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POSITION PAPER

Consecutive Interpreting at the Witness Stand: why it should always be the only mode used

The Court Interpreters Act provides, in paragraph (k):

*The interpretation provided by certified or otherwise qualified interpreters pursuant to this section shall be in the simultaneous mode for any party to a judicial proceeding instituted by the United States and **in the consecutive mode for witnesses**, except that the presiding judicial officer, sua sponte or on the motion of a party, may authorize a simultaneous, or consecutive interpretation when such officer determines after a hearing on the record that such interpretation will aid in the efficient administration of justice.[1] [Emphasis added]*

The practice instituted in recent times by some federal courts that combines the simultaneous interpreting mode for questions and the consecutive interpreting mode for answers during the testimony of non-English speaking witnesses, first and foremost, goes against the clear language contained in 28 U.S.C. §1827 et seq. To date, there have been no reports of any hearing on the record resulting in findings by the presiding judicial officer to the effect that the use of such a combination of interpreting modes in any way aids in the efficient administration of justice.

To make such a finding would actually be very difficult, if not impossible. The law provides for a certified interpreter to be appointed by the presiding judicial officer when a witness “speaks only or primarily a language other than the English language (...) so as to inhibit such witness’ comprehension of questions and the presentation of such testimony”[2], but as

this paper will show, using the simultaneous mode to interpret questions for a witness may actually distort the witness’ comprehension of the questions being posed and, consequently, the testimony presented to the fact finders.

Lost Information on direct and cross-examination

When a witness is called to testify, attorneys don’t limit themselves to asking questions about the facts known to that witness. On direct examination, questions may also be for purposes of **accrediting the witness**[3], or other purposes known only to the team of attorneys that called the witness to the stand. There may be some initial questions that introduce witnesses to the jury or the judge and link the witness to the events or facts in the case. The questions will follow a certain sequence, taking the witness on a journey with the fact finders that follows a chronological order—e.g., what did you see

first? where did you go next?—while establishing a rapport, a rhythm, sometimes even a cadence with the repetition of certain parts of a witness’ answer, or parts of a previous question. The examining attorney’s voice will be very reassuring, both for the witness and the fact finders listening to the testimony. A skilled attorney will use voice **intonation** to convey additional, yet unspoken, information, such as: “this is a reliable witness.”

“Rote intonation implies that witness and testimony are dull and unworthy of attention. A vocal rise, on the other hand, segues attention to the witness and piques the jury’s curiosity.”[4] During cross-examination, on the other hand, the attorney asking the questions will use intonation for purposes diametrically opposed to those of the attorney conducting the direct examination. The main goal of cross-examination is to cast doubt on the testimony already given by the opposing side’s witnesses and diminish their credibility in the eyes of the fact finders.[5] There are strategies that often rely not just on the words chosen to ask questions, but the specific inflection in the voice to convey skepticism, sarcasm, or incredulity. Sometimes lawyers use intentional pauses as if they were trying to remember something the witness said earlier, or staccato sequences of very short questions intended only to fluster and confound the listener.

When the fact-finding native English speakers hear the verbal and nonverbal components of the direct and cross-examination questions, they understand the full intended *meaning* because they share a *context* that tells them, “this is a conciliatory tone of voice,” or “this is a recriminatory tone,” and so forth. As members of the same speech community, English-speakers in the courtroom have certain social experiences, backgrounds, and other knowledge in

common that contribute to an overall understanding of a given message as intended by the speaker.

Shared knowledge, therefore, does not need to be explicitly stated and is oftentimes *implicit* in the verbal messages. For example, when men get together to talk about football, they know the rules of the game and need not repeat them whenever they talk about this player’s mishap or that one’s great performance. But if you have a female witness from a rural community in Central America who is asked “do you have any children?” and her answer is, “I am single,” someone unfamiliar with her speech community may think she is being nonresponsive. The implicit information for her, however, would be that women in her community do not have children until they are married, but outsiders will miss this valuable piece of information, unless it is made explicit.

Language, meaning, society and culture are all interdependent. The way we produce and understand **meaning** cannot be separated from the culture in which the language is used and the social institutions that create all the rules for the way in which we use language. It is of critical importance for interpreters on the witness stand to be able to identify when attorneys and witnesses are not communicating effectively, not merely because they do not speak the same language but because they do not share the necessary knowledge about each other’s culture to be able to infer any implicit information contained in either the questions or the answers. This cannot be done if there is one interpreter rendering the questions in the simultaneous mode and another one rendering the answers in the consecutive mode.

Furthermore, any nonverbal elements that the English-speaking attorney has chosen to incorporate into the question and that everyone else in the courtroom has heard and understood, are more likely to be lost when questions are rendered in the simultaneous mode for the non-English speaking witness than they would be in the consecutive mode.

The impact of simultaneous on witness comprehension of questions

When a witness does not speak English, the reassuring tone of voice that an attorney may use in direct examination, or the disbelief implied in cross-examination intended to undermine a witness' credibility, should be part of the message conveyed by the interpreter. These nonverbal elements in the discursive exchange are just as important as the words themselves in the overall meaning of a question or an answer. Ray Birdwhistell, "an American anthropologist who founded kinesics as a field of inquiry and research"[6], estimated that "no more than 30 to 35 percent of the social meaning of a conversation or an interaction is carried by the words."

Interestingly enough, a survey of legal professionals conducted in New South Wales revealed that 70% of those who answered, among them "judges, barristers and solicitors who work for the Department of Public Prosecutors (...) expected to hear interpreters render their question style more faithfully than they did witnesses' utterances.[7] While it may seem counterintuitive, this survey result points to the critical importance of the question itself in direct and cross-examination.

Studies in simultaneous interpreting have shown that "interpreters try to organise [sic] the words they hear into meaningful units as fast as possible to decrease working memory

requirements, thus producing relatively short intonational phrases."[8] Furthermore, "[o]ther studies involving intonation in simultaneous interpreting have (...) found that interpreters adjust to the fundamental frequency of the speaker and tend to be more monotonous than the speaker."[9]

We know that no two languages are mirror images of each other, and, more often than not, an accurate rendition from source to target language will require more words. If the interpreter is attempting to convey a question in the simultaneous mode that requires more words in the foreign language than it did in English, while at the same time keeping pace with the attorney, then the speed at which the witness will hear the question will necessarily be different—i.e., faster—than the pace the examining attorney may want to set. That speed may also have an impact on the witness' ability to understand the question. The results of "the only investigation to date of the impact of intonational deviations on audience comprehension (...) indicate that abnormal intonation and stress patterns may compromise comprehension. Similar findings have been reported from psychological studies on the perception of flattened fundamental frequency..."[10]

When we combine monotonal renditions with increased speeds, the result of direct and cross-examination questions rendered in the simultaneous mode are essentially distorted conveyances of the attorney's intent when asking a question. Changing the intonation of a question can change the witness's response, and consequently the testimony that goes on the record.

A lawyer can be gentle, sarcastic, friendly, hostile; questions can become polite requests or aggressive demands, all based on the nonverbal elements of speech as much as on the verbal elements. A witness who does

not speak or understand English will have no way of recognizing any of these elements unless the interpreter conveys them. As we have seen and academic research has shown, the simultaneous mode does not allow for that level of accuracy because of temporal limitations and cognitive load management strategies resulting in monotonal and fast-paced renditions that compromise a witness' full semantic and pragmatic[11] understanding of a question. Under these circumstances, the reliability of the ensuing testimony becomes debatable.

The significance of the consecutive mode

The prevailing literature in the field has defined two major interpreting strategies: one based on the surface structure of the message—the form—and one based on the deep structure—the meaning. “Form-based interpreting is generally described as a more or less direct transmission of source text structures to corresponding structures in the target language, i.e. as a procedure in which the interpreter follows the surface form of the source text as much as possible when constructing the target text. In meaning-based interpreting, by contrast, the interpreter detaches him/herself from source text form and produces the target text only on the basis of a conceptual – i.e. a non-verbal or amorphous – representation of the meaning of the source text.”[12]

When interpreters use the consecutive mode for direct and cross-examination, they can assess all the verbal and nonverbal components of the question and incorporate the appropriate equivalents into the target language. The brief window between listening, processing in both short-term working and long-term memory, transferring from source to target language, and rendering the message orally, enables the interpreter to make all necessary allowances for:

- different word orders in source and target languages (S-V-O, O-S-V, V-O-S, etc.)
- culturally appropriate intonation for the target language (not all languages use the same intonation patterns)
- illocutionary force[13] (polite request, command/order/instruction, promise, recrimination, encouragement, intimidation, etc.)

The consecutive mode allows the interpreter to hear exactly what sort of inflection the attorney is using, identify the precise intent of the question, not just the words, and reproduce it all in the target language rendition for the witness. Incorporating all the nonverbal elements of the source language, such as proper stress patterns, pauses, tone, speed, and at times even an appropriate volume, is of vital importance to reproduce the *intended meaning* contained in the English language message. We must keep in mind that everyone else in the courtroom has understood the attorney's question, except the witness. The expectation of an answer to the question posed hinges on the interpreter's conveyance of two distinct aspects of the source message: the semantic—the meaning of the words used—and the pragmatic—the intention with which the speaker addresses the listener.

Consecutive interpreting gives the interpreter a much broader range of possibilities for an idiomatic rendition—a rendition that sounds natural to the native speaker in the target language—of both the question by the attorney and the answer by the witness, than the simultaneous mode ever will.

Loss of coherence

When one interpreter is asking the questions in the simultaneous mode and a different interpreter is rendering the answers in the consecutive mode, there is no uniformity or continuity in the choice of vocabulary or specialized terms used by the one asking the questions and the second one interpreting the answers, because the second one is not necessarily hearing the first one (not unless he or she also wears a headset like the witness is wearing.) This is a very uncomfortable proposition for the second interpreter, who in most instances is next to the witness taking notes for the consecutive rendition and presumably at some distance from the one interpreting the questions.[14]

Having one interpreter working in the simultaneous mode and one in the consecutive mode also defeats the purpose of working in teams, as it makes it impossible for either one to assist the other should it become necessary. For example, one or the other may need assistance with a term and, if the team were working properly, the teammate could consult a dictionary or glossary, or perhaps he or she would already know the word and could just write it down on a piece of paper and pass it on. Then again, one or the other could have a coughing fit, and the proceedings would have to stop because the teammate is busy and cannot take over.

Working in the consecutive mode allows the interpreter to establish a rhythm with the witness and the attorney asking the questions, so the turn-taking with the questions and answers flows smoothly. With questions in the simultaneous and answers in the consecutive, the turn-taking is awkward and there is no flow to the exchange between the attorney, the witness and the interpreters. With very rare exceptions, there will be a delay after a question has been

asked in English while the interpreter completes the simultaneous rendition in the foreign language, creating an awkward moment of silence in the courtroom that breaks up the pace of the examination.

During consecutive turn-taking, the interpreter also becomes familiar with the speech style of both the witness and the attorney, which helps anticipate and reformulate speech and thought patterns for each. This cannot happen when the tasks are divided between two interpreters, one focused solely on the questions and one solely on the answers. This is just another of the many factors in the communication process that may be missed by having questions rendered by one interpreter and answers conveyed by a different interpreter, not the least of which is cultural differences.

Implicit in a communicative process that involves different languages is the difference in cultural points of reference. "Achieving *pragmatic competence* involves the ability to understand the **illocutionary force** of an utterance, that is, what a speaker intends by making it. This is particularly important in cross-cultural encounters since the same form (e.g. 'When are you leaving?') can vary in its illocutionary force depending on the context in which it is made (e.g. 'May I have a ride with you?' or 'Don't you think it is time for you to go?')."[15] This is not to say interpreters are to *guess* an attorney's hidden agenda behind a question, but rather the evident intention of an attorney when examining a witness that can be discerned by the intonation used in a question. A question that reflects disbelief in the attorney's voice should not be rendered in a monotone any more than a question with a sympathetic tone towards a witness should be rendered in a monotone.

There is a classic example of the office employee that someone greets in the morning saying “how are you?”, meaning simply “hello”, but is taken literally by a co-worker who then proceeds to list all the pains and aches that afflict him. This is also known in the field of linguistics as a communicative gap, a misalignment, or a **pragmatic failure**. What the original speaker meant as a simple greeting, the listener took as a literal concern about his current health status. Such simple misreading of a speaker’s intention is not so simple when it involves testimony in court.

Surely you have heard this exchange at some point:

Q Sir, can you tell the judge how old you are?

A Yes.

The witness is not being evasive. He is simply taking the question very literally, understanding the semantic aspect but missing the pragmatic aspect completely. Rather than hearing this as a direct or indirect *request* for information—what is your age—he is hearing it as a *probe*—can you or can you not provide that information?

And then there’s the classic:

Q Sir, can you state your name for the record?

A Who? Me?

Is the defendant being evasive? Making fun of the process? Or just confused? Sometimes knowing what is the best way to pose the question—in this case, “state your name” instead of “can you state your name”—will avoid misunderstandings and lead to more effective communication.

On the other hand, failing to grasp the pragmatic aspects of questions posed to the witness can result in answers that give the wrong impression about the witness’ candor, reliability, truthfulness, and so forth. This is one of the greatest risks of asking questions in the simultaneous mode instead of the consecutive mode.

Conclusion

Witness testimony must always be interpreted in the consecutive mode, both the questions posed by attorneys in direct and cross-examination, as well as the answers given by the non-English speaking witness. It is what the law mandates. It is also the only way to ensure that a witness who cannot understand what the English-speaking lawyer has asked gets a complete rendition of the question that includes the exact meaning of the words spoken and nonverbal components that contribute to the overall sense of the attorney’s question. This practice is what assures everyone—the judge, the jury, the lawyers, and the litigants or defendants in a case—that the witness has given an answer consistent with the question posed in English, and not a different question resulting from a pragmatic failure an interpreter has caused.

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[2] *Ibid*, Paragraphs (d)(1)(A) & (B).

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[5] Cf. George J. Cotsirilos, *Meeting the Prosecution's Case: Tactics and Strategies of Cross-Examination*, 62 J. Crim. L. Criminology & Police Sci. 142 (1971)
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[10] *Ibid*, Citing Shlesinger M. (1994) "Intonation in the production and perception of simultaneous interpretation", in S. Lambert and B. Moser-Mercer (eds.), *Bridging the gap: Empirical research in simultaneous interpretation*, Amsterdam-Philadelphia, John Benjamins, pp. 225-236.

[11] "Pragmatics is a branch of linguistics concerned with the use of language in social contexts and the ways people produce and comprehend meanings through language." Nordquist, Richard. *Pragmatics Gives Context to Language: Body language and tone of voice augment actual words*.
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[13] In speech-act theory, *illocutionary force* refers to a speaker's *intention* in delivering an utterance or to the kind of illocutionary act the speaker is performing. Also known as an *illocutionary function* or *illocutionary point*.

In *Syntax: Structure, Meaning, and Function* (1997), Van Vallin and LaPolla state that illocutionary force "refers to whether an utterance is an assertion, a question, a command or an expression of a wish. These are different types of illocutionary force, which means that we can talk about interrogative illocutionary force, imperative illocutionary force, optative illocutionary force, and declarative illocutionary force."

The terms *illocutionary act* and *illocutionary force* were introduced by British linguistic philosopher John L. Austin in *How to Do Things With Words* (1962). Richard Nordquist. *Illocutionary Force in Speech Theory*. <https://www.thoughtco.com/illocutionary-force-speech-1691147>. Accessed 11 September 2021.

[14] There are many different courtroom setups for this type of practice, and in some the two interpreters may be closer together. Nevertheless, this is not the team interpreting model by any professional standard, since both interpreters are engaged at the same time in separate interpreting functions, rather than helping each other out *as a team*. There are other courts where interpreters work from a fixed station and sit at a distance from the witness, working in teams and using courtroom technology to render questions and answers in the consecutive mode during testimony.

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