

Deaf or Hard-of-Hearing Client?

Criminal justice issues within a complex population.

BY JAIME WILSON, PH.D.



Representing clients with hearing losses in the legal setting is no ordinary run-of-the-mill process. Very few people comprehend the unique

challenges. Knowledge of the issues that can come up when deaf and hard of hearing individuals enter the criminal justice system can help ensure that this population receives appropriate representation and forensic services.

Lack of knowledge regarding deaf individuals results in exponentially costly lawsuits each year. In November of 2016, for example, a former Oregon inmate who was deaf was awarded \$400,000 in emotional damages.¹ The financial compensation was awarded even though — from a hearing standpoint — the inmate had received “adequate accommodations.” The “adequate accommodations” had consisted of written notes. The reasons this was not an appropriate accommodation will be elaborated below.

Individuals with hearing losses constitute a group of more than 37 million people in the United States.² Estimates of deaf people within maximum security forensic psychiatric facilities have ranged from 5.1 per 1000 to 12.3 per 1000, both of which are higher rates than what is found in the general population.³

The aim of this article is to high-

light potential problems that can occur with deaf individuals within the criminal justice system. Recommendations for overcoming these issues are also provided.

Potential Issues in the Criminal Justice System for Deaf Individuals: *Miranda* Administrations

When an individual is arrested, he or she has a right to protections under the Fifth and Sixth Amendment of the U.S. Constitution to avoid self-incrimination and to have a lawyer present when questioned about an alleged offense. A large part of these rights is under the aegis of the *Miranda* warning (*Miranda v. Arizona* 1966).

A police officer arresting a deaf suspect may be faced with three communication choices for administering the *Miranda* warning: (1) in writing; (2) using sign language; or (3) by speechreading.⁴ Many professionals who are not familiar with individuals with hearing losses may be surprised to learn that all three choices are considered problematic communication methods for Mirandizing a deaf suspect.

The problem with administering the *Miranda* warning in written or print form is that the reading level of its content tends to be about an 8th-grade level.⁵ Given that American Sign Language (ASL) is a visual language that has no written form and is distinctively different from English, many deaf individuals struggle with reading and writing English. Some deaf people also have minimal communication skills due to language deprivation or inadequate exposure to an accessible language.

While the argument can be made that many hearing people may not be able to understand legal documents such as the *Miranda* warning, a hearing person can be administered the information orally in English (or the hearing suspect's own native language).

It might be logical to assume that if the oral method works for a hearing person, then the parallel counterpart would be an ASL administration. Unfortunately, there are no standardized ASL signs for many of the terms used in the *Miranda* warnings.⁶ Extrapolations of ASL signs for the *Miranda* warnings are known and understood only to a minority of deaf individuals who are well-educated.⁷ To the majority of deaf people — including many highly educated deaf individuals — the signs and technicality of the phrases are foreign and incomprehensible.

The difficulties deaf individuals have with comprehending the *Miranda* warning was documented in an interesting research experiment that took place in 1978. Vernon and Coley selected a version of a *Miranda* statement and had it interpreted by a certified ASL interpreter. They then had a deaf man sign the final version to bring the presentation as close as possible to native ASL. This signed form was then presented to deaf graduate students at Western Maryland College, and their comprehension was tested. The deaf graduate students failed to grasp its contents accurately.

Further complicating matters is the fact that many deaf individuals may succumb to police questioning even

when it is not in their best interests. This response has a cultural basis grounded in the experiences of growing up in a hearing world. Hearing people are viewed as authority figures.⁸ Waivers and other documents may be signed unwittingly. The deaf person may respond with an “empty nod” and thus acquiescence to questions that have no factor in the reason for the arrest.

Past cases involving deaf individuals have resulted in the inadmissibility of evidence because of a lack of understanding of the *Miranda* waiver. A 1981 Oregon case involved a deaf man confessing to beating a deaf woman to death with a hammer while she was in bed. When the sign language translation of the *Miranda* warning administered to the deaf man was challenged, the court had no choice but to release the detained.⁹ There are many cases involving deaf individuals who were released based on the inadmissibility of the evidence due to an invalid *Miranda* process.

Solutions for an Admissible *Miranda* Waiver

Despite the difficulties of attaining a valid *Miranda* warning with an individual who has a hearing loss, there are best practices available. One step is to ensure that *Miranda* — and all related police interviews — are video recorded. Audiotapes contain only what an interpreter *claims* was said (or signed) and can be considered hearsay and inadmissible in court.¹⁰

The video recording should ensure that the suspect’s face and hands are in clear focus. If present, the defendant’s interpreter should also be included in clear line of sight of the video recording. This will allow an assessment of the deaf suspect’s understanding of the interpreted communication.

When a deaf individual is interviewed by law enforcement personnel — who often have little expertise in issues related to those with hearing losses — the assumption tends to be that the suspect shares a common language with similar features of communication.¹¹ These assumptions regularly lead to significant misunderstandings.

It is for these reasons that deaf suspects frequently require police and attorneys to involve other profession-

Issues with Court Proceedings

While courts must make certain that an adjudicating deaf defendant has equal access to various due process activities, the diverse language issues that many deaf individuals present with can severely limit their ability to participate in proceedings. These problems can present even greater barriers for deaf individuals to attain due process than at the time of arrest.

It is important to be cognizant of the fact that taking a sign language class or two does not qualify an individual as an expert on deaf matters.

als who have expertise on issues with hearing losses. As an example, a clinical psychologist who specializes in issues pertinent to those with hearing losses may administer a comprehensive psychological or neuropsychological evaluation. The information gleaned from an assessment can provide information about the deaf individual’s educational attainment and abilities, such as English reading comprehension, sign language fluency, intellectual levels, and knowledge of the legal process. Evaluations may also detect issues of malingering or other dysfunctional behaviors that may be attempts to avoid legal proceedings.¹²

The above information along with an assessment of recorded video interviews can determine the validity of a *Miranda* administration along with other potential legal instruments that may be administered (e.g., search and seize waiver, polygraph examination consent, plea bargains, legal competency).

Research has shown that a significant percentage of deaf individuals have been convicted and sentenced without understanding the legal proceedings that led to the conviction.¹³ Failure to ensure due process rights of deaf defendants have resulted in significantly delayed trial proceedings, egregious errors in judgments to detain or release a defendant, and substantial financial lawsuits.

A common mistake professionals who are not experts in deaf matters make is to assume that the presence of a sign language interpreter guarantees that a linguistically diverse defendant’s language has been accommodated.¹⁴ It is easy to assume that if an interpreter appears to be fluently gesticulating, making facial expressions, and the recipient is responding with head nods and smiles, then the communication must be effective. In reality, it is difficult, even impossible, to know if an interpreter is competent unless the observer is fluent in ASL.¹⁵

It is important to remember that

interpreters are paid for their services and may naturally want to please those who hired them for the job. The pressure of the forensic setting combined with the personal desire to perform may cause the interpreter to seek the desired response.¹⁶ When verbalizing what a client is signing, interpreters may unintentionally gloss things over and make the person sound more sophisticated than in reality. An interpreter's job is to help the client to be understood and sometimes this comes at the cost of precise verbatim, which can result in intolerable errors in the courtroom.

Another important issue is that professionals, unaware of the complexities of interpreting ASL, will frequently turn to someone they know for assistance due largely to convenience. In 2014, when a Tacoma area arrest of a deaf woman, a police officer who was thought to know "some signs" was called in to help with communication. The police officer ended up fingerspelling most of the communication and later resorted to writing, which was incomprehensible to the deaf suspect who had a first-grade reading level.¹⁷

While it is commendable that police officers or other professionals may try to pick up signing skills to have some basic communication with deaf persons they encounter in their work, it is important to be cognizant of the fact that taking a sign language class or two does not qualify an individual as an expert on deaf matters. Issues that deaf people face, especially in a legal case, are far too intricate for basic signers. It is also inappropriate to ask family members of the suspect to assist with communication, which can result in biases or unethical burdens.

Ensuring Optimal Court Proceedings

Probably the most important factor

Table 1. Potential Resources to Assist with the Deaf Defendant

- **National Association of the Deaf Law and Advocacy Center**
8630 Fenton Street, Suite 820
Silver Spring, MD 20910
301-328-1443
<https://nad.org/contact>
- **Deaf Health**
(Find Local Deaf Experts / Deaf-Friendly Doctors)
P.O. Box 2141
Westminster, MD 21158
<http://deafhealth.org/>
- **Registry of Interpreters for the Deaf, Inc.**
333 Commerce Street
Alexandria, VA 22314
703-838-0030
<http://rid.org/>

to consider within a court setting with a deaf defendant is that if an ASL interpreter must be used, only Specialty Certified: Legal (SC:L) or those with National Interpreter Certification (NIC) interpreters should be involved. While obtaining an SC:L or NIC interpreter is a good faith measure that can be recognized by the courts, efforts to provide accommodations for the deaf defendant should not stop there.

In addition to obtaining SC:L or NIC interpreters, use of a Certified Deaf Interpreter (CDI) can act as an extra safeguard to ensure that every interactive dynamic is assessed and acted on in an ethical manner. CDIs act as relay interpreters and will take the information from the SC:L or NIC interpreter and sign it with all of the inherent "native language flavors" to ensure accurate and maximum comprehension.

When a forensic evaluation is requested in preparation for court proceedings, it is important to ensure that the clinician possesses the appropriate linguistic competencies. The clinician should be able to communicate directly with the deaf defendant in his or her language. This is as opposed to an interpreted communication. If a clinician must rely on an interpreter for communication, the added intermediary between the defendant and the clinician often leads to invalid data and erroneous diagnoses.

A psychological evaluation by a linguistically and culturally competent clinician can determine whether the deaf defendant possesses the capacity to participate, has a reasonable understanding of the legal process, or has adequate cognitive functioning to attain competence at a later date.¹⁸

Care must be taken when involving clinicians or other professionals who may have had "some" experiences working with deaf individuals but who otherwise possess no linguistic competencies. The importance of cultural literacy also cannot be overlooked. Awareness of cultural norms is essential to determine how an individual deviates from their own norms.

To demonstrate some of the complexities involved in the linguistic diversity of deaf individuals, consider the fact that many with a significant hearing loss are not exposed to a reliable visual communication medium until well past the critical years of optimal language development (birth to age five).¹⁹ In addition to language deprivation, the region of the United States in which the deaf individual grew up adds an "accent" to the signs the person may use. A bona fide deaf expert may be familiar with various regional signs.

Moreover, ASL is a highly difficult

language to master. It possesses its own unique syntax, morphology, phonology, semantics, and pragmatics.²⁰ An accurate and definite understanding of a given ASL interaction requires knowledge of not only the language aspect but the cultural dynamics that contribute to the communication.

Conclusion

Despite over 25 years since the passage of the Americans with Disabilities Act (ADA), there remain incredible injustices perpetrated on individuals with hearing losses. These injustices are borne not necessarily out of intentional malice but rather a lack of knowledge on the part of professionals who become involved with this population.

Fortunately, there are some ways to improve the situation. Whenever an individual with hearing loss falls into the hands of the criminal justice system, a vigilant effort should be made by the defense attorney and the court to ensure that due process is served. A list of potential resources is provided in Table 1.

As may be deduced from the issues raised, a healthy dose of skepticism should be applied to previous evaluations conducted by non-specialists, including those done with an interpreter. (Surprising as it may seem, many evaluations conducted through an interpreter with a deaf individual are invalid. Only evaluations that are conducted directly in sign, one-to-one as opposed to going through a third person for communication, are considered to be valid.) An appropriate cultural and linguistic assessment of the individual's language abilities, legal capacities, and cognitive functioning should then be undertaken. ■

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hearing, deafblind, and blind individuals across the State of Washington. Born with a profound hearing loss, Dr. Wilson grew up wearing bilateral hearing aids. Although Dr. Wilson primarily communicated using spoken language growing up, he is also an American Sign Language (ASL) user. Dr. Wilson received his Ph.D. in clinical psychology from Brigham Young University and completed a predoctoral internship at the University of Miami School of Medicine. He then completed a postdoctoral fellowship residency at Madigan Army Medical Center in Tacoma, WA. He may be contacted by email at wcs@wilsonclinical.com; his website is www.WilsonClinical.com.

Notes

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