governed by the Deaf and Hard of Hearing Services (DHHS) code of conduct which applies the NAD-RID Code of Professional Conduct. Texas Department of Assistive and Rehabilitative Services, Code of Professional Conduct, <http://www.dars.state.tx.us/dhhs/codeofethics.shtml> (last visited May 12, 2008).

389. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(b), preamble ¶ 2, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (requiring attorneys to diligently perform their responsibilities to their clients).

390. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 197 (1994) (recommending that courts "qualify the interpreter in the same way as all other experts"). However, the court may not conduct its own voir dire, or may, in good faith but without sufficient experience, conduct an inadequate voir dire. See Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006) (relating that often there will be more than one court-appointed interpreter for a court proceeding).

391. See TEX. R. EVID. 604 ("An interpreter is subject to the provisions of these rules relating to qualification as an expert . . ."); *id.* 705(b) (allowing voir dire for experts).

certification.³⁹² Texas has set minimum standards for interpreter qualifications in both civil³⁹³ and criminal³⁹⁴ court proceedings. Both require “[t]he interpreter [to] hold a current legal certificate issued by the National Registry of Interpreters for the Deaf [(RID)] or a current court interpreter certificate issued by the [Texas] Board for Evaluation of Interpreters [(BEI)] in the Department of Assistive and Rehabilitative Services.”³⁹⁵ A person who interprets a court proceeding without proper certification commits a criminal offense, is subject to administrative penalties,³⁹⁶ and may harm the deaf person’s interests. The deaf client’s attorney can help prevent that harm.³⁹⁷ The attorney can ask the interpreter questions that, if answered satisfactorily, will increase all parties’ confidence in the interpreter’s ability to interpret accurately.³⁹⁸ Fortunately, some courts have already developed voir dire questions,³⁹⁹ but others have not, perhaps because of the relatively small number of deaf persons in society.

392. TEX. GOV’T CODE ANN. § 57.026 (Vernon Supp. 2007).

393. TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon Supp. 2007).

394. TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon Supp. 2007).

395. TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon Supp. 2007). The Criminal Code has almost identical language. TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon Supp. 2007).

396. See TEX. GOV’T CODE ANN. § 57.026 (Vernon Supp. 2007) (prohibiting an uncertified person from interpreting a court proceeding); *id.* § 57.027 (establishing criminal and administrative penalties).

397. See TEX. R. EVID. 705(b) (permitting a party “to conduct a *voir dire* examination” of an expert); *id.* 604 (subjecting an interpreter to the same qualification rules as an expert).

398. See Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community’s Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155 app. C (1994) (offering a robust set of interpreter voir dire questions initially developed by the New Jersey courts and specifically tailored for sign language interpreters). The court may not be familiar with these questions and may—with a timely, respectful request from counsel—appreciate counsel’s assistance in conducting the interpreter voir dire.

399. North Dakota Supreme Court Guides, North Dakota Court Interpreter’s Handbook, <http://www.court.state.nd.us/court/interpreter.htm> (last visited May 12, 2008) (providing voir dire questions to qualify a court interpreter and listing several sign language interpreter certification levels); SUPREME COURT OF WISCONSIN, OFFICE OF COURT OPERATIONS, THE WISCONSIN COURT INTERPRETERS HANDBOOK 6 (2004), available at <http://www.wicourts.gov/services/interpreter/docs/handbook.pdf> (providing voir dire questions to qualify a court interpreter and listing several sign language interpreter certification levels); see also Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community’s Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155 app. C (1994) (listing voir dire questions specifically for sign language interpreters).

c. Briefing the Court

Because Deaf are a small minority in our society,⁴⁰⁰ and assuming a participation rate comparable to that of hearing individuals in civil and criminal court proceedings, courts may not frequently encounter Deaf as parties or witnesses. Ideally, courts will be familiar with the laws affecting Deaf and will appreciate practical tips that help keep their dockets moving.⁴⁰¹ However, for a jury trial, even for trials where the court has dealt with Deaf and interpreters before, the deaf client's attorney may offer the court a list of topics which the judge may wish to review with those in the court.⁴⁰² Also, the attorney may suggest the court-appointed interpreter explain at least two matters not covered in the codes: team interpreting practices and the need for a communications test between each interpreter and each deaf party.⁴⁰³

d. Communication Test for Court-Appointed Interpreter

If the court-appointed interpreter does not take the initiative, the attorney should ask the court for permission for the interpreter

400. See Gallaudet University Library, Deaf Population in U.S. States, <http://library.gallaudet.edu/deaf-faq-stats-states.shtml> (last visited May 12, 2008) (estimating the number of deaf Texans over the age of sixteen to be 56,587).

401. *But cf.* Linton v. State, No. 13-05-00668-CR, 2007 Tex. App. LEXIS 6540, at *3 (Tex. App.—Corpus Christi Aug. 16, 2007, no pet.) (illustrating the problem of courts' lack of experience with deaf parties and the need for the deaf client's attorney to ensure the client is able to understand the proceedings). The opinion does not indicate whether the deaf defendant's counsel sought to advise the trial court that: "If a hearing impaired defendant is unable to understand sign language, the court has an obligation to fashion a remedy suitable to overcome the defendant's disability." *Id.* at *7 (citing Lincoln v. State, 999 S.W.2d 806, 809 (Tex. App.—Austin 1999, no pet.)).

402. See NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, GUIDELINES FOR TRIALS INVOLVING DEAF JURORS WHO SERVE WITH THE ASSISTANCE OF SIGN LANGUAGE INTERPRETERS 5 (2004), available at <http://www.judiciary.state.nj.us/interpreters/wrkgdeafjur.pdf> (suggesting topics related to sign language interpreters on which the judge may wish to brief the jury); NAT'L CTR. FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 129 (2002), available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf (encouraging judges to "explain the role and responsibilities of interpreters to all the courtroom participants in any court proceeding" and suggesting topics to cover).

403. NAT'L CTR. FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 134 (2002), available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf (providing a "Judges' Guide to Standards for Interpreting Proceedings" and describing interpreters' responsibilities including, with consent of counsel, conducting a brief communication test).

to briefly communicate with the attorney's deaf client to ensure that the two are able to communicate effectively.⁴⁰⁴ If the interpreter talks with the deaf person for even a few minutes, the interpreter can probably learn what sign language the deaf person uses, such as ASL or Manually Coded English (MCE),⁴⁰⁵ how fluent the deaf person is, and perhaps most importantly, whether the interpreter will need a Certified Deaf Interpreter (CDI)⁴⁰⁶ in order to communicate effectively with the deaf person.⁴⁰⁷ To test

404. *Id.* (counseling courts that the interpreter has a responsibility to conduct a brief communication test and determine whether the interpreter “can[] communicate effectively with the . . . [deaf] person”). Significantly, the Model Guides add a caution: “There are documented cases that have gone to trial and resulted in verdicts and sentences where it was later discovered that the interpreter spoke a different language than the defendant.” *Id.* A communication test is an essential step before a client meeting or court proceeding. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 130 (2000) (“Interpreters should be given time to establish communication with the client and to obtain background information about the case.”).

405. See Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 164 (1994) (“Manually Coded English (MCE) . . . is word for word English signed on the hands . . . [and] is preferred in many professional settings by highly educated deaf people and by late deafened adults and hard of hearing people who have learned to sign.”).

406. See Registry of Interpreters for the Deaf, Certified Deaf Interpreter (CDI) and Conditional Legal Interpreting Permit-Relay (CLIP-R), http://www.rid.org/education/edu_certification/index.cfm (last visited May 12, 2008) (describing a Certified Deaf Interpreter (CDI) and the certification requirements); REGISTRY OF INTERPRETERS FOR THE DEAF, USE OF A CERTIFIED DEAF INTERPRETER 1 (1997), available at <http://www.rid.org/userfiles/file/pdfs/120.pdf> (explaining what a CDI does and how they can be used to communicate with minimal language skill deaf persons). A CDI must be fluent in ASL, know Deaf culture, and be able to use gestures, mime, and other methods to communicate with a deaf person who has minimal language skills in either ASL or English. *Id.* For example, when the judge speaks to the deaf person, the hearing sign language interpreter interprets into standard ASL, the deaf CDI reads the standard ASL and uses a combination of ASL, gestures, mime, drawings, and other tools as needed to convey the judge's remarks to the minimal language skills deaf person. The process works the same in reverse. See Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 174 (1994) (explaining relay interpreting: using a CDI—a relay interpreter—and a hearing interpreter to communicate with a minimal language skills deaf person); see also *In re Wickman*, No. 270236, 2007 Mich. App. LEXIS 106, at *3 n.2 (Mich. Ct. App. Jan. 23, 2007) (describing relay interpreting and recognizing the usefulness of a specialized interpreter like a CDI). The Texas Board for Evaluation of Interpreters refers to CDIs as intermediary interpreters. Texas Department of Assistive and Rehabilitative Services, DHHS, Board for Evaluation of Interpreters, Chapter 4: BEI Interpreter Certification Policies and Procedures, <http://www.dars.state.tx.us/dhhs/bei/ch4.htm> (last visited May 12, 2008).

407. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

the court-appointed interpreter's communication ability, the attorney may wish to ask the client a few non-confidential questions to which the attorney already knows the answers. If the attorney does not get clear answers, the attorney should not assume the interpreter is communicating effectively with the client.⁴⁰⁸ The attorney can ask for more time for the interpreter to establish effective communication with the deaf client, may ask the interpreter if a CDI is needed, or may object to the court's qualifying that particular interpreter.⁴⁰⁹ If the court understands that simply having a certified interpreter does not guarantee effective communication with a deaf person, the court should not object to this brief but important test.⁴¹⁰ Such a test will also help interpreters fulfill the oath that they must take.⁴¹¹

e. Interpreter Oath

In civil and criminal court proceedings, each interpreter must take an oath to "make a true interpretation . . . that the deaf person understands . . . and [to] repeat the deaf person's answers . . . in the English language."⁴¹² If an interpreter cannot effectively communicate with a deaf person, the interpreter cannot continue to interpret for that person and still fulfill the interpreter's oath.⁴¹³ Likewise, if the court insists that the interpreter interpret verbatim⁴¹⁴ and the interpreter knows the deaf person

408. *Id.*

409. *Id.*

410. *See* Hughes v. State, 665 S.W.2d 582, 584 (Tex. App.—Corpus Christi 1984, no writ) (noting the court-appointed interpreter's report to the court that she met with two deaf witnesses before the trial and "communicat[ed with] them without problems"). The appellate court decision does not contain any criticism by either the trial court or the appellate court of a pre-hearing communication test. *Id.*

411. *See* Linton v. State, No. 13-05-00668-CR, 2007 Tex. App. LEXIS 6540, at *2 (Tex. App.—Corpus Christi Aug. 16, 2007, no pet.) (recounting that a deaf criminal defendant's inability to understand ASL "was first made apparent by [the] court-appointed interpreter").

412. TEX. CIV. PRAC. & REM. CODE ANN. § 21.005(a) (Vernon 1997); *accord* TEX. CODE CRIM. PROC. ANN. art. 38.31(e) (Vernon Supp. 2007) (articulating an identical requirement).

413. *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 21.005(a) (Vernon 1997) (requiring that the interpreter "make a true interpretation" which would not be possible if the interpreter could not effectively communicate with the deaf person).

414. *Contra* TEX. CIV. PRAC. & REM. CODE ANN. § 21.005(a)(1) (Vernon 1997) (requiring the interpreter to "make a true interpretation," not a word-for-word translation); TEX. CODE CRIM. PROC. ANN. art. 38.31(e) (Vernon Supp. 2007) (requiring the same).

uses ASL, the interpreter is in a bind. The court probably intends that the interpreter interpret perfectly, but insisting on verbatim English to ASL interpretation is inapt.⁴¹⁵ The English words subpoena, prosecutor, and weapon, to name a few, do not have corresponding ASL signs.⁴¹⁶ An interpreter can convey the *meaning* of subpoena, for example, using an ASL phrase like “paper require you show-up court later,”⁴¹⁷ but even the best interpreter simply cannot render a word-for-word translation from English to ASL when ASL does not have corresponding signs for certain English words.⁴¹⁸ Similarly, if the interpreter rendered an ASL to English translation verbatim, the court and others might have trouble understanding the deaf person’s statements.⁴¹⁹ If the interpreter does not object to the court’s verbatim instruction, the interpreter may have just decided to comply with the spirit of the instruction rather than confront the judge with the oath-instruction conflict the court has created. The court may also create another problem, but not necessarily a serious one. If the court does not administer the oath to the interpreter as required, but no party timely objects, an appeal arguing lack of oath will probably fail.⁴²⁰

f. Problems with the Interpreters

Other appeals that may fail include those arguing ineffective interpreting where the objection was not raised at trial.⁴²¹ If the

415. Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 869–70 (explaining that word-for-word translation between English and ASL can “distort the meaning of what is being said” due in part to no one-to-one correspondence between English words and ASL signs).

416. *See id.* at 875 (noting that, unlike English, “ASL lacks a body of standardized technical terms” such as “prosecutor”).

417. Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 183 (1994).

418. Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 870 (using the German word “angst” as an example to show that other “languages also have words, phrases, or signs that just cannot be translated or interpreted accurately at all, let alone word for word”).

419. *See id.* (illustrating the inherent problem with a word for word translation from ASL to English using an example: “The ASL for ‘I have been to Chicago’ would be voiced as ‘touch finish Chicago.’”).

420. *See Saunders v. State*, 49 S.W.3d 536, 539–41 (Tex. App.—Eastland 2001, pet. ref’d) (overruling appellant’s complaint—that a deaf juror’s interpreter was not given the required oath—because appellant did not timely object at trial).

421. *See Hughes v. State*, 665 S.W.2d 582, 584 (Tex. App.—Corpus Christi 1984, no writ) (overruling claim of flawed interpreting because, in part, defendant failed to object during trial).

deaf client's attorney suspects the client does not understand the proceeding because of the proceeding interpreter's⁴²² interpretation, the attorney should object to preserve a claim of error.⁴²³ Unfortunately, it may be hard for the attorney to know whether the client understands what the proceeding interpreter signs and whether the interpreter is rendering an accurate interpretation of what the deaf client signs. If there is just one interpreter present, that interpreter is the only one in the room that can speak both languages.⁴²⁴ The interpreter may honestly believe effective communication is taking place, when in fact, the interpreter is not interpreting accurately. An effective table interpreter can monitor the proceeding interpreter's interpreting and can alert the deaf client's attorney to any communication problem.⁴²⁵ Where there is more than one proceeding inter-

422. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006) (identifying the court-appointed interpreter that interprets the proceeding including witness questioning and testimony as the "proceeding interpreter").

423. See *Linton v. State*, No. 13-05-00668-CR, 2007 Tex. App. LEXIS 6540, at *3 (Tex. App.—Corpus Christi Aug. 16, 2007, no pet.) (relating defense counsel's attempts to get "the trial court to hear expert testimony regarding [the deaf client's] level of comprehension"). The trial court placed "any burden of ensuring [the deaf defendant's] adequate understanding [of the proceedings] . . . on defense counsel." *Id.* The appellate court disagreed: "Ensuring that the defendant has that minimum understanding is primarily the task of the trial judge." *Id.* at *7.

424. See generally NAT'L CTR. FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 134 (2002), available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf ("There are documented cases that have gone to trial and resulted in verdicts and sentences where it was later discovered that the interpreter spoke a different language than the defendant."); Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 7 n.48 (1990) (offering a hypothetical illustrating the need for a table interpreter).

425. *Linton*, 2007 Tex. App. LEXIS 6540, at *3 (identifying interpreters that sit at the table with deaf clients and their attorneys as the "table interpreter" or "defense interpreter"). A counsel table interpreter can help ensure effective communication.

Perhaps the most efficient and effective method of ensuring the adequacy of interpretation is to provide a second interpreter seated at counsel table with the defendant and the attorney. Such an interpreter can serve several functions. Commonly, counsel-table interpreters are present so that the defendant or subject can communicate with his attorney throughout the proceeding. However, the second interpreter can serve an equally important function of checking the interpretation and the communication process in general.

Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 921. Although current Texas statutes do not explicitly address appointments for a table interpreter, the appointment question is a valid

preter, the non-signing proceeding interpreter⁴²⁶ may also notice a problem, but may or may not report the team interpreter's inadequate interpretation.⁴²⁷ Regardless of whether any other person reports ineffective communication caused by any interpreter, the deaf client's attorney should ensure that the client is able to communicate effectively. Specifically, the attorney must ensure that the client's responses are being communicated accurately and the client is able to understand the proceeding.⁴²⁸

one. Some courts have indicated that the Sixth Amendment may require appointment of a second interpreter to aid the defense. However, when the defendant can confer effectively with counsel in some manner throughout the proceedings and can understand the proceedings, courts have concluded a separate interpreter for the defense is not necessary. *Sanchez v. State*, 122 S.W.3d 347, 354 (Tex. App.—Texarkana 2003, pet. ref'd). *Sanchez* was not deaf but “could not speak English.” *Id.* at 353.

426. See Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 191 (1994) (explaining that team interpreting means using more than one interpreter so that they can trade off about every half hour to reduce fatigue and diminished effectiveness which can cause interpreting errors). “The prevailing custom is that American Sign Language (‘ASL’) interpreters get relieved by a colleague after a stretch of time in light of the intensity of concentration and swift and tiring arm and hand movements.” *Wahid v. Long Island R.R. Co.*, 840 N.Y.S.2d 861, 863 (N.Y. Sup. Ct. 2007). Trade offs can be especially important in some legal settings. *Id.* at 867–68 (“[I]n a volatile and intense courtroom setting, where attorneys pose numerous questions and are quick to burst [out] objections, the [mental and physical] demands upon an ASL on-site interpreter are immense.”).

427. See Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 191 (1994) (“Another important reason for the use of teams, particularly in legal settings, is the availability for correction of errors by the non-signing interpreter. . . . The other member of the team [may] assist the court and the interpreter who is currently signing by appropriately bringing errors to the court's attention.” (footnotes omitted)). Ideally, the non-signing interpreter can feed suggestions to the signing interpreter in case the signing interpreter did not hear something said or is uncertain how to sign an unusual term or concept. *Id.* If the proceeding team interpreters are not working well together, the non-signing proceeding interpreter may not make suggestions and may not point out significant interpreting errors in order to avoid embarrassing the team interpreter, interrupting the court, or aggravating the relationship with the team interpreter.

428. See *Lawson v. State*, 47 S.W.3d 294, 301–02 (Ark. Ct. App. 2001) (considering but ultimately rejecting a deaf appellant's request that her murder conviction be overturned “because her attorneys did not secure an interpreter at the suppression hearing”). Significantly, the court considered whether “the absence of the interpreter undermined the confidence in the outcome of the trial.” *Id.* at 302. A deaf party's counsel might argue that an ineffective interpreter was akin to no interpreter—which would violate Texas statutes. See TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2007) (“[T]he court shall appoint a qualified interpreter to interpret the proceedings [for a deaf party]”); TEX. CIV. PRAC. & REM. CODE ANN. § 21.002 (Vernon 1997) (“[A] deaf person . . . is entitled to have the proceedings interpreted by a court-appointed interpreter.”).

g. Interpreter Position

To understand what others are saying in the proceeding, the deaf client must be able to see the interpreter *and* the person speaking.⁴²⁹ Initially, the interpreter may be positioned so the client can see the judge and the witness. If another person, such as opposing counsel or a witness, speaks from a position where the deaf client cannot see both the interpreter and the other person, the interpreter should move so the deaf client can see both the interpreter and the speaker. The attorney should ensure that the interpreter is “position[ed] not more than 10 feet from and in full view of the deaf [client]” before the proceeding starts.⁴³⁰ Further, the attorney should take care to prevent any visual disturbances between the interpreter and the client such as persons walking, or visual aids positioned, between the interpreter and the client.⁴³¹ The attorney should also ask the client if the lighting is adequate to see the interpreter.⁴³² Because these accommodations might be distracting to the court, before the proceeding begins, the attorney might respectfully ask to explain the importance of these matters to the court.⁴³³

h. Applying “the Rule” to an Interpreter

The court may grant a motion to invoke “the Rule”⁴³⁴ for deaf witnesses and their interpreters if the interpreters are not also proceeding interpreters.⁴³⁵ Proceeding interpreters are not

429. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

430. TEX. CIV. PRAC. & REM. CODE ANN. § 21.004 (Vernon 1997); *see* TEX. CODE CRIM. PROC. ANN. art. 38.31(d) (Vernon Supp. 2007) (imposing the same requirement).

431. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

432. Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 132 n.32 (2000).

433. *See id.* (outlining several matters that should be discussed before beginning a proceeding using sign language interpreters). An attorney might approach the court clerk before the proceeding to assess the court’s familiarity with using sign language interpreters and to offer such a list of matters to review.

434. TEX. R. EVID. 614 (requiring the court to exclude certain witnesses from the courtroom “[a]t the request of a party” or on the court’s own motion).

435. *See* *Jordan v. State*, 1 S.W.3d 153, 159 (Tex. App.—Waco 1999, pet. ref’d) (reasoning that, in criminal cases, the Rule “applies to interpreters in the same manner as it applies to witnesses”).

subject to the Rule.⁴³⁶ Likewise, a deaf party's table interpreter is also probably exempt.⁴³⁷

i. Multiple Deaf Parties

If there is more than one deaf party, particularly if each deaf party is separately represented because of potentially adverse interests, the deaf parties should each have their own table interpreter to permit confidential attorney-client communications during the proceeding.⁴³⁸ Attorneys should not share one table interpreter to communicate with their respective clients. Although the interpreters' code of ethics prohibits interpreters from sharing a client's confidential information, the interpreters might inadvertently reveal one defendant's confidential information to another. The injured defendant's attorney might be responsible for the interpreter's mistake.⁴³⁹

j. Video Recording

Interpreters sometimes make mistakes,⁴⁴⁰ but diligent attorneys may be able to use video recordings to protect their deaf clients

436. See TEX. CIV. PRAC. & REM. CODE ANN. § 21.004 (Vernon 1997) (requiring the court-appointed interpreter to be present before the proceeding can start); TEX. CODE CRIM. PROC. ANN. art. 38.31(d) (Vernon Supp. 2007) (making the same requirement).

437. See TEX. R. EVID. 614(3) (exempting from exclusion "a person whose presence is shown by a party to be essential to the presentation of the party's cause"); *Sanchez v. State*, 122 S.W.3d 347, 354 (Tex. App.—Texarkana 2003, pet. ref'd) ("An attorney must be able to communicate with his or her client in order to effectively represent the client. Therefore, we conclude the requirement of effective assistance of counsel forms a basis for the requirement of an interpreter."). Because an attorney has a "dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), presumably a deaf party could readily show that the table interpreter is essential to presenting the deaf party's cause.

438. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

439. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(1) reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (prohibiting, generally, a lawyer from revealing a client's confidential information); *id.* 5.03(a) (making lawyers responsible, in many instances, for the conduct of their non-lawyer assistants).

440. Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 191 (1994). Team interpreting helps reduce interpreter mistakes by allowing periodic trade offs and having the non-interpreting interpreter point out the interpreting interpreter's errors. *Id.*

from the detrimental effects of some interpreting mistakes. If a deaf client's attorney discovers—during the proceeding—that the proceeding interpreter has made a substantive mistake while interpreting, the attorney should immediately bring that mistake to the court's attention.⁴⁴¹ Even if the attorney uses a table interpreter to monitor the proceeding interpreter's interpreting, the attorney should also ask the court to video record all testimony by deaf witnesses for later review.⁴⁴² The recording *must* clearly show *both* the deaf witness *and* the proceeding interpreter. Although the video record must be included in the appellate record on a party's request,⁴⁴³ if the appellant does not request video recording of witness testimony during the trial, the lack of a video record alone does little to support the appellant's complaint of biased or inaccurate interpreting.⁴⁴⁴

k. Appeals in General

Besides the lack of a video record, a deaf appellant's complaint may also fail for other omissions. To prevail on claims of error that are contingent on a person being deaf, the deaf party's attorney must make sure the record affirmatively shows the client is deaf.⁴⁴⁵ As with most other errors, the deaf client's attorney

441. *E.g.*, TEX. R. EVID. 103 (prohibiting predicated error on admitting evidence based on an untimely objection).

442. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 21.007(b) (Vernon 1997) (“On . . . a party's motion, the court may order a video recording of a deaf witness's testimony and the interpreter's interpretation of that testimony to use in verifying the transcription of the reporter's notes.”); TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2007) (“On . . . the motion of a party, the court may order testimony of a deaf witness and the interpretation of that testimony by the interpreter visually, electronically recorded for use in verification of the transcription of the reporter's notes.”); *see also* NAT'L CTR. FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 135 (2002), available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf (encouraging courts to make audio/video recordings of interpreted testimony in certain cases).

443. TEX. CIV. PRAC. & REM. CODE ANN. § 21.007(b) (Vernon 1997); TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2007).

444. *See* *Soloman v. State*, No. 01-88-00538-CR, 1989 Tex. App. LEXIS 784, at *5 (Tex. App.—Houston [1st Dist.] Apr. 6, 1989, pet. ref'd) (not designated for publication) (“[N]othing in the record . . . indicates that the interpreter's translation was biased.”). The *Soloman* court also noted that the “[a]ppellant never requested that the complainant's testimony and the interpretation of that testimony be visually, electronically recorded” so as to be included in the appellate record. *Id.*

445. *See* *Easley v. State*, 986 S.W.2d 264, 267 (Tex. App.—San Antonio 1998, no pet.) (applying deaf statutory protections because the record showed the appellant was deaf).

must timely object to preserve a claim of error. In a federal court, which is subject to the Court Interpreters Act,⁴⁴⁶ failure to timely object to an unqualified interpreter may not be plain error sufficient to overturn a conviction.⁴⁴⁷ But the Court Interpreters Act, which applies to “judicial proceedings instituted by the United States,”⁴⁴⁸ though similar to Texas laws in many respects, gives more discretion to a federal court in determining who is a qualified interpreter than do Texas laws for Texas courts.⁴⁴⁹ When a Texas court is required to provide a qualified proceeding interpreter but does not do so and a party timely objects, the trial court’s decision may be an abuse of discretion for failure to comply with the law.⁴⁵⁰ Even if the court uses a qualified interpreter, the interpreter may make errors.⁴⁵¹ If those errors interfere with the deaf party’s rights to the extent that, in a civil case, they “probably cause[] the rendition of an improper judgment,”⁴⁵² or, in a criminal case, they create a “constitutional error,”⁴⁵³ the trial court’s decision might be successfully appealed. If there is a video recording showing the errors, the recording can be included in the

446. Court Interpreters Act, 28 U.S.C. § 1827 (2000).

447. *United States v. Gonzales*, 339 F.3d 725, 728 (8th Cir. 2003) (chastising a federal district court for not following the Court Interpreters Act but reviewing the record only for plain error because the deaf defendant “failed to raise this issue before the district court”). The defendant’s conviction was affirmed because he did not show “the district court’s decision to use uncertified interpreters affected his substantial rights.” *Id.* at 729. As discussed herein, Texas laws regarding interpreters in court proceedings are noticeably different than the Court Interpreters Act.

448. 28 U.S.C. § 1827(a) (2000).

449. *See generally* Act of May 24, 2005, 79th Leg., R.S., ch. 614, §§ 1–12, 2005 Tex. Gen. Laws 1564, 1564–67 (current version at TEX. GOV’T CODE ANN. §§ 57.001–.027 (Vernon Supp. 2007), TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon Supp. 2007), TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(2) (Vernon Supp. 2007)) (adding additional protections); Act of May 28, 2001, 77th Leg., R.S., ch. 1139, § 1, 2001 Tex. Gen. Laws 2537, 2537–41 (current version at TEX. GOV’T CODE ANN. §§ 57.001–.051 (Vernon Supp. 2007)) (creating statutory protections for deaf persons in legal settings including requiring courts to provide qualified interpreters in both civil and criminal court proceedings).

450. *See Easley v. State*, 986 S.W.2d 264, 267 (Tex. App.—San Antonio 1998, no pet.) (stating that a deaf person is “entitled to the [statutory] protections afforded to deaf persons” and deciding that the trial court erred—though ultimately not reversibly—by not complying with the statute).

451. *See Jo Anne Simon, The Use of Interpreters for the Deaf and the Legal Community’s Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 191 (1994) (“Interpreters, being human, occasionally make mistakes or mishear a word or phrase.”).

452. TEX. R. APP. P. 44.1(a)(1).

453. *Id.* 44.2(a).

appellate record.⁴⁵⁴ However, if the deaf client's attorney waives the client's right to an interpreter, that waiver will undermine an appeal claiming the court erred by not providing an interpreter.⁴⁵⁵

3. Civil Proceedings

Texas statutes provide court-appointed interpreters in certain civil proceedings. For instance, "[i]n a civil case or in a deposition, a deaf person who is a party or witness is entitled to have the proceedings interpreted by a court-appointed interpreter."⁴⁵⁶ The statutes place the cost of those interpreters on "the general fund of the county in which the case [is] brought."⁴⁵⁷ Thankfully, the Texas Civil Practice and Remedies Code does not restrict a court-appointed interpreter to those cases involving fundamental rights,⁴⁵⁸ but does not pay for an interpreter at an attorney-client meeting about the case.⁴⁵⁹ For those meetings, if an interpreter is required for effective communication, the attorney must provide the interpreter.⁴⁶⁰ But there are other civil proceedings in which the court provides an interpreter.

a. Civil Depositions

The court provides a qualified interpreter⁴⁶¹ in a civil case deposition.⁴⁶² Before a deposition that requires a court-appointed interpreter begins, the attorney should allow the interpreter to talk

454. TEX. CIV. PRAC. & REM. CODE ANN. § 21.007(b) (Vernon 1997); TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2007).

455. See *Fonseca v. State*, 163 S.W.3d 98, 100 (Tex. App.—Fort Worth 2005, no pet.) (stating that "the right to an interpreter can be waived"). *Fonseca* was not deaf; he requested, and later waived, a Spanish language interpreter. *Id.* at 99–100.

456. TEX. CIV. PRAC. & REM. CODE ANN. § 21.002(a) (Vernon 1997).

457. *Id.* § 21.006(c).

458. See *id.* § 21.002(a) (providing a right to an interpreter "in a civil case or in a deposition" without adding other limiting language).

459. Cf. TEX. CODE CRIM. PROC. ANN. art. 38.31(b) (Vernon Supp. 2007) (providing a court-appointed interpreter, after certain triggering events, for "communications concerning the case between the defendant and defense counsel").

460. 42 U.S.C. § 12182(b)(2)(A)(iii) (2000) (prohibiting a public accommodation from denying services to any disabled person "because of the absence of auxiliary aids and services"); 28 C.F.R. § 36.303(a) (2007); *id.* § 36.303(c) ("A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."). A law office is a public accommodation, 42 U.S.C. § 12181(7)(F) (2000), a deaf person is an individual with a disability, and a qualified interpreter is an auxiliary aid or service, 28 C.F.R. § 36.303(b) (2007).

461. TEX. CIV. PRAC. & REM. CODE ANN. § 21.003 (Vernon Supp. 2007).

462. *Id.* § 21.002(a) (Vernon 1997).

briefly with the deaf deponent to ensure the interpreter can communicate effectively with the deponent.⁴⁶³ The attorney should conduct a voir dire of the interpreter including asking to see a copy of the interpreter's qualification certificate.⁴⁶⁴ After the attorney is satisfied that the interpreter can interpret satisfactorily, the interpreter can be sworn and the deaf deponent deposed.⁴⁶⁵ An in-person interpreter can work well for local deponents, but attorneys should insist on similar procedures for remote deponents as well. Texas discovery rules allow "oral deposition by telephone or other remote electronic means . . . [with] prior written notice."⁴⁶⁶ The court should appoint an in-person qualified interpreter at the deponent's location, or approve VRI—but not VRS—as an alternative because the VRS interpreter likely does not meet Texas interpreter certification requirements, is not required to disclose any certification, and may be prohibited by the VRS provider from taking any oath. Unlike VRS, VRI may be an appropriate alternative to an in-person interpreter with the deponent if the attorney and the deponent can access VRI. With VRI, the interpreter's qualifications and experience can be examined on voir dire, and the interpreter can be sworn to make a true interpretation of the deposition.

463. See *Hughes v. State*, 665 S.W.2d 582, 584 (Tex. App.—Corpus Christi 1984, no writ) (noting that the court-appointed interpreter met with two deaf witnesses before the trial and "communicat[ed with] them without problems"); NAT'L CTR. FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 134 (2002), available at http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf (counseling courts that the interpreter has a responsibility to conduct a brief communication test and determine whether the interpreter "can[] communicate effectively with the [deaf] person"). The *Hughes* decision does not contain any appellate or trial court criticism of a pre-hearing communication test. *Hughes*, 665 S.W.2d at 584.

464. See REGISTRY OF INTERPRETERS FOR THE DEAF, NAD-RID CODE OF PROFESSIONAL CONDUCT 5 (2005), available at <http://www.rid.org/UserFiles/File/pdfs/codeofethics.pdf> (directing interpreters to "provide [certification] documentation when requested"). Texas DARS imposes the NAD-RID Code of Professional Conduct on interpreters it certifies. Texas Department of Assistive and Rehabilitative Services, Code of Professional Conduct, <http://www.dars.state.tx.us/dhhs/codeofethics.shtml> (last visited May 12, 2008).

465. See TEX. CIV. PRAC. & REM. CODE ANN. § 21.002(a) (Vernon 1997) (providing a court-appointed interpreter for a deposition). Before interpreting, the interpreter is required to take an oath to "make a true interpretation to the deaf person . . . and repeat the deaf person's answers to questions." *Id.* § 21.005(a).

466. TEX. R. CIV. P. 199.1(b).

b. Other Civil Proceedings

In addition to a civil deposition, Texas statutes create a right to a court-appointed interpreter “[i]n a proceeding before the governing body of a political subdivision in which the legal rights, duties, or privileges of a [deaf] party are to be determined by the governing body after an adjudicative hearing.”⁴⁶⁷ A political subdivision includes “a county, municipality, school district, special purpose district, or other subdivision of state government that has jurisdiction limited to a geographic portion of the state.”⁴⁶⁸ Similarly, a state agency must provide a qualified interpreter for a deaf party or deaf subpoenaed witness in a contested case.⁴⁶⁹ Attorneys representing deaf clients before state agencies, political subdivisions, or in civil cases can help ensure effective communication in those proceedings, and reduce their own costs, by using court-appointed interpreters when provided by state law.

4. Criminal Proceedings

Texas laws, principally the Texas Code of Criminal Procedure, also provide deaf criminal suspects and defendants with specific protections to compensate for their hearing disability. The Texas Code of Criminal Procedure requires the state to use a qualified interpreter to interpret for the deaf person in specific circumstances.

One circumstance where an interpreter is not explicitly required is before an arrest at the scene of a disturbance. Article 38.31 of the Texas Code of Criminal Procedure does not specifically address this situation,⁴⁷⁰ but case law in other jurisdictions disfavors impeding police operations by requiring an interpreter at the scene before interacting with a deaf person.⁴⁷¹

467. TEX. GOV'T CODE ANN. § 558.003(a) (Vernon 2004).

468. *Id.* § 558.003(b).

469. *Id.* § 2001.055 (Vernon 2000).

470. *See generally* TEX. CODE CRIM. PROC. ANN. art. 38.31 (Vernon Supp. 2007) (providing a court-appointed interpreter for “an arraignment, hearing, examining trial, or trial,” but not covering a pre-arrest situation). *But see* Salinas v. City of New Braunfels, No. SA-06-CA-729-XR, 2006 U.S. Dist. LEXIS 91082, at *11–12 (W.D. Tex. 2006) (“*Hainze* stands for the limited proposition that an on-the-street police response to a disturbance involving a mentally or physically disabled suspect does not fall within the ambit of Title II prior to the officer’s securing of the scene and ensuring that there is no threat to human life.” (citing *Hainze v. Richards*, 207 F.3d 795, 800 (5th Cir. 2000))).

471. *See* Tucker v. Tennessee, 443 F. Supp. 2d 971, 976 (W.D. Tenn. 2006)

When a deaf person, or any other person, is arrested, the accused must be taken before a magistrate “not later than 48 hours after the person is arrested” and “inform[ed] in clear language . . . of the accusation against him and . . . of his right to retain counsel, . . . to remain silent, . . . to have an attorney present during any interview with peace officers or attorneys representing the state,” and other rights.⁴⁷² For a deaf accused, the “inform[ed] in clear language” requirement is expanded as it instructs “the magistrate . . . [to] inform the person in a manner consistent with Article[] . . . 38.31.”⁴⁷³ Article 38.31 requires “the court [to provide] a qualified interpreter to interpret the proceedings in any language that the deaf person can understand.”⁴⁷⁴ For many Deaf, a single qualified interpreter will suffice. For minimal language skills (MLS)⁴⁷⁵ deaf persons, a Certified Deaf Interpreter (CDI) may be required for the deaf persons to understand their rights and the accusations against them.⁴⁷⁶

(dismissing an ADA claim that the deaf defendants had been discriminated against because of their disability and would not have been arrested if an interpreter had been present at the scene because the arrests were based on a deaf person’s assault on another and not on any inability to communicate due to a lack of an interpreter); *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999) (declining to “forestall[] all police activity until an interpreter can be located . . . [as] impractical and [possibly] jeopardiz[ing] the police’s ability to act in time to stop a fleeing suspect, physically control the situation, or interview witnesses on the scene”).

472. TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (Vernon 2005).

473. *Id.*

474. *Id.* art. 38.31(a) (Vernon Supp. 2007).

475. Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community’s Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 174 (1994) (“Minimal Language Skills is a term characterizing the diminished or idiosyncratic communication system of some deaf individuals.”).

476. *See* Registry of Interpreters for the Deaf, Certified Deaf Interpreter (CDI) and Conditional Legal Interpreting Permit-Relay (CLIP-R), http://www.rid.org/education/edu_certification/index.cfm (last visited May 12, 2008) (describing a Certified Deaf Interpreter (CDI) and the certification requirements); REGISTRY OF INTERPRETERS FOR THE DEAF, USE OF A CERTIFIED DEAF INTERPRETER 1 (1997), available at <http://www.rid.org/userfiles/file/pdfs/120.pdf> (explaining what a CDI does and how they can be used to communicate with minimal language skills deaf persons). A CDI must be fluent in ASL, know Deaf culture, and be able to use gestures, mime, and other methods to communicate with a deaf person that has minimal language skills in either ASL or English. *Id.* For example, when the judge speaks to the deaf person, the hearing sign language interpreter interprets into standard ASL, the deaf CDI reads the standard ASL and uses a combination of ASL, gestures, mime, drawings, and other tools as needed to convey the judge’s remarks to the minimal language skills deaf person. The process works the same in reverse. *See* Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community’s Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 174 (1994)

If the deaf accused was not informed of the accused's rights using a qualified, sworn interpreter as prescribed in Article 38.31, any written, oral, or sign language statement is not admissible.⁴⁷⁷ An oral or sign language statement is also inadmissible unless, *inter alia*, it is visually recorded⁴⁷⁸ and made after the deaf accused has been warned and "knowingly, intelligently, and voluntarily waives any rights set out in the warning."⁴⁷⁹

When representing a deaf defendant that the prosecutor argues has waived the defendant's rights and made an admissible statement, the attorney should carefully examine the events to ensure that the client's rights were not abridged. First, the attorney should discover whether the magistrate proceeding interpreter was a qualified interpreter.⁴⁸⁰ If not, and absent an intervening warning using a qualified interpreter, the deaf defendant's statement is likely inadmissible.⁴⁸¹ Even if the magistrate gave the deaf accused the required warning using a qualified interpreter, the deaf accused may not have understood the warning and was thus unable to "knowingly, intelligently, and

(explaining relay interpreting: using a CDI—also known as a relay interpreter—and a hearing interpreter to communicate with a minimal language skills deaf person); *see also* Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 184 (1994) (asserting that relayed interpretation is "[t]he proper practice when dealing with a deaf person who has minimal language skills" and discussing relayed interpretation). The Texas Board for Evaluation of Interpreters refers to CDIs as intermediary interpreters. Texas Department of Assistive & Rehabilitative Services, Chapter 4: BEI Interpreter Certification Policies and Procedures, <http://www.dars.state.tx.us/dhhs/bei/ch4.htm> (last visited May 12, 2008).

477. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(d) (Vernon 2005) (preventing a deaf accused's statement from being "admissible against the accused unless the [required] warning . . . is interpreted to the deaf person by an interpreter who is qualified and sworn as provided in Article 38.31 of this code"); *Easley v. State*, 986 S.W.2d 264, 267 (Tex. App.—San Antonio 1998, no pet.) (deciding that by failing to use a qualified interpreter to give the defendant his *Miranda* warnings, his subsequent "statement was inadmissible and it was . . . error for the trial court to admit it into evidence").

478. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(1) (Vernon 2005).

479. *Id.* art. 38.22 § 3(a)(2).

480. *See id.* art. 38.22 § 3 (d) (importing Article 38.31 interpreter qualification requirements for statements and arraignments). Article 38.31(g)(2) defines a "[q]ualified interpreter" [as one] who holds a current legal certificate issued by the National Registry of Interpreters for the Deaf or a current court interpreter certificate issued by the Board for Evaluation of Interpreters at the Department of Assistive or Rehabilitative Services." *Id.* art. 38.31(g)(2).

481. *Easley*, 986 S.W.2d at 267 (agreeing that a deaf defendant's statement should not have been admitted because the State failed to use a qualified interpreter to give the defendant his *Miranda* warnings).

voluntarily waive[]” those rights.⁴⁸² The deaf accused’s attorney should have another qualified interpreter review the visual recording of the accused’s waiver and statement to assess whether the accused shows sufficient language skills to have probably understood the waiver of rights. Some deaf persons have minimal language skills (MLS)⁴⁸³ such that they cannot readily understand even a qualified interpreter.⁴⁸⁴ A qualified interpreter—one who has a Court Interpreter Certificate—has been trained to recognize MLS deaf.⁴⁸⁵ If the accused is a MLS deaf person, hopefully the interpreter will see that the deaf accused does not understand the interpreter’s signing and will call for a CDI to help the deaf person understand and communicate.⁴⁸⁶ If the interpreter did not request a CDI or a CDI was not provided, the magistrate warning or accused’s waiver might be challenged as ineffective.⁴⁸⁷ If a

482. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2 (Vernon 2005).

483. Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community’s Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 174 (1994) (“Minimal Language Skills is a term characterizing the diminished or idiosyncratic communication system of some deaf individuals.”). In practice, the Certified Deaf Interpreter (CDI) “will read the [MLS person’s] idiosyncratic signs and interpret the message into standard ASL which the hearing interpreter will interpret into spoken English (and vice versa).” *Id.*

484. *Graham v. Jenne*, 837 So. 2d 554, 556 (Fla. Dist. Ct. App. 2003) (“[A] psychologist with expertise in deaf culture testified that [the deaf defendant] would not be able to understand the most basic legal terms such as ‘jury,’ ‘prosecutor,’ or ‘judge,’ since his limited sign language did not contain such words.”).

485. Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

486. See REGISTRY OF INTERPRETERS FOR THE DEAF, NAD-RID CODE OF PROFESSIONAL CONDUCT 3 (2005), available at <http://www.rid.org/UserFiles/File/pdfs/codeofethics.pdf> (directing an interpreter to “[r]equest support (e.g., certified deaf interpreters . . .) when needed to fully convey the message or to address exceptional communication challenges” such as MLS); *id.* at 5 (directing an interpreter to “[p]romote conditions that are conducive to effective communication, inform the parties involved if such conditions do not exist, and seek appropriate remedies”).

487. See *Easley v. State*, 986 S.W.2d 264, 267 (Tex. App.—San Antonio 1998, no pet.) (approving Article 38.22’s prohibition against admitting a defendant’s statement unless the defendant was given the *Miranda* warnings using a sworn, qualified interpreter). *Easley*’s statement was inadmissible because there was *no* interpreter. *Id.* However, the opinion connotes that the reason for an interpreter was so that *Easley* could “be given the *Miranda* warnings in a meaningful way.” *Id.* The court’s reasoning highlights a known problem:

Few deaf people, however, know and understand their constitutional rights. Even in situations where law enforcement officers are required to inform deaf suspects of their rights, the informational act, such as delivery of *Miranda* warnings, may fail to actually inform the deaf person because of the communication method chosen by the law enforcement officer.

court finds the warning or waiver is a legal nullity, the deaf person's statement may not be admissible due to the state's failure to comply with a required warning and knowing waiver.⁴⁸⁸

The required warning and waiver also may not be effective if the deaf accused is just given a written warning to read. The Texas Code of Criminal Procedure explicitly protects deaf persons by requiring the warning to be interpreted by a qualified and sworn interpreter regardless of whether the statement is made in writing, orally, or in sign language.⁴⁸⁹ This helps protect deaf persons because, although some are highly educated, many may read English at a fourth grade or lower reading level⁴⁹⁰ and "the standard *Miranda* warning form is written at a 6–8th grade reading level."⁴⁹¹ Regardless of the communication resources used in processing a deaf accused, if the accused made an inculpatory statement, the accused's attorney should investigate whether the client understood his or her rights and in fact "knowingly, intelligently, and voluntarily waive[d those] rights."⁴⁹²

Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 165 (1994). For an MLS deaf accused, and the law enforcement personnel trying to do their jobs, the challenge to "warn[] in a meaningful way," *Easley*, 986 S.W.2d at 267, is even greater.

Although individuals with minimal language skills require a highly expert interpreting team, they also require substantially more time for the interpreting process[] because legal concepts do not exist in ASL Experts estimate that an interpreter will require five to six hours to communicate the *Miranda* warnings to a deaf individual with minimal language skills even though the *Miranda* warnings are only a few sentences.

Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 185 (1994) (citation omitted). If the state's chosen communication method was not effective and thus not able to "give[] the *Miranda* warnings in a meaningful way," *Easley*, 986 S.W.2d at 267, an attorney might argue *Easley* by analogy to defend the deaf MLS client.

488. *Easley v. State*, 986 S.W.2d 264, 267 (Tex. App.—San Antonio 1998, no pet.) (asserting that a deaf defendant is "entitled to be given the *Miranda* warnings in a meaningful way, through the aid of [an] interpreter, before giving [a] statement" and the State's failure to do so makes the statement inadmissible).

489. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(d) (Vernon 2005).

490. See generally Gallaudet Research Institute, Gallaudet University, Literacy & Deaf Students, <http://gri.gallaudet.edu/Literacy/> (last visited May 12, 2008) (reporting that the median deaf seventeen- and eighteen-year-old student in school has a reading level of a fourth grade hearing student). No comprehensive literacy data for deaf adults is available. *Id.*

491. Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 177 (1994).

492. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(2) (Vernon 2005).

If a deaf defendant's rights are to be decided in a criminal trial, the defendant's attorney should ensure that the client is not prevented from understanding the proceedings because of the client's deafness.⁴⁹³ For a criminal trial, the Sixth Amendment⁴⁹⁴ and the Texas Constitution⁴⁹⁵ by court interpretation,⁴⁹⁶ and the Texas Code of Criminal Procedure by explicit language,⁴⁹⁷ all require an interpreter for a deaf criminal defendant. If the defendant is a child in the juvenile justice system and the child's parent or guardian is deaf, on the motion of a party "the court shall appoint a qualified interpreter to interpret the proceedings" for the deaf person.⁴⁹⁸ In the adult justice system, particularly in

493. *See Peeler v. State*, 750 S.W.2d 687, 691 (Mo. Ct. App. 1988) ("We find that the failure of counsel to request an interpreter constituted ineffective assistance of counsel and resulted in a conviction that is constitutionally infirm and that the finding of the hearing court in this respect was clearly erroneous."). Significantly, Samuel Peeler—apparently postlingually deaf—could speak for himself, could not "read lips well or understand sign language," but "was able to adequately understand the questions asked of him on direct and cross-examination." *Id.* at 689–90. However, his ability to speak for himself and answer examination questions "[did] not mean that he had a rational understanding of the rest of the proceeding." *Id.* at 690. Although his attorney knew of his hearing loss, *id.* at 689, and perhaps because Samuel could speak for himself, his attorney did not ensure that Samuel could understand the proceedings, *id.* at 690–91, and his actions constituted ineffective assistance of counsel. *Peeler*, 750 S.W.2d at 691.

494. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

495. TEX. CONST. art. I, § 10 ("In all criminal prosecutions the accused shall . . . have the right of being heard by himself or counsel, or both, [and] shall be confronted by the witnesses against him . . .").

496. *See United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970) ("[I]t is equally imperative that every criminal defendant—if the right to be present is to have meaning—possess 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'" (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1962) (per curiam))); *Garcia v. State*, 149 S.W.3d 135, 142 (Tex. Crim. App. 2004) (commenting that the non-English speaking defendant "experienced exactly what the Sixth Amendment protects against" when his entire trial—save one witness's testimony—was conducted in a language he did not speak and without any simultaneous translation). Even without a motion for an interpreter, "the judge has an independent duty to implement this right in the absence of a knowing and voluntary waiver by the defendant" if the judge notices a language problem. *Garcia*, 149 S.W.3d at 145.

497. TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2007) (requiring the court, on notice from a party, to "appoint a qualified interpreter to interpret the [trial] in any language the deaf person can understand"). The Code extends the qualified interpreter protection beyond just a trial to include "an arraignment, hearing, [or] examining trial" at which the deaf defendant will be present. *Id.*

498. TEX. FAM. CODE ANN. § 51.17(e) (Vernon Supp. 2007). The Texas Family Code provides an interpreter for the deaf parent or deaf guardian of a child in a juvenile justice proceeding. *In re T.L.V.*, 148 S.W.3d 437, 440 (Tex. App.—El Paso 2004, no pet.).

serious matters, the attorney should hire a table interpreter to interpret privately between the attorney and client while in the courtroom⁴⁹⁹ and to monitor the proceeding interpreter(s).⁵⁰⁰ In at least one case, a trial court avoided appellate review of the question of whether it was necessary to “appoint[] . . . a second interpreter to aid the defense” because it reimbursed an attorney who hired a separate (table) interpreter.⁵⁰¹ If the attorney believes that the proceeding interpreter is interpreting ineffectively, the attorney should promptly advise the court and, if necessary, formally object to that interpreter continuing to interpret.⁵⁰² The attorney, as part of a vigorous defense, must ensure the proceeding is interpreted accurately and that the client understands the proceeding.⁵⁰³

D. *Representing a Deaf Client Efficiently and Effectively*

Whether as defendants or plaintiffs, deaf clients need skilled legal representation no less than their hearing counterparts. But an attorney cannot effectively represent a deaf client without

499. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (identifying one of counsel's duties to a criminal defendant as the “dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments *in the course of the prosecution*” (emphasis added)); *Sanchez v. State*, 122 S.W.3d 347, 354 (Tex. App.—Texarkana 2003, pet. ref'd) (“An attorney must be able to communicate with his or her client in order to effectively represent the client. Therefore, we conclude the requirement of effective assistance of counsel forms a basis for the requirement of an interpreter.”); Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 921–22 (encouraging attorneys to use a table interpreter to ensure effective communication with their clients during the proceeding and noting the advantages of using the same interpreter they used for their pre-trial attorney-client meetings).

500. See Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 921 (asserting that a table interpreter can monitor the proceeding interpreter's interpreting).

501. *Sanchez v. State*, 122 S.W.3d 347, 354–55 (Tex. App.—Texarkana 2003, pet. ref'd).

502. *E.g.*, TEX. R. EVID. 103 (prohibiting predicated error on admitting evidence based on an untimely objection).

503. See *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970) (stating forcefully that every criminal defendant must be able “to consult with his lawyer with a reasonable degree of rational understanding” during the proceeding (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1962) (per curiam))); *Garcia v. State*, 149 S.W.3d 135, 142 (Tex. Crim. App. 2004) (noting that the non-English speaking defendant's Sixth Amendment rights were violated when his entire trial—save one witness's testimony—was conducted in a language he did not speak and without any simultaneous translation).

effective attorney-client communication.⁵⁰⁴ There are many different communication resources available to attorneys, but attorneys need to take time to plan how to best match those resources to situations for cost-efficient, effective communication.

1. Plan Ahead

Effective communication with a deaf client will likely require an interpreter, but with a little planning, an attorney can minimize the interpreter costs.⁵⁰⁵ First, an attorney can send a deaf client a written list of questions that the attorney needs to ask the deaf client. If the deaf client can read English well, the client will have a preview of the attorney's questions. Even if the deaf client's reading level is not very high, the client may have family or friends with higher reading levels that can help the client understand the questions. There is some risk that the client may misunderstand more questions than would a hearing client, but whatever correct understanding the client can gain before the meeting should be helpful. The attorney should remember that when meeting with the deaf client, the lower the client's reading level, the less of the written materials the client may understand, and the more the attorney may need to explain orally using an interpreter.

Before the attorney and client meet, if the deaf client has VRS access, the attorney can call to set or change meeting appointments and discuss other matters that are not too complex. The attorney should sort the matters to discuss with the deaf client over the

504. *Sanchez*, 122 S.W.3d at 354 (“An attorney must be able to communicate with his or her client [during the proceeding] in order to effectively represent the client. Therefore, we conclude the requirement of effective assistance of counsel forms a basis for the requirement of an interpreter.”).

505. See State Bar of Texas, What is the Sign-Up Fund?, http://www.texasbar.com/Content/NavigationMenu/Other_Services/Attorney_Member_Services/Sign_Up_Fund1/What_is_the_Sign-Up_Fund_.htm (last visited May 12, 2008) (“In certain circumstances, the Sign-Up Fund will reimburse attorneys for their usage of qualified sign language interpreters and other auxiliary aids . . . to facilitate attorney-client communications.”). The Sign-Up Fund began in April 2007 for a one year test period that may be extended. More information about the Sign-Up Fund and how to be reimbursed is available on the Internet. See generally State Bar of Texas, Sign-Up Fund: Basic Guidelines for Use, http://www.texasbar.com/Content/NavigationMenu/Other_Services/Attorney_Member_Services/Sign_Up_Fund1/Sign-UpFundBasicGuidelines.pdf (last visited May 12, 2008) (providing basic information about the fund); State Bar of Texas, Sign-Up Fund Request Form, http://www.texasbar.com/Content/NavigationMenu/Other_Services/Attorney_Member_Services/Sign_Up_Fund1/Sign-UpFundRequestForm.pdf (last visited May 12, 2008) (posting the reimbursement request form).

telephone into roughly three categories according to complexity: simple, intermediate, and complex. The attorney can discuss the simple matters first using VRS and then test that communication by questioning the client about what the attorney said. As the client answers, the attorney should be able to detect voids or defects in the client's understanding. The attorney can fill in any gaps and ask the client more questions. For example, assume Child Protective Services (CPS)⁵⁰⁶ has removed a deaf couple's child from their home, established requirements for the return of the child, and the deaf parents want the attorney to help them get their child back. After the attorney explains CPS's actions and the steps the parents must take to get their child back, the attorney should ask the clients questions like: "Why did CPS take your child from your home?"; "What do you have to do to get your child back?"; and "What will happen if you do not make those changes?" The attorney should *not* ask yes or no questions like "Do you understand why CPS took your child?" or "Do you understand what I said?"⁵⁰⁷ Even if the clients did not understand, they may smile and nod and the VRS CA may answer "Yes."⁵⁰⁸ If the attorney is able to explain the simple matters to the clients, and they correctly explain them in return, the attorney can move on to the intermediate complexity category matters and use the same explain, question, and answer technique. If the clients have trouble understanding the increasingly complex matters, the clients may better understand a different VRS CA or may need to use an in-person interpreter.

If the attorney believes the VRS CA is having trouble interpreting the conversation, the attorney should request a team interpreter or a new interpreter and try again.⁵⁰⁹ The attorney

506. See generally Texas Department of Family and Protective Services, About Child Protective Services, http://www.dfps.state.tx.us/Child_Protection/About_Child_Protective_Services/ (last visited May 12, 2008) (describing Child Protective Services).

507. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 192 (1994) ("The only way to properly determine whether a deaf or hard-of-hearing defendant understands the proceedings is to ask open-ended questions that require the defendant to answer in her own words.").

508. *Id.* at 191 ("While saying 'yes' when one does not understand is incomprehensible to many, . . . it is reality for deaf and hard-of-hearing individuals.").

509. Sorenson VRS, <http://www.sorensonvrs.com/vids/index.php> (follow "Sorenson VRS info" hyperlink; then follow "Can I request to change my interpreters before I make my VRS call?" hyperlink) (last visited May 12, 2008) (providing an informational video in

should remember that many VRS CAs do not hold court interpreter certification, have not been trained in legal interpreting, and do not have any subject matter context when they begin interpreting the call.⁵¹⁰ Despite a new or team interpreter assisting, if the client still does not understand, the attorney can set up a meeting in the law office with an in-person interpreter.

If the in-person interpreter comes from an agency, the agency may know the deaf client and what interpreters have worked well with that client in the past.⁵¹¹ The attorney may not know whether the deaf client is a minimal language skill (MLS) deaf person who will also require a Certified Deaf Interpreter (CDI), but the agency may know and should tell the attorney.⁵¹² If the agency or independent interpreter does not know the deaf client, once the interpreter talks with the client for a few minutes, the interpreter should then know whether to request a CDI to communicate with the client.⁵¹³

Before the attorney meets with the deaf client, the attorney should know the interpreter's billing policy. The interpreter may have a two hour minimum that starts when the interpreter leaves the previous location.⁵¹⁴ The attorney should use the interpreter's

ASL with English captioning and voiceover advising Sorenson VRS users that they may request a different interpreter "before or during a VRS call").

510. Interview with Sarah E. Compton, VRS provider district manager, in San Antonio, Tex. (July 15, 2007) (explaining that although some VRS CAs are certified legal interpreters in their state, the FCC does not require VRS CAs to have legal interpreting training and a VRS CA does not have any conversational context when they begin a call).

511. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 132 n.32 (2000) (recognizing that the Deaf community is relatively small and that it is not uncommon for interpreters in a particular community to have previously interpreted for a deaf client). This is most especially true of interpreters with specialized legal interpreting certification; in Texas there are less than 200 court certified interpreters. See Texas Department of Assistive and Rehabilitative Services, BEI Interpreter Search, <http://www.dars.state.tx.us/dhhs/beiterpsearch.shtml> (select "Level: Court" from the search category drop-down list; then select "Search the Directory!") (last visited May 12, 2008) (listing 142 interpreters in Texas with a Court certification from the Texas Board for Evaluation of Interpreters).

512. If the attorney learns that the client has minimal language skills, the attorney can plan more time to meet with the client and can alert the court that a CDI is needed for any court proceeding.

513. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 178 (1994) (emphasizing the importance of "an interpreter . . . assess[ing] the deaf person's interpreting needs and assur[ing] that [the interpreter's] skills match those needs" and recommending "a minimum of thirty minutes" for making that assessment).

514. Interview with Sarah E. Compton, VRS provider district manager, in San

billable time to its best advantage. If the attorney has questions that do not have to be answered in the present meeting but eventually need to be answered, the attorney should have them ready to ask in case there is time left on the interpreter's "meter." To avoid paying an interpreter to wait on a tardy client, the attorney should have the client arrive a few minutes before the interpreter does. During that time, the attorney may wish to give the client a copy of any new documents with a brief note inviting the client to read the documents now, and telling the client the attorney will explain the documents in the meeting. When the interpreter arrives, if the interpreter has not worked with the client before, the interpreter will need a few minutes to adjust to the client's language preference.⁵¹⁵ When the meeting begins, the attorney may want to ask the client to give concise answers. Often, culturally deaf persons disclose much more personal information than is typical in the hearing community; they give answers with lots of background information to fully explain the matter.⁵¹⁶ If the background information is superfluous, the attorney should politely insist on short answers.

In the attorney-client meeting, as in a VRS conversation, the attorney should not assume the client understands what the attorney is saying.⁵¹⁷ The attorney may wish to use the following communication technique:

Antonio, Tex. (July 15, 2007) (explaining a common policy for independent contractor interpreters working for an interpreting agency).

515. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 130 (2000) (encouraging establishing client-interpreter communication before beginning a meeting).

516. See Must Let You Know, Mother Father Deaf, Experiencing Life Again, Through My Koda's Eyes, <http://codadiva.wordpress.com/2007/07/20/must-let-you-know/> (last visited May 12, 2008) (describing how a Deaf woman experienced the difference in Deaf and hearing cultures when she announced to the entire group of hearing people she was with that she was going to the bathroom but would return soon). The website contains numerous videos and posts describing Deaf experiences. *Id.*

517. See *Stanley v. Lazaroff*, 82 Fed. App'x 407, 413 (6th Cir. 2003) (quoting a defense expert witness who noted the deaf defendant "might smile and nod but may not really understand what was being asked"); *People v. Alexander*, No. A106840, 2005 Cal. App. Unpub. LEXIS 5721, at *20 (Cal. Ct. App. June 30, 2005) (dictum) ("[D]eaf people often act as though they understand what is being stated so as to conform or to be accepted."); Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 191 (1994) ("It is common for a deaf person to nod his or her head in agreement without fully understanding the nature of the assent.").

- explain a matter to the client,
- ask the client open-ended questions about the matter,⁵¹⁸
- listen for gaps in the client's understanding,
- fill in the gaps in the client's understanding, and
- ask the client more open-ended questions until the client has fully explained the matter to the attorney.⁵¹⁹

In the conversation, the attorney should be polite but direct; Deaf are often blunt and may misunderstand subtleties.⁵²⁰

If the interpreter shows up for the appointment but the client does not, the attorney may bill the deaf client for the missed appointment. However, if the attorney does not bill hearing clients for missed appointments, the attorney cannot bill a deaf client even though the attorney had to pay for the interpreter.⁵²¹ To prevent a deaf client's surprise at a missed meeting charge, the attorney should make sure the client understands the missed appointment billing policy not later than at their first meeting.

2. Request a Court-Appointed Interpreter in Every Applicable Situation

In an attorney-client meeting, if the client needs an interpreter for effective communication, the attorney must provide an interpreter.⁵²² However, the court appoints—and the county pays for—proceeding interpreters in many settings:

518. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 180 (1994) (“[U]sing ‘yes/no’ questions with deaf . . . persons is a trap for the unwary. The inquiry should take the form of open-ended questions that require the individuals to respond in their own words.”).

519. See *id.* at 192 (“The only way to properly determine whether a deaf . . . defendant understands the proceedings is to ask open-ended questions that require the defendant to answer in her own words.”).

520. *E.g.*, Texas Connect, Newborn Hearing Screening, http://www.callier.utdallas.edu/pdf/Topic%20Cards/Topic_Card_09.pdf (last visited May 12, 2008) (listing one of the “Rules of Social Interaction” for the Deaf Community as “Being blunt, ‘telling it like it is’”).

521. See 28 C.F.R. § 36.301(c) (2007) (“A public accommodation may not impose a surcharge on a particular [deaf client] or any group of [deaf clients] to cover the costs of [a qualified interpreter] . . . that [is] required to provide . . . the nondiscriminatory treatment required by the Act or this part.”).

522. *Id.* § 36.303(c); see also 42 U.S.C. § 12182(b)(2)(A)(iii) (2000) (noting not to provide the necessary services would constitute discrimination).

- “[i]n a civil case or in a deposition”;⁵²³
- “[in] mediation, court-ordered arbitration, or other form of alternative dispute resolution”;⁵²⁴
- “at an arraignment, hearing, examining trial, or trial”;⁵²⁵
- “[for] communications concerning the case between [a criminal] defendant and defense counsel”;⁵²⁶
- “where the mental condition of a person is being considered and where such person may be committed to a mental institution”;⁵²⁷ or
- “on its own motion.”⁵²⁸

The statutes provide interpreters in these settings to protect deaf persons from unequal treatment because of their disability. Further, for deaf criminal defendants, the Texas Code of Criminal Procedure provides for a court-appointed interpreter for attorney-client meetings to discuss the case.⁵²⁹ Currently, neither the Texas Civil Practice and Remedies Code nor the Texas Government Code explicitly authorizes court-appointed interpreters for civil matter attorney-client meetings. Nevertheless, an attorney could ask the court to appoint an interpreter on its own motion. The attorney might argue that the state pays for interpreters for deaf persons receiving state funded medical care,⁵³⁰ the attorney's client requires an interpreter for effective communication, the client's legal matter is vital to the client's well-being, and the state should pay for an interpreter for the deaf client to receive legal care. However, the court may remind the attorney of the attorney's obligation under the ADA to provide effective communication⁵³¹ and decline to appoint an interpreter for the deaf client.

523. TEX. CIV. PRAC. & REM. CODE ANN. § 21.002(a) (Vernon 1997).

524. TEX. GOV'T CODE ANN. § 57.001(7) (Vernon Supp. 2007).

525. TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2007).

526. *Id.* 38.31(b).

527. *Id.* 38.31(c).

528. TEX. GOV'T CODE ANN. § 57.002(b) (Vernon Supp. 2007).

529. TEX. CODE CRIM. PROC. ANN. art. 38.31(b) (Vernon Supp. 2007).

530. TEX. HUM. RES. CODE ANN. § 32.024(cc) (Vernon Supp. 2007).

531. 28 C.F.R. § 36.303(c) (2007); *see also* 42 U.S.C. § 12182(b)(2)(A)(iii) (2000) (compelling public accommodations to “ensure that no individual with a disability is excluded”).

IV. CONCLUSION

When a deaf person asks an attorney to represent him or her, and the attorney would otherwise represent the deaf person if the person were not deaf, the attorney is legally obligated to represent the person with two exceptions: when doing so would violate one of the Texas Disciplinary Rules of Professional Conduct,⁵³² or, when the Department of Justice or a court would agree that representing that deaf person would create an undue burden.⁵³³ Attorneys who illegally discriminate against Deaf miss the opportunity to learn more about an underserved group, risk discipline by the State Bar of Texas⁵³⁴ or the Department of Justice,⁵³⁵ and perhaps most importantly, fail to protect the interests of persons who need legal representation.

Regrettably, when deaf persons seek representation, some attorneys still discriminate based on those persons' deafness.⁵³⁶

532. *E.g.*, TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (prohibiting a lawyer from representing a client based on certain conflicts of interest); *id.* 1.15(a)(1) (directing "[a] lawyer [to] decline to represent a client" if doing so would violate "other applicable rules of professional conduct or other law").

533. 42 U.S.C. § 12182(b)(2)(A)(iii) (2000) (prohibiting, generally, public accommodations from denying services based on an individual's disability).

534. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 11 (ensuring compliance with the Rules through other means, but "when necessary, . . . through disciplinary proceedings").

535. *E.g.*, DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JOSEPH DAVID CAMACHO, ESQUIRE, ALBUQUERQUE, NEW MEXICO UNDER THE AMERICANS WITH DISABILITIES ACT, DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-49-37 para. 10 (Aug. 9, 2007), <http://www.ada.gov/albuquerque.htm> (disciplining an attorney that "failed to provide [his client] with effective communication"); DEP'T OF JUSTICE, SETTLEMENT AGREEMENT UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 BETWEEN THE UNITED STATES OF AMERICA AND THE LAW OFFICE OF COHEN AND JAFFE, LLC: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-52-111 paras. 15, 16 (July 3, 2006), <http://www.ada.gov/cohenjaffe.htm> (disciplining "the Law Office [because it] violated the ADA" and "failed to provide [the deaf client] with effective communication"); DEP'T OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GREGG TIRONE, ESQ.: DEPARTMENT OF JUSTICE COMPLAINT NUMBER 202-53-20 para. 20 (Jan. 5, 2004), <http://www.ada.gov/tirone.htm> (disciplining an attorney for "fail[ing] to provide [his client] with effective communication . . . [which was] a . . . violation of the ADA").

536. *E.g.*, Telephone Interview with Melissa Bell, Deafness Resource Specialist for Region IV, funded by Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Tyler, Tex. (Dec. 11, 2006) (relating one deaf client's frustration after being refused by six different firms because each firm refused to provide an interpreter); E-mail from Mark Dickson, Deafness Resource Specialist for Region IV, funded by Office for Deaf and Hard of Hearing Services, Texas Department of

Attorneys disregard their professional responsibilities and disobey the law when they refuse to represent a deaf client because the client is deaf.⁵³⁷ Perhaps some attorneys refuse to serve deaf persons because they overestimate the cost or difficulty of doing so.⁵³⁸ But communication resources like Video Relay Service (VRS) and court-appointed interpreters can substantially reduce interpreting costs when representing deaf clients. With VRS, attorneys do not have to pay for interpreters when discussing matters that are normally discussed with clients over the telephone and which the deaf clients can understand using VRS.⁵³⁹ Likewise, attorneys do not have to pay for a proceeding interpreter for depositions,⁵⁴⁰ alternate dispute resolution,⁵⁴¹ arraignment,⁵⁴² criminal defendant attorney-client meetings,⁵⁴³ or in the other situations where courts appoint interpreters.⁵⁴⁴

However, even in some circumstances where the court provides a proceeding interpreter, the attorney may still need to hire a table interpreter. Without a table interpreter, the attorney may not be able to quickly and effectively communicate with the client during the proceeding.⁵⁴⁵ If the attorney is busy writing notes back and

Assistive and Rehabilitative Services, to Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services (Dec. 20, 2006, 17:03:00 CST) (on file with the *St. Mary's Law Journal*) (reporting a similar experience with an attorney who adamantly refused to provide an interpreter for a deaf client).

537. 42 U.S.C. § 12182(b)(2)(A)(iii) (2000) (prohibiting discrimination by public accommodations); 28 C.F.R. § 36.303(b)–(c) (2007) (requiring public accommodations to provide “auxiliary aids and services” which includes sign language interpreters).

538. Telephone Interview with Doug H. Dittfurth, Outreach Development Specialist, Office for Deaf and Hard of Hearing Services, Texas Department of Assistive and Rehabilitative Services, in Austin, Tex. (Dec. 18, 2006).

539. See 47 U.S.C. § 225(d)(3)(B) (2000) (spreading the costs of telecommunications relay services, including video relay services, across all subscribers for *all* services); Federal Communications Commission, Video Relay Services, <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited May 12, 2008) (“VRS providers are compensated for their costs from the Interstate TRS Fund, which the Federal Communications Commission (FCC) oversees.”). The VRS provider does not charge either the caller or the party called to complete the VRS call.

540. TEX. CIV. PRAC. & REM. CODE ANN. § 21.002 (Vernon 1997).

541. TEX. GOV'T CODE ANN. § 57.001(7) (Vernon Supp. 2007).

542. TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 2007).

543. *Id.* 38.31(b).

544. See TEX. GOV'T CODE ANN. § 57.002(b) (Vernon Supp. 2007) (allowing the court to appoint an interpreter on its own motion).

545. See *Linton v. State*, No. 13-05-00668-CR, 2007 Tex. App. LEXIS 6540, at *14 (Tex. App.—Corpus Christi Aug. 16, 2007, no pet.) (rejecting as insufficient a court-

forth to the deaf client, the attorney may fail to timely object, may fail to notice some change in witness testimony, or may distract the deaf client from noticing a matter that substantially affects the client's claim or defense.⁵⁴⁶ Furthermore, the attorney needs a table interpreter to monitor the proceeding interpreter for errors or omissions that may adversely affect the client.⁵⁴⁷ In some circumstances, the court may pay for a table interpreter in addition to the court-appointed interpreter.⁵⁴⁸

When the court does not appoint an interpreter, and VRS is not an appropriate resource, the attorney can plan ahead and minimize interpreting costs without compromising effective communication. The attorney can give the client copies of documents at least a few days before the meeting, have the client arrive before the interpreter, give the client and the interpreter a few minutes to talk before starting the meeting, politely insist the client give concise answers, and use the interpreter's time wisely. During the meeting, the attorney should periodically test the client's understanding of what the attorney has said to ensure that the client and attorney are communicating effectively.⁵⁴⁹

appointed table interpreter who was restricted to communicating with the deaf defendant only "during breaks in trial"); Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 921 (recommending table interpreters for attorney-client communications during proceedings). See generally Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 7 (1990) (discouraging bilingual attorneys from acting as both counsel and table interpreter for their clients during proceedings and asserting that "zealous advocacy requires that counsel insist on having two interpreters [(a proceeding interpreter and a table interpreter)] in the courtroom").

546. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (identifying one of counsel's duties to a criminal defendant as the "dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments *in the course of the prosecution*" (emphasis added)); *Sanchez v. State*, 122 S.W.3d 347, 354 (Tex. App.—Texarkana 2003, pet. ref'd) ("Some courts have indicated that the Sixth Amendment may require appointment of a second interpreter to aid the [criminal defendant's] defense." (footnote omitted)).

547. See Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 921 (suggesting that a table interpreter can monitor the proceeding interpreter's interpretation and report problems to counsel).

548. See *Sanchez v. State*, 122 S.W.3d 347, 355 (Tex. App.—Texarkana 2003, pet. ref'd) (reimbursing a criminal defendant's attorney for a table interpreter). *Sanchez* was not deaf but "could not speak English." *Id.* at 353.

549. See Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 130 (2000) (encouraging establishing client-interpreter communication before beginning a meeting). Periodically asking clients (deaf

If an attorney cannot communicate effectively with a deaf client, the attorney cannot properly represent the client.⁵⁵⁰ As discussed above, recent changes in Texas law provide a court-appointed interpreter in more situations than before. Used effectively, the court-appointed interpreter can reduce the attorney's costs for ensuring effective communication. When attorneys are tempted to put their own financial interests ahead of their clients' needs for effective communication by not providing qualified interpreters, the attorneys should reconsider. Instead, attorneys should take full advantage of communication resources, including VRS, attorney-provided interpreters, and court-appointed interpreters, to ensure effective communication with and for their deaf clients. As attorneys ensure effective communication with their deaf clients, attorneys obey the law, benefit individuals in an underserved group, and fulfill their professional responsibilities when representing deaf clients in Texas.

or hearing) to recapitulate what the attorney told them may be a good idea for any attorney-client meeting.

550. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (requiring a lawyer to "keep [the] client reasonably informed" and "explain . . . matter[s] to . . . the client"); *Sanchez*, 122 S.W.3d at 354 ("An attorney must be able to communicate with his or her client [during the proceeding] in order to effectively represent the client.").