2018 Deaf Rights Update: Are Doctors or Hospitals Required to Provide Interpreters for Deaf Patients and what are the penalties for not doing so?

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On August 2, 2018, the Eleventh Circuit Court of Appeals decided a major decision in a Deaf person's right to get an interpreter at a hospital and the penalties for not doing so. In this decision, Crane v. Lifemark Hospitals, the court found that Mr. Crane had a right to have effective communication when he wanted help from a psychiatric Hospital.

As a person who communicates in ASL, Mr. Crane arrived at Palmetto General hospital and requested a sign language interpreter. He was evaluated by the psychiatrist who communicated with Mr. Crane by writing notes and using basic sign language that she learned when communicating with her developmentally disabled daughter. At that time, Dr. Caro determined that Mr. Crane was not a threat to himself or others. Mr. Crane remained in the hospital and could not discuss his medical or psychological issues and depression for another two days. At the end of his hospitalization, he was provided with an interpreter to advise him that he was being discharged.

This is the third case that has been brought by Disability Independence Group and decided by the Eleventh Circuit that have defined "Effective Communication" for persons who are Deaf, and when denial of effective communication will lead to an award of damages. The first is Liese v. Indian River Medical Center, and the second is Silva v. Baptist Health South Florida, and all together, these three cases define the rights of a person who is Deaf to receive effective communication.

What is the law for providing Sign Language Interpreters for the Deaf?

Under the ADA, the definition of discrimination includes:

> (iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would

fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."

The Department of Justice is the governmental entity that enforces the ADA, and to interpret the ADA, it created regulations. The regulations interpreting effective communications for hospitals is as follows:

(c) *Effective communication*.

(1) A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities.

(i) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(2) A public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her.

(3) A public accommodation shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication, except –

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

> (4) A public accommodation shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

To assist hospitals and medical professionals to comply with the requirements of effective communication, the Department of Justice issued guidance to hospitals when interpreters should be used.

However, the problem was that "effective communication" was not defined, for advocates, effective communication was communication necessary so a Deaf person is not "excluded, denied services, segregated or otherwise treated differently than "hearing persons because of a lack of an interpreter; for some medical providers, the duty of effective communication only gave the Deaf patient a basic understanding of the medical procedure or hospital stay.

What is "effective communication?"

The meaning of "effective communication" was clarified through several decisions in the appellate courts. "Effective communication" is defined as having an equal opportunity to participate in healthcare services and be able to communicate (both expressively and receptively) medically relevant information. In Silva, the court stated as follows:

> There can be no question that the exchange of information between doctor and patient is part-and-parcel of healthcare services. Thus, regardless of whether a patient ultimately receives the correct diagnosis or medically acceptable treatment, that patient has been denied the equal opportunity to participate in healthcare services whenever he or she cannot communicate medically relevant information effectively with medical staff. It is not dispositive that the patient got the same ultimate treatment that would have been obtained even if the patient were not deaf.

What this means is that a Deaf patient has the right to participate in his or her care to the same degree as a hearing person, including conveying and receiving medical information from doctors or other hospital. The ultimate result of the treatment does not matter as much as having the ability to understand the entire treatment.

In Crane, the Court reemphasized this and found that the focus in on the Deaf person's ability to communicate, not on whether the basic requirements of the doctor's procedure were completed or whether the doctor's choice was correct. The test applied is simple – was Mr. Crane able to

exchange the same medically relevant information as a hearing patient would have been? If Mr. Crane could prove that he not understand and suffered a real hindrance due to his disability to provide material medical information with his health care provider, then he could prevail on his case.

So now the question is, how does a doctor or a hospital ensure effective communication?

Why is lip reading or exchanging notes often ineffective?

For many persons in the Deaf population, English is not their primary language; American Sign Language is. The Deaf person's English ability may be at the Elementary School level. Also, the majority of English speech sounds emanates from the tongue, throat, breath, so they are invisible on the lips. Approximately 70% of speech reading involves guesswork because only about 30% of English speech sounds appear on the lips. During a discussion about medical information, where the patient is usually nervous and anxious, this type of guesswork leads to misunderstandings and may place the patient in serious danger. Written notes may be acceptable for short and simple conversations, such as asking a question in a store, but not when the information is long, important, or complex.

Why are Qualified Interpreters necessary?

Sign Language interpreters are highly experienced professionals that have specialized expertise and training. While proficiency in English and in Sign Language is necessary, language skills alone are not sufficient for an individual to work as a professional interpreter. Becoming an interpreter is a complex process that requires a high degree of linguistic and technical skills. According to ADA Regulations, a qualified interpreter is required to be able to interpret accurately, both expressively and receptively using any specialized vocabulary needed for the communication. While professional certification is not required under the law, an important measure of an interpreter's proven ability is professional credentials by an accrediting organization such as Registry of Interpreters for the Deaf, Inc. (RID).

There are some persons in the Deaf community who have limited fluency in ASL and may require a Certified Deaf Interpreter, who is a deaf individual certified to interpret with a certified sign language interpreter to facilitate understanding with the patient.

Does the Law Require Doctors to provide interpreters?

Doctors' offices are public accommodations and are required to provide auxiliary aids and services, such as an interpreter for the appointments. It also requires that the doctor provide an interpreter to a companion of a patient that the doctor would normally communicate with during the appointment. Unlike hospitals, small doctor's offices may claim that providing interpreters are an undue burden for them to provide an interpreter. If a doctor's office is inside a hospital or a medical building with doctor's office owned by the hospital, both the hospital and the doctor's office are both responsible for providing the interpreter.

Are there any benefits for the doctor by providing interpreters?

Besides the basic benefit that doctors are able to communicate with their patient and be compassionate and understanding to the Deaf patient's needs, the Internal Revenue Service provides a "Disabled Access Tax Credit" for 50% of all amounts spent on services for the Deaf. After the first $250.00, this amount is in addition to the 50% deduction for the business expense. So if you have several Deaf patients, the tax benefit pays for the price of the interpreter.

When can a Doctor decide not to provide an interpreter?

1. Where the information conveyed is short, simple and not important. If the visit is to provide a flu shot, with not much discussion or conversation, then passing notes may be acceptable. However, if the patient has a pre-existing condition that would cause a side effect, an interpreter may be required.

2. When providing an interpreter is an "undue burden," meaning that providing a interpreter would have a substantial material effect on the overall resources of the doctor's office. This may be the case if the doctor's office has a very few patients and can hardly make ends meet. When a doctor has an active medical practice, it does not matter whether the cost of the interpreter exceeds the amount of the appointment. (1) (2) (3) (4) (5)

When can a Hospital or Doctor provide a Video Remote Interpreter?

Most of my clients hate using a Video Remote Interpreter at a hospital. In fact, the use of a video remote interpreter is controversial, and is being used as a cure-all for communication needs for a hospital. Many times when this equipment is used, the hospital staff is untrained, the equipment cannot be connected to the remote interpreter, and when it is used, the connection lags, choppy, blurry and disconnects. Because of the general discontent of the Deaf community, and the many technical problems or inappropriate use of such technology, the National Association of the Deaf urges the use of VRI for emergency situations when in-person interpreters are not available or otherwise as a last resort.

With a Video Remote Interpreter, a live ASL interpreter is located remotely and communicates with the doctor and patient through an Internet connection via portable screen and

camera located in the hospital or doctor's office. According to Department of Justice Regulations, the requirements to use a VRI are as follows:

(f) *Video remote interpreting (VRI) services*. A public accommodation that chooses to provide qualified interpreters via VRI service shall ensure that it provides –
(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
(2) A sharply delineated image that is large enough to display the interpreter´s face, arms, hands, and fingers, and the participating individual´s face, arms, hands, and fingers, regardless of his or her body position;
(3) A clear, audible transmission of voices; and
(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

When the VRI does not work, or lags, is choppy, blurry, repeatedly disconnects, or the staff does not know how to use the VRI, then it is not effective communication.

VRI is good for many situations. In some areas, it could take two or more hours to obtain an in-person interpreters for an emergency, and, without VRI, there would be only basic exchanges of notes. VRI also is useful for conversations about insurance or payment information, short exchanges of medical information, such as hospital rounds or quick questions, or other calm, straightforward, one-on-one communications.

There are many circumstances and medical procedures that VRI would not provide effective communication:

- Patients with low vision who cannot accurately see the screen.
- Patients with an injury or procedure that impedes their ability to view the screen. For example, this includes procedures where a person is lying on their stomach, has their feet in the air, or visiting the eye doctor.
- Patients that cannot position their hands or arms in a location where the camera on the VRI allows the remote interpreter to adequately see what the person is signing. For example, this would include someone who has IVs in their arm(s), broken arms or hands, or is in pain when moving.
- Situations where there are multiple hearing persons who would be speaking. The remote interpreter may not be able to distinguish one person's voice from another. The

remote interpreter will not be able to distinguish between a doctor and your Aunt Martha.

- Situations where there are multiple deaf persons who are communicating with hearing medical professionals. In these situations, it may be difficult to move the VRI so multiple deaf professionals can use it.
- Situations that involve movement of the Deaf patient, such as physical or occupational therapy, as the VRI cannot be constantly moved. It would also be difficult placing the VRI in a location where the therapist could be viewed at the same time as the interpreter.
- Patients who are emotional, medicated or intoxicated, or young children who may not be able to concentrate on the screen and may not be able to keep their signing within the limited area so the VRI camera can send the image to the remote interpreter. This is similar to requesting that a hearing person who is emotional, medicated or intoxicated, or a child whisper to a doctor in order to be understood. For the same reason, if the Deaf patient is discussing sensitive issues or other emotional issues, a VRI will not be effective.

How have courts dealt with issues relating to VRI.

Courts have treated the use of VRI identically to any other types of modes of effective communication. The main question is whether the person's ability to discuss medical information was impaired. In Silva, many of the allegations of ineffective communication involved the reliance on faulty or inappropriate use of VRI. The Court focused on the effects of the lack of ineffective communication, and what efforts were made to provide effective communication, and not the equipment itself. In doing so, the Court stated:

> Noncompliance with the technical performance standards for VRI machines is, by itself, not necessarily enough to make out an effective-communication claim. What matters is the actual quality of the communication between the patient and hospital staff.

As such, the failure to comply with the technical performance standards is relevant to corroborate the Deaf patient's testimony that the VRI did not work, and to believe that the VRI may not work when the Deaf patient goes back to the hospital.

Who gets to choose, the doctor or the Deaf patient?

According to the Eleventh Circuit Court of Appeals, "If effective communication under the circumstances is achievable with something less than an on-site interpreter, then the hospital is well within its [Americans with Disabilities Act] obligations to rely on other alternatives. Indeed, the implementing regulations clarify that 'the ultimate decision as to what measures to take rests with' the hospital."

So it all depends on whether the Deaf person has an equal opportunity to understand and participate in his or her medical treatment and medical decisions.

How can I make sure that I receive an interpreter? Then, when can I sue the Hospital or Doctor for not providing me an interpreter?

These questions are very similar, because if you are able to advocate for yourself, it is likely that you will get the accommodation that you need. If you advocate correctly, then you will be able to have a discrimination lawsuit if you are denied an interpreter.

For a hospital or a doctor's office, the laws are the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The Rehabilitation Act applies to all entities that accept federal financial assistance, such as Medicaid and Medicare, and is interpreted the same way as the ADA. However, while the ADA does not provide for damages, the Rehabilitation Act provides for damages when the discrimination is intentional or done with deliberate indifference. A case under either the ADA or the Rehabilitation Act can require a doctor or hospital that you would like to use in the future to provide you with an interpreter when you return to that doctor.

In order to prove intent under the law, a Deaf person does not need to show that the doctor or hospital disrespected the Deaf patient. The hospital can even be very nice to the Deaf patient and have great policies and procedures, and still be liable for intentional discrimination. All that is required to be shown is that

(1) a person who had the authority to provide an interpreter
(2) knew that an interpreter was required for effective communication
(3) that person deliberately failed to obtain an interpreter for the deaf person.

Who is a person with authority?

A person with authority is a person in the hospital or doctor's office that had the authority to get an interpreter. It will depend on the hospital or doctor's office. Accordingly, when an interpreter is required, it is advisable to ask a person who is a supervisor or a doctor so you know can be sure that the request is getting to the right person.

How do you ask for an Interpreter?

1. Ask for the interpreter when you make the appointment, or immediately when you arrive at a hospital
2. If they say no, then ask to speak to the office manager or the doctor.
3. You need to ask everyone who has the authority to obtain an interpreter for you that you need an interpreter. If it is a doctor's office, ask to speak to the doctor or office

manager. At a hospital, ask everyone from the person who first sees you at admissions, to each nurse and doctor for an interpreter so you can understand.

4. If they say no, say that you are deaf and you will not understand if you do not get an interpreter. Tell them that it's your right under the ADA and provide them this article or information from the ADA website about medical information.

Also – be sure to keep written notes of who you ask, and if you communicate by writing back and forth, keep those notes too!

How can you make sure to have that person with authority know that an interpreter is required?

If VRI is not working, complain to the person with authority. If you are not getting an interpreter, complain to the person with authority. If you do not complain that you are not receiving effective communication. If a hospital insists on providing a Video Remote Interpreting, and you do not believe that it will be effective, you need to tell the doctor or nurse why the VRI will not be effective. According to the National Association of the Deaf, these are a few examples:

I need a sign language interpreter on site because (choose one or more):

1) I cannot see the VRI screen.
2) The VRI screen is too small; I cannot understand the interpreter.
3) The VRI machine keeps freezing and/or pixelating; I cannot understand the interpreter.
4) The VRI interpreter cannot hear you and therefore cannot interpret.
5) The VRI machine has disconnected too many times. It is not reliable.
6) The personnel here do not know how to set up the VRI machine.

At that time, you can ask for a live interpreter to the doctor, nurse, or other hospital staff that can provide an interpreter. If the VRI is working, use the VRI interpreter to explain to the doctor or nurse why the VRI is not effective for the treatment or service. It is not enough to just say that you do not like VRI.

But, if no interpreter is provided, constantly complain to every doctor, nurse, and supervisor, and have your friends and family complain. Also, refuse the medical service, or refuse to sign papers until an effective interpreter is provided. (unless it is an emergency or you are in pain!)

What does deliberately fail mean?

It cannot be a mistake. If a hospital calls an interpreter, and the interpreter does not show up, then it is not a deliberate act by the hospital. If the Deaf patient complains the next day after the interpreter does not show up, and the hospital continues to fail to obtain an interpreter, than a

mistake may turn into an intentional failure. Or if VRI does not work, and refused to wait for an interpreter and a hospital proceeds with an operation without waiting for a live interpreter, that may be sufficient for an intentional violation.

What to do if the Doctor in his or her office says no?

1. If the doctor leases space from a medical building that is owned by a hospital, call the hospital's interpreter services and ask them to provide an interpreter for the doctor's office. Under the ADA, the person who owns the space where the medical office is located may also be responsible for the accommodation. This is the case where the building owner focuses on having all doctors and medical offices in its building

2. Call up the insurance company. Most insurance companies receive and administer Medicare policies, especially those that are a part of the Affordable Care Act (a/k/a Obamacare), and if they do, they are not allowed to discriminate in their programs and services under a law called Section 504 of the Rehabilitation Act. Tell them that the doctor on their plan refused to provide an interpreter and you want to see a doctor that will provide an interpreter.

Retaliation

Under the ADA or the Rehabilitation Act, a doctor or hospital cannot refuse to see you if you complained or filed a suit against the doctor or the hospital.

All cases are unique, and if you have a question, or need to know what your rights are, call a lawyer!

There are many different laws in the United States, and in this article, I focused on two federal laws that involve the denial of interpreter services by hospitals or doctors. Many states, like California, have state laws that provide more protection than federal laws, and it is important that you speak to a lawyer in your state if you believe that you have a claim. Also, all claims and relief that you can get are dependent on the specific facts or your case. All cases are not alike and you should speak to a lawyer if you think you have a claim.

Other Resources.

1. Filing a complaint with the Department of Justice.
   http://www.ada.gov/filing_complaint.htm
   If you are deaf and cannot communicate in English, call up the Department of Justice ADA Information Line at 1-800-514-0301 to schedule an appointment for them to take the complaint by phone. If you file a complaint, the complaint may also be referred to

the Key Bridge ADA mediation program, which will give you an opportunity to resolve the case without substantial delay.

2. If the office has over 15 employees or a hospital, you can complain to the Department of Health and Human Services at https://ocrportal.hhs.gov/ocr/smartscreen/main.jsf If you are deaf and cannot communicate in English, call up the Department of Health and Human Services, at 1-800-368-1019,to schedule an appointment for them to take the complaint by phone

3. For information on the standards when Video Remote Interpreters are effective, see the following:
    a. National Association of the Deaf position paper on Video Remote Interpreting
    b. National Association of the Deaf position paper on VRI in hospitals
    c. Registry of Interpreters for the Deaf Position Paper on Video Remote Interpreting