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The Right to an Interpreter or Facilitator at Trial

Any person who has difficulty with communication, due to language differences or a disability, is entitled to testify with the aid of an interpreter or facilitator where the court finds that certain criteria are met.

By Joel R. Brandes | December 10, 2019 at 11:45 AM



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In *Matter of Er-Mei Y*, 29 A.D.3d 1013 (2d Dept. 2006), an Article 10 child protective proceeding, the Appellate Division observed that an individual has a constitutional right to counsel in any proceeding in which incarceration is a possibility. It held that as a corollary to the right to counsel, non-English speaking individuals have the right to an interpreter to enable them to participate meaningfully in their trial and assist in their own defense. Although the father had been assigned counsel in connection with the ongoing proceeding, the Family Court judge, among other things, denied him any opportunity to confer with his counsel with the assistance of a Mandarin-speaking court interpreter before remanding him prior to the hearing. The judge also failed to advise the father of his rights to retain counsel of his own choosing in defense of the petition and to have an adjournment to confer with counsel. The record supported the father's assertion that he had no meaningful opportunity to confer with counsel, with the assistance of an interpreter, between the day when he

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first appeared and was summarily remanded to prison, and two days later, when the hearing was held. The Appellate Division held that this deprivation of the right to counsel was a *fundamental* error warranting reversal.

To facilitate the right to counsel, the Judiciary Law provides for the appointment and temporary appointment of court interpreters (Judiciary Law §§386, 387) and provides for the appointment of interpreters for deaf persons (Judiciary Law §390). In addition, the Uniform Court Rules provide: "In all civil and criminal cases, when a court determines that a party or witness, or an interested parent or guardian in a Family Court proceeding, is unable to understand or communicate to the extent that he or she cannot meaningfully participate in the proceedings, the court shall appoint an interpreter." See 22 NYCRR Part 217.

The determination of whether a court-appointed interpreter is necessary lies within the sound discretion of the trial court. *In re Ejoel M.*, 34 A.D.3d 678 (2d Dept. 2006). It is in the best position to make the fact-intensive inquiries necessary to determine whether there exists a language barrier such that the failure to appoint an interpreter will deprive an alleged juvenile delinquent or criminal defendant of his or her constitutional rights. *In re Edward N.*, 51 A.D.3d 928 (2d Dept. 1988).

The determination of the qualifications of an interpreter for a non-English speaking witness or a deaf party is within sound discretion of trial court. *People v. Catron*, 143 A.D.2d 468 (3d Dept. 1988). Thus, a speech therapist was qualified to act as "interpreter" for the complainant who suffered from severe cerebral palsy where the therapist demonstrated an ability to understand that witness and to translate his responses word for word. *People v. Miller*, 140 Misc.2d 247 (1988).

The trial court is also in the best position to determine whether an appointed interpreter, is biased in favor of a party or witness, thereby necessitating removal and replacement. *People v. Lee*, 21 N.Y.2d 176 (2013).

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Upon being appointed to act in a given case, a temporary interpreter is required to "file with the clerk of the court the constitutional oath of office." Judiciary Law §§386, 387.

It is error for the court to allow a relative to interpret for a witness without first determining the need for appointment of an interested person, inquiring into the extent of his bias, ascertaining his qualifications to translate, and admonishing him that he must translate exactly what the primary witness had said. An interpreter should be one who has no bias or interest in the outcome of a case. The danger that a primary witness's message will be distorted through interpretation is compounded

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when the interpreter is biased one way or the other. It has been termed the better practice to avoid appointing a friend or relative of a party or witness as interpreter. *Matter of James L.*, 143 A.D.2d 533 (4th Dept. 1988).

Many cases recognize that it sometimes may be necessary to appoint an interested interpreter, where no competent disinterested interpreter is available. An interested person should not be utilized unless and until the trial judge is satisfied that no disinterested person is available who can adequately translate the primary witness's testimony. Even where the court permissibly appoints an interested interpreter, the trial judge must interrogate him in order to gauge the extent of his bias and admonish him that he must translate exactly what the primary witness has said. *Id.* Since the interpreter is the conduit from the witness to the trier-of-fact, interpretation should be word-for-word rather than summarized, with no conversation between the witness and the interpreter, and no significant differences in the length of dialogue of the witness and the interpreter. *Id.*; *In re Yovanny, L.*, 33 Misc.3d 894 (Fam. Ct. 2011)

The Office of Court Administration has issued a "bench card" for judges working with interpreters in the courtroom, alerting judges to assess the following: (1) Are there significant differences in the length of interpretation as compared to the original testimony? (2) Does the individual needing the interpreter appear to be asking questions of the interpreter? (3) Is the interpreter leading the witness, or trying to influence answers through body language or facial expressions? (4) Is the interpreter acting in a professional manner? (5) Is the interpretation being done in the first person? (6) If the interpreter has a question, does he or she address the court in the third-person? See **[Court Interpreter Manual and Code of Ethics](http://www.nycourts.gov/Courtinterpreter/pdfs/CourtInterpreterManual.pdf)** (<http://www.nycourts.gov/Courtinterpreter/pdfs/CourtInterpreterManual.pdf>), NYCourts.gov; *In re Yovanny, L.*, *supra*.

It has been held that the failure of the defendant to object as to the adequacy of the translation during trial or otherwise preserve proof of any serious error does not provide the basis for a reversal. See *People v. Ko*, 133 A.D.2d 850 (2d Dept.1987); *People v. Rolston*, 109 A.D.2d 854 (2d Dept.1985).

Reversal is not required where there are errors in translation if the errors do not prejudice the rights of a party. *People v. Singleton*, 59 A.D.3d 1131 (4th Dept. 2009); *People v. Dat Pham*, 283 A.D.2d 952 (4th Dept. 2001). *In re Yovanny L.*, where the interpreter did not translate word for word, the court found that the errors made were relatively minor and few, and did not affect the main aspects of the witness's testimony. As it was able to discern the testimony notwithstanding these errors, and there was no major prejudice to any party, the drastic remedy requested by the Presentment Agency during the hearing, of striking the testimony and starting anew, was denied. The court directed that the trial resume with the continued testimony of the witness, with a different Mandarin interpreter to be supplied by the clerk of the court and the interpreter service unit.

A facilitator may be appointed where a witness is non-verbal and has a disability that makes communicating with the court difficult. In *Matter of Luz P.*, 189 A.D.2d 274 (2d Dept. 1993), a child protective proceeding, Luz P. was an 11-year-old girl who was non-verbal and had been described as both autistic and mentally retarded. She had been enrolled in a special education program for the developmentally disabled. It

did not appear that Luz had any hearing defect. In February 1992, therapists in the special education program claimed that Luz could communicate with them by means of "facilitated communication." In this process, Luz allegedly communicated by spelling out words on a keyboard while a "facilitator" supported her hand. Using this technique, the teachers contended that Luz had demonstrated an understanding of both English and Spanish and an ability to read, spell, and tell time. In the course of communicating with her teachers, it was claimed that Luz alleged that her parents were sexually abusing her. As a result of this information, the Department of Social Services removed Luz from the custody of her parents and filed a petition in the Family Court alleging sexual abuse. At the fact-finding hearing Luz was called as the first witness. When the court raised questions as to the ability of Luz to communicate, the County Attorney suggested that questions be put to Luz through the "facilitator". The Law Guardian joined in this application. Counsel for both of the respondent parents objected to this procedure and insisted that there must first be a *Frye* hearing to establish the validity of "facilitated communication" and its acceptance in the scientific community. See *Frye v. United States*, 293 F. 1013, 54 App.D.C. 46 (C.A.D.C. 1923). The court sua sponte summarily dismissed the petition. The Appellate Division reversed and remitted. *Matter of Luz P.*, 189 A.D.2d 274 (2d Dept. 1993).

The Appellate Division observed that all questions of competence are to be decided preliminarily by the court alone. A deaf mute may testify through a person who can understand and communicate with the witness. A critical consideration in the appointment of an interpreter for a witness who does not speak in the English language is a matching of the level of communication skill of the witness with that of the interpreter. Communicating with witnesses who have profound hearing and/or speech impairments can be complicated by the variety of "signing" systems that are in use. It held that the test for the court in cases such as these is a pragmatic one. Can the interpreter, or in this case the facilitator, effectively communicate with the witness and reliably convey the witness's answers to the court? The Appellate Division then held that determination of these questions does not require expert testimony. The proffered facilitated communication lends itself to empirical rather than scientific proof. Thus, the test proposed by the County Attorney, whereby the court could question Luz outside the presence of the facilitator and then hear her responses through facilitated communication, should adequately establish whether this is a reliable and accurate means of communication by Luz. Fact-specific questions can be devised which should demonstrate whether the answers are subject to the influence, however subtle, of the facilitator. If the court is satisfied from this demonstration that the facilitator is "qualified" to transmit communications from Luz to the court, then the facilitator may be appointed as an interpreter under Judiciary Law article 12.

The Appellate Division then held that the facilitated communication proffered need not satisfy the requirements of the *Frye* test. Since the ability of an interpreter, translator, "signer", or anyone else who transmits the testimony of a witness is not based on a scientific theory, any application of the *Frye* test was inapposite. There was no basis for concluding that the presentation of expert scientific evidence was necessary with respect to Luz's facilitator, who would only assist her in communicating her responses to the court and would not translate any of the questions put to Luz.

The respondents argued that expert testimony would be required both as to Luz's competency to testify in light of her autism and as to the susceptibility of her testimony to manipulation by the facilitator. The Appellate Division observed that the court must be satisfied that the testimony as transmitted by facilitation is in fact the testimony of Luz, uninfluenced by the facilitator. If the court is not convinced that the facilitator is reliable, then that facilitator may not serve as the interpreter. However, such a finding should not foreclose Luz from testifying if a reliable facilitator can be found elsewhere. The DSS would have the burden of establishing the reliability of the facilitator at the preliminary proceeding. The fact that Luz had been diagnosed as autistic and classified as retarded did not preclude her from testifying "provided [she] understands the nature and obligations of the oath, and provided, also, [she] possesses the capacity to give a correct account of what [she] has seen or heard in reference to the question at issue". This challenge had to be decided by the court preliminarily. To this end, the court could examine not only the proposed witness, but anyone else who could aid in the resolution of the issue. Inasmuch as proposed witnesses are presumed competent, it would be the burden of the respondents to demonstrate that Luz lacked the capacity to testify by reason of her autism or purported mental retardation.

Conclusion

Any person who has difficulty with communication, due to language differences or a disability, is entitled to testify with the aid of an interpreter or facilitator where the court finds that: (1) he understands the nature and obligations of the oath; and (2) he possesses the capacity to give a correct account of what he has seen and heard in reference to the question at issue; and (3) the interpreter or facilitator can effectively communicate with the witness and reliably convey the witness's answers to the court.

Joel R. Brandes is an attorney in New York and the author of the nine volume treatise *Law and the Family New York, 2d*, and *Law and the Family New York Forms (five volumes)*, both published by Thomson Reuters, and the *New York Matrimonial Trial Handbook*.

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