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INTERPRETERS IN THE COURTROOM

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From the Editor...

Wisconsin is becoming an increasingly diverse and multicultural state. More and more often, we are seeing individuals who do not speak, hear, or understand English appear in court as parties and as witnesses. Wisconsin courts have thus come to need the services of an interpreter much more frequently. This issue of the *Wisconsin Defender* focuses on court interpreters to help those who work in the criminal justice system better understand the interpreting process and the proper role of a court interpreter.

The issue leads off with an article by Attorney Michele LaVigne, who offers several suggestions to help ensure that quality interpreting occurs in the courtroom. Her suggestions include the use of certified interpreters only, the use of counsel table interpreters, and audio or video taping the court proceedings.

Next, Milwaukee County Circuit Court Judge Elsa C. Lamelas describes the new Court Interpreter Code of Ethics, which went into effect on July 1, 2002. The Court Interpreter Code of Ethics was developed and proposed by the Committee to Improve Interpretation and Translation in the Wisconsin Courts and was ultimately approved by the Wisconsin Supreme Court.

Finally, Stephanie Kerkvliet, a sign language interpreter, shares tips to help ensure the use of qualified interpreters and accurate interpretations in the courtroom and Bruce Goodman, a Spanish interpreter, helps us understand the role an interpreter plays in the courtroom.

Additional articles of interest in this issue include "But it was only a DWI...," which illustrates the effect a drunk driving conviction can have on our clients who are not U.S. citizens and "Criminal Jury Instruction Committee Report," which discusses the recent activity of the Criminal Jury Instruction Committee.

Agency Mission

To enhance the quality of justice throughout Wisconsin by providing high quality, compassionate, and cost-effective legal representation; protecting the rights of the accused; and advocating as a criminal justice partner for effective defender services and a fair and rational criminal justice system

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(Note: Portions of this article are excerpted from a work in progress "Deafness, Language and Due Process: When an Interpreter Isn't Enough," by Michele LaVigne and McCay Vernon Ph.D)

Court Interpreters: "Good Enough" isn't Good Enough Anymore

By: Michele LaVigne*

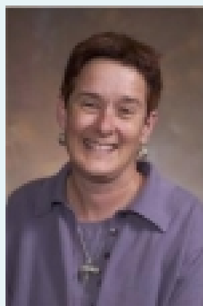
Interpretation "is a metaphysical act: an incomprehensible set of words becomes comprehensible, or nearly so… But [interpretation] is also, strictly speaking, impossible."[1]

When it comes to providing an interpreter for a deaf or non-English speaking defendant, Wisconsin law is relatively generous. In Wisconsin a court *must* make a factual determination whether an interpreter is necessary *anytime* the court has notice that a person has a language difficulty[2] and *must* make an interpreter available at no cost to a defendant or subject in a criminal or quasi-criminal matter (proceedings under Chapters 48, 51, 55, 938, or 980).

Where Wisconsin continues to struggle however is with the quality of interpreters and interpretations. My own experience with interpreters has primarily come through representing deaf and hard of hearing clients and I am sadly familiar with the inconsistency in the quality of interpreters and their interpretations. A few of the interpreters I have worked with are brilliant (I keep their number on speed dial); a few have made errors so substantial that they threatened to derail an entire case and they should never be allowed in a courtroom again without substantial training. Most are part of the vast spectrum in between. The range of competencies for foreign language interpreters is at least as wide. [3]

Until recently, Wisconsin's interpreter statute did not even define the term "qualified interpreter" and left the determination of qualification strictly up to the court.[4] This created a legacy of high school language teachers, neighbors, children, spouses, arresting officers, complaining witnesses, and even the judge's wife (who took a couple of sign language classes) all acting as so-called "interpreters" in court. [5] The statute was so vague that it gave judges and lawyers no way to determine whether the person called in as "interpreter" was in fact qualified, and essentially forced us to take it on faith that he or she was doing an adequate job. And even when attorneys had qualms about a particular interpreter, or the quality of his or her work, the statute helped contribute to a prevalent attitude that we would just have to "make do" with whatever interpreter was provided.

Recognizing this pervasive problem, the Director of State Courts appointed the Committee to Improve Interpreting and Translation in Courts to revise the statute, with the goal of improving the quality of interpreter services in state courts. The end product is new statutes, Wis. Stat. §§ 885.37 and 885.38 which govern the use of interpreters in court, and a Court Interpreter Code of Ethics (SCR 63.001 to 63.10) adopted



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by the Wisconsin Supreme Court. Both went into effect on July 1, 2002.

Wis.Stat. § 885.38(c) now specifically defines a qualified interpreter as a person who is able to "readily communicate with a person who has limited English proficiency; orally transfer the meaning of statement to and from English and the language spoken by a person who has limited English proficiency in the context of a court proceeding; [and] readily and accurately interpret…in a manner that conserves the meaning, tone, and style of the original statement, including dialect, slang, and specialized vocabulary."

The new Code of Ethics for Court Interpreters (*See* **"Interpreter Code of Ethics: An Important First Step"** by Honorable Elsa C. Lamelas on Page 8) requires that interpreters give full, complete, and accurate interpretations (SCR 63.01) and that interpreters assess at all times their ability to deliver services and that they immediately inform the court if they are unable to meet the appropriate standards. (SCR 63.05). Interpreters are also required to engage in professional development (SCR 63.09)

This statute and the Code of Ethics for Court Interpreters are a wonderful start, but they are just that. These provisions alone will not guarantee the quality of interpreters or interpretation that due process requires. Even under the new statute, trial courts are still responsible for deciding which interpreter is "qualified" and realistically trial courts cannot be expected to undergo a tectonic shift in how they select and assess interpreters simply because there is a new statute in place.

In order for a genuine shift in the overall quality of interpretation to come about, attorneys for deaf and foreign language speaking clients must take responsibility and become vocal advocates for their clients' communication rights. We cannot assume that the interpreter is somebody else's problem nor can we passively accept whatever interpreter the clerk called. We can no longer settle for "good enough." We must insist upon interpreters who are genuinely qualified — not only to interpret, but to interpret for *this particular client.* We must continually monitor the interpreting process to insure adequate communication, and voice our objections when communication falls below an acceptable level. Finally, we must be ready and able to provide alternatives so that when the court says, "what do you propose we do counsel?," we have an answer.

Insuring interpreter quality may seem like yet another load of bricks on the backs of defense attorneys who are already overburdened. Yet advocating for quality interpretation need not be a burden, nor does it require a crash course in linguistics. There a number of concrete steps that attorneys can take which will help assure competent interpretation for our deaf and foreign language speaking clients.

Understanding the interpreting profession and process

Interpreters and the interpreting process are a major source of confusion, misunderstanding, ignorance, and error when the legal system meets the deaf or foreign language speaking defendant. Judges and lawyers tend to operate under a fixed set of beliefs about interpreters and interpreting and most of what we believe is wrong. These misconceptions have a direct impact on the quality of interpretation especially since so many interpreters try to conform their work to the system's expectations rather than confront us. If lawyers are to become effective advocates for communication, we ourselves must first understand what an interpreter can and cannot do.

Perhaps the most fundamental misconception about interpreting is that it is rather like mathematics – that there is such a thing as *a* right answer and that one interpreter's rendering will be pretty much like that of another, *and* that this canned interpretation will be equally understood by all users of that language. But nothing could be further from the truth. Let me give an example. I have a videotape of three nationally recognized interpreters for the deaf interpreting the Miranda warnings into American Sign Language. *All three interpretations are completely different*. If you ask me which one is better, I would have to say, better for whom? It depends on which deaf person is at the other end. Interpretation number one may be perfect for

deaf person A but a disaster for deaf person B. The differences lie in the deaf person's education, experience, and language use. A good interpreter will anticipate those specific needs and shift gears as necessary. A deficient interpreter will stick with the program regardless of whether it works for our client or not.

Other related misconceptions can have an equally devastating impact on the quality of interpretation, and ultimately the quality of justice. One of the most common is that anyone who knows two languages is competent to interpret. This is how we have ended up with children and neighbors interpreting in court. In reality, interpreting is a highly specialized profession that requires training and skill, a fact long known in the worlds of international business and diplomacy. And legal interpreting is an even more specialized skill, one that requires knowledge of legal language and culture in addition to two languages.

Another pervasive belief is that one language can be interpreted word for word into another. Lawyers, judges, and police officers routinely admonish an interpreter "Just tell him what I'm saying, word for word," and become quite irritated if the interpreter demurs. But no two languages in the world interpret word for word and any attempt to do so will distort the meaning of what is being said and make even the most articulate speaker sound foolish. Put into word for word English, the French for "how are you?" (*Comment allez-vous?)* comes out "how go you?" The ASL for "I have been to Chicago" would be voiced as "touch finish Chicago."

Word for word interpretation is also impossible because all languages have words or phrases that just cannot be translated or interpreted. The German *angst* is often translated as "anxiety" but that misses the depth, breadth, and sense of foreboding that *angst* implies. ASL has a sign of heartfelt derision (a very distinct jabbing sign) which tends to be interpreted as a popular English-language expletive or a cleaned up variant. This too misses the point.

Yet another widespread myth is that interpretation is something that just happens and that an interpreter ought to be able to accurately interpret simultaneously to the speaker with no accommodation of additional time. The court system sets "perfect temporal synchrony" as the gold standard and questions the capability of any interpreter who cannot keep up. However forcing an interpreter to keep time with the speaker dramatically increases the rate of interpreter errors.[6] Research has shown that interpreter accuracy correlates directly with "lag time" – the period between the end of the spoken utterance and the interpreted rendition. The longer the lag time, the less prone the interpreter will be to errors or miscues and omissions. The explanation is quite simple: "The greater the lag time, the more information available; the more information available, the greater the level of comprehension"[7] for both the interpreter and our client.

Perfect synchronicity is also undesirable because there is no uniformity in the amount of time it takes to express a message in the idiom of one language as opposed to another language. Because no two languages translate word for word, and because of the many differences in syntax, equivalent statements in any two languages will not match in terms of length. This is certainly true for Spanish, which when compared with the equivalent English tends to be significantly longer.[8] Likewise, American Sign Language may take longer to express a point, at least in a technical and abstract arena like the courtroom. Any attempt to keep up with the spoken English will by necessity result in shortcuts or omissions.

Contrary to so many of our beliefs, an interpreter is not a technician, a clerical assistant, an automaton, or a computer. We cannot plug her in and expect her to "just interpret" until we tell her to stop. An interpreter is an artist. Her art lies in the act of bringing the deaf or foreign language speaking individual, whatever his educational, social and linguistic history, and the judge, lawyer, or witness, with all of their linguistic baggage and eccentricities, onto the same wavelength. Not only must the interpreter connect divergent linguistic communities, she must do it in a way that satisfies due process. Our obligation as attorneys for deaf or foreign language speaking client is to appreciate the complexities of interpretation, to make sure that the interpreter we use is up to the task, and finally, to make it possible for her to practice her art.

Certified Interpreters Only

A critical step in any case involving a deaf or foreign language speaking litigant or witness should be the appointment of a *certified* interpreter. For a deaf person, a certified interpreter is who has received, at the minimum, a Certificate of Interpretation or Transliteration (CI or CT) from the Registry of Interpreters for the Deaf (RID), a Level 5 from the National Association of the Deaf, or a state equivalent[9]. In complex proceedings, the appointment of an interpreter who has an additional certification in Legal Interpreting (SC:L) is strongly encouraged. For the foreign language speaking person, a certified interpreter would be one who has passed either the federal court certification exam or the exam designed by the National State Courts Consortium for State Court Interpreter Certification.[10]

This recommendation is being made for a very simple reason – assurance of quality. Just as a law license insures that a lawyer has at least a minimal level of competence, as attested by her law school and the bar examiners, so too the certification of an interpreter. A certified interpreter has had her skills thoroughly assessed and tested by experts who are themselves experts in the field of interpretation and knowledgeable about the linguistic issues that court interpreting encompasses. Certification also means that an interpreter is bound by a code of ethics[11] and a standard of professionalism.

This is not to suggest that certification is an absolute guarantee that an interpreter can adequately communicate with a specific individual. Despite her certification, an individual interpreter may not have the skills, intuition, judgment, or knowledge needed to interpret for a particular person in a particular case.[12] The appointment of a certified interpreter in no way absolves the court and the attorney for the deaf or foreign language speaking person from their own obligations to continually insure comprehension. However, certification does tell the court and the parties that the interpreter they are considering at least has the base line skills.

Right now, the requirement of certification for court interpreters is a distinctly minority view. Only a handful of states (not Wisconsin) and the federal court system have a requirement that a court interpreter have some sort of certification. Instead, courts generally operate under a rebuttable presumption that an interpreter in the performance of his official duty has acted regularly.[13] As long as the interpreter is providing "continuous… translation"[14] courts will usually assume the interpretation is adequate.[15] Whether an interpreter is capable of communicating appropriately with the deaf or foreign language speaking person is left to the discretion of the trial court judge.[16] Even under the greatly improved Wisconsin statute the trial court judge is still the ultimate arbiter of whether an interpreter meets the standard for "qualified."

But most trial court judges have no way of knowing if an interpreter is meeting the standard or not. The fact that she is interpreting continuously tells us nothing about whether she is interpreting accurately or whether the deaf or foreign language speaking person understands what she is saying.[17] The court cannot simply ask the interpreter whether she can communicate with the deaf or foreign language speaking person because interpreters are not always in a position to judge their own work and unfortunately, some interpreters overestimate their own abilities.[18] Nor can courts rely on an interpreter's "experience" as an indicator of an interpreter's ability to communicate because experience without assessment tells us nothing about the interpreter's skills. It only tells us that he or she is busy. Requiring the appointment of a certified interpreter will bring a measure of rationality and dependability to the process.

Although the Wisconsin statute does not currently require certification, an attorney who insists on a certified interpreter for her client will find support within the law, since the statute does anticipate a certification process eventually. Wis.Stat. § 885.38(2) requires that the supreme court "establish the procedures and

See "LaVigne" on Page 21

Interpreter Code of Ethics: An Important First Step

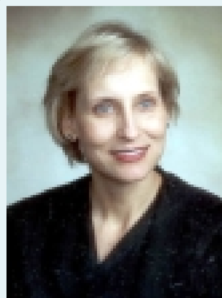
By: Honorable Elsa C. Lamelas*

By enacting a code of ethics for interpreters in the spring of 2002, the Wisconsin Supreme Court took an important first step to resolve one of the most urgent problems of the trial courts. This is, how to provide access to justice to deaf persons and foreign language speakers. The new code of ethics, codified as Supreme Court Rule 63, became effective on July 1, 2002, and will be published in its entirety with the Rules of the Supreme Court. [1] It signifies the high court's recognition of the need to formalize the role of court interpreters as professionals.

In 1999, J. Denis Moran, the Director of the Office of State Courts, created the Committee to Improve Interpretation and Translation in Wisconsin Courts (Interpreter Committee). To achieve geographical diversity, the Director appointed members from many Wisconsin communities. To achieve a diversity of viewpoints, the Director sought the views not just of judges, clerks of court, and court administrators, who traditionally comprise most courts committees, but also of other stakeholders in the integrity of the courts. For that reason, Interpreter Committee members included not only appellate, circuit and municipal court judges, but also legislators (Representatives Scott Walker and Pedro Colon), a prosecutor (then Outagamie District Attorney Vince Biskupic) and a Milwaukee defense attorney (Assistant State Public Defender Francisco Araiza). Perhaps the most significant contributions came from foreign language (Hmong and Spanish) and sign language Interpreter Committee members (including Debra Gorra, Bette Mentz-Powell, Ernesto Romero, Pam Vang, Tony Vang, and Mai Zong Vue). Meetings attracted remarkable attention and support from the public; the observations and concerns of lay persons served as a constant reminder of the importance of this issue to so many Wisconsin residents.

In 2000, the Interpreter Committee presented its report to the Supreme Court.[2] The report recommended adoption of a code of ethics as well as a comprehensive program of training, testing and certification for interpreters. Furthermore, the Interpreter Committee urged the high court to provide interpretation for all who need it regardless of the type of case or indigency. These recommendations were adopted by the Supreme Court and included in the 2001-03 biennial budget request. While budgetary constraints precluded inclusion of the concept of providing interpretation for all persons who need it in all types of cases, the training, testing and certification provisions were approved and included in the budget presented to the governor. Ultimately, Governor Scott McCallum vetoed all funds intended for training, testing and certification because of their fiscal implications. Since Wisconsin still does not test for language proficiency by court interpreters for any language, and since there is no certification program, even conscientious judges are at a disadvantage when appointing an interpreter.[3]

It is a situation that courts confront often. The frequency with which Wisconsin courts must rely on the services of an interpreter to communicate with parties and witnesses has grown dramatically in the last years. According to the U.S. 2000 census, Wisconsin's Hispanic and Hmong population doubled during the 1990's. Brown County's Hispanic population grew by an astounding 470% during the same period. Four Wisconsin counties have Hispanic populations in excess of 5%: Milwaukee, Racine, Kenosha, and Walworth. These



***Honorable Elsa C. Lamelas** is a circuit judge in Milwaukee County. She received her J.D. from the University of Michigan Law School, and her B.A degree from Dominican College, Racine, Wisconsin. Before becoming a judge, she served in the Eastern District of Wisconsin as Assistant and Deputy United States Attorney. Earlier, she was a trial attorney with the U.S. Department of Justice Civil Rights Division in Washington, D.C. Judge Lamelas served as chair of the Committee to Improve Interpretation and Translation in the Wisconsin Courts.

numbers confirm what trial courts know firsthand: Wisconsin has a serious need for qualified Spanish and Hmong interpreters.

Other language speakers have also become more numerous. Consequently, judges must with increasing frequency find and appoint interpreters for Russian, Polish, Somali, Laotian, Vietnamese, Bosnian Serbo-Croatian, and Arabic. In addition to foreign language speakers, significant numbers are deaf or hard of hearing. They, too, may require interpreters.

Without competent and honest interpreters, the courts can neither understand, nor be understood by, a significant segment of the community. An inability to communicate compromises the courts' ability to decide cases intelligently and justly. This is not only an affront to justice, but suggests broader societal costs. A court system that is, or appears to be, disinterested in the word of significant numbers of persons discourages those who are not fluent in spoken English from cooperating with authorities. Wisconsin, still battling a severe crime problem, can ill afford to do this. While it is in everyone's best interest that all who can do so learn to speak English, the work of the courts cannot wait.

Given these circumstances, the new code of ethics is a particularly welcome change. As part of its submission to the Supreme Court, the Interpreter Committee drafted a code of ethics based primarily on the model code created by the National Consortium of State Courts, but also incorporating certain adoptions from other states. The principal distinction from the codes of other jurisdictions is that from the outset we in Wisconsin viewed the challenge as one of *access to the courts.* This implicates not only foreign language speakers, but also the deaf and hard of hearing. For that reason, Wisconsin's new interpreter code of ethics also draws from the Registry of Interpreters for the Deaf and has a greater recognition of the Americans with Disabilities Act.

The immediate significance of SCR 63 is, of course, that it defines the duties of court interpreters. In doing so, the code not only informs court interpreters of their duties, but educates judges and lawyers of what they should expect from qualified interpreters. The code of ethics implicitly recognizes, consistent with the critical role interpreters have come to play in the administration of justice, that court interpretation is a professional endeavor worthy of respect. While the new code of ethics cannot, of itself, generate a crop of much-needed competent interpreters, its adoption should naturally lead to higher expectations and a higher level of performance from interpreters.

The code should forever dispel the notion that virtually anyone with a working knowledge of American Sign Language or a foreign language can step into a courtroom and fulfill the duties of a qualified interpreter. Even to be bilingual is not enough, a concept that all too often is still poorly understood. To be fluent in English and in the language of the foreign language speaker or of the deaf person (usually, but not always, American Sign Language) is a necessary skill, but to interpret reliably, the interpreter must be familiar with dialectical variations and slang terminology. If the listener is to be able to distinguish between sincerity and dissimulation, if the trier of fact is to be able to evaluate credibility, court interpretation must be faithful to detail and capture tone and manner. All of this must take place in a setting generally controlled by others, that is, by lawyers and judges.

This leads to another important requirement to court interpretation—an absolute command of the language of the courts. Some of our most common legal terms are part and parcel of a jurisprudence wholly unlike the legal systems of jurisdictions where other languages are spoken. Therefore, even a fully bilingual person may at first find it challenging to translate historic terms such as "probable cause," "preliminary hearing," "proof beyond a reasonable doubt" or the more current inventions of our new "truth in sentencing" laws, terms such as "initial confinement" and "extended supervision." Should the interpreter translate Latin terms such as "prima facie" or "mens rea" that are commonplace in American courtrooms? These questions pale in significance by comparison to what I was told by a Hmong language interpreter: there is no word in Hmong for "constitution."

To navigate in the courtroom, the interpreter must have a basic understanding of the substantive framework of the hearing. Interpretation is intrinsically a cognitive process. Faithful interpretation is not just about language skills, memory, or stamina. It requires an understanding of what is being said. In other words, to interpret well, an interpreter should have at least a general understanding of the nature of the proceeding, of its purpose, of what relief, if any, is being sought.

But the challenge of court interpretation is even more complex than this. It flows from the notion that *language itself* is the primary tool of the courts. Good lawyering, whether during witness examination or legal argument, is about the use of language. Lawyers routinely engage in exchanges where meaning lies in the subtext of what is said. These processes implicate the arts of exaggeration, sophisticated obfuscation, subtle evasion. There is an inherent ambiguity to certain situations, to certain legal concepts. To navigate these gray areas may delight legal practitioners, but bedevil and weary the finest interpreters. A good court interpreter must master more than the vocabulary of the law.

There are also the peculiarities and limitations of language. It would seem that languages should mirror each other in some identical fashion. Yet while all (well, virtually all) languages have a word for table and chair, the translation of other words is less readily accomplished. Spanish speakers, for instance, will readily say "pistola" for an automatic handgun; the distinction between a pistol and an automatic weapon is not drawn as clearly as in English. The translation of terms cannot at times be perfectly achieved because there is no perfect match in the other language. For this reason, many English speakers have adopted words from other languages, such as "déjà vu" and "angst." Certain words are so apropos that with time they are fully integrated and lose their foreign character; we have done this with the Spanish word "guerilla."

But sometimes, the target language fails to offer a perfect match. Interpretation requires judgment. In the space of a fraction of a second, the interpreter must select from that range of words in his or her vocabulary, the word or words that most precisely reflect the meaning of the speaker. These swift but nuanced decisions underlying interpretation become unreviewable by a higher court. (While more and more we prepare an audio record of the interpretation of witness testimony, we do not record interpretation provided at counsel table to criminal defendants. Even if we were to do so, review would require listening to the interpreted trial and comparing it to the transcript. Such a cumbersome and time-consuming process is rightly regarded as generally impossible.) In a legal system that scrutinizes the judgments of the lower courts and the performance of lawyers, the word of the interpreter becomes the record.

Therefore, the integrity of the court interpreter must be above question. Unfortunately, the Interpreter Committee repeatedly heard reports of disturbing practices. These included inmates providing interpretation for other inmates; husbands criminally charged with domestic abuse interpreting for victim wives; and social workers present in court in a victim support role pressed to interpret for the accused. There were also references to law enforcement officers interpreting for defendants.

All of these practices are rendered impermissible under the new code. It is comprised of ten separate canons, each of which is followed by advisory comments. The code applies to sign and foreign language interpreters as well as real time court reporters when providing access to the deaf or hard of hearing.

Canon One requires accuracy and completeness. The interpreter must not add, alter, or omit meaning to what is being said. The rule makes unethical the practice of editing and filling in answers or rephrasing questions, no matter how well-intentioned the interpreter. The canon is also breached by summary interpreting, insufficient language skill or lack of familiarity with court interpreting.

Canon Two imposes a duty on the interpreter of disclosing qualifications and experience. The rule is being used to teach judges how to voir dire prospective interpreters so that the qualifications of interpreters used in

courts will improve.

Canon Three requires impartiality. This canon should bring to an end those practices where persons with an interest in the outcome of the case are permitted to serve as interpreters.

Canons Four, Five and Six relate to professional demeanor, confidentiality, and the restriction of public comment. The requirements are familiar to judges and lawyers but are not necessarily known to newcomers to the court. Court interpreters are precluded from public comment even when the subject matter is neither privileged nor confidential.

Canon Seven prohibits the interpreter from giving legal advice or expressing personal opinions. In the past, court interpreters have at times exceeded their role by giving counsel, defining constitutional principles, and even explaining the plea questionnaire. At times, judges, courts and defense attorneys have prompted interpreters to take on these responsibilities. This important rule clarifies and limits the scope of the interpreter's role.

Canons Eight and Nine require the interpreter to assess and develop professional skills.

Canon Ten requires the interpreter to report ethical violations and efforts to impede compliance with the law court rule or policy to the court. By identifying the court as the authority to whom to report, the rule makes it clear that the duty of the interpreter is to the court, not to one or another side of the dispute.

The new code of ethics has recently been the subject of judicial education. It will continue to be addressed at judicial conferences. It is equally important for lawyers to become familiar with SCR 63. Lawyers who become involved in litigation where interpreters are used should consult the rules to learn what to expect. Lawyers should also learn the code so that they too will refrain from improper conduct.

One last welcome sign of change is that certain statutory language recommended by the Interpreter Committee recently became law. These include definitions of "limited English proficiency" and of a "qualified" interpreter. 885.38 (1). [4] The spirit that animates the new code of ethics is readily apparent in the statutory definition of a qualified interpreter as someone who "readily and accurately interprets, without omissions or additions, in a manner that conserves the meaning, tone, and style of the original statement, including dialect, slang, and specialized vocabulary." 885.38 (1)(c) (3).

It is likely that the need for competent interpreters will continue to be with us. Much work remains to be done to make access to the courts a reality. But for now, our highest court has taken a firm step in the right direction.

Endnotes

[1] Rule 63 (the interpreter code of ethics) can also be found at: **http://www.courts.state.wi.us/circuit/CourtInterpreterCodeofEthics.htm**.

[2] The report can be found at **http://www.courts.state.wi.us/circuit/pdf/Interpreter_Report.pdf**.

[3] Despite the extraordinary challenges posed by lack of funding, the Office of the Director of State Courts obtained funding from the Department of Workforce Development Office of Refugee Services for orientation programs to train court interpreters on ethics, English legal terminology, court procedure and basic legal interpreting skills. Six programs took place in 2002, and four more will be scheduled for 2003. Interested persons should contact Marcia Vandercook, 110 East Main Street Suite 410, Madison, WI 53703, 608-267-7335; or e-mail **Marcia.Vandercook@courts.state.wi.us**.

[4] The complete text of all interpreter statutes (which are codified at diverse places of the Wisconsin Statutes) can be found at **http://www.courts.state.wi.us/circuit/CourtInterpreterStatutes.htm**. ■

Hearing Justice: An Interpreter's Perspective on the Deaf Experience in the Courtroom and Other Legal Settings

By: Stephanie Kerkvliet*

As an interpreter who provides services to Deaf and hard of hearing citizens of Wisconsin, and those wishing to communicate *with* them, I find legal settings to be the most challenging of all venues. From in-court services to attorney/client meetings to ancillary court ordered services the challenge is multi-layered. English words and ASL signs do not have a one to one correlation. Words such as "rights," "guilt," or "charge," if interpreted literally will result in an exchange that is not equivalent to the concept, as it is understood in English. Other issues relate to the minority culture status of ASL users. Deaf people often do not feel empowered to ask questions or express concerns to non-deaf members of the legal system, including the very attorneys who have been hired to protect and defend them. Often, attorneys, judges, other court personnel or social workers have not familiarized themselves with the language and culture of Deaf people. Therefore they incorrectly assume that Deaf people can communicate adequately via written English and that the provision of any sign language interpreter will allow them to conduct business as usual. I will use this article to describe some techniques that will be helpful to you in working with sign language interpreters to ensure due process for any Deaf citizen.

In my twenty years as a sign language interpreter, I have learned that American Sign Language, the people who use it and their culture, are the significant forces driving this minority community that flourishes despite a lack of understanding and acknowledgment by people who can hear. Deaf persons use signed languages unique to their country. Sign Language is not universal. Interestingly, English is frequently NOT the first language of many Deaf people born in the United States. American Sign Language (ASL) is a language separate and distinct from English. While English is based on sound, ASL is based on sight in that its grammar and syntax follow parameters influenced by vision not hearing. ASL has no written form. People whose first language is ASL have varying degrees of English proficiency. The American Judicial System can be intimidating and confusing to anyone let alone those who are negotiating it in their second language.

In July of 2002, Wisconsin adopted a Code of Ethics for court interpreters (SCR63.001 – 63.10). For sign language interpreters, this code is an addition to a general code of ethics followed by members of the Registry of Interpreters for the Deaf, Inc (RID). RID is a national organization, one whose responsibilities include certifying entry-level sign language interpreters.

RID Certification is granted via a rigorous series of tests which include components covering language knowledge and communication skills, as well as knowledge and judgment on issues of ethics, culture and professionalism (RID, 1997). Upon passing the written and performance tests and after additional years of training and experience in legal settings, sign interpreters may be eligible to test for certification in legal settings. This process involves a written prerequisite test followed by a multi part performance test. A certifying score (RID SC: L) is evidence of entry-level skill for a variety of legal settings. To date, only a few interpreters in Wisconsin possess this entry-level certification. This means that the majority of ASL interpreters currently working in legal settings in Wisconsin are either working with skills below entry-level,

***Stephanie Kerkvliet** hales from Racine, Wisconsin and is the daughter of former Racine County District Attorney, Gerald Clickner. A graduate of the University of Wisconsin Milwaukee Interpreter Training Program in 1982, she also holds a B.S. in Psychology from American International College in Massachusetts. She has been certified as an interpreter by the Registry of Interpreters for the Deaf, Inc. (RID) since 1985 and holds RID SC:L, CI & CT. President of Professional Interpreting Enterprise, INC, she both interprets in legal settings as well as schedules other interpreters to work in a variety of settings including legal. As a member of the Wisconsin RID (WisRID) Legal Development Committee, Stephanie is involved in planning legal development opportunities for sign language interpreters in Wisconsin.

or while they may have the skills, they have yet to obtain the credential. It is important for those depending on the skill of the interpreter to find out the credentials of the interpreter in whose hands their communication abilities now rest.

The certification test for ASL interpreters working in legal settings has been available through RID since 1995. Since that time, training opportunities for ASL interpreters have been on the increase. In 1998, the Wisconsin chapter of RID started a Legal Institute for the purpose of developing certified ASL interpreters to work in legal settings. If an SC:L interpreter is not available for your legal setting, acceptable credentials for interpreters working in legal settings would be RID certifications CSC or CI *and* CT or National Association of the Deaf (NAD) level 5, along with recent advanced training in interpreting in legal settings. To determine if the interpreter servicing your case is qualified, ask the following questions:

- Who certifies you?
- What process did you go through to obtain that certification?
- Describe any training you have had to interpret in legal settings starting with the most recent first.
- Have you met the Deaf person in this case before?
- How do you know you are able to communicate with the Deaf person?
- What will you do if there are problems with communication?
- What is your experience interpreting in legal settings?
- How many years of experience do you have and in what kinds of cases have you interpreted?

Questions about experience, while important, are less so than questions about certification and training. Interpreters who have many years of experience but minimal or no current training in legal settings will be unfamiliar with current trends and practices in the field. Interpreter educator, Risa Shaw states that, "dedicated interpreters spend vast amounts of time discussing the reasons behind the issues and how they are handled, and spend time practicing, and implementing this knowledge. Not even years of experience can substitute for this kind of focused attention and current training" (Shaw, 1996). Until the recent Code of Ethics for court interpreters was passed, there were no standards for ASL interpreters working in legal settings. There are many ASL interpreters who have worked in legal settings for years but do not possess adequate skills.

In order for the interpreter to render an accurate interpretation in your legal setting, a certain amount of preparation is vital. It is helpful for the interpreter to have as much information as possible including access to written documents such as police reports, criminal complaints, social workers reports, etc. "Courts should in their discretion freely grant such leave in order to assist interpreters to discharge their professional responsibilities" (SCR 63.01). These documents assist interpreters with the spelling of proper nouns, dates, addresses, and the descriptions of locations. Preparing for a meeting between attorney and client will be more efficient if the attorney shares with the interpreter any history that might be relevant, as well as the specific goals for the meeting and plans that might be discussed. Advanced preparation does not give the interpreter any unfair advantage. Rather, it serves to facilitate a more accurate interpretation. It will decrease time spent on processing brand new information, correcting errors made due to misunderstandings, or needing to request clarification.

It is equally important for the interpreter to prepare with the Deaf person. The interpreting process in court is quite different from the general interpreting process. In non-court settings, varying degrees of interaction occur between Deaf person and interpreter (sign and or concept clarification, comments to interpreter meant to alter their interpretation in some way such as re-positioning for better sight-line, requesting clarification on who is speaking, etc.) In contrast, within a court setting an ASL interpreter would not engage in any form of interaction with the Deaf person without first informing the court. If preparation does not occur with the

Deaf person prior to a court proceeding, a Deaf person may perceive the interpreter as rude. Trust between the Deaf person and interpreter may then be unnecessarily jeopardized. Preparation between the Deaf person and interpreter also provides an opportunity for the interpreter to assess communication needs and abilities, as well as to afford the Deaf person a chance express any questions or concerns about the interpreter or interpreting process.

Even after you are satisfied with the qualifications of an interpreter; it is wise to confirm understanding with the Deaf person via open-ended questions to which you know the answer. When communicating with a Deaf party, do not assume understanding by that party, regardless of where you are in the legal process or the person's experience with the judicial system. Begin your exchange with generic questions about the weather, family, current events and lead to more specific open-ended questions such as do you know who I am? Why am I here? Why are you here? This will allow both you and the interpreter to gauge the party's understanding and make any necessary adjustments. Deaf people are frequently unfamiliar with trial procedures. If you are talking about written documents, allow time for the Deaf person to look at the document. Any time you address a particular document, again allow time for the Deaf person to refer to the document. Seeing the document, and the specific points you are discussing in print, is a reinforcement of information. In discussing criminal charges, it is helpful to discuss each element of a crime both in general *and* as it relates to the case at hand. Plea questionnaires are written in "yes"/"no" format. It is incorrect to assume that a "YES" or "NO" response indicates that the defendant understands. Deaf people are as varied in education and experience as non-deaf people. These techniques are meant to assist you with Deaf people who feign understanding in attempt to be cooperative or to mask their ignorance of the surrounding verbal communication. It would be wise to check with the interpreter after the exchange is completed to see if there was anything remarkable about the communication (i.e., difficulties, nuances, etc.)

There are numerous factors that complicate the interpreting process. These include but are not limited to the person's: current age, understanding of English (both written and spoken), experience using an interpreter, past frustrations with communication, frequency and extent of contact with other Deaf people, level of education, knowledge of legal processes and concepts, visual or motor limitations, length of time in Wisconsin and or the United States. When one or more complicating factor is present, it may be necessary to employ the use of an additional interpreter who is Deaf and also trained as an interpreter. Certified Deaf interpreters (CDI) can be of great assistance in facilitating communication that is otherwise inadequate. The addition of a CDI is the best tool available in providing native language equivalency.

One of the most difficult challenges currently facing legally certified ASL interpreters occurs when attorneys delay initial contact with their clients until court appearances. The first obstacle is the fact that interpreters hired by the court for the proceeding are *not* automatically covered by attorney/client privilege, therefore putting them at potential risk to be called to testify as to what they interpreted. It is true that not all exchanges between attorney and client are privileged communications. When necessary, judges are most often willing to extend privilege to the court interpreter. The next challenge is time limitation. Communication that takes place just prior to a court proceeding is generally rushed and abbreviated. It does not leave time for a Deaf person to consider new information. Deaf people are frequently confused by these pre-court appearance meetings and do not comprehend their significance. A third challenge is the role confusion caused by using the interpreter for communication between the attorney and client communication (more flexible with dialog encouraged for clarification and questions) and in-court communication (more restricted with dialog forbidden unless it is directed at the court). When hired by the court, "interpreters are linguistic experts who work in the best interests of the proceedings." (Mathers, 2002). At times, this duty may conflict with the attorney's view of best interests for his or her client.

While cost considerations can be of concern to attorneys hiring their own interpreters, there are important benefits to note. An interpreter hired specifically to facilitate communication between attorney and client becomes part of the counsel team. This allows them to provide attorneys with information that is otherwise

unavailable to them. For example, an interpreter who interprets more than one meeting has the benefit of information used at the previous meeting to assist with the follow up. That interpreter is in position to notice inconsistencies, information that has been misunderstood, even possible resources that might be beneficial for the attorney's edification. During court proceedings, the counsel interpreter will notice cultural or linguistic subtleties of which the attorney is unaware. The counsel interpreter serves as a monitor for the court proceeding, making sure that the court interpreter is accurate and that the Deaf person understands the proceeding.

The Wisconsin Committee to Improve Interpretation in the Courts has begun to make an impact on the quality of services to non-English users. There are numerous resources available to anyone who is interested in learning about Deaf people, their language and culture. It is difficult to understand much about Deaf people without investing time and interest. Here are some good preliminary resources for additional information:

NAD Law Center, 814 Thayer Avenue, Silver Spring, MD 20910, Fax: 301-587-0234, Email: **nadlaw@nad.org**, **www.nad.org**

Midwest Center on Law and the Deaf, P.O. Box 804297, Chicago, IL 60680-4104, 800-894-3653, Email: **mcld1@aol.com**, **www.mcld.org**

Bureau for Deaf and Hard Hearing, P.O. Box 7851, 1 W. Wilson Street, Rm. B-275, Madison, WI 53707, Fax: 608-266-3256, **www.dhfs.state.wi.us/sensory**

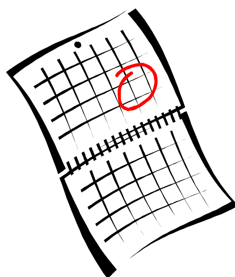
Mathers, Carla M. Esq., RID Views, Volume 19, Issue 5, May 2002

Registry of Interpreters for the Deaf, INC., 333 Commerce Street, Alexandria, VA, 22314, 703-838-0030, **www.rid.org**

RID, 1997, Standard Practice Paper, "Professional Sign Language Interpreting", also "Interpreting in Legal Settings"

Shaw, Risa, RID Views, Volume 13, Issue 7, July/August 1996, "Preparing Yourself to be an Effective Legal Interpreter"

SCR 63.01, 2002, Wisconsin Code of Ethics for Court Interpreters, Comment ■



TRAINING CALENDAR

For more information about these and other training events, please contact the SPD's Office of Training and Development at:

training@mail.opd.state.wi.us

2003 Trial Skills Academy
Office of the Wisconsin State Public Defender
May 12-16, 2003
Lake Lawn Resort
Delavan, Wisconsin

2003 Annual Criminal Defense Conference
Office of the Wisconsin State Public Defender
October 9 and 10, 2003
Hilton City Center
Milwaukee, Wisconsin

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Understanding Interpreters

By: Bruce Goodman*

Foreign language interpreters are hardly strangers to the Wisconsin court system. Due to the growth of immigrant populations within the state in recent years, cases are routinely heard in which a defendant, witness, or other party in interest does not understand or speak English well enough to participate meaningfully in the legal process without someone there to translate. Especially in those jurisdictions that have experienced a large influx of Spanish speakers, so-called "interpreter cases" have begun to occupy a significant portion of the judicial calendar.[1]

Despite the increasing visibility of interpreters in the courtroom, their proper role and function tend to remain somewhat of a mystery both to the people whom the interpretation is ultimately meant to serve and, all too often, to the interpreters themselves. This lack of understanding can produce an awkward working relationship. On the one hand, the interpreter struggles against the common perception that, beyond the happenstance of being bilingual, no particular skills or training are required. (This misperception is, of course, reinforced by the practice of permitting bilingual, but otherwise unqualified, people to act as interpreters in the courtroom.) Judges, attorneys, and administrators, on the other hand, are frustrated by the difficulty of overseeing the quality of a powerful function that, by its very nature, does not permit them to know if the person performing it is doing a proper job.

Unfortunately, mere service in the legal arena—no matter how essential—cannot, by itself, transform foreign language interpreting into a recognized profession. For that to occur, interpreters must come to be seen, as suggests the New Jersey Supreme Court Task Force on Interpreter and Translation Services (1984), as "…individuals who not only possess specialized knowledge, but also adhere to a code of ethics, demonstrate their mastery of skills through a licensing or certification process, and serve the public interest in the performance of their services."

Thanks to the work of the Committee to Improve Interpretation and Translation in the Wisconsin Courts[2], which drafted the language and successfully advocated its acceptance before the Wisconsin Supreme Court, the status of interpreters is bolstered by the Code of Ethics for Court Interpreters, SCR 63.01 to 63.10, effective as of July 1, 2002. Still, the lack of a state-sponsored credential for foreign language interpreters remains a major obstacle, and until such time as there is a state certification process, the task of educating the rest of the citizenry as to exactly what it is they do and why will continue to rest with foreign language interpreters themselves.

The Code of Ethics is extremely helpful in this regard, containing, as it does, the underpinnings of proper legal interpreting. It also serves as a portable, written authority for insisting on correct practices and resisting the forces that tend to entice the interpreter away from them. The remarks that follow make reference to the code in touching upon a few areas that are particularly instructive.

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***Bruce Goodman** has been a full-time Spanish interpreter in Milwaukee for the last five years, regularly interpreting in federal and state trials, court proceedings, and administrative hearings throughout southeastern Wisconsin. In 1997 he attended the Agnese Haury Summer Institute for Court Interpretation at the University of Arizona in Tucson. He currently teaches the court-interpreting portion of "Bridging Cultural and Linguistic Barriers", an introductory interpreting program offered throughout the state by the International Institute of Wisconsin. Mr. Goodman has earned a B.A. degree in Spanish from Lake Forest College in Illinois and a J.D. degree from The Benjamin N. Cardozo School of Law in New York City. He has also taken graduate level courses in Spanish and taught high-school Spanish.

"Goodman" continued from Page 16

Accuracy

The heart of the Code of Ethics is:

63.01 Accuracy and completeness. Interpreters shall render a complete and accurate interpretation or sight translation by reproducing in the target language the closest natural equivalent of the source language message, without altering, omitting, or adding anything to the meaning of what is said or written, and *without explanation*. (Emphasis added)

It is obvious from the language of 63.01 that the interpreter must possess native or near-native fluency in both languages, including legal terminology. What is less obvious is that he or she must remain faithful to the utterance in the source language, even when the interpreter is aware that the speaker has made an error, or, as is frequently the case, the interpreter knows full well that the person for whom he or she is interpreting will not understand the message. With respect to this latter point, beginning interpreters often fail to see the point of using a precise legal term with a defendant who, for whatever reason, could not possibly grasp the meaning. The explanation is that the function of the interpreter is to put the person with limited or no command of English on the same level as the person who is not under that handicap. As we all know, just because someone is a native speaker of English does not mean he or she will necessarily understand what is being said in court.

Requests by the interpreter to see material that might be confidential, or to speak to various parties about the case, are sometimes misunderstood as intrusive, or as taking up valuable time, or simply unnecessary since the interpreter has no advocacy role. 63.01 speaks to this issue directly, imposing upon interpreters the obligation to be properly prepared, and encouraging them to obtain, with leave of the court where appropriate, documents and other information necessary to familiarize themselves with the nature and purpose of a proceeding.

Narrowing down the possible universe of what he or she may be asked to interpret is essential for the interpreter in the quest for accuracy. The more the interpreter knows beforehand about the specifics of the case, the easier it will be to render a correct and fluid interpretation. Names, addresses, dates, social security numbers, descriptions of persons and events, etc., are much easier to deal with when the interpreter is already familiar with them and has had an opportunity to wrestle with potential vocabulary problems before the actual interpretation begins. It follows that the more technical or specialized the terminology/subject matter, the more significant preparation becomes. Examination of documents commonly contained in the court file (e.g., criminal complaint, motions, preliminary hearing transcript) as well as those in the possession of counsel (e.g., police reports, witness summaries, presentence investigation) is critical in this regard, and custodians of these and other records should take comfort in knowing that interpreters are subject to the following canon:

63.05 Confidentiality. Interpreters shall protect the confidentiality of all privileged and other confidential information.

Simultaneous Interpretation

"Simultaneous interpreting is rendering an interpretation continuously at the same time someone is speaking. It is intended to be heard only by the person receiving the interpretation and is usually accomplished by speaking in whispered tones or using equipment specially designed for the purpose in order to be as unobtrusive as possible."[3]

See "Goodman" on Page 28

NEWS BRIEFS

On November 13-16, 2002, the National Legal Aid and Defender Association held its Annual Conference in Milwaukee. The Wisconsin Public Defender's Office was very involved in NLADA's conference this year with State Public Defender Nicholas Chiarkas delivering the keynote address and various members of the SPD presenting three sessions in the Defender Track.

In his keynote address, Chiarkas explained that being poor in America is not only about the lack of money but also about the lack of options, recourse and influence. Chiarkas noted that those involved in indigent defense are fighting for the most vulnerable of our citizens. Chiarkas encouraged the use of "wraparound" services. Specifically, he discussed the system's need to provide a wide variety of services to the poor, citing that oftentimes those who are involved in the criminal justice system also need services in the civil realm.

Among the three sessions presented by the SPD during the NLADA conference was "Justice Without Borders" where it was standing room only. Panel members included Chiarkas and Randy Kraft, both founding members of Justice Without Borders, and Colin Gonsalves, the Director of the Human Rights Organization in India. Justice Without Borders is a non-profit organization that works to create or strengthen indigent defense programs around the world. Funding for Justice Without Borders is provided solely by private donors. Since its creation approximately three years ago, the non-profit organization has helped Israel set up an indigent defense program and has assisted Japan with a new structure for its criminal justice system. Presently, Justice Without Borders is planning an assistance mission to India in 2003.

Another SPD session at the NLADA conference was "When Clients are not your Only Customers: Balancing the Needs of Different Stakeholders." In recent years, the SPD has evolved from focusing solely on the clients' needs to also focusing on the needs of other stakeholders, such as the taxpayers and the legislature. Identifying and meeting the needs of these other stakeholders has been incorporated in the agency's strategic planning process as well as the agency's new attorney hiring process. Because the various and sometimes conflicting needs of the different stakeholder groups must be balanced, the SPD has adopted a "balanced scorecard" to measure agency performance in which a number of key indicators are tracked and analyzed. These are: quality and stakeholder satisfaction; fiscal and provision of public value; employee satisfaction; and operational efficiency.

Finally, the third SPD session at the NLADA conference was "Quality Indicators for Public Defense." During the past several months, a small group of attorney managers have met to identify the attributes of high quality representation and effective ways to measure them. The group identified effective advocacy, client relationship, and preparation as the top three components of quality representation. Indicators of a strong client relationship and preparation were then identified and set forth in a draft "file review form." The third component, effective advocacy, is more amenable to evaluation through in-court observation and review of case dispositions. Last summer, the agency tested the file review form with staff attorneys and managers in the attorney performance evaluation process. In the future, the SPD plans to identify and use quality indicators for all of the agency's job groups, in addition to improving the indicators used in developing the skills of attorneys. ■

WEBSITE OF THE MONTH

http://www.courts.state.wi.us/circuit/CourtInterpreter.htm

This issue's featured Internet resource is the Court Interpreter page of the Wisconsin Court System's website. This site reflects the growing importance of skilled interpreters, specifically trained in their role in legal proceedings.

There are a number of useful resources for attorneys who might find themselves defending a client who is hearing-impaired or does not speak English. The site includes a link to the Wisconsin Court Interpreter's Handbook: A Guide for Judges, Court Commissioners, Attorneys, and Interpreters. There are also links to statutes, rules, and case law related to court interpreters as well as the report prepared by the Committee to Improve Interpreting and Translation in the Wisconsin Courts, published in October 2000.

Another important resource at this site will be the Wisconsin Court Interpreter Roster. This list is intended to be used by state and municipal courts, lawyers, law enforcement agencies, and others needing interpreters with legal training. To be included, an interpreter must complete an orientation, pass a written exam, sign an oath, and meet character and fitness requirements. The roster is scheduled to be available in April 2003. ■

"BUT IT WAS ONLY A DWI..."

By: Daniel M. Kowalski*

Business immigration lawyers face daily hurdles in managing client expectations. Savvy clients, especially in the computer science, engineering or other high-tech fields, demand quick turnaround time. If we can order books or CDs online for next-day delivery, the thinking goes, why not visas?

Our clients soon discover, however, that U.S. immigration laws are not as "user-friendly" as the software they may be designing. One of the many hidden pitfalls has to do with minor criminal convictions that can delay - or even completely block - the issuance of working visas.

Take the case of "Jacques Jolie," an imaginary client from France. He studied for many years at the University of Texas on a valid student visa, and emerged with a Ph.D. in low-temperature physics. He's now vacationing in France with his family, but several U.S. computer chip manufacturers have e-mailed him, offering him high-paying jobs under the temporary H-1B visa category.

But "the Jackster," as his college roommates used to call him, has a bit of a history. Weekends found Jacques in the bars on 6th Street in Austin, and more than once driving back from Spring Break at Padre Island, Jacques racked up DWI convictions, one of them severe. (For purposes of discussion, we'll leave the number and specifics of the convictions vague.) And in the context of plea bargaining one DWI case, Jacques admitted possession of a marijuana cigarette in the glove-box of his car, even though he was not charged with possession. Before we can determine if Jacques will obtain his working visa to be able to re-enter the U.S., some background is needed.

The Immigration and Nationality Act ("INA") contains a long laundry list of "inadmissibility" grounds. Applicants for visas - temporary or permanent - must show that none of the inadmissibility grounds apply. If one of the grounds is triggered, a statutory waiver (if there is one) must be applied for and obtained before the visa can issue.

Many criminal convictions, no matter how minor or how old, can trigger inadmissibility. And the INA even contains inadmissibility grounds for activity not rising to the level of a conviction. For example, if a U.S. consular officer or INS inspector has "reason to believe" the applicant is or has been a "controlled substance trafficker," the applicant is inadmissible, even if the applicant was never charged with any crime, much less convicted.

To further complicate matters, many states have statutory sentencing schemes that provide for "deferred adjudication" or other options not rising to the level of "conviction" under state law. Yet the federal statutory definition of "conviction" in the INA, for immigration purposes, is so broad that it can rope in clients who have not, under state law, been convicted. See, e.g., *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (deferred adjudication under Tex. Code Crim. P. Ann. art. 42.12 § 5 is a "conviction" for federal immigration law purposes).

When evaluating a client's criminal history for immigration law purposes, immigration attorneys look at

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everything: the police report, the charging documents, the exact language of the statutes under which the client is being charged, the minimum and maximum sentences possible under those statutes, the wording of the plea bargain (or conviction after jury or bench trial) and the sentencing documents.

One question to be asked is whether the conviction is for a "crime involving moral turpitude" (a/k/a "CIMT,") one of the major inadmissibility grounds under the INA. Having survived a "void for vagueness" challenge at the Supreme Court level in 1951, that statutory phrase is now broadly defined as "conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Torres-Varela*, 23 I&N Dec. 78, Interim Decision No. 3449 (BIA 2001) (2001 BIA LEXIS 10). Needless to say, much legal ink has been spilled in litigating whether the term applies to specific crimes.

Under Arizona law, for example, some DUI convictions are CIMTs, *Matter of Lopez-Meza*, 22 I&N Dec. 1188, Interim Decision No. 3423 (BIA 1999) (1999 BIA LEXIS 50), while others are not, *Torres-Varela*, supra. In Jacques's case, then, we would have to critically examine the Texas statutes (municipal or state) under which he was convicted to determine if any of them are CIMTs.

What about the joint in the glove-box? There was no conviction, but Jacques may be inadmissible as one whom the INS has "reason to believe" is or was a controlled-substance trafficker, and/or as one who "admits having committed, or who admits committing acts which constitute the essential elements of" any law "relating to" a controlled-substance.

Finally, we left the number of Jacques' convictions, and their sentences, vague: if he racked up two or more convictions (not part of a "single scheme," and regardless of whether they involve moral turpitude) and the "aggregate sentences to confinement" were five years or more, he is inadmissible.

But what if Jacques were not in France? Would his chances be any better if, after graduation, he had stayed in Austin while pondering the H-1B visa offers? Maybe not: running nearly parallel to the grounds of inadmissibility (INA Sec. 212) are the grounds of deportability under INA Sec. 237. Jacques and his immigration lawyer and criminal defense lawyer need to take a close look again at the CIMT issue, the multiple conviction issue, and, most dangerous of all, the "aggravated felony" issue.

The INA definition of "aggravated felony" at INA Sec. 101(a)(43) is so broad it encompasses many convictions most lawyers, judges and clients deem "minor," including, incredibly enough, some misdemeanors: see, e.g., *U.S. v. Graham*, 167 F.3d 787 (3rd Cir. 1999) (cert. denied) (N.Y. petit larceny misdemeanor conviction with one year sentence is an "aggravated felony" for immigration law purposes.) One of the most dangerous sub-categories of the aggravated felony definition is the "crime of violence," referencing 18 U.S.C. Sec. 16. And here's where DWI defense work can get very tricky.

In 1998 the Board of Immigration Appeals ("BIA") issued a bombshell of a decision, *Matter of Magallanes-García*, 21 I&N Dec. 1 (BIA 1998), in which they held an Arizona DUI to be a "crime of violence" and therefore an aggravated felony. A year later they followed-up with *Matter of Puente-Salazar*, 22 I&N Dec. 1006 (BIA 1999), holding a Texas DWI to be a crime of violence / aggravated felony. The immigration bar fought back, and after fours years of federal circuit court litigation the BIA partially reversed course in April 2002 with *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002), overruling *Magallanes-García* and *Puente-Salazar* but leaving the door open: "We will follow the law of the circuit in those circuits that have addressed the question whether driving under the influence is a crime of violence... In those circuits that have not yet ruled on the issue, we will require that the elements of the offense reflect that there is a substantial risk that the perpetrator may resort to the use of force to carry out the crime before the offense is deemed to qualify as a crime of violence under § 16(b). Moreover, we will require that an offense be committed at least recklessly to meet this requirement."

So, if Jacques' DWIs are not crimes of violence / aggravated felonies, what are they? They might be a variety of our old friend, the crime involving moral turpitude, *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) (Arizona aggravated DUI conviction is a crime involving moral turpitude), or they might not be, *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (conviction under different Arizona DUI statute is not a crime involving moral turpitude), depending on the exact language of the statute.

It's safe to say Jacques' immigration attorneys and criminal defense attorneys will have their work cut out for them to determine Jacques' future in the U.S. It also bears noting that if Jacques' criminal defense attorneys had consulted with immigration counsel prior to pleading or sentencing, the immigration consequences might have been minimized or eliminated. ■

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policies for the recruitment, training, and certification of persons to act as qualified interpreters in court proceeding." However, a legislatively or court imposed preference for certification may be a long way off given the budgetary constraints in play.[19] Therefore, it is incumbent on counsel to continue to insist on certified interpreters in each and every case in order to guarantee a consistent level of quality.

Assessing and monitoring comprehension

1. Contemporaneous Objections

Even with the appointment of a certified interpreter, lapses in comprehension and accuracy are still possible. This means that the parties, and in particular the attorney for the deaf or foreign language speaking person, has a duty to continually monitor communication. Counsel has a further obligation to inform the court in a timely fashion when breakdowns occur.

State and federal law is quite clear that any errors or inadequacies in interpretation must be objected to contemporaneously or will be deemed waived.[20] Failure to object or complain will also be considered as evidence that the defendant or subject "knew exactly what was going on in the courtroom."[21]

From a reviewing court's perspective, this approach makes a great deal of sense because "to allow 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."[22] It also permits trial courts to step in immediately and make the necessary changes before the problem escalates. But from the perspective of those who contend with the practicalities of "life in the trenches" the requirement of contemporaneous objections is troublesome in that it places responsibility squarely on the shoulders of the two parties least able to assess whether there is a problem or not – the lawyer and the deaf or foreign language speaking person.

As for the lawyer, the dilemma is obvious: how would she know whether an interpretation is adequate or not? Most attorneys are monolingual. Moreover, even the attorney who is fluent in his client's language is not in any position to monitor the interpreter because her attention is devoted to the proceedings themselves.

The other part of this equation places responsibility on the defendant himself to inform the court or his attorney if he does not understand. While this too might make sense, it simply does not mesh with reality. First, it wrongly assumes that the person knows what he does not understand. While there occasionally will be interpretations that are blatantly defective or mismatched, the more likely situation will be the individual who thinks he understands but whose understanding is wrong.

This approach also forces the deaf or foreign language speaking person to know whether an interpretation

accurately reflects what is being said. Again we must ask — how would he know? In order to make the objection that the interpretation is not accurate, the person would have to know what is being said in English, and what it means, and then compare it with the non-English version. Such a task is impossible for any number of reasons.

The more insidious problem with requiring contemporaneous objections from the defendant or subject has nothing to do with language and interpreters but with human nature. To put it bluntly, do we really expect a deaf or foreign language speaking defendant sitting in a courtroom, surrounded by English speaking professionals, to raise his hand and say "excuse me your honor, I don't know what you are talking about?"[23]

I am not suggesting that the requirement of contemporaneous objections be abandoned. An after-the-fact claim of lack of understanding does a disservice to the entire system and wastes both time and resources. However, counsel should insist on procedures which would make the contemporaneous objection requirement more than an illusion. Among those procedures would be an interpreter sitting at counsel table and video or audio taping the court proceedings.

2. Counsel table interpreter

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

Counsel table interpreter is in a position to essentially act as communication facilitator and advocate. Most likely she will have served as the interpreter during attorney client meetings. She knows the client and his style and level of communication. She is familiar not only with the vocabulary of the case, but with the defendant's vocabulary of the case. She is tuned into the subtleties that indicate a lack of understanding and is able to communicate directly with the deaf or foreign language speaking person to ascertain the source of the problem. When problems arise, this interpreter could inform the attorney who would in turn register the appropriate objection or complaint.

The law on the subject is somewhat ambiguous. In most jurisdictions, the issue has been raised as one of communication between attorney and client. In that context, courts have not found an absolute constitutional right to separate counsel table interpreter in order insure the Sixth Amendment right to communicate with counsel, provided that the defendant is afforded an adequate opportunity to speak with his attorney with an interpreter during breaks in the testimony.[24]

The Wisconsin Supreme Court however is very supportive of the use of counsel table interpreters. In *State v. Santiago,* the Court acknowledged that "the better practice…may be to have two interpreters, one for the accused and one for the court,"[25] in order to insure adequate interpretation for all parties and to avoid the appearance of conflict.[26]

Certainly the appointment of counsel table interpreter is a better practice where there is any question about the ability of a deaf or foreign language speaking person to understand an interpreter, and should be desirable to both the attorney with the deaf or foreign language speaking client and the court. For the attorney, it offers an escape from the Catch-22 of being required to object but having no way of discovering what is objectionable. For the court, it offers the opportunity to fix the problem right on the spot rather than having to wait until the appeals process to find out that there was a problem.

3. Video or Audio Taping

A simple, unobtrusive, and inexpensive way to further insure the quality of communication afforded a deaf or foreign language speaking person is through liberal use of video or audio tape.[27] Taping can serve several functions: ongoing review of communication and record preservation

a. *Ongoing Review of Communication*

Videotaping the proceedings provides an opportunity for the interpreter and the parties to continually assess the interpreting process. If, for example, there is a disagreement between the court interpreter and counsel table interpreter about the way that an important comment or concept was interpreted the court can replay the videotape during a recess with all parties and interpreters, resolve the conflict and make the necessary corrections.[28]

Videotaping will also assist the interpreter in her professional and ethical obligation to continually assess her ability to deliver services in the case.[29] Any good interpreter will have doubts from time to time about certain aspects of the interpretation she has just provided, especially when she is working with a linguistically deficient deaf person. Obviously the speed of the proceedings will present her from reassessing her work on the spot, but a videotape will give her the opportunity to review during a break in the proceedings and to take remedial steps.

b. *For the Record*

Videotaping the interpretation of the proceedings has the potential to address a more pervasive problem that affects practically all defendants and subjects who rely on an interpreter in court – the absence of a record. Under current law, the only official record is the spoken English that is recorded in the transcript. But there is no record of what was said in the foreign language or signed language, which means in essence there is no record of the hearing, trial, guilty plea, probation revocation, or commitment that the deaf or foreign language speaking defendant or subject attended and experienced.

Without a taped record, a reviewing court has no way of knowing whether or not the defendant or subject understood or whether the interpretation was accurate. Routinely, trial and appellate courts arrive at their conclusions about a person's ability to comprehend interpreted proceedings by looking at the transcript.[30] But a transcript tells nothing about the manner in which a statement or concept was conveyed through interpretation, the amount of time a particular interpretation took, or whether the interpreter had to go through extraordinary contortions to get a point across. One question by the judge during a guilty plea colloquy may take five minutes to interpret sufficiently so that the defendant is able to answer, yet will appear in the transcript as a simple "do-you-understand?-Yes-I-do."

The legal basis for any request for videotaped proceedings seems clear enough: meaningful appeal is impossible because the record is incomplete.[31] Without a recording of the proceedings, there is no record of what the deaf or foreign language speaking person has been told, or if she testifies, what she herself actually said. So far, however, many courts have either ignored the issue or been resistant unless the defendant can specifically show the type of errors that were made or what he did not understand.[32] This forces the defendant or subject to attempt to restructure the interpretation — a difficult task at best. But, there are signs that courts are changing direction on this question. The Federal Court Interpreters Act has a specific provision allowing for the recording of proceedings where the quality of an interpretation is in doubt[33]. And, in certain controversies where the accuracy and sufficiency of the interpretation is a matter of intrinsic significance, such as in the interpretation of Miranda warnings, some courts (including the Wisconsin Supreme Court) are beginning to recognize that it is impossible to know whether the interpretation meets the requirements of the law without actually seeing it.[34]

The other argument for videotaping is more functional and in some respects, more compelling. Without a record of the interpretation, the condition of deaf and foreign language speaking defendants in court remains invisible. Reviewing courts have remained generally oblivious to the actual state of communication for deaf and foreign language speaking defendants because a transcript can mask even the most inept interpretation or the most confused defendant. Recording the interpreting process would provide an opportunity for reviewing courts to confront the quality of justice for deaf and foreign language speaking individuals and to weigh in more extensively on the question of meaningful communication.

We are no longer a monolingual society and an English transcript no longer speaks our language. As courts are forced to rely on interpreters more and more, and as challenges to the quality of interpretation become an issue, courts will eventually have to reconsider their reluctance to permit recording. Until that time, we should continually make the request.

4. Asking the Client

There is one person who probably could tell us a lot about the level of communication in the courtroom if only we asked. I am referring of course to our client. The notion that a client and his lawyer might actually have something to say about the quality of communication seems so obvious, one may wonder whether it is even worthy of mention. Ironically though, it is not standard in most courts. In most courts, the determination of whether the interpreter is communicating accurately and adequately and whether defendant's level of understanding is sufficient is left entirely up to the judge.[35]

At first glance, this sweeping grant of discretion may seem entirely appropriate since the judge is in the position to watch a deaf or foreign language speaking defendant converse with his attorney, to listen to the answers to the court's questions, and to observe the defendant's demeanor during testimony or arguments by counsel.[36] But in reality, judges do not have the expertise to know what any non-native English user is capable of understanding or not.[37] Too often they make decisions about a person's comprehension of legal proceedings based on factors like ability to converse at the factory or to obtain a fishing license.[38] One commentator observed that asking a judge to determine language ability of a non-native English speaker "is akin to a lawyer deciphering an x-ray in a medical malpractice action."[39]

Nor do courts have the necessary contact with defendants in order to accurately assess how well they understand. Clients sit across the courtroom at counsel table, and to the extent they speak to the court, it is usually in monosyllables or soundbites. Often judges and clients do not speak to each other at all unless a guilty plea is entered, and even then the conversation is hardly in depth.

We, as the attorneys are in a much better position to provide information about what our clients do and do not understand. But we must actively seek out that information and we must do so in a way that is most likely to achieve a true picture of our client's level of comprehension.

The *least* effective means of finding out whether our client understands what is being said is what could be called the "guilty plea method" of questioning. We have all seen it: The court informs the defendant of an obscure or complicated fact (e.g. "You have the right to have the state prove you guilty by evidence beyond a reasonable doubt.") and then asks, "do you understand?" Even among English speaking clients, it is only the uniquely bold person who will say, "I don't get that. Could you explain it?" Among deaf and foreign language speaking clients, the tendency to say yes whether they understand or not is even more prevalent. First, regardless of the language they speak, they certainly recognize that when someone in authority says "do you understand?," she actually means "you understand this don't you?" And like anyone else, deaf and foreign language speaking people do not want to appear ignorant or stupid. They will go along with the program, however obtuse, in order to appear intelligent, and to get it over with.

If we want to know what our clients understand, we must ask just that. "What do you understand?" "What does that mean?" "Tell me about this in your own words." In other words, we must ask good old-fashioned open ended questions.[40] We must also follow up the answers. A client may give an answer that seems to signal that he understands when in fact there is still a great deal of confusion lurking beneath.

Afterwards we must make a very specific record about the inadequate communication in the courtroom. It is not sufficient to say, "my client doesn't understand." We must tell the court exactly what he does not understand, what he misunderstands, or what he has missed. Without these details, a court can make findings based on its own observations.

What do you propose we do counsel?

Complaining about the lack of communication in the courtroom will not do our clients any good if we are not prepared to offer alternatives. The good news is that courts who become aware of communication difficulties are afforded great latitude in devising accommodations, both orthodox and unorthodox, to remedy the situation.[41] This means we should not be afraid to be creative in our requests for communication services.

Perhaps the most straight forward choice in many cases will be to request a new interpreter. This should not be seen as an insult to the interpreter since a good interpreter knows that her skills will not be a proper fit for every situation. There is explicit support for substitution of the interpreter within the plain language of the interpreter statute. Wis. Stat. § 885.38(6) states, "Any party to a court proceeding may object to the use of any qualified interpreter for good cause. The court may remove a qualified interpreter for good cause."

Another option is to bring in a second interpreter to assist. This will be particularly useful in cases where the defendant has a linguistic deficiency (a condition found in a fair number of deaf individuals), cognitive difficulties, or has cultural issues which interfere with communication. Again, the plain language of the statute is on our side. Section 885.38(5)(b) provides, "the court may appoint more than one qualified interpreter in a court proceeding when necessary."

Yet another remedy might be to switch from simultaneous to consecutive interpreting, especially during those portions of the proceedings where the issues are more technical in nature or deal with abstractions, or the deaf or foreign language speaking individual seems to be struggling. Consecutive interpretation is a form of interpreting where "the interpreter conveys a message in the target language after the speaker of the source language has finished."[42] Essentially this method builds in lag time and allows the interpreter the extra time she needs to further simplify and alter the language into a form that can be understood by the defendant or subject. Consecutive interpretation also cuts down on the possibilities of error and the confusion that error is likely to cause. A related accommodation would be the frequent use of breaks so that counsel can meet with her client and her own interpreter to clarify matters and fill in blanks.

However, neither of these last two suggestions, consecutive interpreting and frequent recesses, should ever be used to remedy an inadequate interpretation. They should be used *to supplement* the services of a certified interpreter who may be encountering impediments brought about by more than language difference.

This list is hardly exhaustive. Attorneys whose clients are struggling with communication are encouraged to consult with their own interpreter. He or she is an expert who brings experience, training, and knowledge to the table, and can be a great source of suggestions for modifications in the communication process.

Better than "good enough:" It's worth it

Not too long ago, I ran into a bilingual Latina attorney who told me her own interpreter story. She described

how she had gone to court with a Spanish speaking client and when she arrived the clerk said, "Oh good, since you're here we don't have to get an interpreter." The attorney explained to the clerk that she was here as the party's lawyer and could not interpret, and further that she was not trained as an interpreter. The clerk was visibly displeased.

This story illustrates the work that still needs to be done to educate the justice system about the interpreting process and about language in general. This story also shows that when we raise these issues, we may encounter some resistance. Good interpreters and accommodations that insure adequate communication implicate the two resources that are in shortest supply in every courthouse in every county – time and money. When we as lawyers intervene in the interpreting process by requesting certified interpreters and other accommodations, we are asking the court to spend both.

And yet, communication is worth every minute of the fight. Genuine communication, communication that is better than "good enough," can make all the difference in the world in a case. It can mean the difference between the client who is satisfied with the results of his case and the client who is angry and frustrated because he did not understand the process. It can also mean the difference between a case that ends favorably at the trial court level and a case that is the subject of extensive and expensive post-conviction litigation.

Interpreter quality is not an issue that will go away. Quite the opposite. In writing for a unanimous Supreme Court last year in *State v. Douangmala*, (2002 WI 62), Justice Abrahamson observed that "[a]s Wisconsin's immigrant population grows, obtaining qualified interpreters for an ever growing, diverse, and multi-language population remains a high priority." (par. 45) By consistently advocating on behalf of adequate communication, we will be giving the issue the attention it deserves.

Suggested Reading List

http://www.courts.state.wi.us/circuit/CourtInterpreter.htm (*See* this issue's **Website of the Month** on Page 18).

"Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin," 82 Marq. L. Rev. 601, by Heather Pantoga. **http://www.lexis.com**

THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS by Susan Berk-Seligson

LINGUISTIC EVIDENCE-LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM by Phillip O'Barr

Endnotes

[1] Guy Davenport, *People of the Book*, HARPER'S*,* May 2001, at 68. This statement was originally made about translation, the written word sibling of interpretation.

[2] The court must make this determination even if no request is made by counsel or by the defendant. *See, State v. Yang*, 201 Wis.2d 725, 731, 549 N.W.2d 769 (Ct.App. 1996), *citing* Wis.Stats. § 885.37(1)(1995)

[3] Actually the quality of interpreters for the deaf tends, on the whole, to be better than the quality of interpreters for foreign language speakers because most interpreters for the deaf have had some specialized training.

[4] Wis. Stat. §885.37(5)(c)(1997-1998) Within the statute there was some attempt to set standards for interpreters for the "hearing impaired." Courts were required to obtain an interpreter for the deaf and hard of hearing from a list of "qualified" (undefined) interpreters maintained by the Department of Health and Family Services, unless no listed

interpreter was available.

[5] Dianne Molvig, *Overcoming Language Barriers in Court,* WISCONSIN LAWYER, February 2001 at 10-11. The example of the Judge's wife was provided at a September, 2000 meeting of client services coordinators from the Wisconsin Bureau of Deaf and Hard of Hearing. The example of the complaining witness was provided by a member of the private bar.

[6] Dennis Cokely, *The Effects of Lag Time on Interpreter Errors* in SIGN LANGUAGE INTERPRETERS AND INTERPRETING, 39-69 (Dennis Cokely, ed. 1992) (SLS Monographs)

[7] *Id.* at 67

[8] Susan Berk-Seligson, THE BILINGUAL COURTROOM (1990), 120

[9] Some state chapters of RID offer a state certification. Other states have a certification process which is less rigorous. Wisconsin uses a "verification" process which is less comprehensive than RID certification. The state Bureau of Deaf and Hard of Hearing does not recommend using an interpreter in court whose sole qualification is verification by the state.

[10] This is the proposed standard for certification by the Wisconsin Court System. This standard was also proposed in a 1999 Marquette Law Review Article, "Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin," 82 Marq. L. Rev. 601, by Heather Pantoga.

[11] For example, the Registry of Interpreters for the Deaf has strict Code of Ethics which all members must follow.

[12] *See* for example *State v. Hindsley*, 2000 WL 568253, 614 N.W. 2d 48 (Ct. App. 2000) (interpreter who had received a certificate of transliteration was found to have rendered an inadequate interpretation of the Miranda warnings for a deaf suspect whose primary language was American Sign Language, and thus required interpretation rather than transliteration.)

[13] *State v. Van Pham*, 675 P.2d 848, 860 (Kansas 1984) citing *People v. DeLarco* 190 Cal.Rptr. 757 (1983) The widely applied standard is that absence an objection, the interpreter's performance will be presumed adequate.

[14] *United States v. Joshi*, 896 F.2d 1303, 1303 (11th Cir. 1990), *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980)

[15] One exception is the Ninth Circuit which refused to "confer upon the state the benefit" of the presumption that an interpreter was complete and accurate. *Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1495 (1991)

[16] *State v. Besso*, 240 N.W.2d 895, 898 (1976)

[17] Pantoga at 624.

[18] *Id.* This inability to judge one's own work is not limited to non-certified interpreters. See also, *Hindsley* at *State v. Jenkins*, 2002 WL 373244 (Tenn.Crim.App.) (Note: this is an unpublished opinion)

[19] There was an attempt to begin a certification testing program in 2002-2003, but there was insufficient funding.

[20] *Joshi*, supra at 1303, *United States v. Bennett*, 848 F.2d 1134, 1141 (11th Cir. 1988)

[21] *Vallardes v. United States*, 871 F.2d 1564, 1565 (11th Cir. 1989)

[22] *Id.*

[23] *See* Pantoga at 617

See "LaVigne Endnotes" on Page 30

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Whenever a party is speaking on the record, the interpreter's obligation is to interpret simultaneously everything that is said. This is no easy task, and unless the interpreter has had training and significant practice, he or she might not even know that interpreting in the simultaneous mode is required, let alone be able to do it[4]. It is dismaying (but, unfortunately not uncommon) to see an interpreter sitting silent when he or she should be most fully engaged in simultaneous interpretation, or interpreting in small bursts that signify an attempt merely to paraphrase what is being said. Either way, the defendant is being denied the opportunity to be fully "present" at the proceedings.

The interpreter can only maintain an optimal simultaneous interpretation for about 30 minutes, after which time performance begins to deteriorate markedly. The obvious implication of this fact is that proceedings that will go on longer than 30 minutes require the services of two interpreters so that they can relieve each other at intervals. Given current economic restraints, convincing the court administrator of the desirability of using of two interpreters in situations where one might be sufficient is a hard sell, but certainly a single interpreter cannot be expected to handle a longer or more complex proceeding, such as a trial.

It would be nice if interpreters could be completely machine like, merely inputting one language and outputting the other, undisturbed by sound and movement around us or even our own thoughts. Although it might seem that way to the observer, the reality of the experience is quite different. What is heard as the 'translation' is, from the interpreter's perspective, more like the destination arrived at after navigating the responses to a seemingly endless stream of questions: *What is the meaning of what I just heard? ... How do I say that in the target language while maintaining the same register? I just made a mistake. Is it significant enough to require correction? ...Now the defendant is talking to his attorney. He's not listening to me, so should I stop interpreting? Besides, it's hard to hear when they're conversing. ... Is "Mr. Hernandez" going to be the subject of this sentence or the object of a preposition? I need to know before I can begin. How long can I hang in there before I forget what's been said altogether? ... Remember to look up "preemptory challenge" at the next break.*

The interpreter cannot expect that every actor in the courtroom will remain cognizant of the presence of the interpreter and, consequently, mindful not to speak too quickly, or too softly. However, good simultaneous interpretation depends upon this sort of cooperation, and if it falls below a certain level, the interpreter has the responsibility to bring that to the court's attention. It can, of course, be an uphill struggle for the interpreter if he or she is constantly interrupting the proceedings. Clearly the court is in the best position to create and maintain the proper environment. Some brief remarks from the judge at the very start, reminding the parties that the proceedings are being interpreted, can go a long way toward encouraging people to adjust their way of talking. It never hurts, either, if the court itself exemplifies adequate volume, reasonable speed, and pacing in its own speech.

The overall obligation of the interpreter to let others know that he or she is encountering difficulties of a linguistic nature is addressed directly under canon:

63.08 Assessing and reporting impediments to performance. Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, the interpreters shall immediately convey that reservation to the appropriate judicial authority.

Ethical interpreters avoid getting in over their head by making an initial assessment of whether their knowledge and skills are adequate to handle the assignment they have been asked to perform. Nevertheless, there are always unforeseen interferences that arise and need to be dealt with. Perhaps the A.D.A. is reading the complaint with a rapid-fire delivery, or two people are talking at the same time. Or defense counsel is

continually posing questions that involve double negatives or employing a style of cross-examination in which the subsequent question begins even before the interpreter has rendered a complete translation of the witness' response to the prior question. Maybe what seemed to be a routine matter has turned out to involve a speaker of a regional dialect, or an unscheduled expert witness. Or it might simply be that the interpreter is long overdue for a break and knows that his or her performance is beginning to suffer. Whatever the obstacle, it is incumbent on the interpreter to bring it to the attention of the judge and seek the court's direction in overcoming it.

Scope of Practice

People who work with judiciary interpreters need to appreciate that, harmless and convenient as it may seem, asking the interpreter to explain or restate what someone has said is tantamount to asking him or her to violate the Code of Ethics. It is for this reason that while it is, for example, perfectly proper for the judge or the attorney to request that the interpreter translate the Plea Questionnaire and Waiver of Rights form to the client, it is unethical for the interpreter to respond to questions that the client may have.

Interpreters are frequently asked by attorneys and judges alike to, as they say, "read the form to him in Spanish." All well and good if the attorney or the prosecutor is present to answer the questions that inevitably arise. Unfortunately, it is all too common for the interpreter to be alone with the client —many defendants, of course, appear pro se— and the usual expectation is that the interpreter will engage in a dialogue with the defendant and, in general, assist him in answering the questionnaire.

No doubt this usurpation of the attorney's role was born out of a common-sense approach to expediting a time-consuming process and freeing the attorney to attend to other matters. After all, it is much easier for the interpreter to communicate directly with the defendant, and having participated in countless guilty plea proceedings, it may well be that the interpreter knows a great deal about the concepts contained in the form and enjoys being helpful in this way.

Nevertheless, once the interpreter departs from merely translating the words on the page, interpretation ceases, and any conversations about the form or the plea are likely to violate the following canon:

63.07 Scope of practice. Interpreters shall limit themselves to interpreting or translating and shall not give legal or other advice, express personal opinions to persons using their services, or engage in any other activities that may be construed to constitute a service other than interpreting or translating while serving as an interpreter.

If this canon seems somewhat self-evident, it is probably the one most often violated. There has probably never been a court interpreter who has not responded to (or even invited) requests for assistance that fall outside the interpreter's function. The impulse comes from the same source of empathy that makes people want to be interpreters in the first place.

It is completely understandable that people who are disadvantaged by the language barrier would tend to see the interpreter's service as having the potential to help them with any number of practical issues (e.g., finding the Public Defender's office, filling out paper work), but these activities should be avoided unless the judge has specifically instructed the interpreter to undertake them.

It is true that the ability to judge the appropriate professional distance to be maintained comes with experience, but then so does the acquisition of the kind of knowledge that leads interpreters into feeling comfortable about crossing the line between cordiality and giving legal opinions and advice. The need to refrain from these types of interactions applies equally to the attorney asking, "How am I doing?" as to the

defendant wanting to know, "Should I plead guilty?"

Endnotes

[1] Wisconsin Statutes §885.38(3)(a) establishes the right of the person with limited English proficiency to the services of a qualified interpreter in criminal proceedings, and the requirement that they be provided at the public's expense if the person is one of the following: (1) A party in interest; (2) A witness, while testifying in a court proceeding; (3) An alleged victim, as defined in §950.02(04); (4) A parent, legal guardian of a minor party in interest or the legal guardian of a party in interest; (5) Another person affected by the action, as deemed necessary and appropriate by the court.

[2] Since October of 1999, some 22 individuals culled from the justice system, social services, and the private sector, have been volunteering their time and expertise to address interpreter issues. Acting under the auspices of the Director of State Courts, the Committee to Improve Interpretation and Translation in the Wisconsin Courts has drafted a state interpreter project that includes interpreter certification and training and proposed the language for the Code of Ethics ultimately approved by the Wisconsin Supreme Court. Federal grant funding from the Office of Refugee Services, Department of Workforce Development, made possible an initial series of two-day orientation trainings (Wisconsin Court Interpreter Training Program) conducted in Milwaukee, Eau Claire, Wausau, Appleton, and Madison between August and November of this year. The goal of this program is to provide participants with an overview of the needs and expectations of the court, with an emphasis on ethical conduct, legal terminology, court procedure, and basic legal interpreting skills. Attendance at the program is a requirement for inclusion of the attendee in the roster of trained interpreters available to work in the courts that will be created by the Director of State Courts.

[3]"Orientation Training Notebook," Wisconsin Court Interpreter Training Program, Tab 2, Page 1.

[4]Anyone who has ever tried to interpret simultaneously becomes immediately sensitive to the characteristics of the source language, particularly speed, pacing, and volume. Brown County Circuit Court Judge Mark Warpinski gave the attendees of this year's judicial conference a taste of the experience when he asked his fellow judges to do some shadowing—an exercise that involves listening to a speaker and repeating the message in the same language. Although no translation is involved, the judges got an immediate appreciation for the auditory and oral logistics required, and for how much the interpreter is at the mercy of the speaker. ■

"LaVigne Endnotes" continued from Page 27

[24] *United States v. Johnson*, 248 F.3d 655, 664 (7th Cir. 2001),

[25] *State v. Santiago*, 556 N.W.2d 687, 695 (Wis. 1996). The Court previously held that the court, not the State Public Defenders Office was responsible for the costs of counsel table interpreter's in court services. *In re Appointment of Interpreter in State v. TaiV. Le*, 517 N.W. 2d 144 (1994)

[26] *Santiago*, supra at 695.

[27] *See* Pantoga at 659-661

[28] *See Van Pham* 675 P.2d at 858

[29] SCR 63.08

[30] *See,* for example, *State v. Yang*, 549 N.W. 2d 769 (Ct.App. 1996)

[31] *State v. Perry*, 401 N.W. 2d 748 (1987)

[32] See "Right of Accused to Have Evidence or Court Proceeding Interpreted Because Accused or Other Participant in Proceeding is not Proficient in the Language Used," 32 A.L.R. 5th §101 (1995)

See "LaVigne Endnotes" on Page 39

CRIMINAL JURY INSTRUCTION COMMITTEE REPORT

By: Chuck Vetzner*

The flurry of Wisconsin Supreme Court decisions at the end of its term prompted the Criminal Jury Instruction Committee to consider numerous changes in pattern jury instructions. The Committee made the following decisions at its meetings in August, October and December of 2002. Please note that all of the discussed instructions are subject to further revision by the Committee prior to the annual distribution of jury instruction materials next spring.

- **J .I. 1014:** In *State v. Head*, 2002 WI 99, the court held that imperfect self-defense only required a subjective belief that the defendant was preventing or terminating an unlawful interference. The decision prompted a change in this pattern instruction used when a defendant is charged with first-degree intentional homicide and the jury is given the option to convict for the lesser-included offense of second-degree intentional homicide. The revised instruction explains that the defendant is guilty of the lesser offense if he "actually," rather than "reasonably," believed excessive force was necessary. *Head* is a very long decision. Thus, it may have been inevitable that some of its language would be inconsistent. In ¶ 70 the court said that when unnecessary defensive force has been placed in issue, the prosecution must prove "*that the defendant did not actually believe she was preventing or terminating an unlawful interference with her person* or did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm. . ." The italicized alternative is consistent with neither the statutory definition nor other parts of the decision's explanation of what the prosecution must prove when a defense of imperfect self-defense is raised. The Committee decided not to include this alternative in the pattern instruction. However, it will be mentioned in a footnote. It is likely the prosecution will seek an instruction on this alternative in an appropriate case, such as the killing of a police officer.

- **J.I. 2502.** This is the pattern instruction for ch. 980 commitments. The Committee had immediately disseminated a February 2002 revision in this instruction adding the phrase "serious difficulty in controlling behavior" to the definition of mental disorder. This was done in response to the decision of the Supreme Court of the United States in *Kansas v. Crane*, 534 U.S. 407 (2002). However, the Wisconsin Supreme Court held such language need not be part of the instructions to the jury. *State v. Laxton*, 2002 WI 82. The Committee concluded that the present version of the instruction, containing the phrase, should not be altered. The Committee decision could obviously assist a defense lawyer building a case around the control issue and seeking an instruction on the point.

- **J.I. 990:** This pattern instruction on using or possessing a dangerous weapon includes the following language: "Dangerous weapon means _________." In *State v. Tomlinson*, 2002 WI 91, where the defendant was charged with a crime involving a dangerous weapon penalty enhancer for using a baseball bat, the court held that an unconstitutional mandatory conclusive presumption was created when the pattern instruction was used to instruct the jury: "Dangerous weapon means a baseball bat." To eliminate the potential problem, the Committee modified the pattern instruction definition of dangerous weapon. Instead of a blank, the instruction will explicitly mandate the intended explanation that dangerous weapon be defined as one of four generic types of dangerous weapons. This approach was already explicit in J.I. 910, defining a dangerous weapon. Thus, the proper instruction in *Tomlinson* would be: "Dangerous weapon means any device or instrumentality which, in the manner it is used or intended to be used, is

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likely to produce death or great bodily harm. Great bodily harm means serious bodily injury."

- **J.I. 60, 61 & 62:** The pattern instructions currently include J.I. 60 concerning use of an interpreter for a participant. The Committee elected to have three separate instructions: an interpreter for a witness (60); an interpreter for a juror (61); and an interpreter for the defendant (62). J.I. 62, much like an instruction about the defendant not testifying, would only be given upon request of the defense.

- **J.I. 795:** This is a law note, not a pattern instruction. It addresses the scope of *State v. Hobson*, 218 Wis.2d 550, 577 N.W.2d 825 (1998). *Hobson* eliminated the common law defense of the right to resist an unlawful arrest. The note explains the distinction between the abrogated defense at issue in *Hobson* and the prosecution's continuing requirement to prove that a police officer was making a lawful arrest, where that issue is an element of the crime charged. One example is resisting or obstructing, Wis Stat. § 946.41, requiring proof that the officer was acting "with lawful authority."

- **J.I. 2134B:** This is an additional alternative child enticement instruction. *State v. Robbins*, 2002 WI 65, held that the enticement law could be applied to an "internet sting" where the defendant attempts to arrange over the internet a meeting with a nonexistent child "created" by law enforcement. The instruction defines the extraneous factor that prevented completion of the intended crime: "That the victim was fictitious can constitute an extraneous factor. What is required is that the defendant believed the person (he) (she) was dealing with" was a real child under the age specified in the relevant provision of the enticement law.

- **S.M.-20:** This portion of the special materials in the jury instruction book addresses voir dire. The new revision includes summaries of several recent decisions on the topic. SM-20 is a helpful compendium of the law in this area, especially in regard to juror bias—one of the most frequently litigated areas of criminal law since the Wisconsin Supreme Court decided *State v. Ramos*, 211 Wis.2d 12, 564 N.W.2d 328 (1997).

- The Committee also decided not to address two recent supreme court decisions. In *State v. Davis*, 2002 WI 75, the court considered factors that bear on admission of evidence that the accused does not meet the profile of a sex offender. While the case implied that the admission of such evidence would be accompanied by an instruction to the jury, the Committee concluded that further development of the law should precede the drafting any special cautionary instruction for this type of evidence.

- In *Burg v. Cincinnati Casualty*, 2002 WI 76, the court held that a person was not "operating" a snowmobile by sitting in the driver's seat with the engine off. The Committee elected not to make reference to this decision in its pattern instructions for operating a motor vehicle while intoxicated. Nevertheless, since the definition of "operating" a snowmobile applies to motor vehicles, the decision may be important to defense counsel in appropriate factual circumstances.

At its October 2002 meeting, the Jury Instruction Committee meeting approved a new pattern instruction, Wis. J.I.—Criminal, No. 772, on the defense of accident in response to the Wisconsin Supreme Court's decision in *State v. Watkins,* 2002 WI 101, which reversed a conviction involving an accident defense.

Accident is a "negative defense." In other words, unlike defenses such as entrapment or provocation, accident does not involve proof of a fact in addition to those facts comprising the mental state element of an offense.

The decision of the Committee to draft a pattern instruction for this defense may be helpful in persuading a

See "Jury Instructions" on Page 44

CASE DIGEST

By: Bill Tyroler, Assistant State Public Defender, Milwaukee Appellate Office

This Case Digest includes United States Supreme Court and Wisconsin appellate decisions released/published October 1, 2002 to November 21, 2002.

UNITED STATES SUPREME COURT OPINIONS

HABEAS CORPUS (U.S.C. § 2254)

STATE COURT'S DETERMINATION THAT JUDGE'S EXHORTATION TO HOLD-OUT JUROR TO CONTINUE DELIBERATIONS DIDN'T COERCE VERDICT WAS NEITHER CONTRARY TO, NOR AN UNREASONABLE APPLICATION OF, CONTROLLING PRECEDENT. STATE COURT NEED NOT CITE OR EVEN BE AWARE OF CONTROLLING CASES, "SO LONG AS NEITHER THE REASONING NOR THE RESULT OF THE STATE-COURT DECISION CONTRADICTS THEM."
Richard E. Early, Warden v. William Packer, **http://www.supremecourtus.gov/opinions/02pdf/01-1765.pdf** 01-1765, *reversing Packer v. Hill,* **http://www.ca9.uscourts.gov/ca9/newopinions.nsf/BED95E0B1688A2BE88256BAE00740A56/$file/0057051.pdf?openelement** 291 F.3d 569 (9th Cir. 2002)

INEFFECTIVE ASSISTANCE OF COUNSEL – STATE COURT REASONABLY APPLIED *STRICKLAND* IN UPHOLDING DEATH SENTENCE; FEDERAL COURT MAY THEREFORE NOT SUBSTITUTE ITS JUDGMENT FOR THE STATE'S.
Jeanne Woodford, Warden v. John Louis Visciotti, **http://www.supremecourtus.gov/opinions/02pdf/02-137.pdf** 02-137, *reversing Visciotti v. Woodford*, **http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D529B685DB93940D88256BA400767EF2/$file/9999031.pdf?openelement** 288 F.3d 1097 (9th Cir. 2002).

WISCONSIN SUPREME COURT AND COURT OF APPEALS OPINIONS

APPELLATE PROCEDURE

HARMLESS ERROR – TEST: "AN ERROR DOES NOT AFFECT THE SUBSTANTIAL RIGHTS OF A DEFENDANT IF IT IS CLEAR BEYOND A REASONABLE DOUBT THAT A RATIONAL JURY WOULD HAVE FOUND THE DEFENDANT GUILTY ABSENT THE ERROR," ¶29
State v. Shirley J. Peters, **http://www.courts.state.wi.us/html/ca/01/01-0555.htm** 2002 WI App 243
For Peters: Steven P. Weiss, SPD, Madison Appellate

HARMLESS ERROR — TEST
State v. Troy D. Moore, **http://www.courts.state.wi.us/html/ca/01/01-1737.htm** 2002 WI App 245
For Moore: Suzanne L. Hagopian, SPD, Madison Appellate
The recent articulation of the test for harmless error, in *State v. Harvey*, **http://www.courts.state.wi.us/html/sc/00/00-0541.htm** 2002 WI 93, ¶49, does not "constitute[] a substantive change in Wisconsin's harmless error test ... 'whether there is a reasonable possibility that the error contributed to the conviction. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction.'" ¶16, quoting, *State v. Williams*, **http://www.courts.state.wi.us/html/sc/00/00-3065.htm** 2002 WI 58, ¶50, 644 N.W.2d 919.

STANDARD OF REVIEW — CERTIORARI
State ex rel Gary Tate, **http://www.courts.state.wi.us/html/sc/00/00-1635.htm** 2002 WI 127, *reversing* 2001 WI App 131, **http://www.courts.state.wi.us/html/ca/00/00-1635.htm** 246 Wis. 2d 293, 630 N.W.2d 761
For Tate: Jerome F. Buting, Pamela S. Moorshead and Buting & Williams

Amicus: Robert R. Henak

> ¶15. Certiorari review of a probation revocation order by the Department of Administration, Division of Hearings and Appeals ("the Department"), "is limited to four inquiries: (1) whether the Department acted within the bounds of its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will, not its judgment; and (4) whether the evidence was sufficient that the Department might reasonably make the determination that it did." *State ex rel. Warren v. Schwarz*, **http://www.courts.state.wi.us/sc/opinions/96/pdf/96-2441.pdf** 219 Wis. 2d 615, 628-29, 579 N.W.2d 698 (1998). *See also Van Ermen v. Dep't of Health & Soc. Servs.*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978).

> ¶16. This case requires an application of the second inquiry—whether the Department acted according to law—which is a question of law that we review de novo, without deference to the conclusions of the Department, the circuit court, or the court of appeals. *See Warren*, 219 Wis. 2d at 629.

STANDARD OF REVIEW – GENERAL: WHERE "THE PROCEDURAL HISTORY" AND "THE UNDERLYING FACTS" ARE NOT IN DISPUTE, "A DETERMINATION OF WHETHER THE FACTS MEET THE APPLICABLE LEGAL STANDARD" IS REVIEWED DE NOVO.
Calumet County DHS v. Randall H., **http://www.courts.state.wi.us/html/sc/01/01-1272.htm** 2002 WI 126, on certification

STANDARD OF REVIEW – REFUSAL TO GIVE SELF-DEFENSE INSTRUCTIONS REVIEWED DE NOVO, ¶12
State v. Shirley J. Peters, ***(See link to State v. Shirley J. Peters on page 33)*** 2002 WI App 243
For Peters: Steven P. Weiss, SPD, Madison Appellate

CHIPS

CHILD SUPPORT — OBLIGATION NOT TERMINATED BY IDEA
Calumet County DHS v. Randall H., ***(See link to Calumet County DHS v. Randall H. above)*** 2002 WI 126, on certification

> ¶1. This case involves the intersection of the federal Individuals with Disabilities Education Act (IDEA) and state statutes governing children in need of protection or services (CHIPS). The issue is whether the parent of a disabled child placed in a residential treatment facility pursuant to a circuit court's CHIPS order is exempt from the court's child support order if the child's individualized education program (IEP), mandated by the IDEA, subsequently specifies that the child's educational program be implemented at the residential treatment facility. We conclude that the parent is not relieved of the obligation to contribute to the child's support under these circumstances.

> ¶4. We do not view this case as presenting a preemption question. The federal and state statutory schemes at issue here do not conflict, at least not under the circumstances of this case. Robert was placed in the residential treatment facility for mental health care pursuant to a CHIPS order of the circuit court. The IEP specifying that his educational program be implemented at the facility while he resided there did not constitute a residential placement necessary for educational purposes under the IDEA. Accordingly, the IDEA does not provide grounds for relief from the child support obligation in the CHIPS order. We affirm the circuit court's order denying relief.

> ¶30. Accordingly, because Robert's placement in the residential program at Lakeview was necessitated not by his educational needs, but, rather, his mental illness, and was brought about by the circuit court's CHIPS order rather than Robert's IEP, it was not an educational placement for purposes of the IDEA. Therefore, the IDEA does not provide a basis for relief from the child support obligation

> under the CHIPS order. Nor does Wis. Stat. § 115.81 provide a basis for lifting that obligation. We affirm the circuit court's denial of Randall's motion for relief from the child support order.

CIVIL COMMITMENTS

SEXUALLY VIOLENT PERSONS – INSTRUCTIONAL DEFINITION THAT "SUBSTANTIAL PROBABILITY MEANS CONSIDERABLY MORE LIKELY THAN NOT TO OCCUR" UPHELD, ¶¶9-15
State v. Richard A. Brown (II), **http://www.courts.state.wi.us/html/ca/99/99-0635.htm** 2002 WI App 260, *PFR filed 10/22/02*
For Brown: Steven P. Weiss, SPD, Madison Appellate

SEXUALLY VIOLENT PERSONS — JURY SELECTION – USE OF PEREMPTORY TO STRIKE JUROR CHALLENGED ON APPEAL AS BIASED REMOVED ANY POSSIBLE TAINT, ¶¶16-17
State v. Richard A. Brown (II), ***(See link to State v. Richard A. Brown above)*** 2002 WI App 260, *PFR filed 10/22/02*
For Brown: Steven P. Weiss, SPD, Madison Appellate

SEXUALLY VIOLENT PERSONS – FAILURE TO INSTRUCT ON REQUIREMENT OF PROOF RESPONDENT WITHIN 90 DAYS OF RELEASE AT TIME OF PETITION'S FILING SUBJECT TO HARMLESS ERROR
State v. Richard A. Brown (II), ***(See link to State v. Richard A. Brown above)*** 2002 WI App 260, *PFR filed 10/22/02*
For Brown: Steven P. Weiss, SPD, Madison Appellate
(*State v. Thiel (I)*, **http://www.courts.state.wi.us/sc/opinions/99/PDF/99-0316.PDF** 2000 WI 67, extended from bench to jury trials. ¶¶18-22.)

CONSTITUTION

SELF-INCRIMINATION — RETENTION OF RIGHT AFTER CONVICTION AND DURING DIRECT APPEAL TIME PERIOD
State ex rel Gary Tate, ***(See link to State ex rel Gary Tate on page 33)*** 2002 WI 127, *reversing* 2001 WI App 131, ***(See link on page 33)*** 246 Wis. 2d 293, 630 N.W.2d 761
For Tate: Jerome F. Buting, Pamela S. Moorshead and Buting & Williams
Amicus: Robert R. Henak

> ¶4. All parties to this review now agree, as do we, that the revocation of Tate's probation was premised on a legitimate assertion of his Fifth Amendment privilege against self-incrimination, and was therefore unconstitutional. The parties also agree, as do we, that Tate's failure to appeal the denial of his motion to delay sex offender treatment did not constitute a waiver of his right to challenge his probation revocation on Fifth Amendment grounds. Finally, the parties agree that the immunity rule of *State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977), as expanded by *State v. Thompson*, 142 Wis. 2d 821, 419 N.W.2d 564 (Ct. App. 1987), should be applied in these circumstances. We agree and hold that a defendant in this situation cannot be subjected to probation revocation for refusing to admit to the crime of conviction, unless he is first offered the protection of use and derivative use immunity for what are otherwise compulsory self-incriminatory statements.

(Tate was convicted after jury trial, placed on probation with an SOT condition requiring admission to the offense; he refused to admit, was kicked out of the program, then revoked for violating the treatment condition. Highlights: compelling a probationer to admit to the offense of conviction during the time a direct appeal is pending or could be commenced implicates the 5th amendment. This tension is resolved by grant of full immunity (including impeachment-use). Note, however, that the court specifically reserves whether this rule "should extend to admissions made during treatment regarding uncharged conduct, and ... where the

probationer pleaded guilty or no contest." ¶22 n. 10.

COUNSEL

INEFFECTIVE ASSISTANCE – FAILURE TO OBJECT TO INADMISSIBLE EVIDENCE NONPREJUDICIAL, WHERE DEFENSE WAS MISIDENTIFICATION BUT DEFENDANT'S OWN PRETRIAL STATEMENT PLACED HER AT SCENE, ¶11
State v. Shelleen B. Joyner, **http://www.courts.state.wi.us/html/ca/01/01-3049.htm** 2002 WI App 250, *PFR filed 10/24/02*
For Joyner: Margaret A. Maroney, SPD, Madison Appellate

CRIMES

ATTEMPTED CHILD ENTICEMENT, § 948.07(1) — ADULT POSING AS CHILD ONLINE
ATTEMPTED 2D- DEGREE SEXUAL ASSAULT OF CHILD, §§ 939.32 AND 948.02(2) — ADULT POSING AS CHILD ONLINE
State v. Thomas W. Grimm, **http://www.courts.state.wi.us/html/ca/01/01-0138.htm** 2002 WI App 242
For Grimm: Daniel W. Hildebrand
State v. Robins, **http://www.courts.state.wi.us/html/sc/00/00-2841.htm** 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, and *State v. Koenck*, **http://www.courts.state.wi.us/html/ca/00/00-2684.htm** 2001 WI App 93, 242 Wis. 2d 693, 626 N.W.2d 359, which permit enticement charges where a fictitious online "victim" is thought by the defendant to be a child, are controlling. ¶¶8-9.

EVIDENCE

BATTERED WOMEN'S SYNDROME – "Comparison testimony is permitted so long as it does not include conclusions about the battered person's actual beliefs at the time of the offense, about the reasonableness of those beliefs or about the person's state of mind before, during and after the criminal act," ¶27 n. 4
State v. Shirley J. Peters, ***(See link to State v. Shirley J. Peters on page 33)*** 2002 WI App 243
For Peters: Steven P. Weiss, SPD, Madison Appellate

CHARACTER — EXTRINSIC PROOF, § 906.08(2)
State v. Troy D. Moore, ***(See link to State v. Troy D. Moore on page 33)*** 2002 WI App 245
For Moore: Suzanne L. Hagopian, SPD, Madison Appellate
Extrinsic evidence offered by the state solely to bolster a witness's credibility, by showing that he had provided reliable information leading to the arrests of other drug dealers, violated § 906.08(2). ¶15. (Note: the court holds open the question of whether such evidence might be admissible under § 904.04(2). ¶15 n. 2.)

HEARSAY — ADMISSIBILITY — METHODOLOGY
State v. Shelleen B. Joyner, ***(See link to State v. Shelleen B. Joyner above)*** 2002 WI App 250, *PFR filed 10/24/02*
For Joyner: Margaret A. Maroney, SPD, Madison Appellate

> ¶18. Shelleen Joyner argues that Trudy Joyner's statement is against her penal interest, however, because Trudy Joyner admitted that she "knowingly helped a robber escape," we disagree. "[W]hen ruling upon a narrative's admissibility ... a court must break it down and determine the separate admissibility of each 'single declaration or remark.'" *United States v. Canan*, 48 F.3d 954, 959 (6th Cir. 1995) (quoting *Williamson v. United States*, 512 U.S. 594, 599 (1994)). "[E]ach particular assertion in a narrative should be interpreted within the context of the circumstances under which it was made to determine if that assertion is in fact sufficiently against interest." *Silverstein v. Chase*, **http://www.ca2.uscourts.gov:81/isysnative/**

RDpcT3BpbnNcT1BOXDAwLTc2Mjdfb3BuLnBkZg==/00-7627_opn.pdf 260 F.3d 142, 148 (2d Cir. 2001) (citing *Williamson*, 512 U.S. at 603-604).

HEARSAY — AGAINST-INTEREST STATEMENT
State v. Shelleen B. Joyner, ***(See link to State v. Shelleen B. Joyner on page 36)*** 2002 WI App 250, *PFR filed 10/24/02*
For Joyner: Margaret A. Maroney, SPD, Madison Appellate
A hearsay statement must be broken into its constituent parts, each viewed separately. ¶18. This statement has two parts. The first — that the defendant "wasn't there" — isn't self-inculpatory; merely saying that the defendant didn't commit a crime doesn't expose the declarant to criminal liability. ¶19. The second statement — that a named 3rd party committed the crime and the declarant was in the get-away car — presents a closer question. However, the statement implies that yet another individual was the driver, hence effectively absolving the declarant of responsibility for the crime. ¶¶19-20.

JURY

INSTRUCTIONS — IMPERFECT SELF-DEFENSE, § 940.01(2)(b) — EVIDENTIARY SUPPORT
State v. Shirley J. Peters, ***(See link to State v. Shirley J. Peters on page 33)*** 2002 WI App 243
For Peters: Steven P. Weiss, SPD, Madison Appellate
Defendants seeking an instruction on unnecessary defensive force to a charge of 1st-degree intentional homicide must present "some" evidence of *actual* belief of imminent threat of death or great bodily harm, along with *actual* belief that the force used was necessary. ¶16. Peters presented some evidence of the requisite actual beliefs — her deceased husband was known to keep guns within reach and had threatened her — and she therefore meets this test. The facts closely parallel those of *State v. Head*, **http://www.courts.state.wi.us/html/sc/99/99-3071.htm** 2002 WI 99, decided after her trial.

INSTRUCTIONS — PERFECT SELF-DEFENSE — EVIDENTIARY SUPPORT
State v. Shirley J. Peters, ***(See link to State v. Shirley J. Peters on page 33)*** 2002 WI App 243
For Peters: Steven P. Weiss, SPD, Madison Appellate
Evidence supported self-defense instruction, in that the deceased-husband: was psychologically and verbally abusive; kept guns within reach in the house; looked down the scope of a rifle at her the day before the shooting; pulled the phone cords out of the wall the morning of the shooting, and told her she wasn't going anywhere; and dropped his hand into an area where he kept a gun, just before she shot. ¶¶25-26. Certain problems with her version were just that, matters going to credibility and therefore for the jury to weigh. ¶¶27-28.

INSTRUCTIONS — THEORY OF DEFENSE — TEST, IN GENERAL
State v. Shirley J. Peters, ***(See link to State v. Shirley J. Peters on page 33)*** 2002 WI App 243
For Peters: Steven P. Weiss, SPD, Madison Appellate
"Some" evidence standard is "relatively low," and evaluation of reasonableness of defendant's actions "also has traditionally been entrusted to the jury." ¶27 n. 4. Evidence must be viewed in light most favorable to defendant. ¶28.

PROBATION, PAROLE

COMPUTATION OF GOOD-TIME ON MISDEMEANOR PRISON SENTENCE IS REGULATED BY § 302.11, RATHER THAN § 302.43, BECAUSE THE PLACE OF CONFINEMENT RATHER THAN NATURE OF UNDERLYING CONVICTION CONTROLS, ¶¶13-14
State ex rel. Vonnie D. Darby, **http://www.courts.state.wi.us/html/ca/02/02-1018.htm** 2002 WI App 258

CONDITIONS — ADMISSION TO OFFENSE OF GUILT, DURING DIRECT APPEAL TIME PERIOD

State ex rel Gary Tate, ***(See link to State ex rel Gary Tate on page 33)*** 2002 WI 127, *reversing* 2001 WI App 131, ***(See link on page 33)*** 246 Wis. 2d 293, 630 N.W.2d 761
For Tate: Jerome F. Buting, Pamela S. Moorshead and Buting & Williams
Amicus: Robert R. Henak

> ¶4. All parties to this review now agree, as do we, that the revocation of Tate's probation was premised on a legitimate assertion of his Fifth Amendment privilege against self-incrimination, and was therefore unconstitutional. The parties also agree, as do we, that Tate's failure to appeal the denial of his motion to delay sex offender treatment did not constitute a waiver of his right to challenge his probation revocation on Fifth Amendment grounds. Finally, the parties agree that the immunity rule of *State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977), as expanded by *State v. Thompson*, 142 Wis. 2d 821, 419 N.W.2d 564 (Ct. App. 1987), should be applied in these circumstances. We agree and hold that a defendant in this situation cannot be subjected to probation revocation for refusing to admit to the crime of conviction, unless he is first offered the protection of use and derivative use immunity for what are otherwise compulsory self-incriminatory statements.

(Tate was convicted after jury trial, placed on probation with an SOT condition requiring admission to the offense; he refused to admit, was kicked out of the program, then revoked for violating the treatment condition. Highlights: compelling a probationer to admit to the offense of conviction during the time a direct appeal is pending or could be commenced implicates the 5th amendment. This tension is resolved by grant of full immunity (including impeachment-use). Note, however, that the court specifically reserves whether this rule "should extend to admissions made during treatment regarding uncharged conduct, and ... where the probationer pleaded guilty or no contest." ¶22 n. 10.

REVOCATION FOR VIOLATING CONDITION LATER DEEMED UNCONSTITUTIONAL NEED NOT BE SEPARATELY RAISED THROUGH ATTEMPTS AT MODIFYING THAT CONDITION, ¶¶23-25
State ex rel Gary Tate, ***(See link to State ex rel Gary Tate on page 33)*** 2002 WI 127, *reversing* 2001 WI App 131, ***(See link on page 33)*** 246 Wis. 2d 293, 630 N.W.2d 761
For Tate: Jerome F. Buting, Pamela S. Moorshead and Buting & Williams
Amicus: Robert R. Henak

PRETRIAL PROCEEDINGS

COMPLAINT — PROBABLE CAUSE — ATTEMPTED CHILD ENTICEMENT
State v. Robins, ***(See link to State v. Robins on page 36)*** 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, and *State v. Koenck*, ***(See link to State v. Koenck on page 36)*** 2001 WI App 93, 242 Wis. 2d 693, 626 N.W.2d 359, which permit enticement charges where a fictitious online "victim" is thought by the defendant to be a child, are controlling. ¶¶8-9.

COMPLAINT — PROBABLE CAUSE FOR ATTEMPTED 2D-DEGREE SEXUAL ASSAULT OF CHILD WHO IS FICTITIOUS ONLINE "VICTIM"
State v. Thomas W. Grimm, ***(See link to State v. Thomas W. Grimm on page 36)*** 2002 WI App 242
For Grimm: Daniel W. Hildebrand
Rationale of *State v. Robins*, ***(See link to State v. Robins on page 36)*** 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, and *State v. Koenck*, ***(See link to State v. Koenck on page 36)*** 2001 WI App 93, 242 Wis. 2d 693, 626 N.W.2d 359, which permit enticement charges where a fictitious online "victim" is thought by the defendant to be a child, is equally applicable to a charge of second-degree sexual assault of a child. Moreover, such a charge doesn't run afoul of the rule that an a strict liability offense can't support a charge of attempt. ¶¶10-14.

SEARCH & SEIZURE

EXIGENT CIRCUMSTANCES, INVESTIGATION OF DOMESTIC VIOLENCE, SUPPORTS WARRANTLESS ENTRY OF RESIDENCE
State v. Mark S. Mielke, **http://www.courts.state.wi.us/html/ca/01/01-3116.htm** 2002 WI App 251, *PFR filed 10/3/02*
For Mielke: David J. Van Lieshout

SENTENCING

ENHANCEMENT — SUFFICIENCY OF PROOF – DEFENDANT'S ADMISSION TO BEING REPEATER NOT ENOUGH BY ITSELF, BUT REVIEW OF TOTALITY OF RECORD SUPPLIES NECESSARY PROOF, ¶¶5-6
State v. Razzie Watson, Sr., **http://www.courts.state.wi.us/html/ca/01/01-2674.htm** 2002 WI App 247
For Watson: Dennis Schertz

ENHANCEMENT — JUDGMENT ON PRIOR ENTERED AFTER COMMISSION OF CURRENT OFFENSE
State v. Razzie Watson, Sr., ***(See link to State v. Razzie Watson, Sr. above)*** 2002 WI App 247
For Watson: Dennis Schertz
A guilty plea suffices to establish a qualifying repeater-enhancement, even though the judgment of conviction on that plea isn't entered until after commission of the offense being enhanced. ¶¶9-14.

FACTORS – COURT NARROWLY ALLOWED TO FACTOR JAIL CREDIT INTO LENGTH OF SENTENCE, TO ENSURE COMPLETION OF TREATMENT PROGRAM, ¶10
State v. Eric S. Fenz, **http://www.courts.state.wi.us/html/ca/01/01-1436.htm** 2002 WI App 244
For Fenz: Jacob W. Gobel ■

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"LaVigne Endnotes" continued from Page 30

[33] 27 U.S.C. § 1827

[34] *See State v. Santiago*, supra

[35] *United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973) *cert. denied* 94 S.St. 1613 (1974)

[36] *Id.*

[37] Pantoga at 618

[38] *See Yang* at 775, *State v. Carlson*, 2001 WI App 296, petition for review granted.

[39] Pantoga at 618

[40] This approach has been recommended by a number of experts in the field of deafness. In addition, it is recommended by Heather Pantoga in her article.

[41] *Ferrell v. Estelle*, 568 F.2d 1128 (5th Cir. 1978) (This decision was withdrawn when the defendant died prior to retrial.)

[42] Pantoga at 643 ■

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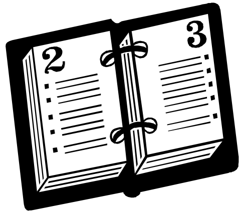

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Agenda:
Overview of the New Code
Professor Thomas Hammer
Truth in Sentencing II-Sentencing Examples
Honorable Patrick J. Fiedler
Structure of the New Sentencing Guidelines
Honorable Elsa C. Lamelas
Effective Defense Sentencing Advocacy
Attorneys Stephen Hurley and Craig Johnson
A Defense Look at the Code: Legal Challenges
Attorney Deja Vishny

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Review Granted in the Wisconsin Supreme Court

(August 10, 2002 through November 21, 2002)

State v. H. Byers 99-2441
REVW 09/26/2002
District 3/Brown County
(Consol. w/00-0454)
Does a district attorney have plenary authority to file a Ch. 980 petition or is the district attorney's authority limited to those cases in which the Department of Corrections has certified an individual as eligible for Ch. 980 proceedings and the Department of Justice has declined to file a petition for commitment?

State v. H. Byers 00-0454
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State ex rel. G. Tate v. D. Schwarz 00-1635
REVW 09/21/2001
District 2/Washington County
246 Wis 2d 293/630 NW2d 761
Does a defendant on probation for child sexual assault whose probation is revoked solely for refusing to admit guilt in treatment while his direct appeal is pending, waive the right to challenge the refusal issue by failing to also separately appeal the circuit court's denial of his motion to delay treatment?

State v. M. Knapp 00-2590-CR
CERT 09/26/2002
District 4/ Jefferson County
Should physical evidence obtained as the direct result of a *Miranda* violation be suppressed when the violation was an intentional attempt to prevent the suspect from exercising his Fifth Amendment rights?

State v. N. Lamon 00-3403-CR
REVW 09/26/2002
District 4/Rock County
Is a prosecutor's failure to ask any voir dire questions of a black juror that the prosecutor peremptorily challenged evidence of discrimination under *Batson v. Kentucky*, 476 U.S. 84 (1986)?

State v. Lindsey A.F. 01-0082/01-0081
REVW 11/12/2002
District 4/Dane County
Does Wis. Stat. § 938.12(7) authorize the circuit court to dismiss a juvenile delinquency petition and refer the case to the court intake worker for a deferred prosecution agreement, over the objection of the district attorney?

State v. J. Hunt 01-0272-CR
REVW 11/12/2002
District 1/Milwaukee County
Did the Court of Appeals err in reversing a judgment of conviction when it determined that the circuit court

did not give the proper instructions to the jury regarding the admission of "other acts" evidence as set forth under *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30?

Does a *Sullivan* test violation require that the entire judgment of conviction be reversed including those counts where the "other acts" evidence could not have had any impact?

State v. P. Cole 01-0350-CR
CERT 11/27/2001
District 1/Milwaukee County
Is the prohibition against carrying a concealed weapon as set forth in Wis. Stat. § 941.23 unconstitutional in light of article I, section 25 of the Wisconsin Constitution, which confers the right to keep and bear arms to Wisconsin citizens?

State ex rel. Schatz v. G. McCaughtry 01-0793
REVW 09/26/2002
District 4/Dane County
2002 WI App 167/650 NW2d 67
Whether the state, in order to comply with the Prison Litigation Reform Act, Wis. Stat. § 802.05(3)b)4, must first notify the prisoner of the court's proposed decision to dismiss a certiorari review on the grounds that it fails to state a claim upon which relief may be granted, and give the prisoner an opportunity to be heard, before the matter can actually be dismissed?

State v. J. Davison 01-0826-CR
REVW 09/03/2002
District 2/Kenosha County
2002 WI App 109/647 NW2d 390
Does a criminal defendant waive the right to raise a claim that a conviction of two types of battery violates state and federal constitutional guarantees against double jeopardy when by pleading guilty, through a negotiated plea agreement, to the two battery charges?

Does Wis. Stat. § 939.66(2m) prohibit convictions for both battery by a prisoner under Wis. Stat. § 940.20(1) and aggravated battery under Wis. Stat. § 939.19(6)?

Do convictions for battery by a prisoner under Wis. Stat. § 940.20(1) and aggravated battery under Wis. Stat. § 939.19(6) offend the principles of double jeopardy?

State v. J. Haines 01-1311-CR
REVW 09/26/2002
District 4/Vernon County
2002 WI App 139/647 NW2d 311
Was the prosecution of the defendant for child sexual assault a violation of the ex post facto clause of article I, section 12 of the Wisconsin Constitution because the state commenced prosecution of the defendant under Wis. Stat. §§ 939.74(2)(c), as amended in 1994, and 948.02, when the sexual assault allegedly occurred in 1992?

State v. P. Weed 01-1476-CR
REVW 09/26/2002
District 4/Columbia County
Should the circuit courts be required to determine whether a defendant who does not testify has personally and expressly waived that right?

In the absence of a personal and express waiver of the right to testify, should the nonwaiver be presumed, and should the burden be on the state to overcome that presumption by clear and convincing evidence? Was the defendant's constitutional right to the effective assistance of counsel violated when her lawyer failed to raise a confrontation clause objection to a hearsay statement admitted at trial?

State v. A. Radke 01-1879-CR
REVW 09/26/2002
District 4/Dane County
2002 WI App 146/647 NW2d 873
Does the "serious child sex offense" portion of the persistent repeater statute, Wis. Stat. § 939.62(2m), violate the state and federal constitutional due process or equal protection clauses on its face because it provides a greater penalty upon conviction of a second Class B felony "serious child sex offense" than upon conviction of a second Class A "serious felony" homicide offense?

State v. B. Seefeldt 01-1969-CR
REVW 09/03/2002
District 2/Fond du Lac
2002 WI App 149/647 NW2d 894
Did the circuit court properly exercise its discretion when it found there was a manifest necessity to grant the prosecutor's motion for a mistrial because it was determined that defense counsel violated a pretrial order in his opening statements to the jury?

State v. J. Greer 01-2591-CR
CERT 09/26/2002
District 1/Milwaukee County
Is a police statement that the defendant failed a polygraph examination, made immediately before a post-polygraph interview, so significant that it overcomes the other factors distinguishing the polygraph examination from the interview and causes the interview to be so closely related to the polygraph examination that statements made in the interview must be suppressed?

State v. P. Jorgensen 01-2690-CR
REVW 10/21/2002
District 4/Dane County
Does Wis. Stat. § 346.65(2m)(a), which authorizes the chief judge of each judicial administrative district to adopt sentencing guidelines for drunk driving offenses, violate equal protection and due process because the guidelines result in differences in sentencing from district to district?

State v. W. Church 01-3100
REVW 10/21/2002
District 4/Dane County
2002 WI App 212/650 NW2d 873
Did the circuit court's imposition of a harsher sentence after a successful appeal violate the defendant's due process rights as set forth under *North Carolina v. Pearce*, 395 U.S. 711 (1969)?

State v. P. Peters 01-3267-CR
CERT 11/12/2002
District 2/Racine County
Does the phrase "or anything else of value" as used in Wis. Stat. § 943.201(2) (1999-2000), Wisconsin's identity theft statute, include a circumstance where an individual uses another person's identity to obtain something that does not have any monetary or commercial value?

State v. L. Edwards 01-3352-CR
REVW 09/26/2002
District 2/Racine County
Did the court of appeals err when it concluded that it did not have jurisdiction to hear a state appeal from a circuit court's order denying a motion for reconsideration because the appeal was not timely filed under the circumstances of this case?

State v. R. Stynes 02-1143-CR
REVW 11/12/2002
District 2/Walworth County
Whether the notice requirements pursuant to Wis. Stat. § 973.12(1), at the pleading stage, and the principles of due process were violated when the state notified the defendant of his status as a repeat offender in a complaint that misstated the date of a prior conviction by one day? Does this misstatement require commutation of the penalty-enhanced sentence? ■

"Jury Instructions" continued from Page 32

trial judge to submit either an instruction for other negative defenses utilized in particular cases or a theory of defense instruction where the theory involves negating a particular element. For more information on theory of the case instructions, you may wish to review Wis. J.I.—Criminal, No. 700, Law Note: Theory of Defense Instructions.

At its December 2002 meeting, the Committee approved several new instructions for variations of the crimes of stalking and harassment. The stalking statute, Wis. Stat. § 940.32, requires proof of a course of conduct which is defined as two or more acts from a list of ten. The Committee concluded that the list, introduced with the phrase "including any of the following," were the exclusive acts which could constitute the course of conduct. However, the Committee deliberately took no position on whether jury unanimity was required when more than two acts were alleged, *see Richardson v. United States*, 526 U.S 813 (1999) (requiring unanimity for specific acts constituting a continuing criminal enterprise), and on whether the two acts could be derived from one incident.

Another difficult aspect of the stalking and harassment laws resulted from penalty enhancers requiring proof of certain prior convictions in which the victim was also the target of the charged offense. The Committee provided for special questions to be answered on the penalty enhancer elements if the jury first found the defendant guilty of the base crime. However, the Committee decided not to address whether the penalty enhancer was close enough to a repeat offender provision that the defense could concede this aspect of the case and remove it from jury consideration. *Compare State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997), *with State v. Veach*, 2002 WI 110, 255 Wis.2d 390, 648 N.W.2d 447.

A recently enacted law, Wis. Stat. § 346.04(2t), creates what is essentially a misdemeanor version of fleeing. It provides a penalty when the defendant "knowingly resists the traffic officer by failing to stop his or her vehicle . . ." after receiving a signal to stop from a traffic officer. In drafting an instruction for this law, the Committee concluded that the word "resisting" did not have its customary meaning and was to be defined solely by the above-quoted statutory language.

The crime of use of a computer to facilitate a child sex crime concerns conduct with children under the age of 16. Wis Stat § 948.075. The law contains an exclusion if the defendant reasonably believed the "victim" was not more than two years older than the defendant at the time of the communication. The Committee instruction drafted for this crime treated the exclusion as an element to be disproved beyond a reasonable

See "Jury Instructions" on Page 45

"Jury Instructions" continued from Page 44

doubt by the prosecution. While several Committee members believed that this exclusion could logically apply only for defendants under the age of 18, the pattern instruction and commentary provide no such limitation on its availability.

In *State v. Harvey*, 2002 WI 65, 254 Wis.2d 442, 649 N.W.2d 189, the court held that it was error for the trial judge to instruct the jury that as a matter of judicial notice a particular park was a "city park." The judicial notice of that fact qualified the defendant for an enhanced penalty for selling drugs within 1000 feet of a city park. The Committee concluded that the decision warranted a special caution that the pattern instruction on judicially noticed facts, No. 165, should not be given "as to facts that constitute elements of the crime."

The Committee elected to replace the existing instruction on the presence of an interpreter during the trial with three separate instructions, depending on whether the interpreter was for a juror, a witness or the defendant. The instruction on an interpreter for the defendant is to be submitted only at the request of the defense.

The Committee met with a staff attorney for the Court Interpreter Committee in order to iron out the wording of the instructions. In the view of your reporter, the discussion seemed to preview issues concerning interpreters other than jury instructions that are likely to arise in the future. For example, it would seem that a defense-retained interpreter assisting in pretrial discussions with an indigent criminal defendant becomes a court-paid interpreter when performing that function at trial. Wis Stat § 885.38(8). This will not help assure loyalty to the defense. Indeed, the new code of ethics for court interpreters limits the role of the interpreter to interpreting or translating. *See* SCR 63.07. This seemingly precludes delegation by defense counsel to the interpreter the role of explaining various matters to the defendant. ■

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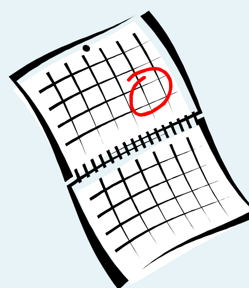

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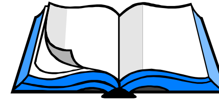

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