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RQ-723

July 20, 1994

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JUL 22 1994

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FILE # ML-27738-94

Dan Morales, Attorney General  
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I.D.# 27738

Att: Chair, Opinion Committee

Re: Can an interpreter for a deaf juror accompany  
the deaf juror into the jury deliberation room  
during deliberation?  
C. A. No. 45,884

Ladies and Gentlemen:

The County Courts of Harris County have requested your opinion on  
the following question:

May a court permit an interpreter for a deaf juror  
to accompany the juror into the jury deliberation room  
during deliberation?

Our Memorandum Brief is enclosed. Please furnish us with your  
opinion on the above question.

If we can provide you with additional information, please do not  
hesitate to contact us.

Sincerely,

MIKE DRISCOLL  
COUNTY ATTORNEY

By:  
Sandra D. Hachem  
Assistant County Attorney

Enclosure (1)

**MEMORANDUM BRIEF:**

**May a court permit an interpreter for a deaf juror to accompany the juror into the jury deliberation room during deliberation?**

The Americans with Disabilities Act (ADA) expresses that a person who has a disability, such as deafness, cannot be excluded from participation in or be denied the benefits of a local government's activities, programs or services on account of their disability, if such individual, with or without accomodation (such as a qualified interpreter or other appropriate means) meets the essential eligibility requirements for participation in the subject activity, program or service. 42 U.S.C.A. §12132 (West Supp. 1994) (general mandate against discrimination toward qualified individuals with disabilities); also see *Id.* at 12131(2) (defines "qualified individual with a disability"); *Id.* at §12102 (defines "auxiliary aids and services" to include qualified interpreters). This congressional mandate indicates that a person who is deaf cannot be excluded from participation in jury service on account of their deafness if the person can meet the essential eligibility requirements to serve as a juror with a qualified interpreter.

Nevertheless, article 36.22 of the Code of Criminal Procedure mandates that "No person shall be permitted to be with a jury while it is deliberating;" and "No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court." TEX. CODE CRIM. PROC. ANN. §36.22 (West Supp. 1994). Violation of this article results in criminal penalties. *Id.* at §36.23 ("contempt of court by confinement in jail not to exceed three days or by fine not to exceed one hundred dollars, or by both such fine and imprisonment."). In addition, article 40.03 of the Code of Criminal Procedure states that new trials, in cases of felony, "shall be granted the defendant" for limited causes, which include "where a juror has conversed with any person in regard to the case. . ." *Id.* at article 40.03. In other words, the Code of Criminal Procedure suggests that an interpreter, who would be a person permitted to converse with a deaf juror out of the presence of the court during deliberation, could be subject to criminal penalties, or expose the case to a potential mistrial. Accordingly, the question addressed in the memorandum is whether an interpreter may be allowed into the jury room during the jury deliberation if such interpreter is necessary for the purpose of communicating the jury deliberations to the deaf juror.

Despite the severe language in the Code of Criminal Procedure which would seem to prohibit nonjuror interpreters from participating in jury deliberation, the legislature in 1987 made clear, at least in the context of civil cases, that an interpreter appointed for a juror "may be present and assist the juror during the jury deliberation." TEX. CIV. PRAC. & REM. CODE ANN. §21.009 (a)

(Vernon Supp. 1994). In addition, the legislature added that the presence of the interpreter during jury deliberations "does not affect the validity of a verdict." Id. at §21.009(b). Further, section 21.002, as amended, indicates a juror has the right to participate in a case with a court-appointed interpreter. Id. at §21.002 (Vernon Supp. 1994) ("juror in any case is entitled to have the proceedings interpreted by a court-appointed interpreter."). Accordingly, these provisions in the Civil Practice & Remedies Code seem to conflict with the sections in the Code of Criminal Procedure prohibiting nonjurors from conversing with jurors during deliberation.

Nevertheless, the Code Construction Act states that if a general provision conflicts with a special provision, the provisions should be read together so as to give effect to both. If the provisions cannot be harmonized, the Act directs that the special provision prevail as an exception to the general provision, unless the general provision is the later enactment. TEX. GOV'T CODE ANN. §311.026 (Vernon 1988). Pursuant to this instruction, even if the pertinent sections in the Code of Criminal Procedure and Civil Practice and Remedies Code cannot be read together in harmony, the sections in the Civil Practice and Remedies Code, which is later in enactment, should be read as an exception to the general prohibition against the presence of nonjuror's in the deliberation process. Id. Accordingly, it is clear, at least in the civil context, that a nonjuror interpreter may be present in the jury deliberation room if necessary to provide effective communication of the deliberations to a nonhearing juror.

In the context of criminal cases, however, it may be argued that the provisions in the Texas Civil Practice & Remedies Code do not apply since the title of this Code indicates it is utilized for civil cases, and there is no mirror provision in the Code of Criminal Procedure. It should be noted, however, that the Texas Civil Practice & Remedies Code, although entitled "Civil Practice" does not state that it only applies to civil cases. See TEX. CIV. PRAC. & REM. CODE ANN. ch. 1 (Vernon 1986) and (Vernon Supp. 1994) (general provisions); also see Id. at ch. 21 (interpreters). In addition, section 21.002 suggests that a deaf person is entitled to have an interpreter "in any case." This section provides:

In a civil case or in a deposition, a deaf person who is a party or witness is entitled to have the proceedings interpreted by a court-appointed interpreter. A deaf person who is a juror in any case is entitled to have the proceedings interpreted by a court-appointed interpreter.

Id. at §21.001 (Vernon 1994). As this section is written, the legislature qualifies that in a "in a civil case" a deaf person has the right to have a court-appointed attorney; but adds that "in any case" a juror has the right to have a court-appointed interpreter

interpret the proceedings. The way this section is written, it suggests that the legislature intended to emphasize that a deaf juror has the right to have an interpreter regardless whether the case is civil or criminal.

Also, it seems logical that the Civil Practice & Remedies Code should be able to address jury service, regardless of whether the case is civil or criminal, because jury service is not a matter of civil or criminal concern. A juror's right to serve as a juror is a matter of judicial process and procedure that applies regardless of whether the case is civil or criminal. Accordingly, the applicable provisions in the Civil Practice & Remedies Code should apply and allow jurors the right to have a court-appointed interpreter present during jury deliberations.

Nevertheless, even if section 21.009 of the Civil Practice & Remedies Code did not apply to jurors serving in criminal cases, the Texas Code of Criminal Procedure could not prevent nonhearing jurors from participating in jury service with an interpreter, because this appears to conflict with the federal mandate of the ADA. State law is in conflict when it is impossible to simultaneously comply with both the state and federal law or when state law is an obstacle to the accomplishment and execution of the full purposes and objectives of the federal enactment. Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985). If the only way for a deaf juror to participate in jury deliberation is through the service of an interpreter, then a state law which would prohibit the interpreter's presence would act as an obstacle to the ADA mandate. The mandate, as noted before, prohibits governmental entities from excluding persons with disabilities from participating in governmental activities on account of their disabilities as long as the disabled person is otherwise qualified to participate. Texas law, therefore, is preempted by federal law to the extent it prevents a governmental entity from allowing qualified jurors who are deaf from participating in jury service.

Accordingly, a deaf interpreter must be allowed in a jury room during deliberations if such interpreter's services are necessary to allow a participating and qualified deaf juror to effectively understand and communicate during jury deliberations.