Interpreters as Experts: The Task & Its Effect

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Abstract

Expert witnesses serve an important role in the litigation process. When evidence is complicated, scientific or technical, courts permit this special class of witnesses to explain the evidence in a way which helps the jury or the judge to understand the issues in dispute in the case. Yet, because of the expert's special knowledge, judges are concerned that they will exert undue influence over the jury members. Accordingly, there are legal standards that must be followed when having experts provide testimony. ASL-English interpreters are sometimes called upon to serve as experts in matters involving issues of interpretation and/or language use in the Deaf Community. This paper explains the legal standards which interpreters functioning as experts should understand and apply in testifying. As well, survey data collected from a pool of ASL-English interpreters who have served as experts is reported and examined in terms of how effectively their work conforms to legal standards.

I. Introduction

Interpreting in the legal system – particularly in court – is an extremely challenging task. Interpreters who specialize in legal and/or court interpreting are often seen as resources in areas outside of the traditional role of interpreter. When issues arise in a legal matter related to the competency, ethical behavior of other interpreters (or signers), or even general issues relating to interpretation and the culture of deaf people, courts often look to legal and/or court interpreters to provide expert witness services.

To date, there has been good basic training regarding how to function as a legal and/or court interpreter or how to present one's credentials when being qualified to interpret in a matter; however, there has been no systematic effort to inform interpreters acting as experts of the legal standards for admitting expert testimony or the practical aspects of functioning in the capacity of an expert witness. This paper explains the legal standards which interpreters functioning as experts should understand and apply in testifying. As well, it reports on survey data collected from a sampling of interpreters who have previously acted as experts in matters involving issues of interpretation and/or language use within the Deaf Community.

II. Role and Function of Expert Witnesses

Unlike in daily conversations, the judicial system has stringent rules controlling the timing, nature and content of in-court communications. Rules govern who can speak, how questions may be asked, when people may speak, and how responses may be formulated. Each person in a court room has a prescribed role with respect to communications. The judge oversees the process and is literally the only one who can speak at will. The jury is constrained with respect to both the topics and the timing of their communications. Attorneys must follow highly

formulaic communicative recipes for presenting their arguments and conducting witness examinations. Not surprisingly, witnesses are limited to answering questions and relaying information only when called upon and in an appropriate manner.

Different rules apply to different kinds of witnesses. Fact witnesses are those who answer questions about events personally seen or heard. In most cases, fact witnesses are not permitted to give opinions about what they saw or heard. The judge or jury draws conclusions about the ultimate issues in the case based upon the information relayed by fact witnesses.

Expert witnesses are retained well after the specific events giving rise to the litigation. As a result, most experts will not have personal knowledge of the actual matters at issue. Rather, experts develop their opinions in anticipation of testifying in a lawsuit.

Expert witnesses enjoy a unusual status in court: they are unique speakers in terms of the topics which they are called upon to address. When evidence is complicated, scientific or technical, courts permit this special class of witnesses to explain the evidence in a way which helps the jury or the judge to understand the issues in dispute in the case.[1] The Federal Rules of Evidence explain that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[2] Experts are the only witnesses who are allowed to testify in this manner.

Because of the expert's special knowledge, judges are concerned that they will exert undue influence over the jury members. Jurors may be unable to substitute their judgment for the opinion of an expert. In fact, "[a] sizeable body of research suggests that expert testimony influences juror decision making in predictable ways."[3] As a result, courts are less amenable to permitting experts testify if the subject matter is one in which the average juror can understand without much difficulty. Nevertheless, experts are used in a good number of cases, and often multiple experts are used by each side within a single case.

The Federal Judicial Center has published a study on the use of expert testimony in federal civil trials.[4] The Center surveyed attorneys and judges to determine how often and in which content areas expert testimony is admitted. By far the most common type of expert was the medical professional. The Center reported that most of the opinions were given regarding either the extent of the person's injury or the cause of the person's injury.

In terms of substantive areas of law, tort cases represented the most frequent type of case in which expert testimony was offered. According to the Center's survey, experts were used in four broad professional categories: medical/mental health, engineering/process/safety, business/law/financial, scientific specialties and other specialties. In 297 federal trials, a total of 1203 experts were employed. The numbers indicate that multiple experts were hired by the

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[1] The Federal Rules of Evidence are used in all United States District Courts and have been adopted by some, but not all of the states. This paper discusses the Federal Rules in order to work with a uniform body of law.

[2] Federal Rule of Evidence 702.

[3] Kovera, M., Russano, M., & McAuliff, B., (2002) Assessment of the Commonsense Psychology Underlying *Daubert. Psychol. Pub. Pol'y & L.* 180, 188.

[4] Johnson, Molly T., Krafka, Carol & Cecil, Joe S., (2000). *Expert Testimony in Federal Civil Trials: A Preliminary Analysis*. Federal Judicial Center.

respective parties. Although not a common occurrence, the court also has the authority under the Federal Rules to engage an expert for itself.

III. ASL Interpreters as Experts

During the Fall of 2005-Spring 2006, the authors conducted a survey of ASL interpreters who had been called upon to act as experts—in some cases, individuals were interviewed to gather more specific data. The individuals surveyed were identified through the network of ASL-English court interpreters, along with appellate court decisions that were available for review. Approximately 35 individuals were contacted and asked to participate in the survey—12 participated and approximately 10 indicated that they had no direct experience as experts. There was no response from the remainder. The 12 respondents reported serving as expert witnesses in a total of 57 cases. (See Graphic 1).

The authors also surveyed a number of interpreters who had had prior interpretations reviewed by ASL interpreter experts.[5] Like the ASL interpreter experts, some of those interpreters were personally interviewed. The results of the survey were incorporated into a presentation at the Iron Sharpens Iron conference in Atlanta, Georgia in May 2006.

The survey respondents reported that ASL experts are hired most frequently in criminal cases. Two thirds of the instances in which ASL interpreters were retained involved reviewing another interpreter's prior interpretation. This testimony typically arose in a motion to suppress evidence in a criminal matter when there was a question as to whether the deaf person understood and knowingly waived their Constitutional rights. Associated with the analysis of a prior interpretation, was the need in a number of cases to also assess and testify about the deaf defendant's language use. (See Graphic 2).

Even in cases where a prior interpretation was not at issue, ASL interpreters were often asked to testify about a deaf person's particular method of communication and the reasons for specific configurations of interpreters. In cases in which deaf interpreters were used, ASL interpreter expert witnesses were asked to explain the reason why the specialized type of interpreting was necessary. Experts found themselves describing the deaf person's unique language profile and briefing the court regarding the role and function of deaf interpreters.

At times, ASL interpreter experts were hired to explain linguistic or cultural issues not related to a specific deaf person's use of language. For example, experts provided information on appropriate accommodations for deaf employees in discrimination cases. ASL interpreter experts described the appropriate accommodations for deaf consumers in public and private settings such as a hospital or law office. (See Graphic 3).

Since ASL interpreters function as expert witnesses with some regularity, the area deserves attention in the professional literature and discourse of ASL-English court interpreters. In order to adequately complete the task of an expert, the legal standards that apply to all expert witness testimony will be examined. Information from the survey respondents and from the reported cases involving ASL interpreter experts will be incorporated where relevant.

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[5] The term ASL interpreter expert is not in common usage currently. This paper uses the term to refer to the ASL interpreter, or other professional and to distinguish that person from the interpreter whose work is being reviewed.

IV. The Charge of the Expert Witness

The Supreme Court established the right to expert services in criminal matters in *Ake v. Oklahoma,* where it held that an indigent defendant has a right to a defense expert to assist in evaluation, preparation and presentation of the defense.[6] *Ake* presented the argument that a psychiatrist should be provided at state expense to determine the defendant's competency to stand trial. The Supreme Court agreed. The state would be required to provide the raw materials necessary to be able to prepare and present a defense. If there was a competency issue, counsel needed the assistance of an expert to assess the defendant's abilities. Non-indigent defendants are free to associate experts as deemed necessary by counsel; however, if those experts intend to testify, they must be qualified, the testimony must be helpful to the jury and the methodology used to arrive at the opinion must be reliable.

An expert's usefulness is not limited to providing in-court testimony; though, often the expert contributes to the litigation team in a variety of ways short of actually testifying. This occurred in a small percent of the cases reported by the ASL interpreter experts. For example, expert consultation regarding the configuration of an interpreting team occurred in several cases where the court did not require testimony regarding the same.

A. Evaluate the client's competency

At times, a defendant's mental abilities to understand and participate in the proceedings may be in question. A defendant cannot constitutionally be tried if he or she is unable to meaningfully participate in the proceedings. An expert might be retained to determine if the client is competent and provide testimony on the issue. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on ones' own behalf or to remain silent without penalty for doing so."[7] According to the Supreme Court, "a defendant's right to effective assistance of counsel is impaired when he cannot cooperate in an active manner with his attorney."[8]

1. Competency standards

If a mental defect prevents the defendant from being able to consult with counsel, to understand the witnesses against him or to assist the attorney in conducting cross-examination of the witnesses, then the defendant cannot be tried until or unless those mental faculties reappear.[9] The standard for competency is well settled and requires a determination of "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him."[10]

Certainly, one can be incompetent under this definition because of an organic defect. One may also be fall under this definition because of a present incompetence in language which

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[6] 470 U.S. 68 (1985).
[7] *Drope v. Missouri,* 420 U.S. 162 (1975)
[8] *Riggins v. Nevada,* 504 U.S. 127, 144 (1992).
[9] *Pate v. Robinson,* 383 U.S. 375, 378 (1966).
[10] *Dusky v. United States,* 362 U.S. 402 (1960).

impairs the ability to consult with counsel with a reasonable degree of rational understanding which prevents a factual understanding of the proceedings. At times, deaf defendants fall within this category. When there is a suspicion of linguistic incompetence, the task of examining the deaf defendant and forming an opinion normally falls to an ASL interpreter expert.

2. Linguistic competency

Linguistic competency is different than mental competency; although, in some respects it presents similar barriers to effective trial proceedings. When a deaf person, for whatever reason, does not possess the language skills required to cognitively process interpreted information, a question arises whether there are mental issues, linguistic issues, or if some other explanation exists for the inability to participate meaningfully in the proceedings. Often the ASL interpreter is the first person to recognize issue with the deaf person's linguistic processing abilities. Naturally the interpreter is then looked upon as a resource for determining how to proceed.

Many interpreters do not feel qualified or comfortable providing a professional opinion about a deaf person's comprehension level. However, often the interpreter is in a unique position to assist the attorney in locating a properly credentialed expert. Over 40% of the time, when cases were referred to the expert survey respondents, the referrals came from an interpreter involved in the case. In about 20% more of the cases, the referral came from another interpreter who knew of the experts work. (See Graphic 4).

According to the survey respondents, ASL interpreter expert witnesses were often consulted to evaluate the deaf person's language skills and give an opinion with respect to the person's linguistic competence to stand trial or to understand a prior interpretation (such as a previous waiver of rights). The expert may meet with the deaf person and engage in a language assessment tests in order to determine the person's linguistic skills, ability to understand the proceedings and identify strategies that promote the most effective communication with the deaf individual. At times, the expert may be asked to review another interpreter's work to give an opinion on whether a prior interpretation was adequate for the specific language and communication style of the deaf person.

In the case of the expert respondents in this survey, it was more common for them to assess the deaf person's language skills in relationship to a prior interpretation than it was for them to assess the deaf person's language skills in terms of competence to stand trial. A few of the respondents are also linguists in addition to being interpreters, and they were the individuals who testified about language competence in terms of standing trial. (See Graphic 5).

In those instances where the experts analyzed the language skills of the deaf person in relationship to a prior interpretation, the interpretation was also analyzed in terms of its accuracy in relationship to the original source message. This two step process—assessing the interpretation in terms of its general equivalency to the source message, and assessing the interpretation in terms of its accessibility to a specific deaf person—yields different results. In a few instances, the interpretation was simply not equivalent to the source message, regardless of the deaf person's language competence. Therefore, the issue of the deaf person's language competence was less of a factor than the fact that the interpretation was not accurate, regardless of the consumer.

3. Opposing experts: The analysis of one case

Frequently, the opposing side will present contrary linguistic testimony. Divergent opinions by experts are not uncommon. The bar's penchant for locating an expert to present a contrary opinion has lead to criticism of experts, branding them as hired guns who present junk science in a battle of the experts in the court room. Some of the criticism was well-deserved and led to major revisions in the federal rules and the case law for admitting expert witness testimony in the federal system which will be addressed later in this article.

Shook v. Mississippi[11] involved two experts who came to opposing conclusions regarding a deaf criminal defendant's linguistic competence and ability to participate fully in a legal proceeding In *Shook*, the defendant was described as "a person with serious, permanent hearing disability and diminished communication skills."[12] Mr. Shook challenged his incarceration by claiming that his due process rights had been violated at trial. He contended that because his physical disability (hearing loss) prevented him from being competent to stand trial, his trial should have been indefinitely delayed until he had the opportunity to learn sign language.

Two experts, Dr. McCay Vernon and Ms. Marie Griffin, testified in various proceedings and depositions. Both experts were found qualified in their respective fields: psychology of deaf people (Vernon) and interpretation, including legal interpretation and oral interpretation (Griffin). Vernon's opinion was that Mr. Shook was profoundly deaf and even with an excellent interpreter; he would understand no more than probably five percent (5%) of what was happening in the court room. The opinion was based upon spending less than half a day with Mr. Shook some 14 years earlier and upon a review of evaluations done by other individuals. Even though the court found Vernon academically qualified, it discredited his opinion stating that "his testimony is more of a generalization from studies conducted rather than any specific observation."[13]

Griffin was also found to be qualified as an expert. The court considered her to be an eminently qualified interpreter in the field of oral interpreting in a legal setting. Griffin had been appointed to interpret Mr. Shook's trial. Griffin's opinion described the various methods by which she was able to convey the proceedings to Mr. Shook. Based upon her experience at the trial, she provided her assessment of Mr. Shook's understanding of the original proceedings.

Ms. Griffin used oral interpreting supplemented with techniques such as drawing pictures for relative locative information. According to her testimony, Mr. Shook smiled and nodded when the testimony was in his favor, and became upset when he disagreed with witnesses. At times, Mr. Shook would inform her that he did not understand something, and she would adjust her methods accordingly. Based upon Griffin's testimony, the court concluded that her close association with and opportunity to observe Mr. Shook made her opinion more valid and reliable. In many of the reported cases regarding competency, competing ASL experts have been secured who provide conflicting opinions.

B. Assist the attorney to understand technical aspects of the case

Expert witnesses are teachers of sorts when retained on a case for which they have esoteric or specialized knowledge not generally available outside of practitioners in their field.

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[11] 2000 WL 877008 (N.D. Miss.).
[12] *Id.*
[13] *Id.* At *6.

Attorneys cannot be expected to know the technical aspects of each content area brought to them by a client. A litigation firm knows how to litigate, a process that varies little regardless of whether the case involves employment law, medical malpractice, or copyright infringement. The firm however will need assistance in understanding and formulating, condensing, presenting and summarizing information in a clear and understandable manner both for the attorneys involved and for the judge or jury.

For example in discrimination cases based upon a disparate impact theory which asserts that certain classes of people are impacted adversely by a neutral employment practice, a statistician must be employed to sample the employer's hiring practices and determine whether protected categories of people are negatively affected by a particular employment practice to a statistically significant degree. The expert will have to assist the attorney in understanding the data, the methodology used and the results obtained. Further, the expert will assist in preparing the data and the conclusions in a format and manner which can be presented to the jury in an easily digestible manner. Preparing the information requires time and creativity. The expert should begin to think about how this teaching role can be achieved early in the litigation process.

The majority of ASL interpreter experts noted that they encountered significant misconceptions, faulty assumptions and erroneous information from the court and attorneys, and found that much of their task as an expert was educating the system about the nature of interpreting, language use in the Deaf Community and differences between ASL and English. They found that establishing this information was foundational to the Court's understanding of the implications of an interpretation, or the specific language profile of a deaf individual, or the necessity of a certain composition of interpreters in a matter (See Graphic 6) .

C. Assist in preparation of the case and evaluate opponent's evidence

As a part of the expert's charge, the attorney will be educated regarding the technical aspects of the field. Additionally, the expert will assist in preparing the information and organizing the evidence accurately, but in the light most favorable to the respective side. This duty includes reviewing the case and learning the law and counsel's theory. The expert must learn the opponent's case as it relates to his or her testimony. The expert should provide direction and suggestions to assist the attorney in refuting the merits of the opponent's case as it relates to the area for which the expert has been hired.

It is perfectly appropriate for the expert to research and gather information, statistics and data from other sources such as governmental sources in the form of pamphlets, brochures, reports and the like. In addition, the expert can and should provide reference materials related to the field of interpreting, linguistics and deaf studies to support a point or rebut an opposing expert's point. The expert can should check the opposing expert's report for any erroneous or dubious positions that can be rebutted with information from governmental or private associations.

The expert should educate the attorney on the potential experts that the opponent might retain. Once the opposition has arranged its team, the ASL expert can advise the attorney on the opposing expert's strengths and weaknesses, and can research the person's prior writings for use on cross-examination. The expert may to attend the opposing expert's deposition, or at the very least, review the deposition transcript with an eye toward locating inconsistencies, shaping lines of questioning, and explaining the expert's methodology and conclusions to the attorney and the client.

In terms of the experts responding to the survey, an opposing expert was used in eleven (11) of the fifty-seven (57) cases. When an opposing expert was used, the ASL interpreter expert was always informed. It is interesting to note that only a small percent of the opposing experts prepared a formal report (See Graphic 7). However, when a report was prepared, the expert respondent reviewed the report and was prepared to provide testimony about it. In most cases, the opposing experts report was never discussed because either 1) the opposing expert ultimately agreed with the report of the ASL interpreter expert, or 2) upon reading the report of the expert respondent, or hearing the expert's testimony during depositions, the opposing side entered into a settlement agreement.

For example, in the Tennessee v Jenkins case, both the opposing expert and the interpreter whose work was challenged agreed upon cross-examination that the ASL interpreter expert's transcription and back-translation were in fact an accurate representation of the signed interpretation being challenged.

The expert should assist in designing a visual presentation of their information highlighting the opinions and complementing the strengths of the case. For example, in a criminal matter involving deaf people, an expert used a combination of "post-it" notes to cover portions of words in a sentence to demonstrate the meaning that was added to a sign by the use of non-manual markers. According to observers, the impact of this demonstration illustrated the importance of non-manual markers in a way that the average lay person could understand and differentiate from the common misconception that sign language uses simple "facial expressions."

Any number of techniques can be used. The expert is constrained only by his or her imagination. The data should be presented visually. Different people have different learning styles and a point may be more effective if presented in a variety of modes.

D. Assist the client participate in the defense

ASL table interpreters assist the client in participating in the preparation and defense of the case even though they do not testify in the case. When the defendant is deaf and does not have access to counsel because the proceedings interpreters are otherwise occupied interpreting the proceedings, the table interpreter performs the critical function of assisting with privileged communications at the table during the proceedings. The table interpreter also assists the deaf party by preparing him or her for the potentially new experience of working with proceedings interpreters.

In addition to providing support for the table interpreter position, *Ake* holds that indigent defendants have the right to the assistance of other experts in order to fully participate in a criminal case.[14] Counsel might require additional experts to adequately present and defend the case. The ASL expert, along with the attorney, may explain how the expert's opinions in the report were determined or how any independent research was conducted. The client may be asked about the expert's opinions during the deposition. In one case, the expert report indicated that audiological deafness is not the only criteria for determining whether an individual uses American Sign Language and is a member of the deaf community. The plaintiff was hard-of-hearing, but culturally deaf and used American Sign Language to communicate. For this person's testimony, the explanation in the expert's report assisted him in expressing his

[14] *See Ake v. Oklahoma,* 470 U.S. 68 (1985).

deposition responses. Another witness who had not reviewed the report was asked whether he considered himself "big D" or "little d" deaf. The distinction, which was in the expert's report, was new to him and he was unable to respond. However, upon further examination, the witness was able to explain his cultural identification with the deaf community. Having the expert available to explain the research, data and opinion on the matter enables the client to see how to respond to the issue in an honest, consistent and persuasive manner.

At times, the expert may be retained with an eye towards providing deposition or trial testimony. For example, one expert who had provided the majority of expertise during civil litigation reported that all but one of the cases had reached the deposition stage. Once a report and deposition testimony was provided, the case settled. Other times, the expert is not expected to testify, but simply to consult with the litigation team. The distinction between the two roles is important. Experts should understand the differences between the two types of engagement and the associated consequences of each.

E. Testifying experts

Federal Rule of Civil Procedure 26(A)(2) requires the disclosure of the name and the opinion of testifying experts only. The Rule exempts experts who are consulted with only, but who are not expected to testify. Federal Rule of Civil Procedure 26(a)(2)(B), states the disclosure obligations as follows:

> Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Accordingly, in federal proceedings, the testifying expert must prepare and sign a report listing the complete opinions on which he or she will testify. The expert must explain the bases for the opinion and detail the data that was considered in arriving at his or her conclusions. Additionally, the expert must provide information about his or her publications and prior testimony within a four-year time period. Although the disclosures are made at the beginning of the case, there is a continuing obligation to supplement the disclosure as it is learned during the course of the litigation. Testifying experts in federal cases come under more scrutiny than consulting experts. Only one of the fifty-seven (57) reported cases were federal court matters. Accordingly, a report was not consistently requested in the cases reported by the ASL interpreter experts (See graphic 8).

Once disclosed, all of the testifying expert's analysis, documents, research, tests, drafts, calculations, emails, notes, conversations, and correspondence with anyone related to the case

becomes discoverable and must be copied and provided to the opposing side. Draft reports are particularly problematic. Drafts may be incomplete and misleading if made prior to having all of the data and facts necessary to form a well-reasoned opinion. Once a premature thought is fixed in form, it must be disclosed to the other side. The draft might contain inconsistencies, errors, or omissions. Experts should be careful not to create an extensive paper trail in the course of the engagement. Even jotting simple notes on pleadings or other documents given for review is dangerous because all notes must be disclosed as well as emails, correspondence and even a copy of the expert's contract with the law firm and the invoices. Imagine on cross-examination, an expert confronted with a document which has the words "problematic" scrawled in the margin in the witness' own handwriting. Naturally, any problematic areas should be pointed out to counsel, but they should be pointed out verbally.

This is one area where the ASL interpreter experts experience differed from the standard. Although the majority of the experts took notes, the majority did not disclose them to the opposing side, nor were the asked to disclose them. Only about 25% of the experts were asked to disclose their notes (See Graphic 9). However, one expert with extensive experience indicated a shift related to notes. In the past, the expert made notes but disclosure was never addressed. In more recent cases, notes were discouraged by the hiring attorneys and disclosure was required.

1. Fees

Because of the additional work required of a testifying expert, the fees are normally greater than for a consulting expert. When deposed by the opponent, the Federal Rules require that the deposing party pay for the expert's time and expenses. When initially hired, the expert may not realize that for the time and expense of providing deposition testimony, someone other than the law firm with whom they hold a contract will be paying the bill. Federal Rules of Civil Procedure 26(a)(4)(C & D) provide that

> (4) *Trial Preparation: Experts.*
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> (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.
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> (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

2. Ethics

Finally, with respect to testifying experts, they must understand the contours of both the attorney-client privilege and the work-product doctrine. Rules regarding confidentiality, the

implications of a protective order governing the use of case-related documents and the like must be understood and respected by the expert. Inadvertent disclosure by the expert of documents or information can cause untold problems for counsel. Unauthorized contact with the opposing side or clients must be avoided. Attorneys are not permitted to contact a person known to be represented by counsel. The expert, as an extension of the attorney, should not breach this ethical provision. Counsel should be copied on any and all communications originating from the expert to anyone regarding the case. Finally, conflicts of interest must be disclosed to counsel as soon as they are known or suspected.

F. Consulting experts

The onerous discovery obligations facing testifying experts are not present in the case of consulting experts. Discovery of information can be obtained regarding a consulting expert only under extreme circumstances. Federal Rule of Civil Procedure 26(b)(3) provides that general trial preparation materials, including those from consultants may be obtained "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Federal Rule 26(a)(4) provides:

> (4) *Trial Preparation: Experts.*
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> (B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is **not expected to be called as a witness** at trial only as provided in Rule 35(b) or upon a showing of **exceptional circumstances** under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.[15]

A consulting expert's opinion and assistance is not transparent; rather, it is considered work-product of the attorney. The consultant's involvement is less stressful because of the shield provided by the doctrine.

A number of ASL interpreters responding to the survey had served in both capacities either consulting only or of testifying. Because a court interpreter may be known to local attorneys, they are called upon to consult by explaining the issues presented by deaf clients in interpreted cases. At times, consultation is informal and sporadic. At other times, the interpreter may be retained as an active participant in developing the litigation strategy as it relates to interpreting issues even though not expected to testify. In the surveys, at least one respondent considered testifying or consulting to be a part of a public service offered to the courts. In sum, the scope of the work that an ASL interpreter expert can be expected to perform mirrors experts in other fields. ASL experts have been deposed, attended the deposition of opposing experts, drafted reports, and consulted on issues related to the preparation and defense or prosecution of legal matters. Once retained with a clear vision of the expert's purpose, the next step is to examine the legal standards for admitting expert testimony.

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[15] Emphasis added.

V. Admitting Expert Testimony

Simply because an expert is retained or consulted does not mean the expert will be permitted to testify. The expert's opinion may turn out to be unhelpful or the issues upon which the expert was hired to given an opinion about may be removed from the case through a variety of pre-trial mechanisms. The Supreme Court has held that the judge must perform an inquiry that "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[16] The intent of the inquiry is to reduce the judiciary's reliance upon overly subjective expert opinions and to ensure that the knowledge the expert seeks to impart is based upon facts, inferences from verifiable facts or other established truths. The manner in which the inquiry into the expert's reasoning or methodology applies to ASL interpreter experts is a question we will examine throughout this paper. Ultimately, whether an expert is allowed to testify is a judicial decision made after an inquiry by the judge.

A. *Frye* test

For most of the twentieth century, the federal courts and most state courts employed the *Frye* test to determine whether expert witness testimony should be admitted into evidence.[17] The *Frye* test required that the substance of the expert's testimony be based upon methods that were **generally accepted in the relevant scientific community**. The judiciary deferred to the judgment of the academic or scientific community regarding whether the method produced good science. Deference to scholars and scientists relieved the court from examining the validity of the method or reasoning used to obtain the opinion.

If practitioners in the specific field agreed that the method of reaching a conclusion was valid, the court would not second-guess the consensus. To satisfy the *Frye* test, the expert's examination focused on their academic and professional credentials and whether other theorists accepted the particular methods used. If the expert was highly educated, the opinion faced less scrutiny. A number of states still use the *Frye* test though it was discarded as the sole mechanism for determining the admissibility of expert testimony within the federal system.

B. The Federal Rule

The Federal Rules of Evidence embrace a different rule governing the use and qualifications of experts. Federal Rule 702, as amended, governs experts. The Rule states:

> If scientific, technical, or other specialized knowledge **will assist the trier of fact** to understand the evidence or to determine a fact in issue, **a witness qualified** as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is **based upon sufficient facts or data**, (2) the testimony is the product of **reliable principles and methods**, and (3) the witness has **applied the principles and methods reliably** to the facts of the case.[18]

Beginning in 1993, the Supreme Court issued a series of decisions dealing with the admissibility of scientific evidence.[19] To understand how attorneys approach the task of

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[16] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993).
[17] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
[18] Emphasis added.
[19] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

ensuring that expert testimony is admitted, we will examine the provisions of the Federal Rule as modified by a number of Supreme Court cases.

C. Helpful to the trier of fact

The content of the expert's testimony must be in an area which is outside of the experience of the jury. Juries do not need assistance understanding every day concepts. Rule 702 permits inquiry into the content of the testimony to determine whether it is an area truly helpful to the trier of fact. This inquiry is conducted by the court, outside of the presence of the jury, as a preliminary matter.

Though the testimony must be helpful, expert witnesses are not permitted to be too helpful by giving an opinion that answers the question the jury is sworn to decide. In other words, an expert should not testify that the defendant, in fact, breached a contract, or discriminated against an employee. Though the Rule has been relaxed recently, the federal rules still prohibit an expert from testifying in a criminal case concerning the defendant's mental state when it is an element of the crime. The expert cannot testify, for example, that the defendant acted in intentional disregard of a known danger, an element of certain crimes, because the state bears the burden to prove all elements beyond a reasonable doubt to the jury.

The federal rules now permit an expert to give an opinion on certain other matters not permitted in the past.[20] For example, an expert might be permitted to state that a paternity test result excluded other males in the relevant population at 99% and therefore, the expert's opinion is that the male in question is the biological father of the child. Likewise, an expert might be retained to testify that a deaf suspect did not knowingly waive his Miranda rights based upon an examination of the interpretation of the warnings. Each opinion would be scrutinized through the lens of Rule 702 in terms of whether the expert's methodology in arriving at the conclusion is reliable and relevant, whether the expert is qualified and whether the testimony is helpful to the trier of fact.

D. Qualified

Before an expert can give an opinion under Rule 702, the expert must be shown to be qualified. The question of qualifications deal with two essential inquiries: The expert's actual qualifications and the fit between those qualifications and the issue upon which the expert is asked to testify.

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[20] FRE 704 states:

> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

1. Credentials

No specific criteria exist for determining the appropriate credentials. The examination, by necessity, must be flexible. The Rules permit an expert to be qualified by virtue of their skills, experience and/or education. When the content area is one in which experience is the primary criterion, the examination of the expert's qualifications will be fact intensive. In regards to ASL interpreter experts, an interpreting certificate should be coupled with additional credentials for example in teaching or linguistics. In the case of the experts surveyed, all hold academic degrees and the majority hold graduate degrees—four of the twelve hold a Ph.D. And, these same four were involved in 36 of the 57 cases.

With respect to deaf people, attorneys often turn for help to social service centers, schools for the deaf, vocational rehabilitation offices or other governmental or quasi-governmental entities serving the deaf community. Although these resources may be a good starting place, the ability to provide concise cogent opinions regarding language and interpretation issues not surprisingly requires education in linguistics and interpretation. Simply because a person knows sign language or is deaf does not mean the person has the skill or ability to evaluate language or interpretations for equivalency. As an example, in the Jenkins case, the opposing expert was a deaf person who taught at the school for the deaf. The individual did not have any academic background or direct experience related to linguistics or interpreting, yet the accuracy of the interpretation was the issue before the court.

Many of the experts interviewed mentioned the conflict they felt when opposing experts, who were involved in the deaf community but were not professional interpreters, testified. Culturally, the ASL experts did not want to disparage other professionals, particularly deaf professionals; however, the majority concurred that the task of providing expert services regarding language and interpreting issues should be done by those who have an education in, and are practitioners of, interpretation or linguistics.

In *Shook,* when considering whether to continue the trial indefinitely to enable Mr. Shook to learn sign language, the court heard from an official of a state association of the deaf who testified that deaf adults who have not learned sign language would require two to three years to learn sign language. Another expert was a director of a deaf services unit in a government agency who also testified that it would require two to three years for Mr. Shook to learn sign language. Most interpreters and educators would probably agree that competency in a second language for an adult learner will take considerably longer than these estimates suggest. The reported opinion shed no light on the bases upon which these experts relied in suggesting these time frames.

In *United States v. Mesa*, one of the experts was found to be unqualified based on his lack of credentials and his testimony.[21] Joseph Mesa was confessed to murdering two Gallaudet University students. At trial, Mesa moved to suppress the evidence claiming, among other things, that he did not waive his constitutional rights knowingly and voluntarily.

In *Mesa,* two defense witnesses were tendered as experts, Arden Coulston and Betty Colonomos. The witnesses questioned the quality of the interpretation during the Miranda and interrogation, among other things. The court found Mr. Coulston to be "either a wholly incredible witness or . . . simply not competent to make the interpretations, or he was doing some

[21] *United States v. Mesa,* No. 02-CF-915 District of Columbia Court of Appeals (decided May 12, 2005)

form of glossing that is irrelevant to any inquiry on the subject. . . ."[22] Mr. Coulston testified in a manner that created confusion and the appearance that he could not understand sign language.

General knowledge of deafness simply does not qualify one to testify as an expert and often provides incoherent and inconsistent information to the court about deaf people, language, culture and interpretation. At the extreme, when such testimony is credited by the court, it creates difficult precedent for future practitioners, deaf people and interpreters.

2. Fit

The expert's qualifications are established by an examination of their credentials, the fit between their credentials and the subject matter of the testimony, the facts upon which the expert's opinion is based, and the reasons for the opinion.[23] The fit between the expert's background and the issue in contention is a critical point, particularly when expert testimony is provided regarding the field of deafness and interpreting. In addressing the 'fit,' one court stated that it is "not the qualifications of a witness in the abstract, but whether those qualifications provided foundation for a witness to answer a specific question."[24] It should be clear that the requirement that the expert is qualified "does not mean that a witness is an expert simply because he claims to be."[25]

In *Shook,* for example, Dr. Vernon was retained to give an opinion regarding Mr. Shook's ability to comprehend the proceedings against him. Vernon, however, is a psychiatrist who specializes in the "psychology of deafness." He is not a linguist, not an interpreter and the bulk of his experience deals with deaf people who have some kind of additional mental or cognitive limitations. It is questionable whether Vernon's academic credentials provide the requisite "fit" necessary to give expert opinion testimony in the field of interpretation and linguistics. However, Vernon is credentialed in *his* field and has been qualified to give opinions on the mental functioning of specific deaf individuals. A dubious fit between the expert's background and the opinion will be fully explored in a pre-trial motions hearing.

VI. Reliable & Relevant

Once the proposed expert has "crossed the foundational threshold of establishing his personal background qualifications as an expert, he must then provide further foundational testimony as to the validity and reliability of his theories."[26] Litigation over the past decade has refined the analysis by which the expert's offered testimony must be viewed.

A. Judge as Gatekeeper

The Supreme Court in *Daubert* changed the *Frye* generally-accepted standard in important ways, though it kept general-acceptance as one factor for judges to consider in determining whether the expert may testify.[27] Under *Frye,* the trial judge took a hands-off approach deferring to the scientific community. *Daubert* requires the judge to take an active role in ensuring that the science upon which the opinion is based is relevant, reliable and valid. *Daubert* suggested that an expert's opinion should be based upon scientific methodology which

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[22] *Mesa,* at 14.
[23] *Newell Puerto Rico, Ltd., v. Rubbermaid, Inc.,* 20 F.3d 15, 20 (1st Cir. 1994).
[24] *Smelser v. Norfolk Southern Railway Co.,* 105 F.3d 299, 303 (6th Cir. 1997).
[25] *Berry v. Crown Equipment Corp.,* 108 F.Supp.2d 742, 749 (E.D. Mich. 2000).
[26] *Berry v. Crown Equipment Corp.,* 108 F.Supp.2d 743, 749 (E.D.Mich. 2000).
[27] *Daubert v. Merrill Dow Pharmeceuticals, Inc.,* 509 U.S. 579 (1993).

"today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from the other fields of human inquiry."[28] In other words, an expert's subjective belief or unsupported speculation alone that the testimony is valid and reliable is insufficient.[29] Judges must inquire into the basis for the expert's opinion and to keep unreliable opinions from infecting the proceedings.

Daubert did not provide specific guidance to judges faced with a wide array of expert evidence in non-scientific areas of expertise. In *Kuhmo Tire Co. v. Carmichael,* the Supreme Court explained that *Daubert's* principles include non-scientific areas of expert witness testimony which may be based upon experience and knowledge in a field rather than on scientific experimentation.[30]

In *Kumho* the trial judge was faced with whether to admit "non-peer-reviewed expert opinion based on 'clinical' experience and observation outside the domain of traditional laboratory science; that is, to the relative merits of practical as opposed to scientific knowledge."[31] The *Kuhmo* Court stated: that the critical factor was to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of the expert in the relevant field."[32] Hence, testimony in the "soft sciences" including language, culture and interpretation must be viewed under the *Daubert/Kuhmo* analysis just like any other field of study.

Because of these new obligations placed on the trial judge, pretrial motions and hearings take on greater import for both the advocate who seeks to have expert testimony admitted and for her adversary who seeks to keep unsubstantiated "junk" science out of the courtroom.

B. *Daubert* hearing

The judge-as-gatekeeper role means, in practical terms, that lawyers do not make the decision about whether an expert will testify. The proponent has the burden to prove that the *Daubert* requirements are met.[33] The expert must testify with regard to the validity and reliability of the method underlying the proffered opinion. Most attorneys understand the difficulty of this task. As a result, attorneys spend a great deal of effort educating the expert regarding the legal standards for admitting expert testimony.

A judge must make a preliminary determination under Federal Rule of Evidence 104(a) that the expert is qualified to give an opinion on the specific issue in question.[34] Then, the court

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[28] *Id.*
[29] *Smelser v. Norfolk Southern Railway Co.,* 105 F.3d 299, 303 (6th Cir. 1997).
[30] 119 S.Ct. 1167 (1999).
[31] Peter D. Blanck & Heidi M. Berven, *Evidence of Disability after Daubert,* 5 Psychol.Pub.Pol'y & L. 16, 31 (1999).
[32] *Kuhmo* 119 S.Ct. at 1176.
[33] Travelers Property & Casualty Corp., v. General Elec. Co., 150 F.Supp.2d 360 (D. Conn. 2001).
[34] Rule 104(a) Preliminary Questions states:

> (a) Questions of admissibility generally.
> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

must make a determination that the substance of the testimony is reliable and relevant. The analysis takes place in a *Daubert* hearing.

All expert testimony, whether scientifically based or not, must be examined. Expert testimony in the field of language interpretation is non-scientific expert testimony and will be reviewed under the same analysis and is subject to the same challenges as any other substantive area of science. Interpreters functioning as experts should know the legal standards that must be met to have the evidence admitted.

In essence, judges want to ensure that the expert is giving an opinion growing naturally from their professional work and not specifically crafted for trial. The Supreme Court in *Daubert* was reacting to the influx of "hired guns" creating opinions at the insistence of counsel unrelated to their actual work in science or academia.

C. Reliable methodology

Relevance means that the evidence is helpful in proving or disproving an issue in the case. In theory, all relevant evidence is admissible.[35] Relevant evidence can be excluded if its prejudicial value outweighs its probative (truth finding) value, if it is cumulative of other evidence, if it is confusing to the jury or harassing to the witness.[36] Demonstrating relevance is the first hurdle any evidence must clear to be admitted.

After *Daubert, Kuhmo* and the 2000 amendments to the Federal Rule, expert evidence must be not only relevant to the issue in question, but the method used to arrive at the opinion must be shown to be reliable as well. Once the proposed expert "has crossed the foundational threshold of establishing his personal background qualifications as an expert, he must then provide further foundational testimony as to the validity and reliability of his theories."[37]

Daubert provided judges with several tools to evaluate the reliability of the underlying method employed by the expert in arriving at an opinion. The factors the Court suggested that judges consider include:

(a) whether the theory or technique can be and has been tested;
(b) whether the theory or technique has been subjected to peer review and publication;
(c) the known or potential rate of error or the existence of standards;
whether the theory or technique used has been generally accepted.[38]

Reliability is determined by examining how the expert arrived at the conclusion. The methodology and reasoning underlying the opinion the expert purports to give must be examined carefully to ensure that the opinion is valid concerning the precise issue in dispute.

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[35] Rule 401. Definition of "Relevant Evidence" states, "[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[36] Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[37] *Berry v. Crown Equipment Corp.*, 108 F.Supp.2d 743, 749 (E.D.Mich. 2000).

[38] Daubert v. Merrill Dow Pharmeceuticals, Inc, 509 U.S. 579 (1993).

1. Validity in social science opinions

Simply stated, a method is reliable if it consistently measures what it is supposed to measure. A method is valid if it accurately measures what it is supposed to measure. A broken scale may reliably give the wrong weight, for example, the scale might always measure weight five pounds light. The scale may be reliable but it is not accurate or valid. Hence, reliability is a necessary, but not sufficient condition for an expert's opinion to be admitted into evidence. The method must be both reliable (consistent) and valid (accurate).

In the social science fields, reliability and validity rarely deals with controlled experiments, falsifiability and rate of error as in the traditional hard sciences. Rather, the so-called "soft sciences" often present a professional's opinion reflecting "adherence to established standards of practice and [which are] based on training and experience."[39] In the absence of testing, qualitative methods can legitimate the results attained. Social science experts often base their opinions on their education, experience, review of the literature, outside investigation and at times, outside research done for trial or for non-litigation purposes. These are valid, if they are the same methods used by others in the same field to arrive at conclusions and opinions about specific matters.

In the case of the ASL interpreter experts, this 'test' of validity was fulfilled in part by the fact that the majority of experts sought consultation from colleagues. Since this area of specialization is still emerging in our field, this is an important safeguard. Consultation with colleagues provides a system of checks and balances regarding the methods used in formulating an opinion. And, although there are differences in how the experts approached the task, there were several commonalities—such as the review of case related materials and documents, review of relevant literature and legal interpreting training materials, review of videotapes of the relevant interpretations, and transcription and/or back translation of the interpretations (See Graphic 10). The challenge for all experts is to use reliable methodology and be able to articulate it.

2. Methodology concerning the semantics of a sign

The *Daubert* factors are not exclusive. Courts have the discretion to apply a variety of other means to look at the reliability of the expert's opinion in the absence of scientific studies and experimentation. Other important questions more related to social science experts include:

1. Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they developed their opinions expressly for the purposes of testifying.[40]
2. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.[41]
3. Whether the expert has adequately accounted for obvious alternative explanations.[42]
4. Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.[43]

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[39] *See* Blank & Berven, (1999) at 32.
[40] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
[41] *General Elec. Co. v. Joiner*, 118 S.Ct. 512, 519 (1997).
[42] *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994).
[43] *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).

5. Whether the field of expertise claimed by the expert is known to reach reliable results.[44]

When no independently verifiable method exists for determining the accuracy of the expert' method, the court can examine these or other factors. An expert will be asked for the bases of the opinion and how it was derived. The logic used to arrive at the conclusion will be examined. Other academic theories and the alternative explanations will be examined. If the field the expert represents is well-established with educational requirements and standards, the methodology is viewed more positively than if the field is suspect.

These principles were illustrated in *Shook.* Vernon's opinion that the defendant would understand no more than five percent of the interpreted trial was not credited because of the methodology he used. Dr. Vernon spent less than half a day with the defendant 14 years earlier, he reviewed other people's evaluations but conducted none of his own, and he generalized from his knowledge of other people rather than a specific understanding of the particular deaf individual on trial.[45] The court questioned Vernon's methods for arriving at his opinion stating Vernon's "testimony is more of a generalization from studies conducted, rather than any specific observation."[46] In *Daubert* terms, Vernon may not have been as careful in his paid litigation work as one would expert from an expert's professional work.

The court credited Griffin's methodology. Griffin based her opinion on communicating with Mr. Shook over an extended period of time, interacting with him during trial and engaging with him in a discussion of the testimony as it was happening. The court recognized that the field of interpretation maintains national standards demonstrated by its certification examinations. Because Griffin held a number of those national credentials, the court was confident that she knew and implemented the standards of the interpreting field.

The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'[47] ASL interpreter experts must be able to explain the methodology or basis that they use in determining whether an interpretation is effective without appearing as if they expect the court to take their opinion at face value. On what basis does the ASL interpreter expert assert that a text represents a well-formed *Miranda*? A number of methodologies exist that are supported by research, literature and standard practices in the interpreting field. The challenge for the ASL interpreter expert will be to be able to apply and articulate the methodology.

One qualitative study published by Cokely provides an example.[48] One of the conclusions Cokely presented may be stated as: To members of the Deaf community, the sign referred to as "INSTITUTE" has a positive semantic aspect which is not present in the English word "institute." Rather, the English word "institute" often has a negative semantic aspect. How would a court know whether to admit Cokely's opinion? Under *Daubert,* the methodology used to arrive at this opinion must be revealed to determine whether it is reliable and valid. If it is, the opinion may be admitted.

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[44] *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988).
[45] 2000 WL 877008 (N.D.Miss.).
[46] *Id.* at *6.
[47] *Daubert* at 1319.
[48] Dennis Cokely, Ph.D., CSC, (2001). Interpreting Culturally Rich Realities: Research Implications for Successful Interpretations. Registry of Interpreters for the Deaf: Alexandria, Virginia.

Given that it is not possible to poll every user of a language, what method do linguists use to determine the semantic range of a linguistic unit in any language? It is insufficient to rely on personal knowledge of the language.

Cokely's methodology consisted of established qualitative methods of interviewing people who can hear regarding the semantic range of associations they make when they hear a variety of terms and then noting their responses on a survey sheet. The research was not conducted for the purposes of testifying at a trial or at the behest of an attorney. Cokely's associates surveyed members of the English-speaking community in Boston and asked them for their understanding of eight specific English words that have culturally-bound connotations in the Deaf community.

The word "institution" which has positive connotations in ASL was one of the eight. Respondents were chosen at random from areas throughout the metropolitan area. Standardized reporting forms were used for each person interviewed. The results of the surveys were then analyzed. The research was published in a peer-reviewed journal. A peer reviewed publication is more credible than one published without peer review, because it must meet established criteria and is examined and approved for publication by a review board comprised of academics within the same discipline. A peer reviewed publication would be seen as more credible than one published without peer review, because it must meet established criteria and is examined and approved for publication by a review board comprised of academics within the same discipline.

Another interpreter educator, Debra Russell, conducted a qualitative analysis of the differences in court interpreter accuracy rates in selected portions of a mock trial.[49] Russell concluded that consecutive interpreting in court settings is more accurate than simultaneous interpreting. The methodology employed consisted of recording four interpreted discourse events in a mock trial. The trials were analyzed for "accuracy, interpreting errors by interpreting mode and discourse event, and errors per discourse events and the target language used by the interpreters."[50] Russell also conducted an examination of the statistical significance of the type of error by mode and discourse event, among other things.

In determining accuracy of the interpretations, Russell used typical categories of errors such as omissions of content, tense shifts, register non-equivalency, inaccurate but grammatically acceptable messages and inaccurate and grammatically unacceptable messages, source language intrusions and inappropriate interpreter involvement. Based upon the systematic analysis of the recorded trials for equivalency in interpretation, Russell was able to conclude that discourse events in trial settings are more accurate when interpreted in the consecutive mode.

Vernon, whom we have already discussed in the *Shook* matter, expresses another expert opinion which presents a more difficult scenario. Vernon has opined that "the *Miranda* warnings cannot be adequately administered to 90% of the deaf population" even when interpreted in ASL.[51] In essence, Vernon asserts that most deaf people will not understand the *Miranda* warnings and that ASL does not have the ability to convey the content accurately.[52] Vernon's

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[49] Debra L. Russell. (2002) *Interpreting in Legal Contexts: Consecutive and Simultaneous Interpretation.* Linstok Press: Silver Spring, Maryland.
[50] Russell (2002) p.65.
[51] Vernon, M., & Coley, J. (1978) Violation of constitutional rights: The language impaired person and the Miranda Warnings. *Journal of Rehabilitation of the Deaf.* p.7.
[52] Vernon & Coley (1978) p. 5.

ultimate conclusion is that deaf suspects should not be administered the *Miranda* warnings at all. Rather, counsel should be provided.

Vernon bases his conclusion that the *Miranda* warnings cannot be conveyed in ASL by stating that ASL has no one sign to convey the English word "rights." Vernon presents his conclusion thusly: "Since there is no sign for the term 'rights' as it is used in the *Miranda* warning, it is apparent that the deaf person who is given the *Miranda* warning in sign language has, in fact, been denied a basic Constitutional right." Vernon makes the same assertion about the term "waive" by claiming that because ASL has no single lexical item to represent the full legal meaning that the language is deficient and the concept cannot be conveyed.

In a *Daubert* hearing, a court would require more than Vernon's word that ASL is deficient in order to survive a motion to exclude the opinion testimony. Vernon extrapolated the conclusion that the only way to convey an English word is with a single equivalent ASL lexical item from faulty reasoning based upon an accepted premise. The accepted premise in ASL/English interpretation is that word for word equivalents do not exist. Many studies could be cited to support that universal and known truth. The unjust extrapolation Vernon makes can be stated as follows: Because word for word equivalents do not exist, the constitutional concepts cannot be expressed in ASL by *any* method. No support exists for this proposition. Several models exist of perfectly appropriate renditions of the *Miranda* warnings which use the full panoply of constructs in ASL to interpret the equivalent message expressed by the *Miranda* warnings.

The social science research underlying Vernon's conclusion was conducted by the National Association of the Deaf and presented some similarities to the qualitative research conducted by Cokely and Russell. The inquiry consisted of preparing a filmed version of the warnings and permitting a group of deaf graduate students to view the film. The students were "asked to write down what had been signed."

The results were structurally different from the warnings in English, and there were obvious glosses used in the written texts. The methodology question becomes whether it is a reliable methodology to film a signed text, have deaf users view the text, and have them write down in English "what had been signed?" A number of questions would be asked: Who were the students? How many were there? What was their training in ASL and English linguistics? What was their charge in writing down what was signed? Were they asked to write a translation, a transcription or simply write words for the associated signs? How were they instructed to account for the meaning not contained in the manual articulators, such as the locative relations, contextual frames, discourse markers and non-manual markers? How were their recordings assessed? By whom? According to what methodology?

Cokely's doctorate research demonstrates a qualitative methodology for concluding that an interpretation is accurate or inaccurate.[53] Cokely's research was based upon videotaped samples of interpreters interpreting a conference in Monterey, California. Ten interpreters were taped and the linguistic background and educational level of each interpreter was explained and considered in analyzing the accuracy of the interpretation. The research discussed by Vernon presented little demographic information on the linguistic skill or acumen of the deaf students other than to inform the reader that ASL was their native tongue and they were bright.

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[53] Dennis Cokely (1992) Interpretation: A sociolinguistic model. *Sign Language Dissertation Series.* Linstok Press, Inc., Burtonsville, Maryland.

Cokely's research revealed the qualifications of the individuals who transcribed the interpretations: "a highly qualified and experienced Deaf native user of ASL did the original transcriptions of each interpreter's performance and, in conjunction with the author, verified those transcriptions."[54] Rather than relying on glossing the interpretation into English, the transcribers used a widely known published transcription system to preserve the interpretations for later analysis.[55] Thereafter, Cokely conducted a qualitative linguistic analysis of a variety of errors in the interpretations, discussed the probable causes and the implications and applications for the research. Superficially, Cokely's method and Vernon's method are similar; however, when one looks at the *Daubert* factors, it becomes clear that only Cokely's analysis should survive the methodological reliability test.

Cokely's methodology for determining the accuracy of an interpretation has been implemented and modified by experts who were retained to testify with respect to the accuracy of the interpretation. Anna Witter-Merithew, in a reported case, *State v. Jenkins,* provides an example of implementing a careful methodology based upon well accepted practices, published and used by other academicians to determine the accuracy of the interpretation.[56]

Witter-Merithew was hired by the defense in a murder case to review the adequacy and effectiveness of an interpretation of the Miranda warnings. Because the original version of the warnings as interpreted was not preserved, the interpreter was called at a preliminary hearing, asked to reproduce the interpretation which was videotaped for the expert's review. The interpreter testified that the in-court rendition was substantially the same as the earlier version.

Witter-Merithew's process followed established guidelines for effective expert preparation and for accurate analysis of interpretations. Initially, Witter-Merithew conferred with counsel to ascertain the scope of the charge given to her. Additionally, she reviewed the relevant social background materials from the file and about the defendant's background and history. She met with the defendant for an extended period of time and engaged him in a discussion covering a broad range of subjects. Data was recorded from this interview and an initial report of observations was prepared.

Thereafter, Witter-Merithew viewed the videotape of the interpreted rendition and created a Baker-Shenk/Cokely type transcription of the tapes. Two deaf informants were used to verify the accuracy of the transcription. After the transcription was prepared, she produced a back-translation into English in order to gauge any variation or inconsistencies between the text of the warnings and the interpretation provided. Two non-deaf informants were used to verify the accuracy of the back-translation.

Once the back-translation was prepared, Witter-Merithew could analyze the interpretation for consistency or effectiveness as compared to the original source language of the warnings. The information garnered from the interview with the deaf defendant was used to determine the effectiveness of the interpretation for the specific individual involved. The interpreter's testimony at the hearing was also reviewed to gain insight into the interpreter's impressions in

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[54] Cokely (1992) p. 41.

[55] The transcription system was published in Baker, C. & Cokely, D. (1991) *American Sign Language: A Teacher's Resource Text on Grammar & Culture.* Gallaudet University Press. Silver Spring, Maryland: T.J. Publishers (1980).

[56] *State v. Jenkins,* 81 S.W.2d 252 (Tenn. 2003).

creating the interpretation, the rationale for her choices and the factors she stated influenced her process. The opinions for testimony were developed at this stage.

Witter-Merithew called upon colleagues who had prior experience as experts and reviewed her opinions with them. The final report included her opinions, the transcription, the back-translation, the language assessment and the assessment of the interpretation. A bibliography of related scholarship was prepared and a portfolio of her credentials was submitted in court. In other words, according to *Daubert* requirements, the expert revealed all the underlying data and facts upon which the opinion was based in order for the reliability of her methodology to be assessed.

D. Relevance (fit) to a contested issue

Once the methodology is shown to be sufficiently reliable, the next question is whether the jury would be able to independently arrive at the same conclusion without an expert's explanation. Taking Cokely's INSTITUTE example, the question is whether its meaning is in dispute at trial? If so, then it is a fact in "issue."

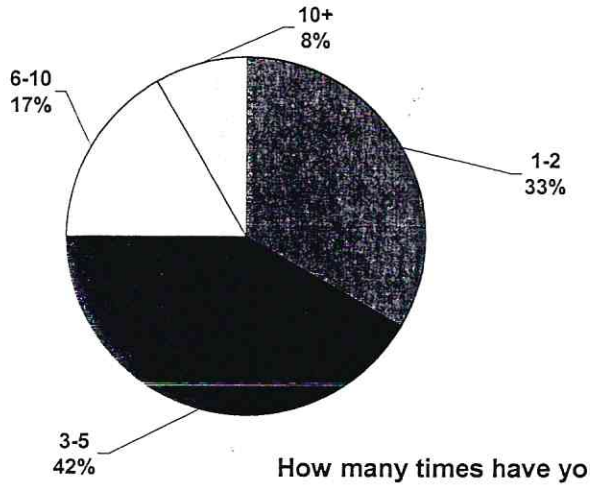
Assume a challenge to the interpretation. The parties dispute whether the interpreter's rendition of the sign "INSTITUTE" as "an educational setting in which a community of deaf people live, learn and share the culture of the American Deaf Community" was accurate. The "fit" question is whether the meaning of the word is being litigated. It is. If the jury would be able arrive at the same semantic range as Cokely did without the expert opinion, then the testimony of an expert is not necessary. Since the Deaf Community's meaning associated with the sign glossed INSTITUTE is one that most people who can hear would not arrive at independently, the opinion should be admissible. Cokely's standard methodology of interviewing and sampling demonstrates that those who can hear do not associate positive connotations with the term. Hence, it is likely the jury would not, absent expert testimony, come to the accurate interpretation of the gloss. The term is in issue, and the jury needs assistance to understand it accurately. The expert's opinion has a fit with a disputed issue.

VII. Summary

Clearly for ASL interpreter experts the discussion and analysis of the task of preparing a solid methodology for expert testimony is an emerging area of specialization within the field. Individuals agreeing to function as experts must have keen insight into the scholarship within our field, as well as the legal standards that govern experts. The four cases highlighted in this paper offer important insight into critical issues related to equivalency of interpretation, comprehension of interpretation, and interpreting practices employed by legal interpreters. They also provide insight into the practices employed by the experts. This article has demonstrated how the practices of the experts conform to legal standards.

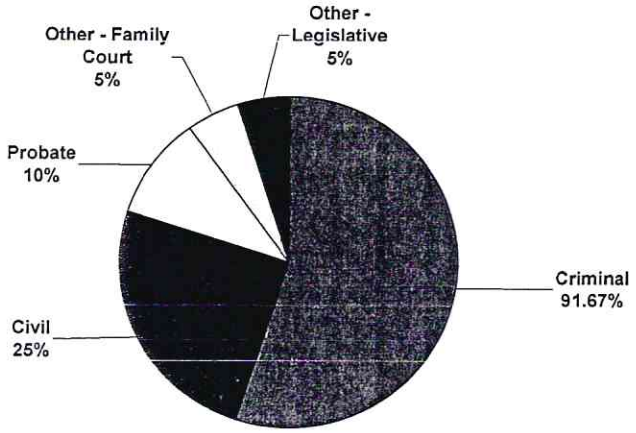
Having a forum to discuss this emerging specialty area is essential because out of the discussion, effective practices can materialize. The preliminary sampling done as part of the Iron Sharpens Iron presentation reveals a number of interesting trends in terms of how the task is approached. In many areas, the experts are aligned with legal standards and with one another. However, more data is needed and a more analysis of the issues that arose in all 57 cases is required. We look forward to the continued discussion and investigation.

Graphic 1.



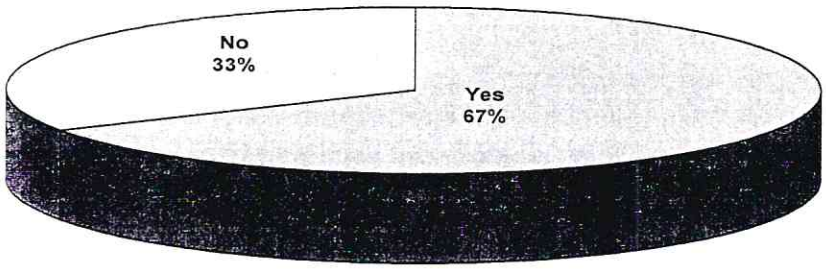
How many times have you served?

Graphic 2.



Nature of the Matter

Was the Work Reviewed for Interpreter Accuracy and Reliability?

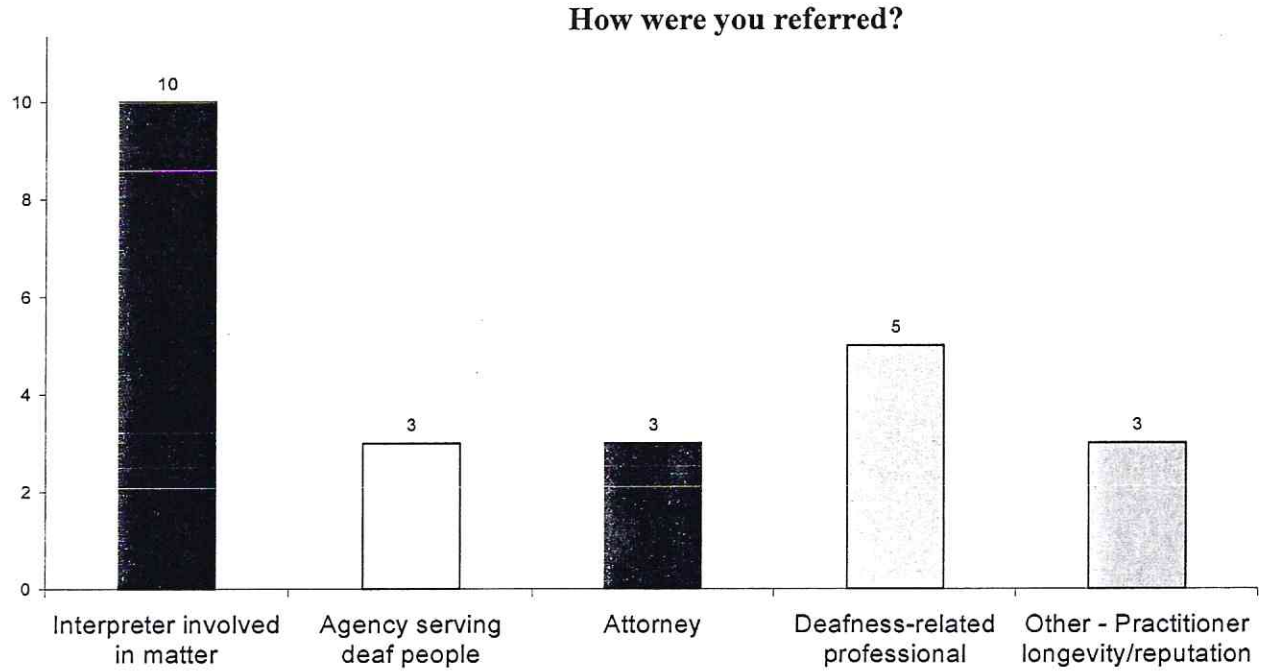


Graphic 3.

What other things did you testify about?

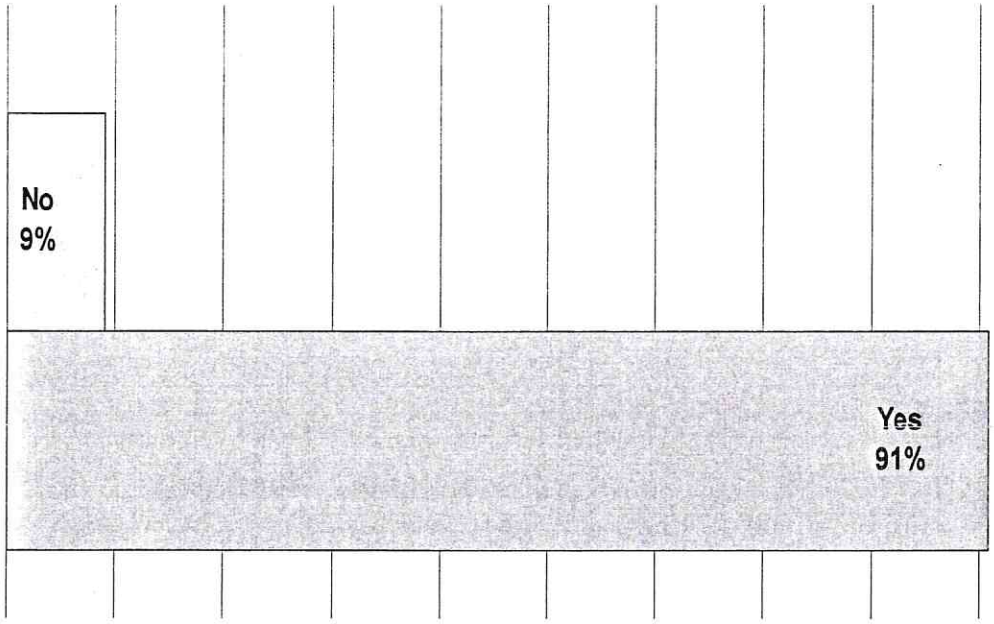
- **Interpreter services education**
- **Language of deaf persons**
- **Deaf Community and Deaf Culture**
- **Composition of interpreting team**
- **Accessibility issues in various settings**
- **Linguistic competency of deaf person**
- **Transliteration vs. Interpretation**
- **Linguistic differences – ASL vs. English**

Graphic 4.

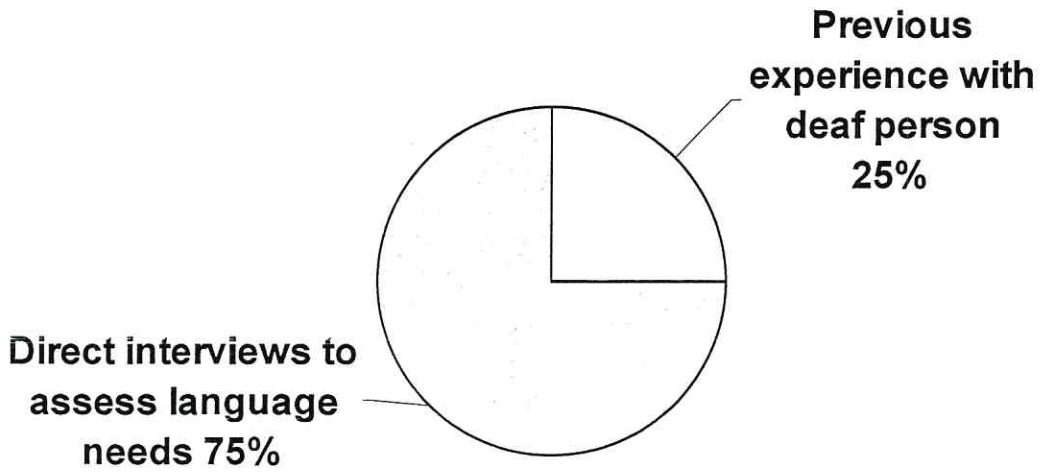


Graphic 5.

Did you assess the deaf person's language?

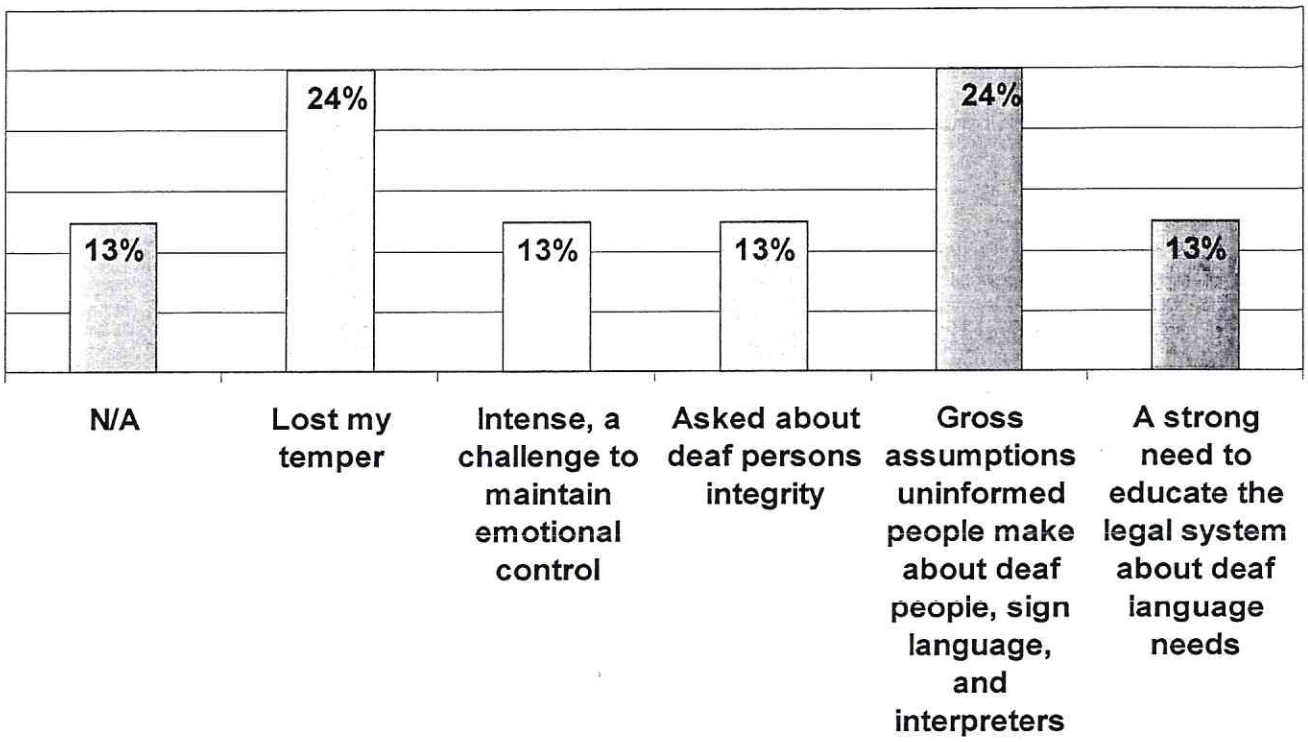


How did you assess the deaf person's language?

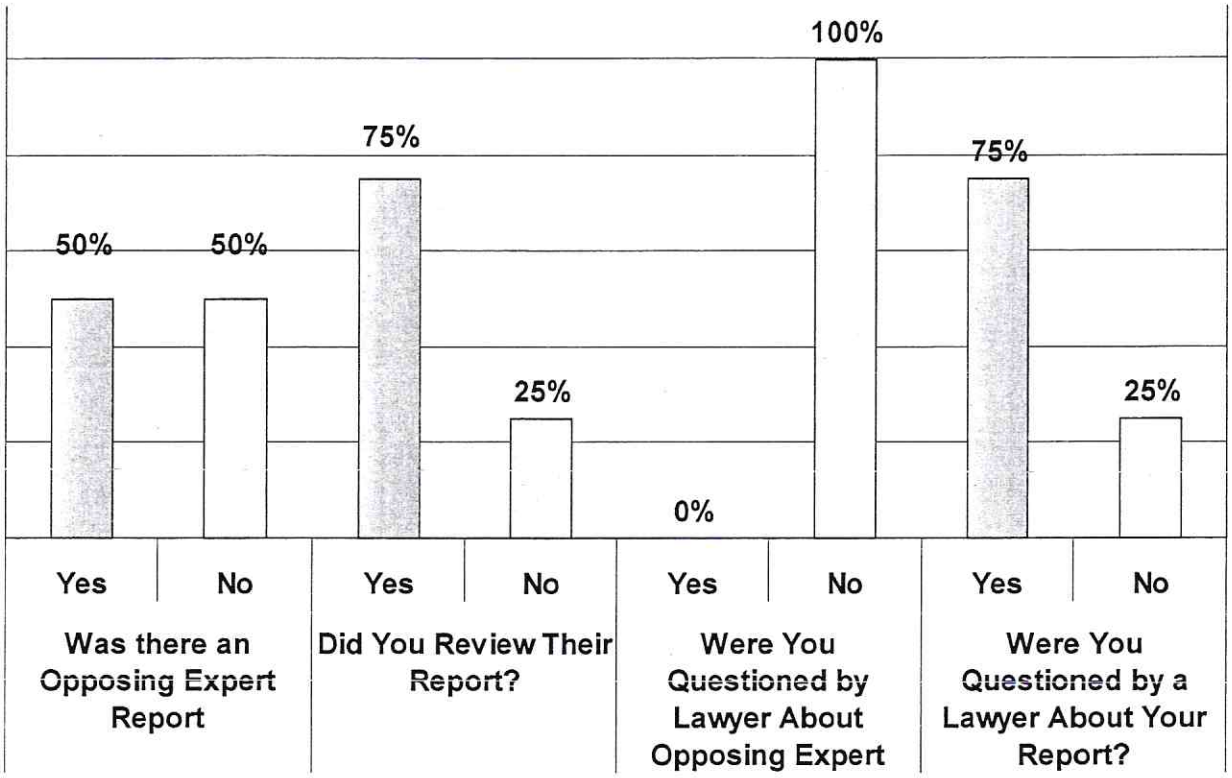


Graphic 6.

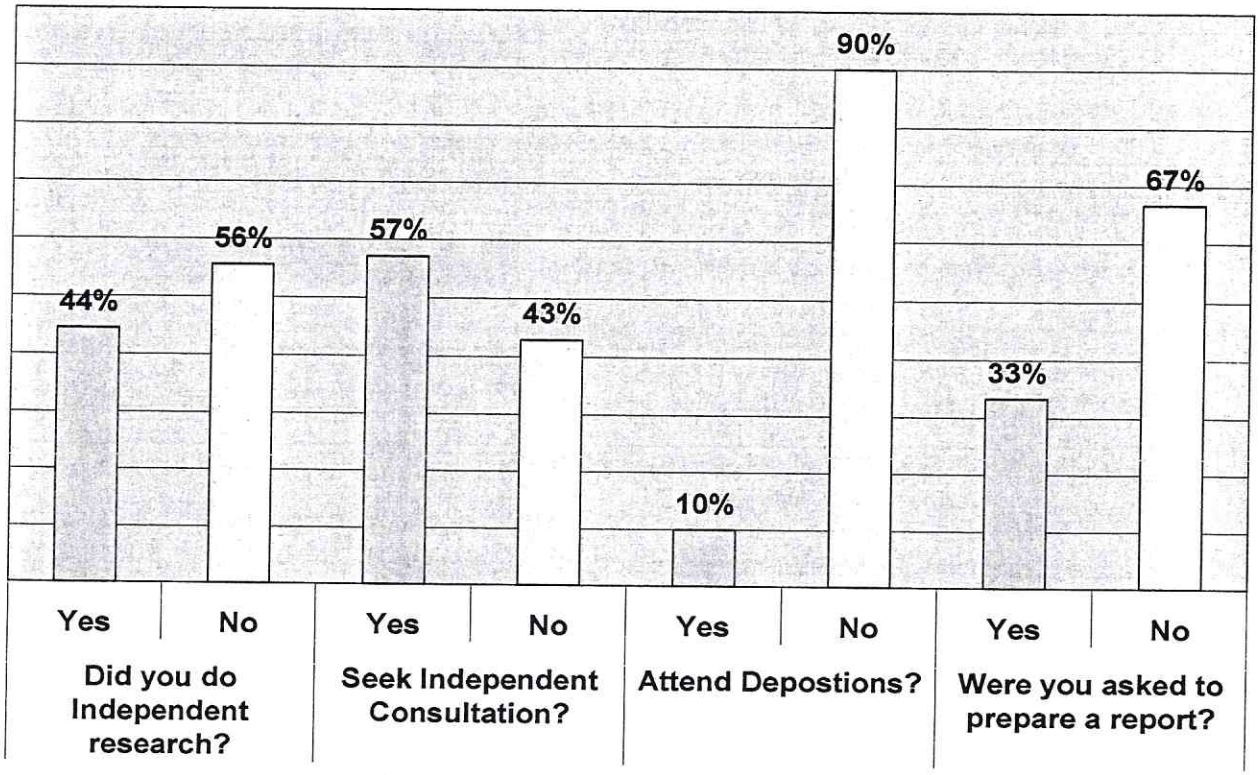
What do you recall about testifying during cross-examination?



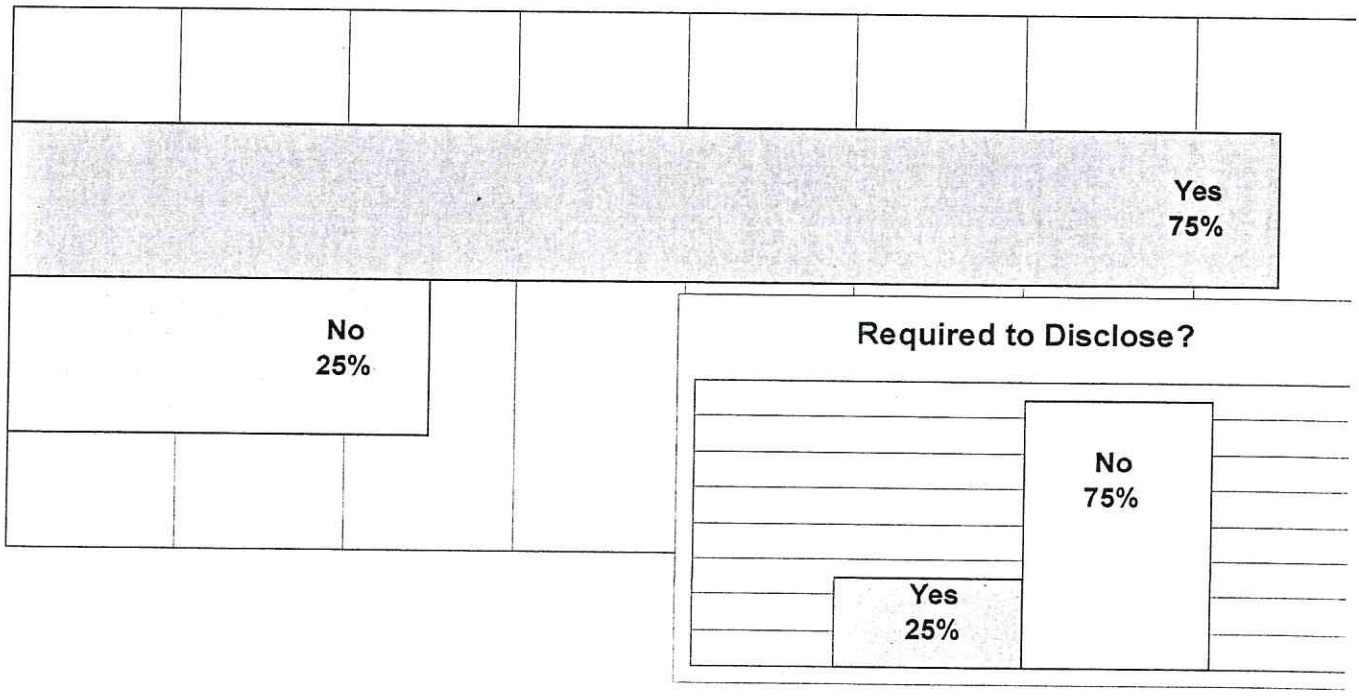
Graphic 7. **Opposing Experts in 11 of 57 Cases**



Graphic 8. **How did you prepare for the task?**



Graphic 9. **Did you take notes?**



Graphic 10. **How did you approach the task?**