COMMENT

PRESERVING FACTS, FORM, AND FUNCTION WHEN A DEAF WITNESS WITH MINIMAL LANGUAGE SKILLS TESTIFIES IN COURT

BRANDON M. TUCK[†]

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[†] J.D. Candidate, 2010, University of Pennsylvania Law School; B.A., 1999, Boise State University; Certificate of Interpretation (1998), Certificate of Transliteration (1998), and National Interpreter Certification (2006), Registry of Interpreters for the Deaf. A special thanks to Miriam Nemeth for her guidance, to Carla Mathers and Pamela Whitney for their insight, to Vlad Vainberg and Chad Albert for their thoughtful feedback and detailed editing, and to my wife, Amy, for her endless support.

INTRODUCTION

The multilingual landscape continues to expand in social and business sectors, but in the judicial arena, it is still an uncomfortable fit. Interpreters are a relatively new fixture in American courts. Judges and trial attorneys spend enormous energy sharpening their use of language, but most consider interpreters too blunt an instrument to accurately convey their exact intent across language barriers. Parties to the litigation harbor similar concerns about their accessibility to the proceedings when language passes through what they consider an interpreter's sieve. For example, at the onset of the Nuremberg trials following World War II, Reich Marshal Hermann Göring famously responded, after being asked if he wanted counsel to represent him against charges of war crimes, "Of course, I want counsel. But it is even more important to have a good interpreter."[1]

Interpreters often provide non–English speakers their only access to court proceedings.[2] Equally important, they provide the court with its only access to non-English-speaking defendants and witnesses. This Comment addresses one particular class of non–English speakers: deaf adults who are called to testify as witnesses in civil or criminal court but who lack both spoken and sign language proficiency.[3] Mi-

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[1] *Germany: The Defendants*, TIME, Oct. 29, 1945, at 38, *available at* http://www.time.com/time/magazine/article/0,9171,776327,00.html. In fact, Göring repeatedly used interpreter error as one of the foundations for his defense, which was conducted simultaneously in four languages. *See* FRANCESCA GAIBA, THE ORIGINS OF SIMULTANEOUS INTERPRETATION: THE NUREMBERG TRIAL 108-11 (1998) (describing Göring's deft exploitation of minor weaknesses in the tribunal's system of language interpretation).

[2] An interpreter's task is to take an initial spoken or signed message in the source language and instantly reproduce it accurately in the target language. *See* NANCY FRISHBERG, INTERPRETING: AN INTRODUCTION 18 (rev. ed. 1990) (noting that "the defining characteristic [of interpretation] is . . . live and immediate transmission"). On the other hand, a translator's task, when used in its more narrow or technical sense, is to take a written text in the source language and reproduce it accurately in the target language. *See id.*

[3] In accordance with the conventions of American Deaf culture scholarship, authors typically differentiate between "deafness" as an audiological status and "Deafness" as a cultural affiliation. Use of "deaf" with a lowercase "d" is meant to include all forms of significant audiological impairment, whereas "Deaf" with an uppercase "D" is meant to include only those deaf individuals who use sign language to communicate and who generally identify themselves as members of a larger deaf community. *See* ANNA MINDESS, READING BETWEEN THE SIGNS: INTERCULTURAL COMMUNICATION FOR SIGN LANGUAGE INTERPRETERS ch. 5 (2d ed. 2006) (cataloguing Deaf cultural norms, strategies of communication, community behaviors, and shared values). *See generally* PADDY LADD, UNDERSTANDING DEAF CULTURE: IN SEARCH OF DEAFHOOD chs. 1-5 (2003) (analyzing Deaf communities and historical and contemporary views of Deaf people in socie-

chele LaVigne and McCay Vernon write that although many deaf adults succeed as doctors, lawyers, stay-at-home moms, and factory workers, the confluence of a restrictive environment, a poor or failed attempt at education, and sometimes other biological limitations deprives some deaf people of the opportunity to acquire a language foundation in either English or sign language.[4] These semilingual or nonlingual deaf adults are often termed as having Minimal Language Skills (MLS).[5] Generally, these individuals are highly visually oriented,

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ty, and presenting a comparison of hearing and Deaf cultural discourses). This Comment deals nearly exclusively with culturally Deaf adults, but the differentiation is not essential to the legal argument. Thus, this Comment will refer to "deaf adults" throughout with the understanding that the affected individuals come from both categories.

An understanding of the implications of this distinction, however, is a helpful component to the overall linguistic foundation later addressed in this Comment. *See infra* text accompanying notes 15-16. Harlan Lane has written two of the authoritative books on the emergence of a national Deaf identity following the establishment of schools that taught deaf children through sign language. For a comprehensive review of Deaf history, see HARLAN LANE, WHEN THE MIND HEARS: A HISTORY OF THE DEAF (1984). For a review of the subsequent oppression the community faced in the age of eugenics, oralism, and beyond, see HARLAN LANE, THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY 132-35, 213-16 (1992).

[4] One federally funded study described this population as "a group of individuals with inadequate or no environmental supports whose functional skills and competencies are considered to be significantly below average making them the most at risk and underserved portion of the overall deaf population." LOW FUNCTIONING DEAF STRATEGIC WORK GROUP, POSTSECONDARY EDUC. PROGRAMS NETWORK, A MODEL FOR A NATIONAL COLLABORATIVE SERVICE DELIVERY SYSTEM 1 (2004), http://www.nad.org/sites/default/files/LFDPosition.pdf. "These individuals," the paper notes, "over the years, have been given a variety of labels, including underachieving, multiply handicapped, severely disabled, minimal language skilled and traditionally underserved, in addition to the current label of low functioning deaf (LFD). None of these labels adequately describe the population." *Id.*; *see also* Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 848-49, 867 (discussing the inadequacy of current court practices that seek to ensure that language-deficient parties understand the proceedings fully). LaVigne and Vernon use as examples two individuals, both deaf since birth, who exhibit this type of language deficiency. The first, Jesse, has a minimal brain dysfunction (but could not be classified as "retarded"), was poorly educated in an inner-city school, uses a diverse mixture of signs and gestures to communicate, and reads at a level between first and second grade. *Id.* at 844. The second, Maryellen, has low-normal intelligence with some nonretardation cognitive deficits, but she was raised in a family that did not learn sign language, and she was only sent to a deaf school at the age of ten when it became obvious that she was not progressing in a mainstream public school. *Id.* at 846.

[5] *See, e.g.*, LaVigne & Vernon, *supra* note 4, at 845 n.4; Katrina R. Miller & McCay Vernon, *Assessing Linguistic Diversity in Deaf Criminal Suspects*, 2 SIGN LANGUAGE STUD. 380, 381 (2002) (noting that the use of various terms in addition to MLS to define these individuals—such as underserved, highly visual, Deaf-plus, low functioning, linguistically incompetent, semilingual, or having Primitive Personality Disorder—"reflects varying sociopolitical perspectives, demonstrating a range of clinical descriptions, psycholinguistic designations, and community-based attempts to recognize yet

low functioning, functionally illiterate, and uneducated; they often go through life using tidbits of the majority language (whether it is English or American Sign Language) and systems of gesture.[6]

How should a court accommodate this type of witness? Many court practices grew out of how the courts learned to deal with MLS deaf defendants in the criminal system. The case of Donald Lang, a deaf man accused of two murders in Chicago, is a well-publicized example of courts wrestling with this issue.[7] Lang came from a poor black neighborhood in Chicago, never attended school, and never learned even a first language.[8] Despite having what could have been the best attorney-defendant fit in lawyer Lowell Myers,[9] who was him-

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destigmatize this condition"). It is estimated that thirty percent of Deaf children leave secondary school functionally illiterate, with only three percent of eighteen-year-old deaf students reading on par with the average eighteen-year-old hearing reader. *See* MARC MARSCHARK ET AL., EDUCATING DEAF STUDENTS: FROM RESEARCH TO PRACTICE 157 (2002). Another authority found that the fiftieth percentile of deaf eighteen-year-olds read at below the fourth grade reading level. Carol Bloomquist Traxler, *The Stanford Achievement Test, 9th Edition: National Norming and Performance Standards for Deaf and Hard-of-Hearing Students*, 5 J. DEAF STUD. & DEAF EDUC. 337, 342 (2000). A study of a Texas inmate population found the reading level for more than a third of ninety-seven inmates to be below grade level 2.8, which is the government's classification for functional illiteracy. Katrina R. Miller, McCay Vernon & Michele E. Capella, *Violent Offenders in a Deaf Prison Population*, 10 J. DEAF STUD. & DEAF EDUC. 417, 421 tbl.3 (2005). Inadequate early education is not the sole cause of this rampant semilingualism. Deafness is often combined with other etiologies in ways that may complicate learning disabilities. *See* MCCAY VERNON & JEAN F. ANDREWS, THE PSYCHOLOGY OF DEAFNESS: UNDERSTANDING DEAF AND HARD-OF-HEARING PEOPLE ch. 3 (1990); Tom Harrington, FAQ: Etiologies and Causes of Deafness, http://library.gallaudet.edu/Library/Deaf_Research_Help/Frequently_Asked_Questions_(FAQs)/Cultural_Social_Medical/Etiologies_and_Causes_of_Deafness.html (last visited Jan. 15, 2010).

[6] *See* Patrick Boudreault, *Deaf Interpreters* (explaining the emergence of Deaf facilitators working alongside hearing interpreters to help ensure successful communication with semilingual individuals), *in* TOPICS IN SIGNED LANGUAGE INTERPRETING 323, 331-33 (Terry Janzen ed., 2005); Katrina R. Miller, *Linguistic Diversity in a Deaf Prison Population: Implications for Due Process*, 9 J. DEAF STUD. & DEAF EDUC. 112, 112-13 (2004) (identifying barriers likely to obstruct due process for those deaf adults with inadequate linguistic abilities).

[7] For a nonfiction account of the earlier portions of Lang's story, see ERNEST TIDYMAN, DUMMY (1974).

[8] *Id.* at 6-7, 17-18. Lang's story is often retold or summarized to highlight problems with linguistic incompetency issues. *See* Jamie Mickelson, Note, *"Unspeakable Justice": The Oswaldo Martinez Case and the Failure of the Legal System to Adequately Provide for Incompetent Defendants*, 48 WM & MARY L. REV. 2075, 2081-85 (2007).

[9] DVD: 20th Century Chicago Stories: Deaf Lives and Experiences ch. 8 (Bob Paul 2005) (on file with author). Myers's obituary in the Chicago Tribune also describes his legal career and his handling of the Lang case. *See* Trevor Jensen, *Lowell J. Myers: 1930–2006, Legal Voice for the Deaf*, CHICAGO TRIBUNE, Nov. 9, 2006, at C12, *available at* http://archives.chicagotribune.com/2006/nov/09/news/chi-0611090222nov09.

self deaf, Lang's situation confounded the Illinois system. In no fewer than nine reported decisions, the courts wrestled with how to accommodate Lang.[10] The crux of the issue was whether Lang was unfit to stand trial because he was linguistically incompetent and therefore unable to assist in his own defense.[11] As a result, Lang fought for years against indefinite confinement in a mental institution despite his lack of any mental illness.[12] In a similar case, the Louisiana Supreme Court approved of the involuntary commitment of James Williams, also deaf and nonlingual, without a trial because he lacked the ability to effectively communicate.[13] These are not merely the results of yesteryear's application of justice; courts continue to wrestle with deaf semilingual or nonlingual adults' linguistic incompetency today.[14]

It may seem a bit unbelievable that, in this digital and enlightened age, native-born Americans can live with parents and siblings, attend school each day, and yet emerge as adults who lack a simple and fundamental foundation in English or some other language. LaVigne and Vernon explain why one must first understand the basics of deafness, language acquisition, and interpretation before appreciating the extent of nonlingualism that can occur within our own schools and communities:

> [O]ur experiences at counsel table and on the witness stand have taught us that without a step-by-step discussion of the hows and whys of deafness

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[10] For a more detailed review of Lang's cases, see Eric Eckes, Comment, *The Incompetency of Courts and Legislatures: Addressing Linguistically Deprived Deaf Defendants*, 75 U. CIN. L. REV. 1649, 1665-67 & n.92 (2007).

[11] *See* People v. Lang, 325 N.E.2d 305, 309 (Ill. App. Ct. 1975) (analyzing the State's argument that Lang's profound communicative disabilities made it impossible to understand the charges, and concluding that the lack of adequate trial procedures rendered his trial constitutionally impermissible).

[12] *See* People v. Lang, 391 N.E.2d 350, 351-52 (Ill. 1979) (chronicling Lang's trials and hospitalizations over a fourteen-year period).

[13] *See* State v. Williams, 392 So. 2d 641, 643-44 (La. 1980) (permitting conditional confinement to determine fitness to promptly stand trial).

[14] *See, e.g.*, United States v. Jones, No. 03-0226, 2008 WL 5204063, at *1 (E.D. Tenn. Dec. 11, 2008) ("This case presents a challenging and troubling quandary: How can the Court afford fundamental due process protections . . . to a man with substantial cognitive and communicative deficits whose impairments render him unable to meaningfully participate in his own defense?"); Mickelson, *supra* note 8, at 2079 (analyzing the case of a deaf-mute man with almost no communication skills who was ordered to undergo intensive language acquisition to attempt to render him competent for trial). For a discussion of linguistic incompetence among the deaf generally, see McCay Vernon & Katrina Miller, *Linguistic Incompetence to Stand Trial: A Unique Condition in Some Deaf Defendants*, 2001 J. INTERPRETATION 99, 99-100. For a discussion of possible outcomes after a determination of linguistic incompetence and proposals for how to better handle the linguistically incompetent, see Eckes, *supra* note 10, at 1673-79.

> and language acquisition, a legal argument that a defendant did not understand because he never fully acquired language is likely to be met with skepticism, if not incredulity. This skepticism does not arise from some antideaf sentiment but from the counterintuitive quality of the subject matter. For those of us who have heard all of our lives, and especially for those of us who use words for a living, the idea that a person could be left without a language is beyond imagining.[15]

LaVigne and Vernon "start at the beginning" with a survey of the relevant facets of deafness that lead to linguistic incompetence.[16] They then counsel how courts can be better prepared to accommodate MLS deaf participants.

When even the most skilled American Sign Language (ASL) interpreters cannot fully bridge the linguistic and cultural gaps with an MLS party or witness in the courtroom, courts may then use a unique type of intermediary interpreter to facilitate communication. This intermediary, known as a relay interpreter or a certified deaf interpreter (CDI),[17] is most often a deaf adult who possesses extraordinary visual-gestural communication skills and abilities[18] by virtue of native deafness and specialized training, enabling her to effectively bridge linguistic barriers. If the court's ASL interpreter is unable to facilitate communication with a semilingual or nonlingual party or witness in the courtroom, the court may pair the ASL interpreter with a CDI.[19]

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[15] LaVigne & Vernon, *supra* note 4, at 849-50.

[16] *See id.* at 849. This Comment omits the valuable history and context available in LaVigne and Vernon's article.

[17] *See generally* Boudreault, *supra* note 6.

[18] Daniel Gile notes that linguistic knowledge is not enough to ensure comprehension; a language user must also have certain extralinguistic knowledge about the outside world. DANIEL GILE, BASIC CONCEPTS AND MODELS FOR INTERPRETER AND TRANSLATOR TRAINING 77-79 (1995). Native deafness is a particularly important characteristic for these intermediaries because it means they possess certain extralinguistic knowledge they gained through their own first-hand experiences using and discerning meaning amid a visual-gestural language or protolanguage. *See* Roger J. Carver & Mike Kemp, Visual Gestural Communication: Enhancing Early Communication and Literacy in Young Deaf and Hard of Hearing Children 6-7 (1995) (unpublished manuscript), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/4d/a5.pdf (describing one of the authors' communications with MLS individuals and the ability of such individuals to understand each other at international Deaf gatherings using visual-gestural communication).

[19] As described in more detail below, the two levels of interpretation required by this process present special challenges to accuracy. One study shows that the linguistic competence or incompetence of the deaf consumer notwithstanding, CDIs working with hearing interpreters significantly differ from hearing interpreters working alone in pauses, eye gaze, head nods, quantity of signs, and fingerspelling when conveying the source message into the target language. *See* Carolyn I. Ressler, *A Comparative*

For example, imagine an exchange between an attorney and an MLS witness. When the attorney asks her question in spoken English, the hearing ASL interpreter provides that question to the CDI in American Sign Language; the CDI then tries to communicate with the witness using whatever means she can. The CDI and the MLS witness then go back and forth until they develop some mutual understanding, some shared corpus of gesture that temporarily creates a communicative bond between the two. When the CDI feels confident that the witness both understands the questions and has provided an understandable response, she then uses sign language to formulate that response and presents that signed formulation in ASL to the ASL interpreter, who interprets that utterance into English and voices it audibly for the record. Such an exchange may look like this:

> *Attorney Question to MLS Witness:* Did you take the train home that night?
>
> *ASL Interpreter to CDI:* THAT NIGHT, TRAIN HOME YOU-RIDE?[20]
>
> *CDI to MLS Witness:* [Here, the CDI would engage the witness in visual-gestural but nonlingual fashion to first arrive at the basic concepts in the question. For example, assume the CDI has previously developed the concept of evening from the previous questions and represents that concept in visual-gestural fashion by using an arm to represent the horizon, followed by a clasped hand to represent the orb of the sun, the falling of the clasped hands below the horizon arm, and a closed-eyes flailing gesture indicating darkness. Also assume the CDI has a recent method to identify this particular night, perhaps the night of the incident in question upon which the witness is testifying. Once established, the CDI can then set up the spatial identity of the MLS witness's starting point, build her end point, and ask if he took a train home. Each of these spatial referents will require significant development and may rely on features, functions, or activities of buildings (e.g., the place where the MLS witness works, shops for food, or sleeps) and other objects (e.g., physical descriptions of the train, procedures for paying at a turnstile or showing a ticket or pass to the conductor, or one's physical stance while riding the train).[21]]

Analysis of a Direct Interpretation and an Intermediary Interpretation in American Sign Language, 1999 J. INTERPRETATION 71, 81-88.

[20] This is necessarily an imprecise transcription of an ASL utterance because, among other things, it lacks notations for the required nonmanual markers and it assumes earlier establishment of spatial referents that would likely be employed in an actual interpreting situation. However, this simplified transcription will suffice for these purposes.

[21] Many American-born MLS deaf adults may know some standardized ASL signs for commonplace concepts, which here could include TRAIN or NIGHT. Even then, however, the spatial and temporal referents about the night in question and other similar feats of syntax may not be among the signs or concepts widely used or easily un-

MLS Witness to CDI: [Here, the MLS witness responds in visual-gestural form, but not in a succinct chunk of linguistic information; instead, the witness and the CDI together build an understanding through gesture for certain acts or objects. The witness describes standing near a turnstile, looking around the ground, but finding no small round and flat items in his pocket to drop into the box. He then actually removes his wallet from his pocket, pretends to look inside, and shrugs with a disappointed face. Next, he mimes looking around on the floor near the box, his eyes darting all around. Last, he mimes that he zips up his coat, wraps his scarf tightly around his neck, and walks into the distance. The response, though, would not likely be bundled up together in a single stream of communication. The response would also likely be unintelligible to most others in the courtroom,[22] including the ASL interpreters, because the miming and gesturing would be so nuanced and, in a sense, deaf-centric, that it would require the specialized skills of the CDI to not only understand the communication, but also to elicit it in a form that achieves the communication's objectives. More likely, the CDI would have ascertained tidbits here and there during long turn-taking sessions to develop this response.]

CDI to ASL Interpreter: TRAIN STATION, THERE ARRIVE. TOKEN NONE, MONEY NONE, SO LOOK-NEAR-GROUND++. FIND NONE, SO BUNDLE-UP, WALK++.

ASL Interpreter to Attorney: When I got to the train station, I didn't have any tokens or money. I looked around on the ground for some, but I didn't find any, so I wrapped myself up to keep warm and then walked away.[23]

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derstood among MLS deaf adults. Courtroom use of concepts such as JURY or PLEA exacerbate these problems.

[22] Prominent neuroscientist and captivating writer Oliver Sacks discusses a commonly held perception about one's ability to discern meaning from visual-manual communication:

> Notions that "the sign language" of the deaf is no more than a sort of pantomime, or pictorial language, were almost universally held even thirty years ago. . . .
>
> There is, indeed, a paradox here: at first Sign looks pantomimic; if one pays attention, one feels, one will "get it" soon enough—all pantomimes are easy to get. But as one continues to look, no such "Aha!" feeling occurs; one is tantalized by finding it, despite its seeming transparency, unintelligible.

OLIVER SACKS, SEEING VOICES 61 (Vintage Books 2000) (1989).

[23] Some interpreters would choose to convey the MLS witness's answer in full narrative form, despite the closed nature of the question's form. *See, e.g.*, People v. Vasquez, No. B162629, 2004 WL 348785, at *3 n.2 (Cal. Ct. App. Feb. 25, 2004). This difference is often ascribed to variance between the low-context nature of English and the high-context nature of many sign languages and systems. *See generally* MINDESS, *supra* note 3, at 45-50. An alternative spoken-English interpretation retaining the high-context narrative could be "I got to the station and realized I didn't have any money for a ticket, so after looking around on the ground for some spare change or a token, I gave up, wrapped myself tightly in my coat and scarf, and started the walk home." This

This Comment focuses on what happens within the above brackets—the gesturing, the miming, the turn taking, and the communication inventing—that has historically remained beyond the ordinary view of the court. Courts have developed multiple options for ensuring the accuracy of courtroom interpreters, such as voir dire, monitor interpreters, and videotaping,[24] but these fail to address one drastic difference between regular interpreters and intermediary interpreters. Unlike regular interpreters who must not converse privately with a witness on the stand and who must not deviate even slightly from the source language, intermediary interpreters necessarily have a wider latitude when working with a semilingual or nonlingual witness. This latitude exists, but the CDI "is not adding information or explaining concepts to the deaf litigant; rather the deaf interpreter is accessing a far richer store of ASL [or gestural] constructs than is available to an interpreter who is tethered to sound."[25] CDIs undergo certification testing and scrutiny to ensure that they understand the importance of treading lightly and not inducing or leading testimony, but the parties can easily be left with a less-than-complete picture of what happened behind the veil.

What if, within this area of wider latitude, an error occurs—an error of substantive fact or an adjustment in the form or function of the intended question or answer? Parties in the courtroom may be unable to object to errors in the interpretation because they may not even realize they occurred. Sometimes, a substantive error would be quite obvious, such as an MLS witness answering "Who was standing?" when asked if she was asleep at a particular moment.[26] But other substantive errors can occur unnoticed, such as a missed pronoun that would clarify who was sleeping and who was awake.[27] Within this complex lin-

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Comment also addresses the effects of the interpreter presenting narrative answers. *See infra* notes 147-151 and accompanying text.

[24] *See infra* subsection II.B.2.

[25] CARLA M. MATHERS, NAT'L CONSORTIUM OF INTERPRETER EDUC. CTRS., DEAF INTERPRETERS IN COURT: AN ACCOMMODATION THAT IS MORE THAN REASONABLE 20-21 (2009).

[26] This was an actual exchange between the questioning attorney and an MLS deaf witness in a murder trial. *Vasquez*, 2004 WL 348785, at *4.

[27] *See id.* The MLS deaf witness in *Vasquez* had initially testified that the victim's girlfriend was asleep, but the CDI-ASL interpreter team misunderstood that testimony and erroneously presented it as though the witness herself was asleep. *See infra* text accompanying notes 205-215. Such errors can come about in different ways. For example, in ASL, the pronoun error could be an error of structured space, *see* MARTY M. TAYLOR, INTERPRETATION SKILLS: ENGLISH TO AMERICAN SIGN LANGUAGE §§ 29–35 (1993), or an error of eye gaze and indexing, *see* CHARLOTTE BAKER-SHENK & DENNIS

gual and semilingual interaction, the CDI may inadvertently foreground a particular point, misunderstand a particular gesture, or lead the witness in a way that introduces an error into the interpretation.[28] The courts have several safeguards for more common interpreted courtroom situations,[29] but those protections may not suffice here. A party must timely object to errors in the interpretation,[30] but will a party notice the error in the CDI's work during the few moments when the objection is ripe?

Certainly, CDIs provide an essential service to the court. Without an intermediary, the court would lose access to an MLS witness (or, worse, an MLS defendant testifying for himself may lose linguistic competency). This Comment does not intend to deride the value of the CDI's work or to tread on its intricate nature. Rather, it provides an alternative examining procedure that opens a window into this complex linguistic interaction. The proposed procedure would allow parties to conduct a deposition-like direct and cross-examination in the absence of the jury but preserved on videotape. Before presenting the videotaped testimony to the jury, the parties would have an opportunity to handle the court interpreters' proposed interpretation much the same way courts currently handle proposed translations of written documents. Thus, parties would be able to study the CDI's interactions with the MLS witness, identify errors, propose corrections, and have the courtroom interpreters record the accurate translation over incorrectly interpreted areas onto the videotape, all outside of the

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COKELY, AMERICAN SIGN LANGUAGE: A TEACHER'S RESOURCE TEXT ON GRAMMAR AND CULTURE 214 (Clerc Books 1991) (1980).

[28] These errors can occur as omissions or modifications of a fact, the statement's form, or the statement's function. Suppose, for example, that the attorney had, on cross-examination, asked the leading question, "Isn't it true that you took the train home that night?" or the more coercive question, "You didn't take the train home that night, did you?" The ASL interpreter's signed question would vary in accordance with ASL rules for constraining the type of acceptable answer and for conveying the paralinguistic features of the questions form, but a CDI is unlikely to be able to preserve some of these formative features of the question when working with a nonlanguage. Her subsequent interaction with the MLS witness would not likely retain the controlling aspects of an interrogating attorney's questions. This is important because juries respond to verbal behaviors that follow, or go against, attempts to control. *See* discussion *infra* Part I.

[29] *See* discussion *infra* subsection II.B.2.b.

[30] *See* FED. R. EVID. 103; *see also* United States v. Villegas, 899 F.2d 1324, 1348-49 (2d Cir. 1990) (requiring claims of interpreter error to be raised soon after their occurrence); United States v. Lim, 794 F.2d 469, 471 (9th Cir. 1986) (finding "no objection at the time of trial, and no direct evidence . . . to indicate that there was any particular portion of the original trial that the defendants could not actually understand").

jury's presence and without risking an arbitrary waiver of objection because the errors were not timely identified during the actual witness interrogation. In the end, the parties would have a better opportunity to identify, contest, and rectify errors, and the jury would see a more accurate interpretation of the testimony.

Part I opens this Comment by describing the use of spoken and written English as primary tools for exercising control in the courtroom. This Part also reviews several studies that demonstrate the power of both the form and function of language, as illustrated through its effects on mock jurors and witnesses. Part II briefly reviews the right to an interpreter and best practices for ensuring competency and accuracy. It also discusses the critiques of interpreted courtroom discourse: (1) the inability of interpreters to always bridge linguistic and cultural divides, and (2) the numerous studies and examples showing the interpreter's tremendous power and influence, which can strengthen, weaken, modify, or erroneously present the language of other courtroom actors. Part III briefly reviews how courts handle non-English written translations as evidence. It then outlines the proposed framework for handling CDI-interpreted testimony, which adopts some best practices from document translation procedures. The mere opportunity for these quality assurances may increase the court's comfort with using a CDI to access a witness for whom a highly competent ASL interpreter would not sufficiently pierce the linguistic veil.

Linguistic accommodations are important for any party to litigation. To illustrate certain principles, this Comment primarily examines practices and rights for MLS deaf *defendants*, but its proposed evidentiary accommodations are intended for *any* MLS deaf witness testifying in court.

I. THE POWER OF LANGUAGE IN THE COURTROOM

A native English speaker may fail to appreciate the value of English proficiency—something so commonplace and familiar for most American-born adults—as a prerequisite for understanding and navigating the American judicial system. Most judges and attorneys are monolingual[31] and most have spent their careers studying the intricacies

[31] *See* CARLA M. MATHERS, SIGN LANGUAGE INTERPRETERS IN COURT: UNDERSTANDING BEST PRACTICES 210 (2007) ("Most matters are not presided over by a bilingual judge.").

of spoken and written English.[32] Written English is the predominant avenue for preserving court proceedings;[33] accordingly, the denizens of courts are prolific writers of briefs, motions, orders, and opinions.[34]

The English of the courtroom, however, at times appears designed to be both alien and alienating to native and nonnative English speakers.[35] Despite a general sentiment that the American courtroom is open and accessible to all, the unique legal register of the courtroom is actually on the outer cusp of most native English speakers' proficiencies.[36] In fact, legal discourse often "is so complex linguistically that even bright college graduates who are not attorneys have to engage an attorney to explain it to them," and "[e]ven lawyers disagree on the meanings of documents in legal register."[37] This complexity goes beyond the use of longer or less common words; indeed, the words themselves may be plain and intelligible, but "the whole may not be *understood* in the sense that the recipient is not able to relate it to the [courtroom situation]."[38]

Judges and attorneys are not oblivious to the control they can exercise by virtue of knowing and speaking the language of the legal sys-

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[32] *See* WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 15 (1982) (discussing David Mellinkoff's idea that law is a "profession of words" and Frederick Philbrick's notion that "[l]awyers are students of language by profession"); *see also* Marianne Constable, *Reflections on Law as a Profession of Words* (exploring the relationship between language and law within the legal profession and its attendant power implications), *in* JUSTICE AND POWER IN SOCIOLEGAL STUDIES 19, 27 (Bryant G. Garth & Austin Sarat eds., 1998).

[33] *See* 28 U.S.C. 753(b) (2006) (detailing how court reporters perform their duties, with a strong emphasis on recording proceedings in a written "transcript"). A notable exception is video preservation used in Kentucky, which won a Ford Foundation award for innovation. *See* WILLIAM E. HEWITT, NAT'L CTR. FOR STATE COURTS, VIDEOTAPED TRIAL RECORDS: EVALUATION AND GUIDE 54-57 (1990) (comparing the advantages and disadvantages of relying on videotaped proceedings during appellate review).

[34] It is telling that many appellate practitioners believe that the written brief outweighs the oral argument in importance unless it is an extremely close case, and oral argument will not often win the case but can lose it. *See, e.g.*, Gary L. Sasso, *Appellate Oral Argument* ("Some lawyers say you can't win appeals in oral argument, but they think you can *lose* them there."), *in* THE LITIGATION MANUAL 316, 316 (John G. Koeltl & John Kiernan eds., 1999).

[35] ALFRED PHILLIPS, LAWYERS' LANGUAGE: HOW AND WHY LEGAL LANGUAGE IS DIFFERENT 30-31 (2003).

[36] *See* Judith N. Levi, *The Study of Language in the Judicial Process* (reviewing empirical studies measuring how frequently jurors misunderstand those jury instructions that embed several features of legalistic language), *in* LANGUAGE IN THE JUDICIAL PROCESS 3, 20-24 (Judith N. Levi & Anne Graffam Walker eds., 1990).

[37] Jean F. Andrews, McCay Vernon & Michele LaVigne, *The Bill of Rights, Due Process and the Deaf Suspect/Defendant*, 2007 J. INTERPRETATION 9, 15.

[38] PHILLIPS, *supra* note 35, at 43.

tem; in fact, it is how they ply their trade.[39] Several legal and linguistic scholars have applied emerging knowledge about register, discourse analysis, speech acts, and stylistics to explore how courtroom participants can exercise linguistic power.[40] These studies support the same basic conclusions: "Form is communication; variations in form communicate different messages; and speakers manipulate form, but not always consciously, to achieve beneficial results."[41]

Susan Berk-Seligson reviews the use of register and the syntactic and discourse features of legal English to show how it lacks cohesion and is overly terse.[42] She also reviews the work of William O'Barr, who extended Robin Lakoff's ground-breaking sociolinguistics work[43] on the incidents of powerful and powerless speech[44] and correlated them to juror perceptions of witnesses.[45] O'Barr found that hedges (e.g.,

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[39] *See generally* SANDRA BEATRIZ HALE, THE DISCOURSE OF COURT INTERPRETING ch. 6 (2004) (exploring the ways in which power is manifested and exercised in courtroom interpretation). Virtually any law library or large litigation department has shelves of practice guides on how to use language and interrogation successfully in front of juries. *E.g.*, ROBERT ARON, JULIUS FAST & RICHARD B. KLEIN, TRIAL COMMUNICATION SKILLS (2d ed., Clark Boardman Callaghan 1996) (1986); CELIA W. CHILDRESS, PERSUASIVE DELIVERY IN THE COURTROOM (1995); JEFFREY L. KESTLER, QUESTIONING TECHNIQUES AND TACTICS (3d ed. 1999).

[40] *See, e.g.*, JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER (2d ed. 2005); O'BARR, *supra* note 32; Levi, *supra* note 36.

[41] O'BARR, *supra* note 32, at 11.

[42] *See* SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS 12-17 (1990) (describing Martin Joos's register studies and Brenda Danet's legal English studies to demonstrate the difficulty of comprehending legal language).

[43] *See* ROBIN LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975) (examining the position of women in society through linguistic analysis of speech by and about women).

[44] Lakoff originally wrote in terms of women's language, but O'Barr and others used the gender-neutral "powerful" and "powerless" nomenclature because the features are by no means confined to a particular gender. *See* William M. O'Barr & Bowman K. Atkins, *"Women's Language" or "Powerless Language"?* ("[W]e would suggest that the phenomenon described by Lakoff would be better termed *powerless language*, a term which is more descriptive . . . and one which does not link it unnecessarily to the sex of a speaker."), *in* WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY 93, 104 (Sally McConnel-Ginet, Ruth Borker & Nelly Furman eds., 1980). Some consider this a well-intentioned but damaging neutralization of a feminist issue. *See, e.g.*, ALETTE OLIN HILL, MOTHER TONGUE, FATHER TIME 122 (1986) (finding that despite O'Barr and Atkins's good intentions, they engage in an unwarranted neutralization of a traditional feminist issue by equating "women's language" with "powerless language"). I continue to adhere to O'Barr's terminology. In fact, John Earl Joseph noted that these powerless features are less entwined with gender because they have recently "spread to become normal features of the English of anyone under the age of twenty-five." JOHN E. JOSEPH, LANGUAGE AND POLITICS 83-84 (2006).

[45] *See* O'Barr & Atkins, *supra* note 44, at 104-109.

"kind of"), intensifiers (e.g., "really" and "very"), hesitations (e.g., "umm" and "uhh"), polite forms, questioning intonation, hypercorrect grammar (e.g., grammatical errors made while attempting to speak formally), fragmented testimony, and interruptions all led to statistically significant changes in juror perceptions of witnesses and questioning attorneys.[46] Much of this linguistic control comes in the context of direct and cross-examination: "With this repertoire of speech styles speakers can manipulate the impressions that others in the courtroom have of them and their interlocutors" by phrasing questions and answers in ways that make themselves more credible and their adversaries less credible.[47]

The courtroom thus becomes a forum for competing narratives. Bernard Jackson found the courtroom trial to be a "complex piece of social action" with "a set of stories," each purposefully crafted to succeed in the adversarial "contest between witness and cross-examining counsel."[48] Successful interrogating attorneys will orchestrate the mesh of multiple witness stories into a single story that "ring[s] true," [49] avoiding a fragmented form and instead creating a cohesive narrative

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[46] O'BARR, *supra* note 32, at 61-87; *see also* Jeffrey D. Smith, *The Advocate's Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?*, 134 MIL. L. REV. 173, 178-82 (1991).

[47] BERK-SELIGSON, *supra* note 42, at 20, 22-25; *see also* HALE, *supra* note 39, ch. 5 (analyzing interpreters' translations of Spanish-speaking witnesses' testimony to demonstrate the importance of conveying the style of speech as well as context).

[48] Bernard S. Jackson, *Narrative Models in Legal Proof*, *in* NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 158, 165 (David Ray Papke ed., 1991). As will become apparent in Section II.B, the interposition of an interpreter amid these competing discourses complicates the interpretation. Debra Russell describes the conflicting goals of each party in an interpreted courtroom scenario:

> The Deaf witnesses wanted to present their perspectives on the events that led them to the court proceedings. [The prosecuting attorneys] wanted to lead the witnesses through their narrative and to emphasize the critical details of the case. Alternatively, the defense lawyer wanted to cast doubt on the witnesses [sic] credibility and to downplay some of the events being relayed by the witness.

Debra Russell, Interpreting Strategies in Legal Discourse 2 (May 2004) (unpublished manuscript), *available at* http://www.criticallink.org/files/CL4_Russell.pdf. Russell goes on to show how legal interpreters provided or omitted narrative and context markers in ways that altered the cohesion of the questioning and subsequent testimony. *Id.* at 4-7.

[49] Jackson, *supra* note 48, at 160-61 (finding support in socio-linguistic and social psychology research for the notion that particular speech acts in the narrative model directly relate to the perceived plausibility of witness testimony).

form.[50] Speech that enhances a seamless narrative leads to perceived credibility:

> Truth is a function not of discourse, but of the enunciation of discourse. If we cannot judge whether the semantic content of stories ("factual" or "fictional") is true, we can at least judge who we think is *telling the truth*, in the sense of most adequately persuading us that s/he is fulfilling the sincerity conditions of the act of making a truth-claim. We make such judgments by narrativising the pragmatics of the act of enunciation. There, we have to ask who has succeeded best in the activity of persuasion, and we have narrative models to guide us in making such judgments.[51]

Jurors decide between these competing narratives using their "everyday" judgment about social signs and symbols, including how the parties portray themselves linguistically, to arrive at what they believe is a fair outcome.[52] Indeed, some jury instructions explicitly direct jurors to measure witness credibility using the same tests of truthfulness they apply in their own everyday affairs.[53] In the end, "a difference in control over the presentation of evidence and arguments . . . [leads] to a difference in judged procedural fairness."[54] Beyond function, the forms of the attorney's questions and the witness's responses are themselves a battleground.

Judges and attorneys are also accustomed to knowing the content of all language used in the open court, which they can monitor in their native tongue. The presence of interpreters disrupts that comfort because it moves a portion of the courtroom's dialogue behind a linguistic

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[50] As part of that effort, interrogating attorneys attempt to keep adverse witnesses' answers short. Indeed, the length of a narrative answer signals a measure of an attorney's control over an adverse witness. *See* BERK-SELIGSON, *supra* note 42, at 119.

[51] BERNARD S. JACKSON, LAW, FACT, AND NARRATIVE COHERENCE 2 (1988).

[52] *See* E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities* (finding that jurors are more comfortable using familiar nonlegal standards for credibility), *in* EVERYDAY PRACTICES AND TROUBLE CASES 177, 187 (Austin Sarat et al. eds., 1998).

[53] *Compare* 1 N.C. CONFERENCE OF SUPERIOR COURT JUDGES, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES 101.15 (2008) ("You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of that testimony. In determining whether to believe any witness you should use the same tests of truthfulness which you apply in your everyday lives."), *with* ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CIVIL CASES) 11 (2005) ("In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness *impress* you as one who was telling the truth? . . . Did the witness *seem* to have a good memory? . . . Did the witness *appear* to understand the questions clearly and answer them directly?" (emphasis added)).

[54] Lind, *supra* note 52, at 179.

veil.[55] For example, as Section II.B illustrates, an interpreter may blur perceptions about the form of language by adjusting the legal register, by adding or omitting characteristics of powerful or powerless language, and by eliciting suspicion and feelings of lack of control in those who are accustomed to controlling courtroom discourse. This is also why interpreters must not converse privately with witnesses.[56]

These concerns are magnified when courtroom participants learn or suspect that the CDI is not strictly adhering to the form of the question. Courts presume that messages traveling through the interpreter retain both their form and function—that is, interpreters are not modifying the messages in any way beyond whatever interpretive transfers are required between languages. However, as demonstrated by the previous example of the MLS witness testifying about being at the train station,[57] this is frequently not the case.

The next Part discusses how courts can increase assurance that messages traveling through a single interpreter are "legally equivalent," as that term is later defined.[58] However, even these checks on interpreter accuracy are difficult to recreate when handling MLS witness testimony. Thus, we turn next to the use of these interpreters and the effect they have on language interaction in open court.

II. TODAY'S SIGN LANGUAGE INTERPRETERS IN THE COURTROOM

Non-English-speaking individuals have only recently begun to receive greater accommodations in American courts. This Part first discusses the historical roots of courtroom interpreters. It then reviews best practices for sign language interpreters in the courtroom, collected primarily from the works of Carla Mathers[59] and Michele La-

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[55] *See* LaVigne & Vernon, *supra* note 4, at 918 (noting that most trial judges cannot tell whether a continuously working interpreter is interpreting accurately or helping the non–English speaker understand the proceedings). Attorneys are in no better position, even if they are themselves proficient in the interpreted language because their attention is to other matters and not to the accuracy of the interpretation. *Id.* at 920. Alexandre Dumas captured the general sentiment about discomfort with using an interpreter as an intermediary. He applauded a smuggler captain's multilingualism, which "spared him the necessity of employing interpreters, —persons always troublesome and frequently indiscreet." 1 ALEXANDRE DUMAS, THE COUNT OF MONTE CRISTO 201 (1941).

[56] *See* MATHERS, *supra* note 25, at 92 ("[A]ll interaction between the deaf witness and the interpreters must be mediated through the court.").

[57] *See supra* Introduction.

[58] *See infra* Section II.B.

[59] *See generally* MATHERS, *supra* note 31.

Vigne and McCay Vernon,[60] including a discussion of the use of CDIs to provide a bridge to MLS deaf participants. These best practices strive to make the interpretive process transparent in order to preserve the integrity of the proceedings and to provide full accommodations to non–English speakers. This Part then uses the research of Susan Berk-Seligson[61] to show that even these best practices might not be enough.

A. *Constitutional and Statutory Rights to an Interpreter*

The United States Constitution does not mention the rights of linguistic minorities.[62] In the legal setting, "[l]ess affluent minorities simply suffer" because they are linguistically and culturally distanced from the specialized discourse of law enforcement and the courtroom.[63] The right to an interpreter first emerged and is most entrenched within the context of a criminal defendant's right to testify on his own behalf,[64] his right to confront witnesses,[65] his right to the assistance of counsel,[66] and his overall due process rights to a fair trial.[67]

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[60] *See generally* LaVigne & Vernon, *supra* note 4.

[61] *See generally* BERK-SELIGSON, *supra* note 42.

[62] *See* MATHERS, *supra* note 31, at 19 ("It should not be surprising that the Constitution is silent regarding the rights of linguistic minorities given the traditional ethnocentric character of the country.").

[63] Robert W. Shuy, *The Language Problems of Minorities in the Legal Setting*, *in* LANGUAGE AND THE LAW IN DEAF COMMUNITIES 1, 1 (Ceil Lucas ed., 2003).

[64] The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Supreme Court has held that this right against self-incrimination "is fulfilled only when an accused is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." Rock v. Arkansas, 483 U.S. 44, 53 (1987) (internal quotation marks omitted); *see also* Harris v. New York, 401 U.S. 222, 229 (1971) (Brennan, J., dissenting) (recognizing a defendant's choice to testify in his own defense as an exercise of his Fifth Amendment constitutional privilege).

[65] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This right grew from a long common law history supporting the right to cross-examine one's accusers in court. *See* Crawford v. Washington, 541 U.S. 36, 43-50 (2004) (summarizing the evolution of the right to confront one's accusers, which "is a concept that dates back to Roman times").

[66] The Sixth Amendment also provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI; *see also* Strickland v. Washington, 466 U.S. 668, 686-89 (1984) (measuring attorney conduct against a standard of "reasonable effective assistance" and the degree to which the attorney consults with the defendant regarding litigation decisions).

[67] The Supreme Court described the denial of Fourteenth Amendment due process standards in criminal proceedings as "the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained

The leading case on the right to an interpreter, *United States ex rel. Negron v. New York*,[68] sparked a change in the legal landscape for linguistic minorities.[69] In *Negron*, a Spanish-speaking defendant was tried and convicted of murder in state court without having an interpreter for most of the trial.[70] The Second Circuit granted Negron's writ of habeas corpus because "[t]o Negron, most of the trial must have been a babble of voices."[71] Without being given the opportunity to contemporaneously understand the testimony of adverse witnesses, Negron could not exercise his Sixth Amendment right to confront them.[72] Even more fundamentally, the court found that

> [c]onsiderations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial . . . [a]nd it 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.[73]

Most federal courts that find a constitutional right to an interpreter do so through the second basis asserted in *Negron*: the due process right to a fundamentally fair trial.[74] Some federal courts have also found the right to an interpreter protected under one's Sixth Amendment right to confront witnesses, akin to the argument made

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of must be of such quality as necessarily prevents a fair trial." Lisenba v. California, 314 U.S. 219, 236 (1941).

[68] 434 F.2d 386 (2d Cir. 1970).

[69] *See* MATHERS, *supra* note 31, at 23 (noting that in the wake of *Negron*, the "legal landscape changed dramatically").

[70] *See Negron*, 434 F.2d at 388 (noting that the only courtroom use of an interpreter was by the prosecution for translating Negron's and two other Spanish-speaking witnesses' testimonies into English). The prosecution's attorney did testify that she spent between ten and twenty minutes during two brief recesses to summarize for Negron the content of the English-language testimony, a fact that gave the appellate court little solace because twelve of the prosecution's fourteen witnesses, including the most damaging witnesses, testified in English. The court held that Negron had no opportunity to know of the testimony while the trial was in progress, and the court further noted that testimony summaries were woefully inadequate to help Negron in his defense. *Id.* at 388-89.

[71] *Id.* at 388.

[72] *Id.* at 389.

[73] *Id.* (internal quotation marks and citations omitted).

[74] JAMES G. CONNELL, III, & RENE L. VALLADARES, CULTURAL ISSUES IN CRIMINAL DEFENSE § 2.3(a) & n.42 (2000). For a more detailed analysis of this and the following constitutional arguments, see LaVigne & Vernon, *supra* note 4, at 888-92; Jeffrey B. Wood, Comment, *Protecting Deaf Suspects' Right to Understand Criminal Proceedings*, 75 J. CRIM. L. & CRIMINOLOGY 166, 169-71 (1984).

in *Negron*,[75] or under one's Fifth Amendment right to testify on one's own behalf.[76] Neither the Sixth Amendment right to confront witnesses[77] nor the right to effective assistance of counsel,[78] however, apply to non-English-speaking litigants in civil proceedings.

In state courts and in some cases in federal courts, the right to an interpreter is less clearly protected in statute and policy.[79] Neither the Federal Court Interpreters Act[80] nor the Americans with Disabilities Act of 1990[81] requires federal courts to provide interpreters for all deaf participants in judicial proceedings. Following *Negron*, Congress passed the Federal Court Interpreters Act to apply only to those judicial proceedings *instituted by the United States*.[82] The presiding officer

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[75] *See, e.g.*, United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973) ("Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered."); *see also* United States v. Lim, 794 F.2d 469, 470-71 (9th Cir. 1986) (noting a defendant's constitutional right to an interpreter when necessary to allow him to confront witnesses). *See generally* Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 263-64 (1996) ("[T]he Sixth Amendment right to confront witnesses is meaningless if the defendant cannot understand their testimony.").

[76] *See, e.g.*, United States v. Mayans, 17 F.3d 1174, 1180-81 (9th Cir. 1994) (holding that a Spanish-speaking defendant's Fifth Amendment right to testify on his own behalf was infringed when the court, learning that the defendant had been in America for two decades, dismissed his interpreter and told the defendant to "try it" in English); *Carrion*, 488 F.2d at 14 ("If the defendant takes the stand in his own behalf, but has an imperfect command of English, there exists the additional danger that he will either misunderstand crucial questions or that the jury will misconstrue crucial responses.").

[77] *See, e.g.*, Carty v. Nelson, 426 F.3d 1064, 1073 (9th Cir. 2005) ("[T]he Sixth Amendment right to confrontation does not attach in civil commitment proceedings."); Van Harken v. City of Chicago, 103 F.3d 1346, 1352 (7th Cir. 1997) ("There is no absolute right of confrontation in civil cases."); United States v. 6109 Grubb Road, 886 F.2d 618, 621 (3d Cir. 1989) (holding that a plaintiff cannot invoke a Sixth Amendment right to confront witnesses in a forfeiture proceeding).

[78] *See, e.g.*, Barkauskas v. Lane, 946 F.2d 1292, 1294 (7th Cir. 1991) (holding that claims of ineffective assistance of counsel do not apply in habeas actions, which are civil in nature); Glick v. Henderson, 855 F.2d 536, 541 (8th Cir. 1988) (holding that claims of ineffective assistance of appointed counsel in a civil case are more appropriately remedied through a malpractice suit against the attorney); MacCuish v. United States, 844 F.2d 733, 735-36 (10th Cir. 1988) (denying a plaintiff's request for a new trial because her claim "confuses this civil case with a Sixth Amendment based claim" for ineffective assistance of counsel (citation omitted)); Sanchez v. USPS, 785 F.2d 1236, 1237 (5th Cir. 1986) ("[W]e now expressly hold that the sixth amendment right to effective assistance of counsel does not apply to civil litigation.").

[79] *See* Grabau & Gibbons, *supra* note 75, at 262-63 & n.147.

[80] 28 U.S.C. § 1827 (2006).

[81] 42 U.S.C. §§ 12101–12213 (2006).

[82] *See* 28 U.S.C. § 1827(a) ("The Director . . . shall establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings insti-

must provide an interpreter when a party or witness speaks only or primarily another language or is deaf and has a language barrier that inhibits a party's comprehension of the proceedings, a party's communication with counsel, or a witness's comprehension of questions and delivery of testimony.[83] In the context of hearing impairments, the courts retain discretion to determine if the impairment is significant enough to inhibit the communication.[84] The Americans with Disabilities Act of 1990 contains no title that applies to the federal judiciary, though Title II does require state and local courts to provide and pay for auxiliary aids and services for deaf participants in state courts.[85] Most states, under their own statutes, independently require interpreters in both civil and criminal courts.[86] In federal courts, deaf

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tuted by the United States."); Hrubec v. United States, 734 F. Supp. 60, 67 (E.D.N.Y. 1990); MATHERS, *supra* note 31, at 26-30.

[83] 28 U.S.C. § 1827(d)(1). The presiding judicial officer must "inquire as to the need for an interpreter when a [party] has difficulty with English." Valladares v. United States, 871 F.2d 1564, 1565 (11th Cir. 1989).

[84] *See* CONNELL & VALLADARES, *supra* note 74, § 2.3(b); *see also Valladares*, 871 F.2d at 1566 (holding that the defendant's failure to object to alleged interpreter incompetence for not providing continuous interpretation was fatal to his claim that the interpreter inhibited his communication); United States v. Lim, 794 F.2d 469, 470-72 (9th Cir. 1986) (finding that the court's borrowing of the defendant's table interpreter for witness interpretation was within the court's discretion and did not inhibit the defendant's ability to communicate with counsel); Luna v. Black, 772 F.2d 448, 451 (8th Cir. 1985) (granting trial courts discretion in meeting a defendant's interpreter needs, but not requiring independent court action when the court is not put on notice about a defendant's language needs); United States v. Tapia, 631 F.2d 1207, 1210 (5th Cir. 1980) (noting that absence of an interpreter at a defendant's trial does not support the defendant's claim for violation of the Federal Court Interpreters Act unless the failure inhibited his comprehension of the proceedings or limited his ability to confront witnesses). *See generally* Grabau & Gibbons, *supra* note 75, at 263-64 (discussing the Sixth Amendment right to confrontation and the importance of effective communication among the client, her attorney, and the tribunal at all stages of the trial).

[85] *See* 42 U.S.C. §§ 12131–12132 (requiring all state and local public entities to provide auxiliary aids and services to qualified individuals with a disability, thus enabling them to participate in and enjoy the benefits of public services, programs, and activities); *see also* 28 C.F.R. § 35.160 (2008) (containing relevant implementing regulations for the provision of auxiliary aids to ensure effective communication).

[86] *See, e.g.*, ALA. CODE § 12-21-131 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 12-242(A) (2003); ARK. CODE ANN. § 16-10-127(c) (1999); CAL. EVID. CODE § 754(b) (West 1995); COLO. REV. STAT. § 13-90-204 (2008); CONN. GEN. STAT. ANN. § 51-245 (West 2005); DEL. CODE ANN. tit. 10, § 8907 (2009); D.C. CODE ANN. § 2-1902 (LexisNexis 2008); FLA. STAT. § 90.6063(2) (2009); GA. CODE ANN. § 24-9-102(a) (1995); IDAHO CODE ANN. § 9-205 (2004); 735 ILL. COMP. STAT. ANN. 5/8-1402 (West 2003); IND. CODE. ANN. § 4-21.5-3-16 (West 2002); IOWA CODE § 622B.2 (2009); KAN. STAT. ANN. § 75-4351 (1997); KY. REV. STAT. ANN. § 30A.410 (LexisNexis 1998); LA. REV. STAT. ANN. § 15:270(A) (2005); ME. REV. STAT. ANN. tit. 5, § 48-A(2)(a) (2002); MD. CODE ANN., CTS. & JUD. PROC. § 9-114(a) (LexisNexis 2006); MASS. GEN. LAWS ch. 221,

participants who do not qualify for interpreter services under constitutional case law or the Federal Court Interpreters Act must instead turn to policy established by the Judicial Conference of the Administrative Office of the United States Courts to receive interpreters.[87]

Deaf defendants and witnesses are certainly not homogenous, and courts are realizing the benefits of flexibility.[88] Providing a CDI or intermediary interpreter is one of these flexible approaches,[89] and some

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§ 92A (2009); MICH. COMP. LAWS § 393.503 (2009); MINN. STAT. ANN. § 611.32 (West 2009); MISS. CODE ANN. § 13-1-303 (West 1999); MO. REV. STAT. § 476.753 (2008); MONT. CODE ANN. § 49-4-503 (2007); NEB. REV. STAT. § 20-153 (2007); NEV. REV. STAT. § 50.051 (2007); N.H. REV. STAT. ANN. § 521-A:2 (LexisNexis 2006); N.J. STAT. ANN. § 34:1-69.10 (West 2000); N.M. STAT. § 38-9-3 (2009); N.Y. JUD. CT. ACTS LAW § 390 (McKinney 2005); N.C. GEN. STAT. § 8B-2 (2007); N.D. CENT. CODE § 28-33-02 (2006); OHIO REV. CODE ANN. § 2311.14 (LexisNexis 2005); OKLA. STAT. ANN. tit. 22, § 1278 (West 2003); OR. REV. STAT. § 45.285 (2007); 2 PA. CONS. STAT. ANN. § 583 (West 2008); R.I GEN. LAWS § 8-5-8 (Supp. 2008); S.C. CODE ANN. § 15-27-15 (2005); S.D. CODIFIED LAWS § 19-3-10 (2004); TENN. CODE ANN. § 24-1-211(b) (2000); TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon 2005); UTAH CODE ANN. § 78B-1-202 (2008); VT. STAT. ANN. tit. 1, § 332 (Supp. 2008); VA. CODE ANN. §§ 8.01-384.1, 19.2-164.1 (2007); WASH. REV. CODE § 2.42.120 (2009); W. VA. CODE §§ 5-14A-3, 57-5-7 (2006); WIS. STAT. ANN. §§ 885.37, .38 (West Supp. 2008); WYO. STAT. ANN. § 5-1-109 (2009).

The state statutes appear similar on their face, but their contours vary. There is ample variation in the categories of deaf persons to whom the laws apply (plaintiff, defendant, witness, juror, attorney, and deaf parent whose child is involved in a legal proceeding) and in the type of judicial proceedings to which the laws apply (civil, criminal, and administrative). *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-242(A) (providing interpreters for any witness, complainant, defendant, or attorney in any civil or criminal matter); ARK. CODE ANN. § 16-10-127(c) (providing sign language interpreters for any state bilingual proceeding or hearing involving a hearing impaired individual); GA. CODE ANN. § 24-9-102(a) (1995) (providing interpreters to any deaf party, witness to any proceeding, or parent whose child is a party or witness to any agency proceeding); 735 ILL. COMP. STAT. ANN. 5/8-1402 (West 2003) (providing interpreters for any deaf person who is a party, witness, or juror to a proceeding).

[87] *See* 1 JUDICIAL CONFERENCE OF THE UNITED STATES, A GUIDE TO JUDICIAL POLICIES AND PROCEDURES, ch. III, pt. H, at 37-39 (2001). California provides a state-level example of this type of process. The California Supreme Court explicitly held that no provision of its state constitution or statutes required courts to provide interpreters for non-English-speaking parties in civil cases. Jara v. Mun. Court, 578 P.2d 94, 95-97 (Cal. 1978). The Judicial Council of California reacted to this holding by increasing its interpreter services for civil litigants, and the California legislature also provided for interpreters in certain civil cases. *See* Nicholas P. Tsukamaki, Comment, *Legislative Inconsistency: California's Good Cause Statutory Exceptions as a Step Back in the Effort to Improve Court Access for Non-English Speaking Civil Litigants*, 41 U.S.F. L. REV. 69, 71-72 (2006).

[88] *See, e.g.*, People v. Vandiver, 468 N.E.2d 454, 458 (Ill. App. Ct. 1984) ("Testimony of a deaf witness may be secured by whatever means are necessary and best adapted to the case, which is a matter within the discretion of the trial court.").

[89] This is not an ironclad right, as noted *supra*, because the judge often retains broad discretion to determine whether a semilingual party can be adequately accommodated, over that party's objection, using only hearing interpreters. *See, e.g.*, Linton v. State, 275 S.W.3d 493, 499-502, 509 (Tex. Crim. App. 2009) (upholding the trial

states have even enacted provisions supporting their use.[90] One court, while commending the trial court's use of a CDI alongside the ASL interpreter, noted that any claim of linguistic incompetence is actually a claim of the judicial system's incompetence to constitutionally try the MLS defendant.[91] However, CDIs in the courtroom (or lack thereof when necessary) have generated only scant mention in reported cases.[92] CDIs themselves remain a small and elite corps of interpreting professionals, perhaps in part because their professional credentialing procedure is relatively new and because their services are only slowly growing in demand.[93] The Registry of Interpreters for the Deaf, the national certifying body for professional sign language interpreters, reports only 91 CDIs compared to over 8200 certified hearing interpreters.[94]

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court's denial of a CDI, despite testimony by an expert witness that the defendant missed twenty to twenty-five percent of the content, because the "best" interpretive service is not constitutionally required as long as the defendant understands the nature and objective of the proceedings and can assist in the defense).

[90] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-242(F); CAL. EVID. CODE § 754(g); COLO. REV. STAT. § 13-90-206 (2008); D.C. CODE ANN. § 2-1905 (LexisNexis 2008); ME. REV. STAT. ANN. tit. 22, § 1521(6)(C) (2002); MASS. GEN. LAWS ch. 221, § 92A; MICH. COMP. LAWS § 393.503(5); MONT. CODE ANN. § 49-4-505 (2007); NEB. REV. STAT. § 20-154 (2007); N.J. STAT. ANN. § 34:1-69.9 (West 2000); S.C. CODE ANN. § 15-27-15; WASH. REV. CODE § 2.42.140(3) (2009).

[91] *See* People v. Rivera, 480 N.Y.S.2d 426, 433 & n.11 (Sup. Ct. 1984) (citing People v. Lang, 325 N.E.2d 305, 309 (Ill. App. Ct. 1975), for an example of a defendant viewed as incompetent to stand trial, where a more accurate view would be to understand that it is the judicial system that is actually incompetent to constitutionally try the defendant).

[92] *See, e.g.*, In re Wickman, No. 270326, 2007 WL 162573, at *2 (Mich. Ct. App. Jan. 23, 2007); *Linton*, 275 S.W.3d at 509. However, courts are not entirely insensitive to the needs of MLS deaf defendants, even when a CDI is not provided. In *State v. Wright*, for example, the court denied the defendant's request for consecutive interpretation and a CDI during the entire trial, but it did provide a multitude of accommodations, described in Section II.B., including three proceedings interpreters, two table interpreters, real-time captioning, complete videotaping of each day's interpreted proceedings available to the defendant on DVDs, and a CDI to communicate with counsel before the proceedings. 768 N.W.2d 512, 518 (S.D. 2009).

[93] *See* Dennis Cokely, *Shifting Positionality: A Critical Examination of the Turning Point in the Relationship of Interpreters and the Deaf Community* (discussing the emergence of the CDI profession and its struggles to gain credence), *in* SIGN LANGUAGE INTERPRETING AND INTERPRETER EDUCATION: DIRECTIONS FOR RESEARCH AND PRACTICE 1, 19-21 (Marc Marschark, Rico Peterson & Elizabeth A. Winston eds., 2005).

[94] *See* Registry of Interpreters for the Deaf, https://www.rid.org/acct-app/index.cfm?action=search.members (last visited Jan. 15, 2010) (follow "CDI" under "Certificates"; then follow "Find Members").

B. *Best Practices for Sign Language Interpretation in the Courtroom*

The primary goal of a sign language interpreter in the courtroom is to provide language access to all courtroom participants while preserving the integrity of that language. Under the Federal Rules of Evidence, an interpreter acts as an expert who swears an oath "to make a true translation."[95] An interpreter's oath, most often a promise to interpret impartially[96] and accurately,[97] binds the interpreter to the court.[98] Nevertheless, because the interpreter "may be the only person in the courtroom with a full command of both languages being used," she can knowingly or unknowingly influence the proceedings.[99] Several best practices help protect the integrity of the language used in the courtroom.[100]

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[95] FED. R. EVID. 604. Courts may also secure interpreters under Federal Rule of Evidence 706, which allows a court "to retain experts for its own benefit to advise and consult with in areas in which the court is lacking information." MATHERS, *supra* note 31, at 73.

[96] Impartiality generally entails disclosing to the court during voir dire all prior interactions with any party and maintaining objectivity throughout the interpretation. *See* MATHERS, *supra* note 31, at 76-77; *see also* Lynn W. Davis & William E. Hewitt, *Lessons in Administering Justice: What Judges Need to Know About the Requirements, Role, and Professional Responsibilities of the Court Interpreter*, 1 HARV. LATINO L. REV. 121, 132 (1994) (listing the kinds of questions a judge may ask during voir dire to establish the interpreter's impartiality, which range from the interpreter's own experience to any potential conflicts of interest). Although no per se rule bars participation of an interpreter who has been involved with the prosecution, CONNELL & VALLADARES, *supra* note 74, § 2.5(e), interpreter objectivity can be a serious concern when the interpreter worked in an investigatory capacity or became privy to privileged communications. *See* MATHERS, *supra* note 31, at 105 (identifying this as a "sequencing" concern); Grabau & Gibbons, *supra* note 75, at 285-86 (explaining why an interpreter should not interpret for more than one party at a trial).

[97] For example, the Southern District of New York requires the following oath of its interpreters: "Do you solemnly swear (or affirm) to interpret these proceedings truly, fairly and impartially, to the best of your ability, so help you God?" SDNY Interpreters Office: Interpreter's Oath, http://sdnyinterpreters.org/?page=oath.html (last visited Jan. 15, 2010).

[98] This occurs within the paradigm of the interpreter as an expert witness. Some courts treat the interpreter as an officer of the court, and her allegiance to the court is more pervasive. *See* MATHERS, *supra* note 31, at 74 & n.3, 79-82.

[99] ALICIA B. EDWARDS, THE PRACTICE OF COURT INTERPRETING 63 (1995).

[100] These subsections discuss only selected best practices that most relate to the integrity of the interpretation, the interpreter's ability to preserve form and function in the target language, and incidents of working with multiple interpreters and CDIs in the courtroom. For a more comprehensive summary of best practices for sign language interpreters in a legal environment, see KELLIE STEWART ET AL., NAT'L CONSORTIUM OF INTERPRETER EDUC. CTRS., BEST PRACTICES: AMERICAN SIGN LANGUAGE AND ENGLISH INTERPRETATION WITHIN LEGAL SETTINGS (2009).

1. Staffing the Courtroom with Competent Interpreters

When a court learns that it will need interpreters to assist non-English-speaking participants, it must address a question of staffing. Sometimes, a single interpreter can provide all the necessary accommodations, but the situation is not always so simple.[101] A typical courtroom generally requires three types of interpreters: (1) a proceedings interpreter (for all remarks in open court and testimony of English-speaking witnesses), (2) a defense or table interpreter (for privileged communications with one's attorney and for out-of-court interpreting), and (3) a witness interpreter (for non–English witness testimony).[102] The court may not need a separate interpreter for each function because a single interpreter can often fulfill multiple roles when those roles do not conflict.[103] However, a single interpreter may be insufficient to staff even a single function, such as when a CDI is required for working with an MLS deaf person or when the duration of the assignment requires that interpreters be available to relieve each other for reasons of mental[104] or physical fatigue.[105]

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[101] *See* MATHERS, *supra* note 31, at 82-105 (reviewing appropriate staffing for both sign language and spoken language interpreters for a variety of situations).

[102] *Id.* at 84-85; *see also* STEWART ET AL., *supra* note 100, at 24-26 (detailing best practices for staffing legal assignments).

[103] For example, if the defendant is a non–English speaker using a spoken language interpreter, a single interpreter can sit next to the defendant and quietly interpret for him all of the proceedings. This same interpreter can serve as the defendant's interpreter for private conversations with his attorney. *See* United States v. Bennett, 848 F.2d 1134, 1141 (11th Cir. 1988) (implying that the requirement for separate interpreters is wasteful when a single interpreter can appropriately perform multiple functions). But problems may arise if the court borrows this interpreter for work with a testifying witness, which would leave the defendant without a proceedings interpreter or a table interpreter. The court in *People v. Aguilar* struck down this type of borrowing in California because it denied the defendant access to testimony and counsel at "moments crucial to the defense—when evidentiary rulings and jury instructions are given by the court [and] when damaging testimony is being introduced." 677 P.2d 1198, 1201 (Cal. 1984); *see also* Grabau & Gibbons, *supra* note 75, at 285 (arguing that a defendant is deprived of her constitutional rights when she loses access to the defense interpreter). However, intermittent borrowing may be permissible when it does not significantly interfere with linguistic access. *See* United States v. Lim, 794 F.2d 469, 470-71 (9th Cir. 1986) (finding that a brief borrowing between the table and witness functions did not infringe on defendant's right to assistance from counsel).

[104] Several studies have shown that interpreters suffer "a marked loss in the accuracy of the interpretation" after around thirty minutes of sustained interpreting, and one study showed that they often appear unaware of the loss in accuracy. *See* STEWART ET AL., *supra* note 100, at 18-19 (collecting the results of studies on accuracy in prolonged simultaneous interpreting).

[105] *See* Grabau & Gibbons, *supra* note 75, at 296 (addressing interpreter fatigue and burnout). Injury from overuse is a particular concern for sign language interpreters.

Increasing the number of interpreters, though, is not helpful if they lack the competency to interpret accurately. Courts usually evaluate an interpreter's competence through a voir dire process that is derived from the hearings on qualifications for other expert witnesses,[106] but this evaluation can be problematic. An interpreter may have the necessary credentials, but linguistic differences such as dialects and regional variations may make the interpreter a poor fit for the non–English speaker.[107] In the prominent Kansas interpreting case of *State v. Van Pham*, defendants wanted to use their own interpreter, not the court's proceedings interpreter, when the defendants testified in court.[108] The Kansas Supreme Court ruled that the lower court was within its rights to refuse to allow the defendants to challenge the court's interpreter and use their own interpreter because they accepted the court's interpreter at the onset of the case; the defendants' attempt to reserve their right to challenge the court's appointment of its interpreter during voir dire did not help them succeed.[109]

The Van Phams' concern, of course, was that they could not ascertain the qualifications of the interpreter and the interpreter's "fit" with their language style before being asked by the court to accept or reject the interpreter. Voir dire of the interpreter may show the interpreter's extensive qualifications, but whether the specific interpreter is a competent linguistic match with a defendant's particular dialect is another question. Courts, however, widely rely on voir dire before anyone in the court has actually witnessed the interpreter's

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See Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. TOL. L. REV. 593, 616 (1999) (noting the additional fatigue factor inherent in sign language interpreting); 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) (justifying the use of team interpreters to avoid fatigue and strain that affect interpreter accuracy); *Self-Care for Interpreters: Prevention and Care of Repetitive Strain Injuries*, STANDARD PRACTICE PAPER (Registry of Interpreters for the Deaf, Alexandria, Va.), 2007, *available at* http://www.rid.org/UserFiles/File/pdfs/Standard_Practice_Papers/Drafts_June_2006/Self-Care_SPP.pdf.

[106] MATHERS, *supra* note 31, at 77-79. For sample voir dire questions for both sign language interpreters and CDIs, see Simon, *supra* note 105, at 199.

[107] *See* Randall T. Shepard, *Access to Justice for People Who Do Not Speak English*, 40 IND. L. REV. 643, 645-46 (2007) ("It is difficult even for someone familiar with a given language to distinguish the language's many dialects, and even more difficult for judges to distinguish between dialects or recognize the need for a different translation.").

[108] 675 P.2d 848 (Kan. 1984).

[109] *Id.* at 861-62. The court did address objections to specific mistranslations as they occurred later in the trial.

skills.[110] This approach has been under attack for years. Constitutionally, a mere "warm body" is likely insufficient unless she "plays a role necessary to ensure that the proceedings are fair."[111] Suggested best practices include permitting only *certified* sign language interpreters,[112] allowing a brief communications test,[113] and limiting the court's discretion in how it measures whether the interpreter is meeting the party's communication needs.[114] Parties also have a greater incentive to try to determine during the brief voir dire period whether the interpreter will be a good fit.

Interpreter competence is particularly salient in the context of an MLS deaf adult.[115] A certified interpreter, or even a team of certified interpreters, may lack competence to ensure effective communication with a deaf person lacking language skills.[116] Thus, courts are turning with greater frequency to CDIs to help bridge the gap between an MLS deaf adult and the court.[117] CDIs use gestures, mimes, drawings, and other tools to create, in a sense, an impromptu system to com-

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[110] *See* CONNELL & VALLADARES, *supra* note 74, § 2.5(b) ("In most instances, the interpreter should be sworn on the record at the beginning of the proceeding and qualifications of the interpreter should be stated on the record at that time.").

[111] United States *ex rel.* Thomas v. O'Leary, 856 F.2d 1011, 1015 (7th Cir. 1988).

[112] *See* LaVigne & Vernon, *supra* note 4, at 916 ("By certified, we mean an interpreter who has received, at the minimum, a Certificate of Interpretation (CI) and Certificate of Transliteration (CT) from the RID, a Level 5 from the National Association of the Deaf, or a state equivalent.").

[113] *See* Matthew S. Compton, *Fulfilling Your Professional Responsibilities: Representing a Deaf Client in Texas*, 39 ST. MARY'S L.J. 819, 882-84 (2008) (suggesting that attorneys representing deaf clients should ask the court to conduct a brief communications test between the court-appointed interpreter and the client to see if they can successfully interact).

[114] *See* LaVigne & Vernon, *supra* note 4, at 914-16 (arguing that broad discretion is inappropriate because judges do not have the expertise to know what a nonnative English user is capable of understanding or not, and this cannot be easily divined by observations from the bench).

[115] *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, 181-85 (1994).

[116] *See* LaVigne & Vernon, *supra* note 4, at 879 ("Meaningful communication, with or without an interpreter, requires language and background information with which to share meaning. The deaf person with minimal language skills lacks both.").

[117] *See* Boudreault, *supra* note 6, at 331-33 (discussing the emergence of CDIs as facilitators to work with semilingual individuals); LaVigne & Vernon, *supra* note 4, at 879-82 (discussing the recommendation that an interpreter use "sources that go far beyond traditional language" when interpreting for a deaf person with minimal language skills); STEWART ET AL., *supra* note 100, at 19-20 (noting a survey finding that people with underdeveloped ASL skills, cognitive challenges, and delayed language benefitted from the use of CDIs).

municate.[118] CDIs are valuable because they have "an uncanny ability to communicate concepts that elude even the most talented hearing interpreter . . . [and] are able to draw upon connections and examples that make sense only in the deaf world."[119]

Having a CDI, however, does not guarantee that the deaf person will be linguistically present.[120] LaVigne and Vernon detail the case of Jesse, a semilingual deaf adult charged with sexual assault.[121] A team of the most qualified interpreters, including a CDI, were unable to meet Jesse's linguistic needs or help him understand his plea bargain.[122] In the words of Vernon, who testified at Jesse's post-conviction competency hearing, "[y]ou can pantomime taking a shower; you can pantomime getting a haircut. You can't pantomime plea bargain."[123] Indeed, the abstract concepts of the justice system make the CDI's task even more complicated and time-consuming.[124] However, whether the

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[118] The Registry of Interpreters for the Deaf, the predominant certifying agency for professional interpreters in the United States, has published a standard practice paper describing the benefits of a CDI in a variety of individuals. *See Use of a Certified Deaf Interpreter*, STANDARD PRACTICE PAPER (Registry of Interpreters for the Deaf, Alexandria, Va.), 2007, *available at* http://www.rid.org/UserFiles/File/pdfs/120.pdf.

[119] LaVigne & Vernon, *supra* note 4, at 926.

[120] *See* Rob Hoopes, *Trampling* Miranda*: Interrogating Deaf Suspects* ("The more difficult question is whether a Deaf person who has been provided an interpreter understands her rights and, therefore, can avail herself of their protections to the same extent as a hearing American. What effect does the level of interpreting competence have on the ability to interpret linguistically complex discourse such as the *Miranda* warning and police interrogation?"), *in* LANGUAGE AND THE LAW IN DEAF COMMUNITIES, *supra* note 63, at 21, 22.

[121] LaVigne & Vernon, *supra* note 4, at 844-46.

[122] *See id.* at 902-13 (describing Jesse's trial, communication style, and the legal arguments surrounding the treatment of his case). For another more recent example, see *New Mexico v. Sanchez*, No. 28,090, 2009 N.M. App. Unpub. LEXIS 157, at *1-2 (App. June 29, 2009), in which two certified interpreters and two CDIs interrupted the proceedings to report to the judge their opinion that they could not provide linguistic access to an MLS deaf defendant on trial for driving while intoxicated. The judge initially threatened to jail the interpreters for contempt of court but, in the absence of any objection by the defendant, eventually permitted the defendant's sixteen-year-old daughter to interpret. *Id.* at *2-3. Unfortunately, the trial court never specifically inquired about the degree of the defendant's understanding. *Id.* at *4.

[123] LaVigne & Vernon, *supra* note 4, at 913 (alteration in original) (internal quotation marks omitted).

[124] For example, some experts have opined that it could take five or six hours to convey the *Miranda* rights to a person of high intelligence who lacks cultural and linguistic experience. *See* McAlister, *supra* note 115, at 185 ("Because legal concepts do not exist in ASL, interpreting legal concepts to a deaf individual requires substantially more time than, for example, interpreting those legal concepts into another spoken language."); Bonnie P. Tucker, *Deaf Prison Inmates: Time to Be Heard*, 22 LOY. L.A. L. REV. 1, 70-71 (1988) (analogizing a particular highly intelligent but culturally and lin-

person is eventually determined to be linguistically incompetent does not affect the rationale for providing all necessary accommodations because it is this provision that helps, in part, to inform the court about the degree of incompetence.

2. Ensuring Interpreter Accuracy

Even if the court is assured of an interpreter's general competence, there remains the issue of the interpreter's ongoing accuracy. Mathers cautions against assuming that the interpreter's active engagement in signing means that the deaf person understands the proceeding.[125] This legal fiction, she warns, is dangerous because it leads the court into allowing the interpreters to "function in an unsupervised parallel universe" while the court "ignore[s] the latent disaster."[126] Many courts mistakenly assume that the interpreter is providing a word-for-word literal translation between languages, and they attempt to shore up the risk of error by leaning on the interpreter to "just tell him what I'm saying, word for word."[127] This assumption re-

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guistically deficient deaf defendant "to a million dollar computer without an adequate program"). A guilty plea waiver of a trial by jury represents another legal concept that does not lend itself to easy interpretation by CDIs. Timothy Jaech, a noted educator for the deaf, prepared a videotaped instructional MLS version of such a plea, but it took thirty times longer than the spoken English version—and it even assumed the MLS defendant's understanding of the basic concept of a jury, a concept that itself would take several hours to interpret. *See* LaVigne & Vernon, *supra* note 4, at 881-82 (describing Jaech's tape and its reactions).

[125] MATHERS, *supra* note 31, at 180 ("Courts have not dealt with interpreting issues entirely honestly. . . . [They assume] [a]utomated, interpreters are switched 'on,' and the deaf person is transformed into one who can hear.")

[126] *Id.* *See generally* Holly Mikkelson, Verbatim Interpretation: An Oxymoron, http://www.acebo.com/papers/verbatim.htm (last visited Jan. 15, 2010) (noting the impossibility of verbatim interpretation of courtroom proceedings and stressing the need for interpreters to use good judgment in rendering the proceedings while retaining meaning and style). LaVigne and Vernon describe the legal fiction as "a pervasive belief within the legal system that if we put an interpreter in front of a deaf person, the interpreter will instantly (and perfectly) convert spoken language to the appropriate language for the deaf person and the communication problem will be solved, thereby freeing everyone from further worry or inquiry and allowing business to proceed as usual." LaVigne & Vernon, *supra* note 4, at 848.

[127] LaVigne & Vernon, *supra* note 4, at 869. A similar incident occurred during the Nuremberg trial, revealing an entertaining example of both judicial misunderstanding and the problems inherent in trying to adhere to literal translations. "[The judge chided an interpreter for too succinct an interpretation], saying, 'Now look here, I want you to translate *everything* I say, *exactly*. Do you understand?' The interpreter nodded, and the judge signalled to me to proceed, saying 'Yes, Mr. Pine?[,'] whereupon the interpreter said, 'Ja, Herr Tannenbaum?'" EYEWITNESSES AT NUREMBERG 92-93 (Hilary Gaskin ed., 1990).

lies heavily on what several linguists have called the conduit metaphor, where words are mistakenly viewed as containers of meaning and where, if the words are accurately transferred from the speaker to the listener, the listener will be able to derive the intended meaning.[128]

Rather than requiring actual or literal equivalence, the Federal Judicial Center seeks what it calls "legal equivalence."[129] A legally equivalent interpretation preserves both the form and the function of the source language because the interpreter must deliver, in the target language, "the original source material without editing, summarizing, deleting, or adding while conserving the language level, style, tone, and intent."[130] The National Association of Judiciary Interpreters and Translators enshrines this into the First Canon of its Code of Ethics and Professional Responsibilities:

> Source-language speech should be faithfully rendered into the target language by conserving all the elements of the original message while accommodating the syntactic and semantic patterns of the target language. The rendition should sound natural in the target language, and there

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The Second and Eleventh Circuits have read a word-for-word translation requirement into the Federal Court Interpreters Act. *See* United States v. Huang, 960 F.2d 1128, 1135 (2d Cir. 1992) ("As a substantive matter, the [Federal Court Interpreters Act] generally requires 'continuous word for word translation.'"); United States v. Joshi, 896 F.2d 1303, 1309 (11th Cir. 1990) ("[T]he general standard for the adequate translation of trial proceedings requires continuous word for word translation of everything relating to the trial a defendant conversant in English would be privy to hear.").

[128] *See* 1 RONALD W. LANGACKER, FOUNDATIONS OF COGNITIVE GRAMMAR 161-62 (1987) (identifying the problem and proposing that "[i]nstead of regarding expressions as containers for meaning, we must focus on the symbolic correspondence between a phonological and a semantic structure" (emphasis omitted)).

[129] *See* Susan Mather & Robert Mather, *Court Interpreting for Signing Jurors: Just Transmitting or Interpreting?* (discussing written products of the Federal Judicial Center and the Federal Court Interpreter Certification Project), *in* LANGUAGE AND THE LAW IN DEAF COMMUNITIES, *supra* note 63, at 60, 70-71.

[130] ROSEANN DUEÑAS GONZÁLEZ, VICTORIA F. VÁSQUEZ & HOLLY MIKKELSON, FUNDAMENTALS OF COURT INTERPRETATION 16 (1991). This emphasis on conserving "the form and content of the linguistic and paralinguistic elements of a discourse, including all of the pauses, hedges, self-corrections, hesitations, and emotion as they are conveyed through tone of voice, word choice, and intonation" exists for the same reasons noted *supra* in text accompanying notes 41 through 54:

> It is important to remember that from the beginnings of judicial proceedings triers of fact (the judge or jury) have to determine the veracity of a witness's message on the basis of an impression conveyed through the speaker's demeanor. The true message is often in how something is said rather than in what is said; therefore, the style of a message is as important as its content.

Id. In linguistic terms, the type of equivalence sought is often called semantic and pragmatic equivalence and includes culture and situational meaning. *See* HALE, *supra* note 39, at 5-7.

> should be no distortion of the original message through addition or omission, explanation or paraphrasing. All hedges, false starts and repetitions should be conveyed; also, English words mixed into the other language should be retained, as should culturally-bound terms which have no direct equivalent in English, or which may have more than one meaning. The register, style and tone of the source language should be conserved.[131]

One technique used to ensure that interpreters have the time and ability to meet the high bar of legal equivalence is to require consecutive interpreting for non–English witness testimony, regardless of whether the court allows simultaneous interpreting for other portions of the proceeding.[132] A consecutive interpreter "listens to the totality of a speaker's comments, or at least a significant passage, and then reconstitutes the speech with the help of notes taken while listening."[133] A simultaneous interpreter, on the other hand, renders the message in the target language while the speaker is generating the message.[134] The extra time and greater context available in consecutive interpreting enhances its quality and accuracy—which is highly sought in witness interpretations—but because it may add considerable length to the trial, most courts then switch back to simultaneous interpreting

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[131] NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITIES Canon 1, *available at* http://www.najit.org/membership/NAJITcodeofethicsfinal.pdf; *see also* WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS ch. 9 (1995), *available at* http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuidePub.pdf (presenting Canon 1 of the Model Code of Professional Responsibility for Interpreters in the Judiciary, which describes the requirement for accuracy and completeness). Nancy Frishberg has a similar emphasis on conveying the whole message, not just the singular words:

> Messages that are fraught with idiomatic phrases or proper names (of products, of places, of official roles) often have many built-in cultural assumptions. Thus, accuracy means that the interpreter says as much as the sender of the message, but not more. Accuracy also means giving the receiver the complete message, including the part carried by pauses, hesitations, or other silent or non-verbal signals. The interpreter transmits the full message, not merely the words.

FRISHBERG, *supra* note 2, at 65.

[132] *See* HOLLY MIKKELSON, INTRODUCTION TO COURT INTERPRETING 70-76 (2000) (discussing the need for consecutive and simultaneous interpreting at different stages of the trial because of differing needs of accuracy and speed); Debra Russell, *Consecutive and Simultaneous Interpreting* (demonstrating that far fewer errors were made when interpreters used consecutive translating rather than simultaneous translating during direct testimony), *in* TOPICS IN SIGNED LANGUAGE INTERPRETING, *supra* note 6, at 135, 152-55.

[133] RODERICK JONES, CONFERENCE INTERPRETING EXPLAINED 5 (1998).

[134] MIKKELSON, *supra* note 132, at 72-73.

for most other English-language portions of the proceeding.[135] Simultaneous interpreting requires greater proficiency and better cognitive management skills in order for the interpreter to maintain the necessary level of accuracy.[136]

This discussion leads to two fundamental questions affecting the accuracy of the interpretation. First, how effective are courtroom interpreters in retaining the facts, form, and function of the source language, even when interpreting consecutively? Second, when the facts, form, or function are lost in translation, how do interpreters rectify the error? The next two subsections address these issues.

a. *Interpreter Ability to Retain Facts, Form, and Function*

The interpretive process is not perfect. The highly nuanced and often highly charged language of the courtroom is not always available with crystal clarity after it has been processed through a linguistic medium. Errors of fact are perhaps the easiest errors to identify, but only if one is fluent in both languages and has adequate access to the source and target languages. In courtroom interpreting, these errors typically include content the interpreter plainly omits (perhaps by missing it or misunderstanding and then altering it) and content the interpreter omits when summarizing segments of the discourse (perhaps by leaving out a critical detail clearly provided in the source testimony).[137] This Comment refers to these types of errors as errors of fact, but it includes any errors that relate to the substance of the interpretation. For example, an interpreter who fails to correctly see a deaf witness attach a possessive marker to an object might inadvertently voice "I put her bag into *my* car" rather than the factually correct "I put her bag into *her* car." Or perhaps an interpreter transposes num-

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[135] *Id.* at 70-71. Simultaneous interpretation has been described as "a speedy, pseudo-efficient interpretation" when compared to the greater accuracy that is achievable through consecutive interpreting; in other words, a shorter time frame usually leads to greater inaccuracy in the interpretation. STEWART ET AL., *supra* note 100, at 14.

[136] MIKKELSON, *supra* note 132, at 73-76.

[137] Debra Russell identified the different rates of incidence for these types of errors between consecutive and simultaneous interpreting in the courtroom. *See* Russell, *supra* note 132, at 151-53 (finding empirically that consecutive interpreting was significantly more accurate than simultaneous interpreting for three types of courtroom discourse). Omission, however, is both a conscious and an unconscious strategy that interpreters employ to cope with the interpretive process. *See* Jemina Napier, *Linguistic Features and Strategies of Interpreting: From Research to Education to Practice*, *in* SIGN LANGUAGE INTERPRETING AND INTERPRETER EDUCATION: DIRECTIONS FOR RESEARCH AND PRACTICE, *supra* note 93, at 84, 94.

bers or misses a shift in tense.[138] These can each lead to factual inaccuracies in the interpretation.

However, errors in form and function are also critical errors in the courtroom. As Part I explains, the language of judges and lawyers often wields control.[139] Susan Berk-Seligson found that court interpreters often and unwittingly interfere with lawyers' and judges' attempts to ask well-designed questions in ways that change the verbal outcome of the witness's answers.[140] They do so because it is linguistically difficult to create a legally equivalent version that matches the source language in both form and function.[141] Berk-Seligson reviewed numerous interpreted courtroom proceedings[142] and found a wealth of incidents where interpreters affected the verbal outcome of witness testimony.[143] Attorneys often exert control over witnesses through questioning and interrogation, particularly by controlling the range of acceptable answers, applying certain tones, and modifying illocutionary force.[144] In

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[138] For a discussion of the effects of misinterpreted tense in courtroom testimony, see James Shepard-Kegl, Carol Neidle & Judy Kegl, *Legal Ramifications of an Incorrect Analysis of Tense in ASL*, 1995 J. INTERPRETATION 53, 58-68.

[139] *See supra* text accompanying notes 41-54.

[140] BERK-SELIGSON, *supra* note 42, at 22-24; *see also* HALE, *supra* note 39, at 238-39 (concluding that interpreters tend to alter the pragmatic force of courtroom discourse, particularly questions); Grabau & Gibbons, *supra* note 75, at 311-17 (summarizing many of Berk-Seligson's findings as interpreter bias strategies); Russell, *supra* note 132, at 152-53 (finding patterns of tense shifts, register shifts, ungrammatical content, hedges, and other linguistic features that did not align with the message in its source language).

[141] Examples abound where the interpreters' struggles to match both form and function had a significant effect. In a rape prosecution of a Hmong man, for example, the interpreters failed to voice English equivalents to derogatory terms used by the victim, a Hmong woman, in her testimony. *See* Timothy Dunnigan & Bruce T. Downing, *Legal Interpreting on Trial: A Case Study*, *in* TRANSLATION AND THE LAW 93, 94-98 (Marshall Morris ed., 1995) (discussing State v. Her, 510 N.W.2d 218, 222-23 (Minn. Ct. App. 1994)). There, the convicted defendant failed to convince the appeals court that the interpreters' consistent choices to interpret the victim's speech in accordance with the prosecution's portrayal of her as a shy, naive, and innocent Asian woman gave him a right to a new trial with better interpreters, despite the appellate court's agreement that the interpreters' less complete and less graphic account hurt the defendant. *Id.* at 104.

[142] Berk-Seligson documented a total of eighteen interpreters working a total of 114 hours in initial appearances, preliminary hearings, arraignments, pleas, pre-trial motions, trials, and sentencings. BERK-SELIGSON, *supra* note 42, at 43-44.

[143] *See id.* chs. 6-8; *see also* EDWARDS, *supra* note 99, ch. 5 (finding interpreters misunderstanding context, misunderstanding witness speech, rendering an incomplete message, erring in meaning, choosing imprecise register, condescending, interpreting literally, using idiomatic expressions, using false cognates, applying homilies, and erring in regard to regional variations).

[144] *See* BERK-SELIGSON, *supra* note 42, at 22; HALE, *supra* note 39, at 35-36 (discussing the pragmatic control of question form). Hale distinguishes between illocutionary point and illocutionary force, noting, for example, that requests and commands have

many of Berk-Seligson's examples, the interpreters adjusted the examining attorney's questions or modified the witness's responses in ways that allowed the interpreter to wrest linguistic control away from the attorney. Most of the interpreter additions were powerless in nature, including hedges, uncontracted forms, politeness markers, particles, and hesitations.[145] Interpreters also rendered witnesses' answers to attorney questions hypercorrect and in a more formal register.[146]

The interpretive process itself, especially when testimonial interpreting is done consecutively, can also provide opportunities for witnesses to provide narrative answers, which may suggest to the jury, consciously or subconsciously, that the attorney has less control over adverse witnesses in ways that alter the jurors' perceptions of both the witnesses and the attorneys.[147] Interpreters may also shield the witness from word traps, fast-paced questions, and other attempts to rattle witnesses.[148] Hale's study also found that interpreters systematically omit-

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the same illocutionary point, but that commands have much stronger illocutionary force. HALE, *supra* note 39, at 36. Interpreters can adjust illocutionary force by, among other things, tempering commands or strengthening requests.

[145] *See* BERK-SELIGSON, *supra* note 42, at 131. Regarding politeness markers, for example, Berk-Seligson found that interpreters with empathy for the non–English speaker often inserted nonpresent politeness forms to put the witness at ease, which often led the witness to reciprocate with a polite marker, directed toward the interpreter, into the record. *Id.* at 150. O'Barr's studies showed that politeness markers and other powerless features reduced a mock juror's perception of the witness's convincingness, truthfulness, competence, intelligence, and trustworthiness. *See* O'BARR, *supra* note 32, at 74-75. Interestingly, Berk-Seligson found that interpreter-inserted politeness markers actually enhanced ratings for competence and intelligence. *See* BERK-SELIGSON, *supra* note 42, at 162. Another similar study on hesitations and hedges in interpreted witness testimony found a marked decrease in guilty verdicts when the witness interpretation systematically used hesitations and hedges. *See* Norma A. Mendoza, Harmon M. Hosch, Bruce J. Ponder & Victor Carillo, *Well . . . Ah . . . : Hesitations and Hedges as an Influence on Jurors' Decisions*, 30 J. APPLIED SOC. PSYCHOL. 2610, 2610-20 (2000). Despite contrary findings, these studies share the conclusion that these types of modifications can affect juror perceptions.

[146] *See* BERK-SELIGSON, *supra* note 42, at 171-72. Berk-Seligson's findings again showed an opposite trend from O'Barr's findings, here showing that the move from the consultative register to the formal register enhanced juror perceptions of competence, intelligence, and trustworthiness. *Id.* at 172-75. But Berk-Seligson's other findings supported O'Barr's conclusions. *See, e.g.*, *id.* at 181-84.

[147] *See id.* at 119-22.

[148] *See, e.g.*, MICHAEL COOKE, INDIGENOUS INTERPRETING ISSUES FOR COURTS 22 (2002), *available at* http://www.aija.org.au/ac01/Cooke.pdf (providing an example of an interpreter shielding a witness from police pressure to contradict a statement made by the witness at an earlier date); Michael Cooke, *Aboriginal Evidence in the Cross-Cultural Courtroom* (providing transcript examples of interpreters shielding witnesses from hostile cross-examination), *in* LANGUAGE IN EVIDENCE: ISSUES CONFRONTING ABORIGINAL AND MULTICULTURAL AUSTRALIA 55, 73-76 (Diana Eades ed., 1995).

ted argumentative and coercive markers in interpreted questions, likely because they were seen as superfluous to the message or because they lacked effective equivalents.[149] Many of the alterations were subtle but could easily combine to great effect. For example, an interpreter interpreted an attorney's question, which used the passive voice as a means to imply blame, in a way that prompted the witness to downplay or background his own involvement and place in the foreground another possible culpable party.[150] Berk-Seligson found that overall, these adjustments significantly affected juror perceptions of witness and attorney convincingness, competency, intelligence, and trustworthiness.[151]

In each instance, the interpreter departed from her ethical role under the standards discussed above.[152] But often, the court welcomes some interpreter modifications because they reduce the court's frustration with the interpretive process, lead to more efficient questioning, and help to culturally mediate between the court and the witness.[153] In fact, one legal compendium recommends that an attorney questioning through an interpreter ask short questions, avoid the passive voice, avoid double negatives, clarify pronouns, and not interrupt.[154] These tendencies might be pragmatically valuable for more

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[149] *See* HALE, *supra* note 39, at 85-86.

[150] *See* BERK-SELIGSON, *supra* note 42, at 99-105 (studying cultural approaches to using the passive voice to avoid blame).

[151] *See id.* at 171-72 (describing how hypercorrectness significantly affects perceived competency, intelligence, and trustworthiness); *id.* at 181 (describing how hedges significantly affect perceived convincingness, competency, intelligence, and trustworthiness); *id.* at 184 (describing how added passive voice significantly affects perceived intelligence and trustworthiness); *id.* at 187-88 (describing how interpreter interruption of an attorney significantly affects perceived attorney competence); *id.* at 189-90 (describing how interpreter interruption of a witness significantly affects perceived intelligence).

[152] *See supra* text accompanying notes 130-131.

[153] *See, e.g.*, BERK-SELIGSON, *supra* note 42, at 65-71, 85 (providing examples of positive interpreter intrusion to clarify a confused line of testimony). However, Berk-Seligson also found several examples of interpreter behavior that did seem to help the court run smoother and more efficiently, but perhaps at too high a cost. *See id.* at 65-86 (finding occurrences of interpreters challenging attorneys' questioning tactics, initiating discussions or questions with other parties in the courtroom on the record, and initiating side conversations with witnesses). One argument in favor of greater use of CDIs is that doing so will enhance the ability of the interpretation to address the "many subtle or not-so-subtle differences found between American mainstream culture and the deaf culture." LaVigne & Vernon, *supra* note 4, at 926 (quoting Phyllis Wilcox, *Dual Interpretation and Discourse Effectiveness in Legal Settings*, 7 J. INTERPRETATION 89, 94 (1995)).

[154] CONNELL & VALLADARES, *supra* note 74, § 2.5(c). But this may not be a limitation about which courts should concern themselves. Although a defending attorney is necessarily limited in the types of questions she can ask when a witness's significant communication limitations only permit answers of "yes" or "no," one court found this similar to "cross examining a child [or] a blind person" and ruled that it was not a li-

efficient court administration, but they illustrate a lack of confidence in a legally equivalent transfer.

With so much meaning and control buried in the form of the attorney's question and the witness's response, one must wonder how much of that form can be retained when working through not one, but two interpreters (a hearing ASL interpreter and a CDI), and not two languages, but one language and a more spontaneous system of gestural or mimed communication. For example, a CDI cannot retain the passive language structure when moving in and out of a nonlanguage. Nor can the CDI retain a well-placed double negative or preserve an attorney's trap placed in a longer or complicated question. Yet, the interpreters' work product will have a form, chosen and applied by the interpreters, that jurors use as a factor in evaluating witness credibility.

Interpreter inaccuracies are not confined to aspects of facts and form. The resulting interpreted language can easily lack the function, or legal substance, so forcefully contained in the source language. Frozen texts, such as the *Miranda* warning or the interaction required for a guilty plea, provide ample opportunity for linguists to study how much intended meaning is actually transferred to the non–English speaker. Rob Hoopes focused on the *Miranda* warning and found that, even with advanced interpreters operating under no time constraints, almost a third of the studied interpretations failed to convey an understanding of the deaf person's legal rights.[155] With time constraints, Hoopes noted that interpreters falling behind chose to delete information because they felt they lacked standing to repeatedly interrupt the judge or questioning attorney.[156]

One reason why the rendered target language might be deficient is because the deaf audience may not be able to independently fill in the resulting gaps. For example, many deaf adults lack a basic understanding of the legal implications of *Miranda*. Because most deaf individuals have lower reading abilities (often between third- and fifth-grade reading levels) and less access to a lifetime of aural input (from overheard conversations, television and movies, and the like), deaf individuals are less informed about how the legal system works and what their constitutional rights are.[157] MLS deaf adults are much less likely than even the average deaf adult to know how the legal system works.

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mitation placed upon the parties by the court. People v. Tran, 54 Cal. Rptr. 2d 905, 912 (Ct. App. 1996).

[155] Hoopes, *supra* note 120, at 42-45.

[156] *Id.* at 33-34.

[157] *See id.* at 45.

This reality highlights that interpreters are not simple conduits for courtroom discourse. Even when interpreters are working in consecutive mode, they have both the ability and the tendency to alter the source language. Thus, the non-English-speaking participant sees a slightly skewed rendition of the proceedings as the interpreter makes slight language adjustments moving into the target language. The English-speaking participants in the courtroom also hear a slightly skewed version. Only the interpreter or another fluently bilingual speaker has full access to what really happens within the interpreted discourse. Even if the interpreter is aware of these errors, however, problems abound in correcting them.

b. *Interpreter Ability to Repair Errors*

An obvious prerequisite to repairing interpreter errors is for the court or the interpreters to identify them. Unless it is a bilingual courtroom, other officers of the court are usually not proficient in other languages to the degree that would enable them to directly monitor the interpreters' effectiveness. Relying on other courtroom participants to monitor the interpreters, even if they are bilingual attorneys or judges, can be problematic because they may lack the necessary training and should likely be devoting their attention to matters other than the interpretation.[158] Some courts try to mitigate the influence of a juror who is proficient in the interpreted language by asking the bilingual juror to swear to accept the court interpreter's version over any version they hear from the non–English source, whereas other courts may ask bilingual jurors to notify the judge if they identify an interpretation error.[159]

However, one way the court does monitor interpreter accuracy is through ongoing analysis of whether the interpreted reply matches the question asked. If the witness's answers are too far afield from what was asked, the judge may feel there is an interpreter error. This is a weak form of monitoring for two reasons. First, the witness may actually be responding off target or nonsensically. Second, the interpreter may be wary of drawing attention to herself, and she may adjust her interpretation to smooth over the troublesome response.[160]

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[158] *See* LaVigne & Vernon, *supra* note 4, at 919-20 (criticizing the requirement of contemporaneous objections because they place additional burdens on deaf defendants).

[159] *See, e.g.*, EDWARDS, *supra* note 99, at 70 (describing a juror's correction of the interpreter's mistaken translation of the word "gun" as "purse").

[160] *See* BERK-SELIGSON, *supra* note 42, at 65 (highlighting the interpreter's unease at translating a witness's meaningless answer when it could cause the court to question

Instead, the most common solutions to protect the accuracy and integrity of the interpretation are to use team interpreters[161] and a separate interpreter who can monitor the proceedings interpreter and the witness interpreter[162] (which aligns with the physical arrangement of most trials involving deaf defendants).[163] A table interpreter who also monitors the proceedings and witness interpreters from her seat next to the attorney can inform the attorney of misrepresentations, and the attorney can then object.[164]

One unacceptable solution is to rely on the interpreter to recognize errors and self-correct.[165] Another unacceptable solution is to expect the non–English speaker to identify when the interpretation is inaccurate.[166] This solution ignores the reality of a multilingual environment. A person who is not proficient in the source language would not know if the interpreter added, omitted, or modified content from the source language.[167] Instead, in the American adversarial tradition, courts rely on the parties to monitor the interpretation.[168]

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the interpreter's abilities); *see also* People v. Vasquez, No. B162629, 2004 WL 348785, at *4-5 (Cal. Ct. App. Feb. 25, 2004).

[161] *See generally Team Interpreting in the Courtroom*, POSITION PAPER (Nat'l Ass'n of Judiciary Interpreters & Translators, Seattle, Wash.), Mar. 1, 2007, *available at* http://www.najit.org/documents/Team_Interpreting.pdf (advocating for team interpretation as a means of reducing interpreter fatigue and increasing accuracy).

[162] *See* MATHERS, *supra* note 31, at 142-43. The monitor interpreters can monitor more than just linguistic errors; they can also monitor ethical and protocol errors. *See id.* *But see id.* at 165 (arguing that corrections effected by a monitor interpreter highlight, but may not alleviate, the inadequacy of the interpretation).

[163] *See* MATHERS, *supra* note 31, at 127 fig.12 (illustrating an effective configuration).

[164] *See* LaVigne & Vernon, *supra* note 4, at 921-23.

[165] Certainly, professional and conscientious interpreters will self-correct when they are aware of an error and have the ability to self-correct; but generally, it is difficult for a working interpreter to always know if the target language lacks some aspect of the source language. A further concern is that an interpreter may lack the courage to interrupt the court to self-correct when it reflects poorly on the interpreter or calls that interpreter's competence into question. Ambrose Bierce defined an interpreter, in his typical caustic manner, as "[o]ne who enables two persons of different languages to understand each other by repeating to each what it would have been to the interpreter's advantage for the other to have said." AMBROSE BIERCE, THE UNABRIDGED DEVIL'S DICTIONARY 135 (David E Schultz & S.T. Joshi eds., 2000).

[166] *See* LaVigne & Vernon, *supra* note 4, at 919-20 (arguing that such a task is nearly impossible for a deaf person).

[167] *Id.* at 919-21.

[168] One circuit court found the adversarial environment sufficient to guard against inaccuracies in interpretation for a deaf juror: "Any problems with inadequate interpretation, because the interpreter either interjects opinions or incompetently interprets can be monitored by the parties to the suit because the proceeding is in open court." United States v. Dempsey, 830 F.2d 1084, 1088 (10th Cir. 1987). An attorney's

However, handling perceived and uncorrected inaccuracies in the ongoing interpretation is its own mire.[169] On one hand, the attorney noticing an error must *timely* object or risk waiving any challenge to the interpretation.[170] On the other hand, though, most litigators and interpreters know "the privilege to interrupt the Court and report an error must not be abused—because it is truly a limited privilege."[171]

Generally, only substantial errors earn objections. Other interpretive errors, usually of the kind earlier described as modifications to form, are chalked up to the inevitable imperfection of the task of interpreting; unless tangible prejudice can be shown, many courts will not attend to these errors in any depth.[172] One must also consider the effect of correcting the error or objecting. Berk-Seligson found that an interpreter's interruptions of an attorney led jurors to rate the attorney as significantly less competent, and an interpreter's interruptions of a witness led jurors to rate the witness as significantly more intelligent.[173] Even though the evidentiary discussions of the objection occur outside the ears of the jury, the sidebar necessarily interrupts the flow of the trial and can seriously hamper the questioning attorney's direct- or cross-examination.

When confronting an alleged misinterpretation, the judge can often simply direct the interpreter to seek clarification from the wit-

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failure to monitor the adequacy of the interpretation could be grounds for a claim of ineffective counsel. *See* MATHERS, *supra* note 31, at 204.

[169] *See* Grabau & Gibbons, *supra* note 75, at 286 (discussing protocol for the working interpreter to correct the record).

[170] *See* FED. R. EVID. 103 (requiring "timely objection"); *see also* United States v. Villegas, 899 F.2d 1324, 1348 (2d Cir. 1990) (denying the defendant's claim of an incompetent interpreter in part because allowing "a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse"); United States v. Lim, 794 F.2d 469, 471 (9th Cir. 1986) (finding "no objection at the time of trial" and "no direct evidence . . . to indicate that there was any particular portion of the original trial that the defendants could not actually understand").

[171] MATHERS, *supra* note 31, at 150. Indeed, "in an ideal world, the American legal system would choose to have the court interpreter physically invisible and vocally silent, if that were at all possible." BERK-SELIGSON, *supra* note 42, at 54. Mathers presents a coherent process for determining whether and how to object effectively. *See* MATHERS, *supra* note 31, at 149-63; *see also* Grabau & Gibbons, *supra* note 75, at 291-93.

[172] *See* MATHERS, *supra* note 31, at 150-52 (discussing two cases, State v. Mitjans, 408 N.W.2d 824, 832 (Minn. 1987), and State v. Her, 510 N.W.2d 218, 223 (Minn. 1994), that affirmed convictions because errors in translation were determined to be nonprejudicial).

[173] *See supra* text accompanying notes 140-157; BERK-SELIGSON, *supra* note 42, at 187-90.

ness.[174] When this option is not available post-trial, the court must look back to the original testimony to consider revisions, but many courts fail to preserve the original verbal or visual testimony.[175] Some courts use audio or videotaping as a means to help the judge resolve disputed interpretations.[176] During the sidebar, then, the feuding interpreters still have access to an audio or video version of the original source language, which can help them either agree on a correct interpretation or give them information they need to present their cases to the judge.[177]

3. Ensuring CDI and ASL Interpreter Accuracy

The previous two subsections discussed problems that courts face in achieving accuracy when having an interpreter work with a non-English-speaking witness in the courtroom. However, the unique situ-

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[174] *See* Grabau & Gibbons, *supra* note 75, at 291-93.

[175] *See* CONNELL & VALLADARES, *supra* note 74, § 2.5(a) n.109 (citing cases holding that there is no requirement of maintaining a foreign language or sign language transcript).

[176] This preservation of the source language is also important in appealing an interpreter-related issue. *See* Davis & Hewitt, *supra* note 96, at 136-37 (asserting that the quality of court interpretation cannot be evaluated on appeal without a video or audio record); Grabau & Gibbons, *supra* note 75, at 294-96 (recommending video as the preferred method for preserving the record); LaVigne & Vernon, *supra* note 4, at 924 ("Courts are beginning to recognize that it is impossible to know whether the interpretation meets the requirements of the law without a record of the interpretation itself."). The National Consortium of Interpreter Education Centers suggests as a best practice that courts videotape all ASL statements in every stage of a proceeding because, despite all precautions to ensure interpreter accuracy, the risk of error persists. STEWART ET AL., *supra* note 100, at 22.

The presence of a video camera itself could affect the trial and witness testimony. Most studies support the idea that camera presence in the courtroom does not impede the smooth function of the judiciary or impose prejudice or a psychological impact on participants, but one study of Nevada proceedings did find witnesses more opposed to camera usage than attorneys or judges. RONALD L. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS 71-72 (1998). Another study, using mock witnesses and jurors, found that "perceived witness nervousness was not found to adversely affect juror perceptions of the quality of witness testimony . . . . [Video-taped] witness testimony was seen as being as clear as [other] witness testimony." MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE 64 (1998) (alterations in original) (internal quotation marks omitted); *see also* WILLIAM E. HEWITT, NAT'L CTR. FOR STATE COURTS, VIDEOTAPED TRIAL RECORDS: EVALUATION AND GUIDE 81-83 (1990) (presenting study results showing that video recording is not likely to negatively affect courtroom decorum, alter courtroom procedures substantially, or influence behavior of courtroom participants).

[177] *See* MATHERS, *supra* note 31, at 163 (quoting one judge's rationale for recording testimony); LaVigne & Vernon, *supra* note 4, at 923 ("Videotaping the proceedings provides an opportunity for the interpreter and the parties to continually assess the interpreting process.").

ation of having an MLS witness testify through a CDI-ASL interpreting team poses additional challenges that these best practices fail to overcome. The complexity of the linguistic interaction may, at times, prevent the court from safely relying on best practices, such as ensuring competency and monitoring interpreters.

Courts rely on parties in the adversarial system to act as the refiner's fire, to challenge errors of consequence as the proceedings progress. The requirement for parties to object timely to interpretation errors may be incompatible with the linguistic reality of an in-the-courtroom interpretation of an MLS witness's testimony. The interpreters' abilities to identify and correct MLS interpreting errors are even more limited. The CDI uses highly specialized skills, and her interaction with the MLS deaf adult, which includes the formation of an impromptu communication system, is linguistically complex. The contemporaneous-objection requirement fails to protect against errors that are not readily apparent but that could be substantial in nature. Even if the court videotapes the source language and makes it available at a sidebar, parties may not have the time or the expertise to study the interaction and discern the correct interpretation.

If the MLS deaf adult is a crucial witness for one of the parties, the court should allow the parties to exercise greater care in handling that witness's testimony. Under current best practices, one of the parties could bring in a monitor CDI and perhaps a sign language linguist to observe the testimony and its interpretation. This, however, could be an insufficient protection.

Suppose, for example, that the MLS witness has information about the weapon used in the commission of a crime. The interpreters know the weapon alleged to have been used because they have been present throughout the entire trial. The MLS witness, however, may not know what evidence and exhibits the prosecutor has or what the other witnesses have said. The questioning attorney asks the MLS witness if he saw the defendant with a weapon in his hand.

Here, the interpreters must be careful not to inadvertently feed to the MLS witness information the witness could unknowingly adopt and then represent as a detail in his testimony.[178] In a typical single-

[178] These types of influences may not only be inadvertent, but they may also be required. The rules of language allow the interpreter to choose among many avenues to present information, but the interpreter must choose one, and the one she chooses may have linguistic information embedded within it at a grammatical or syntactic level. Gile calls this "linguistically induced information," and he found that interpreters often interpreted both the message and the linguistically induced information because

interpreter scenario, the monitor interpreter could more easily look to the witness interpreter to see if the interpreter led the witness by choosing a specific type of weapon or by artificially limiting the sign choices for weapon.[179] Indeed, the problem of inadvertent or unconscious leading or suggesting is one reason courts require a separation of some interpreter functions.[180] It would be much easier for a monitor interpreter to identify inappropriate leading. With an MLS witness, however, the CDI has much more latitude in developing a communicative system with the witness. As a result, the CDI may use leading information, and the witness could take that information and use it in a way that, for example, backgrounds his own involvement or an incriminating detail, or that foregrounds another's involvement or a more innocuous detail. The effects of this leading information, or even its mere existence, would be difficult for anyone not fluent with sign language linguistics to immediately observe.[181]

In our example, the CDI provides a gestured list of possible weapons—a gun, a knife, a club, and a fist—knowing that a point of conflict in other witnesses' testimonies is the description of the weapon used. Some previous witnesses testified about a longer cane, stick, or rake handle, whereas others recalled a short, stubby baseball bat. The MLS witness adopts the CDI's gesture for a club, retaining its shorter stature. It becomes a question whether the MLS witness intended to adopt merely the concept of a long and cylindrical object *or* the more detail-oriented short and stubby baseball bat. Ideally, the CDI interpreter would retain this ambiguity in the signed response that goes back to the attorney and onto the record. The concern here, however, is whether the court has an adequate check on these types of interactions.

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they could not distinguish between the two and they did not want to leave any part of the message out. GILE, *supra* note 18, at 57, 61-62. As an example, Gile describes the fact that Japanese does not always distinguish between singular and plural, distinguish among various verb tenses, or identify which nouns are the verb's subject and object. *Id.* at 67-68. An interpreter presenting this information in English cannot create an utterance that retains these ambiguities, and so, from behind the interpreter's veil, the interpreter must choose the number, tense, and subject/object.

[179] ASL lacks a single signed expression for weapon; instead, ASL uses an open-ended list, such as GUN, KNIFE, CLUB, VARIOUS.

[180] *See* MATHERS, *supra* note 31, at 105-08 (identifying conflicts when an interpreter serving the function of interpreting for the party later serves another function of interpreting for the record, thereby raising the danger that the interpreter may "incorporate[] background knowledge from prior interpreting to construct meaning").

[181] This is precisely why "all interaction between the deaf witness and the interpreters must be mediated through the court." MATHERS, *supra* note 25, at 92.

In order to preserve the benefits of the adversarial system and protect the integrity of the interpretation, courts need an avenue to allow parties to take additional measures. The next Part looks to how courts handle document translations as a model for a possible solution.

III. INTERPRETATION AS TRANSLATION: AN ALTERNATIVE METHOD FOR PRESENTING MLS WITNESS TESTIMONY

Courts can enhance the integrity of an MLS witness's interpretation by mirroring some procedural steps used to admit translated evidence. Many lay readers confuse interpretation, which involves a live reproduction of a spoken or signed language, with translation, which involves a reproduction of language in one written form to another written form.[182] Some of the weaknesses in interpreting correspond to some of the strengths in translating: translations occur outside the hurried courtroom, and translators can use outside resources, such as supplementary texts and peer reviews, to aid in their translations. Fact-finders arbitrating between competing translations are thus more informed about the linguistic dispute. The model this Comment proposes allows MLS witness testimony to occur in a deposition-like environment at trial, outside the presence of the jury but on videotape, with that videotape and a corrected voice-over interpretation being shown to the jury after parties have an opportunity to review and refine it.

This proposal is not an expression of nonconfidence in the work of a CDI-ASL interpreter team. These professionals are essential to tapping an MLS witness's reservoir of knowledge and experience that justice seeks to have exposed at trial. Nor is this proposal an encroachment on their work in the courtroom. Rather, it introduces a feedback loop between the time the interpreters interpret for the MLS witness and the time that information is conveyed to the jury. Within this feedback loop, the interpreters, parties, and other experts can refine the interpretation in a way that enhances its integrity. In this way, the court can protect the proceedings from errors in fact, form, and function.

A. *Introducing Translations into Evidence*

The court's handling of non–English witness testimony through interpreters is quite different from the court's handling of non–English written documents introduced into evidence. Interpreting in-

[182] MIKKELSON, *supra* note 132, at 67.

volves "the transfer of an *oral* message from one language to another in real time," whereas translating involves "the transfer of a *written* message from one language to another," which may occur at any time.[183] An interpreter is in the courtroom speaking as her words enter the record. Occasionally, an interpreter may also do a sight translation, or an on-the-spot reading and translation of a document in real time, for entry into the record.[184]

Translators, however, see their work enter into evidence quite differently. Some procedural differences afford written translations greater protections than those readily available for real-time interpretations. Though the Federal Rules of Evidence do not directly address the introduction of foreign language documents into evidence, some states have addressed this issue in an addition to their rules of evidence under Rule 1009. Arkansas and Texas, for example, only admit translated documents and recordings into evidence when the party seeking admission includes an affidavit from a qualified translator certifying its accuracy and then provides both the original text and its translation to all parties.[185] Other parties can then review the translation, object to portions, and submit evidence supporting their own proposed translations.[186] If another party submits an alternative translation, the court must determine whether there is a genuine issue regarding the accuracy of the translation, and if there is such an issue, the court can allow both parties to submit their proposed translations to the jury for its determination.[187]

These rules do not affect a party's right to enter evidence by live testimony, which presumably includes the court's working interpreter during witness testimony.[188] Faced with evidence in a foreign language, a party in Arkansas can seek to introduce either a scrutinized translation or a live-action sight translation by the proceedings inter-

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[183] *Id.* (emphasis added). Mikkelson does differentiate between "translating" and "translation," the former requiring a written source text, whereas the latter refers to the general act of transferring between languages, whether it be through interpreting or translating. *Id.*

[184] *See id.* at 76-77.

[185] ARK. R. EVID. 1009; TEX. R. EVID. 1009; *see also* EDWARDS, *supra* note 99, chs. 6-7; Shuy, *supra* note 63, at 6.

[186] *See, e.g.*, ARK. R. EVID. 1009(b). Different procedures, with different consequences and problems, may accompany written translations of earlier verbal events, such as transcriptions of covertly recorded telephone conversations. *See* Mary Bucholtz, *Language in Evidence: The Pragmatics of Translation and the Judicial Process*, *in* VIII TRANSLATION AND THE LAW, *supra* note 141, at 115, 116-17.

[187] ARK. R. EVID. 1009(d).

[188] *Id.* R. 1009(e).

preter.[189] Translators working outside the courtroom have access to many more resources than are available in the courtroom, and they produce more accurate translations.[190] One study found significant disparity between courtroom interpretations and out-of-court written translations of the same source language.[191]

In these Rule 1009 situations, the court relies on the adversarial system to ensure accuracy and integrity in the language conversion. If the parties provide competing translations, the judge can allow it to become a question of fact for the fact-finder to decide, or the judge can use a special proceeding to decide which version to accept. Within either avenue, each side can present its proposed translation with its supporting experts to persuade the fact-finder why its particular translation is more accurate.[192]

In contrast, in a sidebar between the judge and the parties discussing a challenged interpretation, the court has only the few attending interpreters and little or no access to a static version of the source language to use as resources. The judge, "despite [her] lack of expertise in the languages used, translation principles, and linguistics," must make a finding of fact that is particularly difficult to remedy once made.[193] The court also runs the risk that the interpreter will make nearly irrebuttable assertions of fact in her interpretation, supported by the court's validation of her qualifications, which itself was based, not on her ongoing performance but on the court's initial assessment of her qualifications following voir dire.[194]

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[189] *Id.*

[190] *See* EDWARDS, *supra* note 99, ch. 3. Most courts disallow many of these materials, and the timing of the live interpreting prevents ready access to them. This is also a glaring difference between regular translation done outside the courtroom and sight translation, which is an oral translation of a document in court done without prior preparation. *Cf.* MIKKELSON, *supra* note 132, at 76-77.

[191] *See, e.g.*, HALE, *supra* note 39, ch. 5 (discussing semantic and syntactic differences between authentic courtroom interpretations and later-composed written translations).

[192] *See* Shuy, *supra* note 63, at 6-7 ("Sometimes [judges] throw up their hands and let both sides present their own transcripts to the jury.").

[193] *Id.*

[194] The defendants made a similar argument in *State v. Van Pham*, 675 P.2d 848 (Kan. 1984). There, the defendants tried to reserve their right to challenge the choice of interpreter later in the proceeding after they had a better opportunity to measure the interpreter's effectiveness and accuracy, but the "trial court was not satisfied with this response and indicated if the two defendants had any objection to the court's interpreter they were to voice them then. The competency of an interpreter should be determined prior to the time he or she discharges his or her duties." *Id.* at 856. Nor were the defendants permitted to challenge the competency of the interpreter in the

Written translations presented to the court sidestep many of these potential pitfalls.[195] First, because both parties must share evidence prior to trial—including the original and translated texts—both sides know in advance the facts, form, and function of the language proposed for introduction into evidence. Second, the parties do not rely on a court-appointed interpreter's performance on the particular day the evidence is introduced. Instead, the parties can employ their own chosen translators. Last, the parties have access to significant resources prior to the evidence's introduction. If the court must hold an evidentiary hearing to resolve differences among parties regarding a translated document, the parties can present expert witnesses to assist the court.[196]

B. *Applying the Translation Evidentiary Model to CDI-Interpreted Testimony*

Most every interpretation, if permitted the luxury of time and attention, would come out better than the time-constrained courtroom version created with few resources.[197] Indeed, current shifts between simultaneous interpreting for overall proceedings and consecutive interpreting for witness testimony evolved in part because consecutive interpretation is generally felt to provide enhanced linguistic access with only modest losses to the court's time and efficiency.[198] Most courts agree that when a witness testifies in a foreign language, con-

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jury's presence, despite defendants' allegations of numerous errors during the trial. *Id.* at 861-62.

[195] This argument should not be construed to imply that the work of translating is in any way beneath the work of interpreting. As Marshall Morris notes, "legal translation is *not* a matter of 'mere formulae,' not something that can be done in automatic fashion." Marshall Morris, *Editor's Preface* to VIII TRANSLATION AND THE LAW, *supra* note 141, at 7. Just as an interpreter faces the challenge of discerning among the "infinite nuancing of texts and meanings," so too does the translator. *Id.* at 1.

[196] The standards for admitting expert testimony are described in Federal Rules of Evidence 702 and 703.

[197] For numerous examples of improved form and function in translated questions over their authentic courtroom counterparts, see HALE, *supra* note 39, at 213-29.

[198] Consecutive interpreting is the model for nearly all witness testimony, but even it has limits. During the Nuremberg trial, which was a showcase of simultaneous interpreting and the marvels of multilingual technologies that eventually served as the model for United Nations proceedings, simultaneous interpreting was used for all phases of the trial. E. Peter Uiberall, *Foreword* to GAIBA, *supra* note 1, at 11. One estimate suggested that the trial, conducted simultaneously in four languages, would have taken four years instead of one year had the court imposed a consecutive interpreting requirement. *Id.* Simultaneous interpreting at Nuremberg, however, did occasionally cause problems. *See, e.g.*, GAIBA, *supra* note 1, at 108-11 (describing Göring's exploitation of his knowledge of English and German to attempt to show that the interpreters were biased and that the trial was an orchestrated sham).

secutive interpreting is necessary to ensure accuracy, even when it slows the trial.[199] In similar fashion, a court facing the introduction of MLS testimony should, upon a party's showing of need, temporarily slow the trial to best ensure the integrity of that testimony. Using a CDI is one mechanism that slows the trial, but the parties also need a corresponding period to study the MLS witness's responses before waiving their right to challenge the interpretation.

In one proposal, Grabau and Gibbons suggest that the judge, when faced with a dispute about the accuracy of an interpretation, should appoint another interpreter as an expert witness to help the court resolve the matter.[200] This approach has two weaknesses. First, the court faces the same issues of competency and accuracy with the second interpreter as it does with the first. Second, this approach only works if the court has adequate safeguards to ensure the source language reviewed by the second interpreter is identical to that encountered by the first interpreter. This is often only available through audio or video recordings, unless the dispute is one that can be resolved by repetition of the witness's statement. This method is particularly ineffective when dealing with an MLS deaf witness because a second CDI would be required to either witness the entire source testimony or execute her own interaction with the witness in order to come to an understanding.

This Comment suggests an alternate procedure for handling MLS testimony that allows for greater linguistic care and scrutiny. This proposal serves as an alternative to—not a blanket replacement for—the current CDI-ASL team interpreting during MLS witness testimony. This model may be helpful in situations where the MLS witness's testimony is particularly contentious, crucial, or uncertain.

If the court finds such a hearing necessary, the interpreter and CDI would continue to act as witness interpreters. The attorneys would conduct direct and cross-examinations outside of the presence of the jury but in the presence of video cameras. Following witness testimony, each side may subject the videotaped testimony, with its proposed interpretation, to its own linguistic analysis to identify whether the interpreters accurately convey the MLS witness testimony.[201] Here, parties would have a better opportunity to identify errors

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[199] MIKKELSON, *supra* note 132, at 70.

[200] Grabau & Gibbons, *supra* note 75, at 290-91.

[201] The videotape would preserve the ASL interpreter's signed interpretation of the original question, the CDI's interaction with the MLS witness, the MLS witness's responses to the CDI, the CDI's signed response to the ASL interpreter, and the ASL

in fact, form, or function that, had the witness been an English speaker, would have been apparent in open court. Their analysis would occur in an environment with more resources and more time to identify and challenge substantive errors. Unlike the contemporaneous-objection requirement in open court, here, the parties could identify errors, challenge them, and provide suggested corrections en masse.

This analysis could reveal, for example, instances where the interpreters introduced or omitted a substantive fact or significantly altered the form or function of a question or response. If the interpreters deviated from the attorney's question or if identified errors lead to a need for additional witness questioning or clarification, the court can put the MLS witness back on the stand. If the parties contest the proper interpretation for a particular portion of the MLS witness's testimony, the parties can introduce expert testimony from sign language linguists or other specialists with insight into the language dynamics of MLS deaf adults.[202] With this additional information, the court could choose which interpretation to present to the jury and have the interpreters voice over the erroneous part on the videotape before showing it to the jury. The court could also allow both parties to present their versions and experts to the jury, leaving it as an open question of fact for the jury to decide.

In the end, the jury would view the videotape of the MLS witness's testimony. That videotape would contain the interpreter's vocal interpretations, with perhaps some voice-overs to correct errors. Here, the jury would retain its ability to see the witness's body language, facial expressions, and other visual features customarily thought to be a part of the jury's task in discerning which competing narrative to accept.[203] The court could frame the showing of the videotape with in-

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interpreter's spoken response. A more limited approach, which could narrow the focus of this evidentiary hearing, is to allow scrutiny of only the CDI and MLS witness interaction, thus leaving the ASL interpreter's work subject to challenge in typical fashion during the trial.

[202] In an ideal sense, a linguist would "analyze the language data and reach conclusions about it that would be the same no matter which side uses it. Trial testimony is simply reporting the results of such analysis." Shuy, *supra* note 63, at 17.

[203] Courts have often stressed the need for jurors to see the testifying witness and for defendants to have an opportunity to confront their accusers face-to-face. *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1019-22 (1988) (disallowing a screen to obscure testifying sexual assault victims from the defendant without individualized findings that the particular witnesses needed "special protection"); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 106 (6th ed. 2008) (describing demeanor problems with hearsay because the declarant "is not under the gaze of the trier of fact,

structions similar to those instructions that accompany the court's explanation of why a CDI intermediary is necessary to overcome the deaf witness's semilingualism or nonlingualism.[204]

A recent California appeal shows a situation where such a hearing may have been appropriate. In *People v. Vasquez*, a jury convicted the defendant of shooting Frank Hernandez in Hernandez's mother's living room.[205] The mother, Carmen Zapata, was in the living room when the shots were fired, and she proved to be a key witness in iden-

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at least at the time he speaks, so the trier lacks those impressions and clues which voice, inflection, expression, and appearance convey").

[204] *See, e.g.*, People v. Vasquez, No. B162629, 2004 WL 348785, at *2-3 (Cal. Ct. App. Feb. 25, 2004). In *Vasquez*, the trial court included this explanation to the jury to help them understand various accommodations made for an MLS witness's testimony:

> This particular witness, Ms. Zapata, does not speak and does not hear. She uses a form of sign language and gesture to communicate. That sign language and gesture is different from and set apart from American Sign Language or any other national sign language. It incorporates certain parts of common sign language and incorporates what she has learned through her childhood and adult experience by way of an ability to communicate and express herself.
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> . . . .
>
> For that reason, the court has seen fit to utilize the services of two different interpreters for each occasion when Ms. Zapata is either questioned or gives an answer. The interpreter standing directly in front of you now in the green, Ms. Gonzales, is known as an intermediary interpreter. Her skills are developed because she also does not speak and is hearing impaired. Accordingly, the intermediary interpreter has some similar experiences as would a witness that does not speak and does not hear. The . . . intermediary . . . will then utilize the services of the American Sign Language interpreter. Before you right now in the black is Ms. Cobb.
>
> So when a question is posed from counsel, it first goes to the American Sign Language interpreter. Right now that would be Ms. Cobb. She will then translate it in sign language for Ms. Gonzales. Ms. Gonzales will then use a form or a mixture of both known sign language expression, gesture, and facial expression and body language to communicate the essence of the question to the witness.
>
> The witness in turn will respond to Ms. Gonzales and then to the American Sign Language interpreter, Ms. Cobb, and then Ms. Cobb will announce the testimony to the court.
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> . . . .
>
> I also gather that in the form of sign that the witness understands, there aren't signs to cover certain concepts and that's some of the struggle we've been having to communicate; because like any and every American, we all have equal access to the courts and if it means that we have to make special accommodations, we make special accommodations.

Id. at *2-3 (internal quotation marks omitted).

[205] *Id.* at *1.

tifying the defendant as the shooter.[206] Zapata was deaf, and the lower court found her to be a semilingual MLS deaf adult and provided her with a CDI-ASL interpreter team when she testified.[207]

During the trial, the defendant's counsel repeatedly objected because "he could not tell if Zapata was 'understanding what's being interpreted to her because we have no independent way of discerning what her state of mind is when the question is posed to her.'"[208] In his appeal, Vasquez referred to a series of problematic exchanges. On direct, Zapata had testified she was asleep when the shots occurred, but when the defense asked her if she remembered telling the court she was asleep during the first shot, Zapata responded "No" and as the trial court described, had "an expression on her face [that] was one of startled surprise. . . . She had that kind of look on her face, like 'What are you talking about? I wasn't asleep.'"[209] The defense tried to clarify, but Zapata responded "Who was standing?"[210]

Vasquez objected during the trial, asserting that "this non sequitur proved either that Zapata did not understand the questions or that the interpreters were not interpreting correctly," and his appeal alleged his inability to confront the witnesses testifying against him.[211] The trial court permitted Vasquez to argue that Zapata was less credible in her memory recall, but it prohibited him from arguing that the interpreters erred in their interpretation.[212] The trial court noted in its opinion that the disputed exchange was the result of the interpreters erring in pronouns, and that Zapata had actually meant that her son's girlfriend was asleep.[213]

The appeals court denied Vasquez's claim that he was unable to confront Zapata in violation of his Sixth Amendment right,[214] but it did so with only a narrow view of the interpretation limitations that arose during the trial. The court seemed to look beyond the identi-

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[206] *See id.*

[207] *See id.* at *2.

[208] *Id.* at *3.

[209] *Id.* at *4 (alteration in original) (internal quotation marks omitted).

[210] *Id.*

[211] *Id.* at *4, 6. This is not the first challenge of the CDI-ASL interpreting process as a barrier to a defendant's right to confront witnesses. In *People v. Vandiver*, the court found the interpreter configuration adequate to protect the defendant's right to confront the MLS witness because each interpreter served a unique function in the process. 468 N.E.2d 454, 457-58 (Ill. App. Ct. 1984).

[212] *Vasquez*, 2004 WL 348785, at *4.

[213] *See id.*

[214] *See id.* at *6 (noting the breadth of questions afforded to Vasquez).

fied errors and focused on an ancillary claim that Vasquez was unable to effectively confront Zapata because he was limited in the forms of questions he could ask:

> A lawyer cannot expect to use the same sort of questions when cross-examining a child, a blind person, a witness who needs an interpreter, or, as here, a witness with substantial communication limitations. Undoubtedly the attorneys were frustrated at having to ask one form of question when they would have preferred to ask another type; however, this restriction was not imposed upon them by the court. . . . The confrontation clause guarantees the opportunity to confront and cross-examine, but this does not mean that a defendant has a constitutional right to ask a particular form of question.[215]

Overall, though, this case illustrates problems that could be addressed if the testimony were videotaped outside of the presence of the jury, if the parties could subject the witness's testimony to further examination, and if the court could squarely address these issues before possibly erroneous testimony goes to the jury.

This proposal does have its costs. First, it would make this aspect of the trial more time-consuming and expensive for parties to litigate. However, a court can offer this alternative model only when a party finds it valuable—that is, only when at least one of the parties finds the MLS witness's prospective testimony crucial enough to its case to merit paying additional expenses at trial. Earlier interactions, including depositions, with the MLS witness may apprise the parties that they need to apply additional scrutiny to resolve ambiguities or misunderstandings in the MLS witness's version of events. That party would bear the burden of showing that it was substantially in its interest or in the interest of the court to incur the additional costs. If the MLS witness were peripheral, perhaps the added expense and inconvenience would be too much for the small benefit of increased clarity; in those situations, the regular interpreter/CDI consecutive model may suffice.[216] The court could also limit the boundaries of the challenges—if the parties do not already self-impose limits[217]—to misrepresentation of facts only, leaving the interpreters' handling of form or function unaltered.

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[215] *Id.* (quoting People v. Tran, 54 Cal. Rptr. 2d 905, 912 (Ct. App. 1996)).

[216] *But see* LaVigne & Vernon, *supra* note 4, at 934-35 (discussing the need for adequate and yet fiscally responsible due process accommodations).

[217] *See supra* text accompanying notes 171-172 (explaining the traditional reticence to object when the court may view the substance of the error as nonprejudicial).

Just as the court and the parties gain access to the nuances of interlingual transfer when a translator prepares a written translation and presents it in both the source and target languages, so too could a court gain access to the richness and depth of the CDI's interaction with the MLS witness. This access would provide the court and the parties with greater insight into any latent but functional information contained within the interaction.

This model has another ancillary benefit: record preservation. The court's videotape would document the major components of the interpretive process, and it would present a more complete picture to any appellate court reviewing the matter, where preservation of both the source and the target language renditions are essential to determining the adequacy of the interpretation.[218]

CONCLUSION

Courts are becoming polylingual environments. In the American courtroom, spoken and written English are the swords and shields that adversarial parties and judges use to instruct, persuade, and coerce. Only in the past several decades has the interpreter become a fixture in the courtroom as a medium of accommodation for non–English speakers. However, the legal profession too often accepts the conduit model, believing that the mere presence of a working interpreter is sufficient to ensure accurate transfer across languages. Indeed, many of the specific characteristics of language that perform key instructing, persuading, and coercing tasks do not always maintain their integrity as they move through the sieve of an interpreter.

Inasmuch as a single interpreter may be a sieve, inadvertently filtering or adjusting facts, form, or function of the language within the courtroom, an additional intermediary interpreter may compound these risks, especially because the CDI works with even greater latitude in her interactions with a semilingual or nonlingual witness. These intermediary interpreters provide a valuable link to MLS witnesses. However, the court should reject the conduit metaphor, which leads to a belief that information transfer happens seamlessly in such an impaired and nuanced environment. Further, the court should not

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[218] *See* State v. Van Pham, 675 P.2d 848, 858 (Kan. 1984) (recording the trial court's use of short-term audio-cassette recording to play back testimony when resolving interpreter disagreements); BERK-SELIGSON, *supra* note 42, at 200-02, 214, 217 (discussing the difficulties in handling appeals based on interpretation error when the record does not contain a recording); *supra* note 176 (noting the importance of original language interpretation on appeal).

entirely rely on the adversarial environment to ensure interpreter accuracy and competency when sufficient time is not granted to parties to meet the task.

Instead, the court should consider deviating from its typical evidentiary model when doing so might shed additional light on the nuances of the lingual and semilingual interaction of an MLS deaf adult testifying through CDI and ASL interpreters. The steps used to introduce document translations would help parties to more adequately monitor an MLS witness interpretation before it is provided to the jury.

In the end, this will provide the MLS witness a fair opportunity to have her statement accurately recorded in the courtroom. The parties will have a fair opportunity to review the interpretations to ensure the accuracy and integrity of the spoken interactions. The jury or fact-finder will receive an interpretation that more accurately aligns with the facts, form, and function the MLS witness intended. Most importantly, the system of justice will move beyond the legal fiction that interpreters transparently pass through language barriers.