ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3935 SHES SB 168

811

Table 20. -- Limitation of Activity Status of Persons 5 Years of Age and Over by State and Type of Limiting Health Condition (Continued)

(Numbers in thousands)

Divisions, regions, and States	Total persons 5 years of age and over	With an activity limitation									
		Total	Percent reporting any of the health conditions listed below:								
			Mentally retarded	Hard of hearing or deaf		Speech impairment	Serious difficulty in seeing or blind	Seriously emotionally disturbed	Crippled (orthopedic handicap)	Arthritis or rheumatism	Trouble with back or spine
				Total	Deaf						
STATES (Continued)											
Middle Atlantic:											
New York	16,731	1,992	3.5	5.6	1.1	1.2	5.5	3.3	8.0	22.9	15.7
New Jersey	6,724	866	1.8	6.5	1.5	2.0	6.4	3.2	7.7	16.6	14.2
Pennsylvania	10,875	1,608	2.5	7.3	1.4	1.7	6.1	2.0	7.0	20.8	14.4
East North Central:											
Ohio	9,791	1,405	3.1	6.4	1.2	1.9	6.9	2.7	8.7	21.4	18.6
Indiana	4,841	657	2.9	8.1	0.9	2.1	7.5	2.5	6.8	21.1	16.4
Illinois	10,160	1,337	3.8	6.8	1.2	2.3	6.6	1.4	8.3	20.6	16.3
Michigan	8,413	1,149	2.4	8.5	1.7	2.6	6.1	2.9	8.6	21.3	18.7
Wisconsin	4,259	519	3.2	7.2	0.6	1.8	5.1	1.3	8.9	20.8	17.1
West North Central:											
Minnesota	3,603	476	3.0	7.2	1.8	2.2	6.3	2.1	8.8	18.4	20.2
Iowa	2,626	320	3.7	7.6	1.9	1.9	7.2	2.1	8.7	20.1	17.2
Missouri	4,335	665	3.0	6.4	0.9	2.6	6.9	2.1	7.5	22.4	13.9
North Dakota	574	72	2.0	6.7	1.0	1.4	5.9	0.9	7.4	20.7	18.8
South Dakota	623	80	2.7	8.0	1.1	3.0	5.8	1.2	7.7	22.9	22.2
Nebraska	1,409	158	2.6	8.0	1.3	3.6	6.4	1.4	9.6	21.5	17.9
Kansas	2,075	276	2.5	8.4	1.6	2.4	7.7	1.8	6.9	24.6	18.6
South Atlantic:											
Delaware	533	68	3.0	7.2	0.9	2.5	7.3	3.1	7.5	19.2	15.6
Maryland	3,758	452	2.9	7.0	1.7	2.3	7.1	3.1	8.8	20.6	14.9
District of Columbia	649	101	4.4	4.7	0.3	1.8	7.0	3.1	9.1	25.8	15.1
Virginia	4,585	651	3.9	6.6	0.8	2.3	7.6	3.4	9.0	22.9	14.7
West Virginia	1,678	372	3.2	9.9	1.4	2.0	8.1	3.2	9.1	28.5	18.8
North Carolina	5,017	789	3.4	7.3	0.4	2.2	7.4	3.7	8.2	28.4	19.4
South Carolina	2,571	425	3.7	8.8	0.9	3.7	9.9	3.4	10.5	25.3	17.4
Georgia	4,522	881	5.3	10.7	2.4	2.8	10.0	2.1	8.5	26.7	20.3
Florida	7,952	1,278	2.7	4.9	1.4	1.5	8.6	2.3	7.5	23.0	18.5

Table 20. -- Limitation of Activity Status of Persons 5 Years of Age and Over by State and Type of Limiting Health Condition (Continued)

(Numbers in thousands)

Divisions, regions, and States	Total persons 5 years of age and over	With an activity limitation									
		Total	Percent reporting any of the health conditions listed below:								
			Mentally retarded	Hard of hearing or deaf		Speech impairment	Serious difficulty in seeing or blind	Seriously emotionally disturbed	Crippled (orthopedic handicap)	Arthritis or rheumatism	Trouble with back or spine
				Total	Deaf						
STATES (Continued)											
East South Central:											
Kentucky	3,113	602	2.1	9.1	2.0	2.3	8.1	1.9	8.3	22.7	14.8
Tennessee	3,868	687	3.7	7.0	0.6	3.1	8.1	2.7	8.9	22.8	19.3
Alabama	3,312	614	4.5	7.3	0.6	1.6	8.5	2.6	8.3	26.8	15.0
Mississippi	2,132	409	4.0	7.7	1.6	3.3	8.1	2.5	9.8	24.9	15.0
West South Central:											
Arkansas	1,973	404	3.1	9.4	1.3	3.1	8.7	1.4	10.3	27.2	20.7
Louisiana	3,437	617	4.7	7.5	0.7	2.6	8.6	3.8	7.3	24.1	16.7
Oklahoma	2,482	449	3.0	9.6	1.2	2.0	8.0	1.5	8.8	28.9	20.8
Texas	11,241	1,547	2.8	8.3	1.2	2.6	7.5	1.8	8.5	18.9	16.2
Mountain:											
Montana	691	100	2.3	8.7	1.5	2.3	7.0	1.2	9.8	22.0	20.1
Idaho	754	104	2.0	9.5	1.8	2.1	5.9	1.7	9.6	22.7	22.0
Wyoming	346	41	2.3	8.2	1.3	2.0	6.7	1.1	11.1	21.0	19.4
Colorado	2,340	270	2.2	8.1	1.1	1.7	5.9	1.8	9.3	19.6	20.2
New Mexico	1,057	137	2.5	7.7	1.7	2.6	6.8	2.2	8.7	24.5	17.8
Arizona	2,080	320	1.8	7.3	1.1	2.5	7.8	2.0	8.9	24.2	19.0
Utah	1,078	130	2.2	7.8	2.0	1.3	5.5	2.0	8.3	19.6	22.8
Nevada	556	67	1.5	6.9	1.7	1.6	6.1	1.8	12.6	17.0	20.8
Pacific:											
Washington	3,239	441	2.5	8.2	1.7	2.6	5.2	1.8	9.1	19.3	23.7
Oregon	2,126	308	1.2	6.0	1.4	2.7	4.9	1.5	11.5	19.3	22.9
California	19,500	2,601	2.5	5.7	1.4	1.6	5.7	3.0	9.8	17.9	21.0
Alaska	314	2	2.3	7.6	1.8	3.1	5.1	1.5	11.7	12.4	20.9
Hawaii	772	74	4.6	7.3	1.5	1.9	4.6	1.5	6.3	8.9	18.0

Sensory Impairment Center

(907) 272-7223 3710 E. 20th Ave. • Anchorage, Alaska 99508

MAR 4 - 1985

February 27, 1985

The Honorable Betty Fahrenkamp
Alaska State Senate
Pouch V (MS3100)
Juneau, Alaska 99811

Dear Senator Fahrenkamp:

Enclosed for your information is a copy of a letter which I have sent to Representative Ron Larson requesting a supplement for the adult rehabilitation programs of the Sensory Impairment Center. I recognize that this material is quite lengthy. However, it did not seem reasonable to me to request supplemental funding without providing thorough justification.

I hope that we can count on your support as these line item requests work their way through the legislative process. If you have questions, please feel free to contact me at any time.

Respectfully,

James H. Omvig, Director
SENSORY IMPAIRMENT CENTER

JHO/skl

Enclosure

Can this is this worth your support

Sensory Impairment Center

(907) 272-7223 3710 E. 20th Ave. • Anchorage, Alaska 99508

February 19, 1985

The Honorable Ronald Larson, Chairman
House Finance Sub-Committee on Education
Alaska State Legislature
Pouch V (MS3100)
Juneau, Alaska 99811

SUBJECT: Line Item Budget Requests for Interpreter Referral Services, and the Rehabilitation Programs of the Louise Rude Sensory Impairment Center

Dear Representative Larson:

Pursuant to your request, I herewith provide you with information concerning funding needs for Interpreter Referral Services in Alaska, and budget needs for our rehabilitation programs for blind and deaf adults from throughout the State. I apologize for the length of this letter. However, it did not seem appropriate to me to make these requests without providing you with a thorough explanation of our needs.

The purpose of the interpreter referral services is to make certain that deaf Alaskans have full opportunity to communicate, through qualified interpreters, with employers, governmental agencies, other service providers, colleges, and doctors, etc. We coordinate such services by receiving and filling requests made either by deaf or hearing persons.

As I told you, the Division of Vocational Rehabilitation (DVR) had requested $127,500 in its budget for FY 1986 to provide these services. Somewhere in the budget review process this item was completely eliminated. Attached for your information is the page from the DVR budget request which included the $127,500 line item. It is imperative that this item be restored so that these services can be continued.

In our case in Anchorage, for example, we have funding from the Municipality to operate our program through June of 1985. The grant was made through June with the understanding that, as of July 1, DVR would have state funding available not only to continue our program but also to support programs in Fairbanks and Juneau. Therefore, if state funding is not made available, our program will terminate as of June 30 since, as you probably know, the Municipality of Anchorage has already allocated all of its limited social service grant money.

To show you something of the scope of our service, we began to operate the Anchorage Referral Service in February of 1984 (it had previously been run by the Suicide Prevention and Crisis Center). From February through December, our coordinator made 1178 individual referrals. Requests for referrals have been on the increase as the public and the deaf community have become more aware of this vital service.

I hope that it will be possible to restore the $127,500 line item to the DVR budget. As you know, I have discussed this issue with numerous individuals, including the governor, and virtually all have agreed that this item must be restored.

Line Item For the Pre-Vocational Rehabilitation
Programs for Blind & Deaf Adults for FY 1986

I am also requesting that line item amounts be placed in the DVR budget for our state-wide training programs for blind and deaf adults. For our Orientation and Adjustment Program for Blind Adults, we need a total operating budget of $429,521.92 (copy attached). For our Pre-Vocational Training Program for Deaf Adults, we need a total operating budget of $355,959.75 (copy attached). If these requests seem high, it is not a commentary upon the request but upon the level of past funding.

Our society decided more than 60 years ago that it made sense to rehabilitate adults with disabilities rather than let them sit out their lives in idleness, frustration and dependency. A state-federal vocational rehabilitation program was established, and every state has some type of rehabilitation agency which provides services using both state and federal funding. In Alaska, our state-federal program is operated by DVR.

Also, in many states the vocational rehabilitation agency establishes and operates its own training centers. In others, such as Alaska, the rehabilitation agency elects to contract with private agencies for needed training and related services.

Until approximately 8 years ago, DVR sent deaf or blind adults "outside" for needed training. At the urging of Louise Rude and the other blind and deaf of the State, our program was established so that Alaska citizens could receive training in Alaska. Therefore, while we are a private agency, we are an integral part of the rehabilitation process.

I assumed my duties as director of the Sensory Impairment Center on October 15, 1984. As I review our situation, I find that our funding level is woefully inadequate. In my judgment, pre-vocational training should be the first vital link in the entire rehabilitation process. To provide such training, it takes a lot of somebody's time and it takes highly trained and qualified professionals; that is, if we intend to provide the kind of training which will equip blind or deaf adults to function independently and competitively for the rest of their lives.

Now, let me summarize our current situation and make some comparisons. For this fiscal year, our program for the blind is operating on a total budget of $230,660, and our program for the deaf has $113,973. The current Director, who has 15 years of experience in the rehabilitaion field, receives $44,000 per year. Our teachers, who are all highly trained and experienced professionals with Masters Degrees range from $26,670 to $33,770. Of these, three teachers work 10 months, one work 4/5 time, and one works 11 months. To compound the inequity, one has worked 7 years, one has worked 6 years, one for 5 years, one for 3 years, and one for 1 1/2 years.

By contrast, rehabilitation counselors for the Division of Vocational Rehabilitation receive from $35,586 to $48,276 per year. First line supervisors receive from $41,678 to $56,328 per year. A good orientation and adjustment center teacher is as valuable as and should be on a par with a good rehabilitation counselor.

To continue the contrast, while our program for deaf adults operates on a total annual budget of $113,973, the State Program for the Deaf has an annual budget of $1,300,000. While we have 2 teachers to serve deaf adults from throughout the state, the State Program has a total of 32 professional and clerical staff members to serve 53 deaf youngsters. Professionals in this program earn from $28,500 to $50,000 per year. The social worker, for example, earns $43,000 per year. The supervisor of this program can earn up to $52,000.

Finally, the Alaska Resource for Moderately & Severely Impaired has a budget of approximately $1,400,000. This program serves blind youngsters outside of Anchorage along with children with other disabilities. The teachers for blind students have a starting salary of $35,700 per year for 10 months, and a supervisor of the teachers for the blind currently receives

$47,000 per year. The director of this program receives $52,000 per year. From these figures, it is easy to see that our staff members are not receiving compensation on a par with those of other vital service agencies. In addition, our operating funds are inadequate to meet the need.

Now, let me discuss our specific needs for each program. In our Orientation & Adjustment Program for Blind Adults we are currently serving 9 full time blind students, and we are receiving additional referrals almost daily because of our increased public relations effort. Three teachers do the very best that they can to teach braille reading and writing, home economics and other daily living skills, independent mobility with the long white cane, typing, sewing, and computer technology, etc. In each of these areas, a newly blinded adult needs a great deal of individualized instruction and observation if the training is truly to be effective. It is not difficult to see that three teachers are simply spread too thin, and the blind students are the ones who suffer.

But our problem is even worse than this discussion would indicate. Other states have what is called a "home teaching" program for the blind. Our SIC responsibility is, at least on paper, to provide such "on-site" teaching and follow-up services throughout Alaska. However, we have no specific individual or individuals to make such visits. In the past, we have sent one of our three teachers to visit and train people in their homes when we could but, as our training center student body has increased, it has become almost impossible to make home visits using one of our three teachers. Right now, several individuals are waiting for home teaching services, not only in Anchorage but in other communities throughout the State.

Accordingly, to improve the quality of our services, we need at least four full-time teachers in the Center: typing, braille, home economics, and independent white cane travel. These four teachers could also handle sewing, computer, etc. In addition, we need at least one (we should have more) home teacher to provide teaching and follow-up services on-site, and to encourage newly blinded individuals from throughout the State who could benefit from it to come to the Center for intensive training.

Finally, we wish to continue our program of providing screening in "low vision" aids. This program meets two importa..t objectives: First, we can often identify specific optical aids which can help an individual to use his or her remaining vision

more effectively. Secondly, through this program people become acquainted with our training center and are more apt to use our services if low vision aids do not work for them.

In our Pre-Vocational Training Program for Deaf Adults, we also face a crisis situation. Two highly qualified teachers do the best that they can to train deaf adults from throughout the State, both those who come to the Center for full-time training and those who call upon us for specific needs. Right now 8 individuals come for training on a regular basis and several "drop in" for help with specific problems. As with the blind, deaf adults need a great deal of individualized training and observation if our services are to be effective. Our two teachers try to evaluate the training needs of new referrals, teach communication skills, prepare needed training materials, teach pre-vocational work concepts, money management, shopping, hygiene, sex education, food and nutrition, etc. In addition, they leave the Center to teach deaf adults how to find suitable housing, to use community resources, driving and getting driving licenses, etc. Obviously, this arrangement means that no deaf "full-time" student is receiving anything like full-time teaching.

To provide the kind of training deaf Alaskan adults have the right to expect, we should have a full-time Program Supervisor who can give overall direction, provide guidance and counseling, maintain community contacts and serve as a role model for deaf adults. We need a Program Secretary/Teacher's aide to handle clerical matters and to assist teachers in collecting and preparing necessary training materials. We need an Evaluation Specialist to determine what type of individualized training is needed for each new referral, since deaf persons who are referred to us vary greatly in their background and training. This Specialist would spend several weeks with each new referral and would help develop training plans so that we can make sure that all needs are met.

We also need four full-time teachers so that we can provide training all day long to each deaf student:

1. A Pre-Vocational & Work Skills teacher would teach work concepts, how to conduct job searches, career awareness, personnel practices, proper dress and appearance, etc.

2. A Communication Skills teacher would develop "total communication" techniques: how to express thoughts and receive

information using telecommunication devices, sign language, written English, body language, etc. It should be noted that most deaf adults read and write English at approximately a 3rd grade level. We must take steps to improve this situation for our students.

3. An Independent Living Skills (classroom) teacher is needed to teach money management, shopping, personal hygiene, sex education, home economics, including foods and nutrition, etc.

4. An Independent Living Skills (on-site) teacher is needed to go outside of the Center to teach students how to locate suitable housing and to learn about lease or purchase agreements, to learn to drive and to secure driver's licenses, to use public transportation systems, to learn to locate and use available community resources, to provide instruction concerning civil rights and responsibilities, and to visit deaf persons and their families in their homes. As with the program for the blind, these teachers would be flexible enough to take on additional responsibilities and to rotate in specific teaching assignments.

In conclusion, I know that these requests will seem high to some and that, indeed, there may be those who will make reference to "pie-in-the-sky" wishes. I can assure you that these needs are real. The blind and deaf of Alaska have the right to expect quality training, and the entire State will be the beneficiary if we are able to provide it. Also, our present staff members are highly qualified but they are also overworked and underpaid. If we cannot find the funds to hire additional staff members, and if we cannot establish both comparable salaries and benefits, the odds are that we will begin to lose the staff we have. Why should they continue to work for us when they could get better salaries and benefits elsewhere with less pressure?

It is my earnest hope that you and other members of the 1985 Legislature will see fit to grant these requests. In return, we will do the very best that we can to provide quality services to blind and deaf adults so that they will have the opportunity to lead meaningful, productive and independent lives. If you have questions concerning these requests, please contact me at any time.

Respectfully,

James H. Omvig

Director

JHO/mb

P.S. Effective rehabilitation pays off! As I pointed out in a recent newspaper article (you may have seen it) I am sure that the Iowa State Commission for the Blind spent more than $10,000 on me. However, I now intend to work for about 40 years. If the initial investment had not been made, I would have received approximately $400,000 during my lifetime in social security and welfare benefits. Because I am now a trained professional, I will pay taxes back to society of approximately another $400,000. Therefore, the initial investment will save society approximately $800,000. While all successful rehabilitation efforts will not produce such dramatic results because of age or occupation, these aren't bad returns.

P.P.S. I thought you would like to see the attached letter concerning Mr. Darrel Nather. Darrel was the first blind Alaskan to receive training in our Center.

enclosures

cc: Rep. Walt Furnace
Rep. Dave Thompson
Rep. Al Adams
Mike Morgan, Director, Division of Vocational Rehabilitation
Bill O'Connor, Director, Alaska Treatment Center

DDE/DHSS COMBINED BUDGET INCREMENTS BY OBJECTIVES, UNITS
TO BE PROVIDED, AND $ AMOUNTS PER INCREMENT
(figures in parentheses are proposed capital costs)

Objective	Governor's Level FY 85	Increment 1	Increment 2	Increment 3	Increment 4	Increment 5	Increment 6	Increment 7	Increment 8	Increment 9	Increment 10	Increment 11	Increment 12	Increment 13
A RESPITE	277 334,600					107 144,450								
B VOCATIONAL	198 1,732,000					10 85,000				28 260,000		16 140,000	15 132,000	4 35,200
C RESIDENTIAL	217 4,469,300			8 416,000 (300,000)		9 203,914 (337,500)				12 259,320 (450,000)	10 520,000 (375,000)	18 362,400 (675,000)	10 360,000 (375,000)	19 445,022 (712,500)
D DEV. DIS. CONTRACT MAN	2 136,200			1 84,000		1 60,000								
E TRANSITIONAL PROJECT	311 136,000		436 393,700											
F INTERPRETER SERVICES	301 30,000		170 127,500											
G PERSONAL CARE ATTENDANTS	0							19 349,000						
H VOC. REHAB. CASE MANAGEMENT	0						—	2 119,070						
I INFANT LEARNING PROGRAM	644 2,242,200	135 495,000					135 495,000		135 495,000					
J INFANT LEARNING ADMINISTRATION	1.5 90,000						1 78,000		.5 12,000					
K EDUCATION FOR DEAF STUDENTS	5 107,400				7 314,219 (337,500)									
TOTAL	1670.5 7,855,200	135 495,000	606 921,200	9 500,000	9 314,219	132	136	21						

ORIENTATION AND ADJUSTMENT

PROGRAM FOR BLIND ADULTS

EXPENDITURES FY '86

STAFF SALARIES, BENEFITS AND TAXES

1. Director
2. Secretary/Administrative Assistant
3. Orientation Center Teachers:
   Typing
   Braille
   Home Economics
   Independent White Cane Travel
4. Home Teacher (On Site)
5. Part-time Low Vision Aid Specialist

	$268,576.56	
6. Benefits & Taxes @19%	51,029.46	
7. Total Personnel		$319,606.02

PROGRAM AND OPERATING EXPENDITURES

7. Supplies	$ 5,000.00	
8. Telephone Utilities	3,000.00	
9. Travel	20,000.00	
10. Staff Training/Development	5,000.00	
11. Equipment	3,000.00	
12. Professional Fees	500.00	
13. Total Program & Operating		$ 36,500.00
14. Subtotal	$356,106.02	
15. Administration @15%		53,415.90
16. Subtotal	409,521.92	
17. Rent		20,000.00
18. Total		$429,521.92

PRE-VOCATIONAL TRAINING PROGRAM

FOR DEAF ADULTS

EXPENDITURES FY '86

STAFF SALARIES, BENEFITS AND TAXES

1. Program Supervisor
2. Secretary/Teacher's Aide
3. Evaluation Specialist
4. Program Teachers:
   Pre-Vocational & Work Skills
   Communication Skills
   Independent Living Skills (Classroom)
   Independent Living Skills (On-site)

	$233,500.00	
3. Benefits & Taxes @19%	44,365.00	
4. Total Personnel		$277,865.00

PROGRAM AND OPERATING EXPENDITURES

5. Supplies	$ 3,000.00	
6. Telephone & Utilities	1,300.00	
7. Travel	10,000.00	
8. Staff Training Development	5,000.00	
9. Equipment	2,000.00	
10. Professional Fees	800.00	
11. Total Program & Operating		$ 22,100.00
12. Subtotal	$299,965.00	
13. Administration @15%		44,994.75
14. Subtot	$344,959.75	
15. Rent		11,000.00
16. Total		$355,959.75

COMMISSIONER OF INTERNAL REVENUE

Washington, DC 20224

19 OCT 1984

Mr. Darrel E. Nather
Internal Revenue Service
Collection Division
Anchorage, Alaska

Dear Darrel:

It gives me great pleasure to inform you that you have been selected as one of IRS' Outstanding Handicapped Employees of the Year. This honor is well deserved; your exemplary courage and determination serve as a model for all IRS employees.

You should be especially proud of the fact that you were nominated for this honor by your managers and the Western Region. Your nomination serves as a representative tribute to all of our fine, dedicated employees.

Please accept my personal thanks and congratulations.

With kind regards,

Sincerely,

Roscoe Egger

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM March 15, 1985

SUBJECT: Research request concerning confidentiality and privilege inherent to electronic translators for the deaf

TO: Senator Patrick Rodey
Attention: Roger Lewis

FROM: George W. Edwards GWE
Legislative Counsel

This is in response to your request for research on the status of the law concerning confidentiality and evidentiary privileges that protect electronic communications carried out by the deaf through human translators.

It is my understanding, based upon a conversation with Roger Lewis, that the principle concern here is assuring that deaf persons have the legal capacity to extend their evidentiary privileges to apply to third parties who electronically translate conversations for which the deaf person otherwise has a privilege. A secondary concern, I gather, is that there be some assurance that such a translator have a general obligation of confidentiality.

With regard to the matter of privilege, current rules of evidence appear to address the question posed here. Relevant sections are attached. Evidence Rule 503, concerning lawyer-client privilege provides in section (a)(5):

> A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

The rule states further in section (b):

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . .

The Commentary to Rule 503 lends emphasis to the applicability of the privilege to persons involved in the communication itself by noting in section (a)(4):

> The definition of "representative of the lawyer "recognizes that the lawyer may, in rendering legal services, utilize the services of assistants in addition to those employed in the process of communicating.

The controlling factor in a situation like that being considered here is the intent of the client, in this instance the deaf person. The Commentary to Rule 503 states in section (a)(5):

> The requisite confidentiality of communications is defined in terms of intent. A communication made in public or meant to be relayed to outsiders or which is divulged by the client to third persons can scarcely be considered confidential . . . . The intent is inferable from the circumstances. Unless intent to disclose is apparent, the attorney-client communication is confidential . . .

The significance of the client's intent is recognized in Blackmon v. State, 653 P.2d 669 (Ak, 1982) in which the court determined a conversation between a defendant and his attorney to be privileged even when carried on or within earshot of a police officer.

Legal treatises uphold this interpretation. Weinstein's Evidence, section 503(a)(4) at page 503-30 states:

> Disclosure to those reasonably necessary for transmitting the communication has readily been recognized as not destroying the privilege. Secretaries, clerks and interpreters fall within this category.

McCormick on Evidence, 3rd ed., states at page 188:

> ...if the help of an interpreter is necessary to enable the client to consult the lawyer his presence would not deprive the communication of its confidential and privileged character.

Evidence Rule 504, concerning the physician and psychotherapist-patient privilege, is similar in concept to Rule 503 and provides in section (a)(4):

> A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication...

Evidence Rule 506, concerning communications of clergymen, states at section (a)(2):

> A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

The Commentary for Rule 506 notes that "confidential" communication is consistent in meaning within Rules 503, 504, and 506.

It is my opinion, based upon the information set forth above, that any privilege afforded a deaf person under the referenced rules can be extended by the deaf person to apply to a third party intermediate communicator, including a translator who communicates through electronics.

With regard to the matter of confidentially, AS 42.20 appears to have in place law that requires confidentiality of a translator who communicates electronically by wire or radio.

Under AS 42.20.300 a person who receives or assists in receiving or who transmits or assists in transmitting a communication by wire or radio is prohibited from divulging the communication except to designated persons. A copy of the law is attached. As the translators of concern here transmit and receive by wire, they are clearly obligated to maintain the confidentiality of a deaf client under this statute.

If you feel there remains a need for legislation in this area please let me know and I will be glad to prepare a draft bill.

GWE:csh
c3/051

Rule 503. Lawyer-Client Privilege.

(a) **Definitions.** As used in this rule:

(1) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A representative of the client is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(3) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services.

(5) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may

receive different treatment on evidence questions in courts of law merely because of differences in financial structure.

If, for example, A runs a taxi service as a sole proprietorship with several employees, and one employee driver is involved in an accident for which A is sued, the employee's statements to A's attorney are not within the attorney-client privilege, even though A may order his employee to talk with the lawyer. If A incorporates, the ruling should not change. It should be sufficient that A and other corporate officers having the capacity to seek legal advice and to act on it can claim the benefits of the privilege for private communications with counsel. A more permissive privilege would result in suppression of information conveyed to attorneys by employees who are more like witnesses than clients and who have no personal desire for confidentiality.

(3) A "lawyer" is a person licensed to practice law in any state or nation. There is no requirement that the licensing state or nation recognize the attorney-client privilege, thus avoiding excursions into conflict of laws questions. "Lawyer" also includes a person reasonably believed to be a lawyer. For similar provisions, *see*, Cal. Evid. Code § 950 (West 1966). Administrative practitioners are not lawyers under Rule 503 (a) (3), but may be included as "representatives of the lawyer" under Rule 503 (b) (4).

(4) The definition of "representative of the lawyer" recognizes that the lawyer may, in rendering legal services, utilize the services of assistants in addition to those employed in the process of communicating. Thus the definition includes an expert employed to assist in rendering legal advice. It also includes an expert employed to assist in the planning and conduct of litigation, though not one employed to testify as a witness. The definition does not, however, limit "representative of the lawyer" to experts. Whether his compensation is derived immediately from the lawyer or the client is not material.

Rule 503 does not expressly deal with communications from an insured to his insurance company. If the insurance agent to whom the information is forwarded were viewed as a "representative of the lawyer" under Rule 503 (a) (4), the privilege

would apply. This is the rule in most state courts. *See* McCormick (2d ed.) § 91 at 190. Some federal courts have been unsympathetic to this line of reasoning because of the peculiar nature of the insurance "situation." *See, e.g., Gottlieb v. Bresler,* 24 F.R.D. 371 (D.D.C. 1959). The demand for privilege is greater when there is a close connection between lawyer and agent and they rely upon confidentiality in their relationship. Thus, the result in any particular case may turn on the specific facts involved. However, it is clear that no privilege is available when a statement is being sought in a controversy between the insured, or one claiming under the insured, and the insurance company. McCormick (2d ed.) § 91, at 190-91; Annot., *Privilege of Communications or Reports Between Liability or Indemnity Insurer and Insured,* 22 A.L.R.2d 659 (1952).

(5) The requisite confidentiality of communication is defined in terms of intent. A communication made in public or meant to be relayed to outsiders or which is divulged by the client to third persons can scarcely be considered confidential. *See LaMoore v. United States,* 180 F.2d 49, 9th Cir. (1950); McCormick (2d ed.) § 95. The intent is inferable from the circumstances. Unless intent to disclose is apparent, the attorney-client communication is confidential. Taking or failing to take precautions may be considered as bearing on intent. "Communications which were intended to be confidential but were intercepted despite reasonable precautions remain privileged." *See* Subdivision (b) *infra; see also* J. Weinstein & M. Berger, Weinstein's Evidence, § 503(a)(4)[01] (1979).

Practicality requires that some disclosure be allowed beyond the immediate circle of lawyer-client and their representatives without impairing confidentiality, Hence the definition allows disclosure to persons to whom disclosure is in furtherance of the rendition of professional legal services to the client, contemplating those in such relation to the client as "spouse, parent, business associate, or joint client." Cal. Evid. Code § 952, Comment (West 1966).

(b) **General Rule of Privilege.** This subdivision sets forth the privilege, using the previously defined terms: client, representative of the client, lawyer, representative of the lawyer,

Rule 504. Physician and Psychotherapist-Patient Privilege.

(a) **Definitions.** As used in this rule:

(1) A patient is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A physician is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (B) a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient to so be, while similarly engaged.

(4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) **General Rule of Privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional conditions, including alcohol or drug addiction, among himself, his physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the patient, by his guardian, guardian ad litem or conservator, or by the personal representative of a deceased patient. The person who was the physician or psychotherapist

Rule 506. Communications of Clergymen.

(a) **Definitions.** As used in this rule:

(1) A clergyman is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary. (Added by Supreme Court Order 364 effective August 1, 1979)

Rule 506. Communications to Clergymen.

The considerations which dictate the recognition of privileges generally seem strongly to favor a privilege for confidential communications to clergymen. During the period when most of the common law privileges were taking shape, no clear-cut privilege for communications between priest and penitent emerged. 8 Wigmore § 2394. The English political climate of the time may well furnish the explanation. In this country, however, the privilege has been recognized by statute in about two-thirds of the states and occasionally by the common law process of decision.

(a) **Definitions.** Paragraph (1) defines a clergyman as a "minister, priest, rabbi, or other similar functionary of a religious organization." This concept is not so broad, however, to include all self-denominated "ministers." A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic Priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis. No further specification seems possible in view of the lack of licensing and certification procedures for clergymen, However, this lack seems to have occasioned no particular difficulties in connection with the solemnization of marriages, which suggests that none may be anticipated here. For similar definitions of "Clergyman" see Cal. Evid. Code § 1030 (West); N.J. Rev. Stat. or Stat Ann. (West) § 29.

The "reasonable belief" provision finds support in similar provisions for lawyer-client in Rule 503 and for physician and psychotherapist-patient in Rule 504. A parallel is also found in the recognition of the validity of marriages performed by unauthorized persons if the parties reasonably believed them legally qualified.

(2) The definition of "confidential" communication is consistent with the use of the term in Rule 503(a)(5) for lawyer-client and in Rule 504(a)(4) for physician and psychotherapist-patient, suitably adapted to communications to clergymen.

(b) **General Rule of Privilege.** The choice between a privi-

42.20.150. The notice shall be printed in type which is no smaller than any other type on the same page and shall be preceded by the word "warning." This section does not apply to directories distributed solely for business advertising purposes, commonly known as classified directories. (§ 4 ch 102 SLA 1957)

Sec. 42.20.150. Definitions. In AS 42.20.120 — 42.20.150

(1) "emergency" means a situation in which property or human life is in jeopardy and the prompt summoning of aid is essential;

(2) "party line" means a subscriber's line telephone circuit, consisting of two or more main telephone stations connected with it, each station with a distinctive ring or telephone number. (§ 1 ch 102 SLA 1957)

Article 4. Eavesdropping and Wiretapping.

Collateral references. 74 Am. Jur. 2d, Telecommunications, §§ 209 — 218.

86 C.J.S., Tel. & Tel., Radio & Television, § 287.

What constitutes an "interception" of a telephone or similar communication forbidden by the Federal Communications Act (47 USC § 605) or similar state statutes, 9 ALR3d 423.

Wiretapping, 29 Am. Jur. POF, pp 591 — 639.

Sec. 42.20.300. Unauthorized publication or use of communications. (a) A person who receives or assists in receiving, or who transmits or assists in transmitting a communication by wire or radio may not divulge or publish the existence, contents, substance, purport, effect, or meaning of the communication, except through authorized channels of transmission or reception to

(1) the addressee or the agent or attorney of the addressee;

(2) a person employed or authorized to forward a communication to its destination;

(3) proper accounting or distributing officers of the various communicating centers over which the communication may be passed;

(4) the master of a ship under whom the person is serving;

(5) another on demand of lawful authority; or

(6) in response to a subpoena issued by a court of competent jurisdiction.

(b) A person not authorized by a party to the communication may not intentionally intercept a communication or divulge or publish the existence, contents, substance, purport, effect, or meaning of the intercepted communication to any person.

(c) A person who is not entitled to a communication but who has received the communication may not use it or any information contained in it for personal benefit or another's benefit.

(d) A person who has received a communication and who knows or reasonably should know that the communication and the information contained in it was obtained in violation of this section may not divulge or publish the existence, contents, substance, purport, effect, or meaning of the communication or any part of the communication.

(e) A person who has become acquainted with a communication or the information contained in it, and who is not entitled to the communication, may not use the same for personal benefit or another's benefit, or divulge or publish the existence, contents, substance, purport, effect, or meaning of the communication or any part of the communication. (§ 1 ch 133 SLA 1966; am § 22 ch 166 SLA 1978)

Revisor's notes. — Formerly AS 11.60.280. Renumbered in 1980.

Legislative history reports. — For report on ch. 133, SLA 1966, see 1966 House Journal, p. 522.

NOTES TO DECISIONS

This section makes no exception for law enforcement officers. — A law enforcement officer is subject to the same penalties as a private citizen who violated the provisions of the statute. Roberts v. State, Sup. Ct. Op. No. 550 (File No. 934), 453 P.2d 898 (1969), cert. denied, 396 U.S. 1022, 90 S. Ct. 594, 24 L. Ed. 2d 515, rehearing denied, 397 U.S. 1059, 90 S. Ct. 1368, 25 L. Ed. 2d 681 (1970).

Nor does it change law as to evidence obtained by eavesdropping devices. — In regard to evidence obtained by wiretap or other eavesdropping devices being used in court proceedings, this section does not in any way change the existing law of Alaska. The admittance or rejection of such evidence is left to case law and the rules governing the admissibility of evidence as interpreted by the court. Roberts v. State, Sup. Ct. Op. No. 550 (File No. 934), 453 P.2d 898 (1969), cert. denied, 396 U.S. 1022, 90 S. Ct. 594, 24 L. Ed. 2d 515, rehearing denied, 397 U.S. 1059, 90 S. Ct. 1368, 25 L. Ed. 2d 681 (1970).

No provision excluding testimony obtained by eavesdropping had been enacted in conjunction with this section. J.M.A. v. State, Sup. Ct. Op. No. 1201 (File No. 2391), 542 P.2d 170 (1975).

Interception alone constitutes prohibited activity. — Subsection (b) of this section deals with the initial acquisition of a message by persons through the interception of the message at any time. The section contemplates an intentional interception. It should be noted that under this section, the interception alone constitutes a prohibited activity. There is no need to prove interception and divulgence, although the latter activity is also prohibited by this section. Roberts v. State, Sup. Ct. Op. No. 550 (File No. 934), 453 P.2d 898 (1969), cert. denied, 396 U.S. 1022, 90 S. Ct. 594, 24 L. Ed. 2d 515, rehearing denied, 397 U.S. 1059, 90 S. Ct. 1368, 25 L. Ed. 2d 681 (1970).

Sec. 42.20.310. Eavesdropping. A person may not

(1) use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation;

(2) use or divulge any information which the person knows or reasonably should know was obtained through the illegal use of an eavesdropping device for personal benefit or another's benefit;

Jury Selection: The Courts, The Constitution, and the Deaf

Traditionally, handicapped persons have been almost universally excluded from jury service regardless of qualifications that might offset their particular disabilities.[1] California, followed by several other states, has recently amended its Code of Civil Procedure to allow blind and wheelchair-bound persons to be jurors,[2] but deaf persons are apparently still excluded.[3] Recent developments suggest that the prohibition against deaf jurors may have little remaining vitality. Legislation recently introduced in the California Assembly would allow deaf per-

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1. Typical modern jury selection statutes require that the prospective juror be "in possession of his or her natural faculties." *See, e.g.*, CAL. CIV. PROC. CODE §198(2); N.Y. JUD. LAW §510 (Consol.). In construing this language in the predecessor of Section 510 in the New York statute, the New York courts held that a blind man who was a professor at a state university was not "in possession of his natural faculties," and was thus incompetent to be a juror. Lewinson v. Crews, 28 App. Div. 2d 111, 282 N.Y.S.2d 83 (1967), *aff'd mem.*, 21 N.Y.2d 898, 236 N.E.2d 853 (1968), *remittitur amended*, 21 N.Y.2d 1004, 238 N.E.2d 326, *appeal dismissed*, 393 U.S. 13 (1968).

2. California Code of Civil Procedure Section 198(2) provides "that no person shall be deemed incompetent [for jury service] solely because of the loss of sight in any degree or other disability which substantially impairs or interferes with the persons's mobility. . . ." The Oregon statute is perhaps a bit broader, prohibiting exclusion "on the basis of blindness or *physical handicap* alone" (emphasis added). ORE. REV. STAT. §10.030. *See also* WASH. REV. CODE §2.36.070 (exclusion based on blindness prohibited). Some statutes are entirely silent on the matter of a juror's physical capabilities and conceivably, otherwise qualified deaf persons and blind persons could be considered under such statutes. *See, e.g.*, FLA. STAT. ANN. §40.07; VA. CODE §8.01-338.

3. In a suit brought by a deaf woman who had been dismissed from a jury panel in Los Angeles, the superior court sustained the demurrer of the jury commissioner, finding, *inter alia*, that Code of Civil Procedure Section 198 disqualifies deaf persons from jury service. Meyer v. Zolin, No. C 30[illegible]883 (L.A. Super Ct., Dec. 20, 1979) (copies of Complaint, Demurrer, and Ruling on Demurrer on file at the *Pacific Law Journal*). The case has been appealed to the Second District Court of Appeal.

While the prohibition against deaf jurors is not explicit in the terms of Section 198, the legislative history of SB 1525 (1977-78 Reg. Sess.) makes it clear that the legislature was not willing to abrogate the traditional prohibition. SB 1525 amended Section 198 to allow wheelchair-bound persons to serve as jurors. *See* CAL. STATS. 1978, c. 301, §2. As originally introduced, the bill "provide[d] that a person shall not be excluded from jury duty because of *any* physical handicap." SB 1525, Legislative Counsel's Digest, *as introduced*, February 13, 1978 (emphasis added). The term "physical handicap" was interpreted to include deafness. *See* Bill Digest on SB 1525 prepared by Senate Committee on Judiciary (copy on file at the *Pacific Law Journal*). An amendment introduced in the Assembly on May 25, 1978, changed "any physical handicap" to "disability which substantially impairs or interferes with the person's mobility." *See* JOURNAL OF THE CALIFORNIA ASSEMBLY 14843 (1977-78 Reg. Sess.) This version was enacted. CAL. STATS. 1978, c. 301, §2. Also enacted as part of the Assembly amendment was the following caveat:

> The Legislature hereby declares that failure to include any specific category of disabled persons within the proviso in subdivision 2 of Section 198 of the Code of Civil Procedure . . . shall not be interpreted as legislative intent to either qualify or disqualify such persons from jury service.

CAL. STATS. 1978, c. 301, §4. The net result of of the legislature's evasive action was to leave intact the common law prohibition against deaf jurors.

sons to be considered for jury service.[4] Deaf persons have actually been seated as jurors in two recent criminal cases[5] and there has been litigation in California and elsewhere on the issue of whether deaf persons have a right to sit on juries.[6]

Case law and statutes excluding deaf persons from jury service have generally done so on the ground that a deaf juror's presence would infringe a litigant's right to a fair trial.[7] Courts have held that deafness is a physical disability that substantially interferes with the performance of the tasks of a juror, thereby depriving litigants of the right to a fair trial.[8] That right, however, is arguably threatened more by the exclusion of deaf persons from the jury selection process than by the potential effects of a juror's deafness during a trial. This comment will contend that the sixth amendment guarantees a trial by a jury chosen from a pool that includes deaf persons. Certainly, the practical impact of a deaf juror on the trial process cannot be dismissed as unimportant, but as will be demonstrated, no aspect of this impact is so insurmountable that a total exclusion of deaf persons, without regard to individual capabilities, is required. Furthermore, to subject deaf persons to a blanket exclusion from jury service while other groups with similar perceptive disabilities are statutorily guaranteed the opportunity to serve, raises equal protection problems. The initial concern, however, must center around the rights of the litigants whose interests in the outcome of the trial are at stake.

Deaf Jurors And The Right To A Fair Trial

The nexus between deaf jurors and the right to a fair trial has two

4. AB 3285, 1979-80 Regular Session, *as introduced*, March 12, 1980.

5. John O'Brien was seated as a juror in a criminal case in Seattle, Washington. State v. Robert J. Scalese, Crim. Cause No. 90771 (King Cty. Super. Ct., August 14-16, 1979). The defendant was acquitted. Charles Peck was seated as juror in a criminal case in Oakland, California in October, 1979. Because the defendant was acquitted of violating California Penal Code Section 647(b) in a case that attracted widespread media attention, it is not deemed appropriate to use his name. This case will hereinafter be cited as Oakland Deaf Juror Case. *See* Letter from Thomas Deal, Alameda County Deputy District Attorney, to Harold Craig Manson, March 11, 1980 [hereinafter cited as Letter on Oakland Deaf Juror] (copy on file at the *Pacific Law Journal*).

6. Eckstein v. Kirby, 452 F. Supp. 1235 (E.D. Ark. 1978); Meyer v. Zolin, No. C 302883 (L.A. Super. Ct., Dec. 20, 1979).

7. *See, e.g.*, 452 F. Supp. 1235; Commonwealth v. Brown, 332 A.2d 828 (Pa. Super. 1974); No. C 302883 (L.A. Super. Ct., Dec. 20, 1979).

8. 332 A.2d at 831. There is no "legal" definition of deafness. The term "deaf" in this comment refers to persons "totally deaf," that is, "[t]hose in whom the sense of hearing is nonfunctional for the ordinary purposes of life." R. Bender, The Conquest of Deafness 11 (1970). A considerable body of case law purporting to treat the issue of "deaf" jurors deals with persons who are "hard of hearing," *i.e.*, "those in whom the sense of hearing, although defective, is functional, with or without a hearing aid." *Id.*; *see* 47 Am. Jur. 2d *Jury* §109; 31 Am. Jur. *Jury* §130; 15 A.L.R. 2d 534. Nearly 14 million Americans have some hearing impairment; of these, nearly two million are deaf as defined above. J. Schein & M. Delk, The Deaf Population of the United States 4 (1974).

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A. *Fairness in the Jury Selecti*

A "fair trial" in California
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9. Taylor v. Louisiana, 419 U.S.
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United States, 315 U.S. 60 (1942); Smit

10. Mullaney v. Wilbur, 421 U.S.
Murchison, 349 U.S. 133 (1965).

11. *See generally* People v. Wheele

12. *See id.*; People v. Carter, 56 Ca
White, 43 Cal. 2d 740, 278 P.2d 9 (1954
cross-sectionalism, *see* J. Van Dyke, Ju
ment to Representative Panels (
Cross-sectionalism in Jury Selection P
(1975) [hereinafter cited as Daughtrey]

13. Taylor v. Louisiana, 419 U.S.
United States, 329 U.S. 187 (1946); Th
United States, 315 U.S. 60 (1942); Sm

14. 439 U.S. 357 (1979). *See* Com
Washburn L.J. 160 (1979).

15. 439 U.S. at 364.

16. *Id.*

17. *Id.*

aspects. First, the litigant is entitled to a *fair jury selection process*.[9] Second, the litigant is entitled to a *fair consideration of the case*.[10] The separate issues raised by these two aspects merit individual treatment.

A. Fairness in the Jury Selection Process

A "fair trial" in California is a trial before a jury representing a "cross-section" of the community, from which no "cognizable" class or group within the community has been excluded in the jury selection process.[11] California courts have generally followed the analysis of this principle developed over several decades in the federal courts.[12] Violation of this principle is per se a denial of a litigant's right to a fair trial.[13]

Recently, the United States Supreme Court in *Duren v. Missouri*[14] set forth a three part test to establish a prima facie violation of the cross-section principle. First, the existence of an excluded "cognizable" or distinctive group in the community must be shown.[15] Second, the complainant must show that the representation of this group in the pool from which juries are selected is not fair and reasonable in relation to the number of such persons in the community.[16] Finally, it must be established that the group's underrepresentation is caused by systematic exclusion of the group from the jury selection process.[17]

With respect to the exclusion of deaf persons, it is not necessary to dwell at length over the second and third elements of the *Duren* test. Since deaf persons are not represented *at all* in the jury selection process, no mathematical analysis is required to conclude that their current representation is not fairly or reasonably related to their numbers in the community. The fact that the exclusion is the result of a legislative act

9. Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972); Ballard v. United States, 329 U.S. 187 (1946); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Glasser v. United States, 315 U.S. 60 (1942); Smith v. Texas, 311 U.S. 128 (1940).

10. Mullaney v. Wilbur, 421 U.S. 684 (1975); Taylor v. Hayes, 418 U.S. 488 (1974); *In re* Murchison, 349 U.S. 133 (1965).

11. *See generally* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

12. *See id.*; People v. Carter, 56 Cal. 2d 549, 364 P.2d 477, 15 Cal. Rptr. 645 (1961); People v. White, 43 Cal. 2d 740, 278 P.2d 9 (1954). For an overview of the federal history of the principle of cross-sectionalism, *see* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977) [hereinafter cited as JURY SELECTION]; Daughtrey, *Cross-sectionalism in Jury Selection Procedures after Taylor v. Louisiana*, 43 TENN. L. REV. 1 (1975) [hereinafter cited as Daughtrey].

13. Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972); Ballard v. United States, 329 U.S. 187 (1946); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Glasser v. United States, 315 U.S. 60 (1942); Smith v. Texas, 311 U.S. 128 (1940).

14. 439 U.S. 357 (1979). *See* Comment, *Systematic Exclusion in the Jury Selection Process*, 19 WASHBURN L.J. 160 (1979).

15. 439 U.S. at 364.

16. *Id.*

17. *Id.*

clearly qualifies the exclusion as "systematic."[18] Thus, in order to show that the exclusion of deaf persons from the jury selection process deprives litigants of a fair trial, only the first element of the *Duren* test need be analyzed. This requires a showing that deaf persons are a distinctively cognizable group in the community whose exclusion deprives juries of a representative cross-section of the community. Before specifically addressing that issue, it is appropriate to discuss the development of the cross-section principle in order to comprehend its full import to the right to a fair trial.

1. Development of the Cross-section Principle

The germ of the cross-section principle is in the sixth amendment guarantee of criminal trials "by an impartial jury of the State and district wherein the crime shall have been committed. . . ."[19] The principles developed under the sixth amendment are logically applicable to civil trials.[20] In 1940, the United States Supreme Court, in *Smith v. Texas*,[21] interpreted "impartial jury" to mean one drawn from a cross-section of the community. In an oft-quoted passage now regarded as "seminal,"[22] the Court declared: .

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. . . . [T]he exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government.[23]

The decision in *Smith* was placed upon equal protection grounds since the sixth amendment did not then apply to the States.[24] The Supreme Court in its supervisory role then gradually extended the

18. Meyer v. Zolin, No. C 302883 (L.A. Super. Ct., Dec. 20, 1979) (ruling on Demurrer, at 2) (copy on file at the *Pacific Law Journal*).

19. U.S. CONST., amend. VI.

20. The sixth amendment did not apply to the states, and states were not required to have jury trials in criminal prosecutions prior to the decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *Duncan* applied the sixth amendment to the states through th due process clause of the fourteenth amendment. The seventh amendment right to jury trial in civil cases has not been incorporated into the fourteenth amendment and theoretically states need not have juries in civil cases. Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 11 (1916). *But see* CAL. CONST., art. I, §16 (jury trial "inviolate right" in both civil and criminal actions).

In the pre-*Duncan* era, however, and today with respect to civil trials, the theory was and is that if a state chooses to provide jury trials, it must do so on terms that comport with notions of due process and equal protection. *See* Peters v. Kiff, 407 U.S. 493, 501 (1972) (plurality opinion per Marshall, J.).

21. 311 U.S. 128 (1940).

22. People v. Wheeler, 22 Cal. 3d 258, 267, 583 P.2d 748, 755, 148 Cal. Rptr. 890, 896 (1978).

23. 311 U.S. at 130. Some evidence suggests that the cross-sectional jury dates to the thirteenth century. *See* JURY SELECTION, *supra* note 12, at 12.

24. See note 20 *supra*.

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26. Williams v. Florida, 399 U.S. 78,
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365 F.2d 698 (5th Cir. 1966).

27. 43 Cal. 2d 740, 278 P.2d 9 (1954)

28. *Id.* at 754, 278 P.2d at 18. *See al*
Cal. Rptr. 890 (1978); People v. Carter, 56
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Co., 328 U.S. 217, 220 (1946).

29. 22 Cal. 3d 258, 583 P.2d 748, 14

30. *Id.* at 272, 583 P.2d at 758, 148

31. Taylor v. Louisiana, 419 U.S. 52
(9th Cir. 1977); United States v. Gast, 4
(1972); United States v. DiTomasso, 405 F
Simmons v. United States, 406 F.2d 456

32. 43 Cal. 2d at 749, 178 P.2d at 1

33. 419 U.S. at 538; Carter v. Jury-

34. 419 U.S. at 538, citing Fay v. N
"6 U.S. 404 (1972). *See also* 22 Cal. 3

35. See text accompanying note 23

cross-section requirement to federal criminal and civil actions.[25] Cross-sectionalism was finally read into the sixth amendment in 1970.[26] In the meantime, however, the California Supreme Court had adopted the cross-section requirement, saying in *People v. White*:[27]

> The American system requires an impartial jury drawn from a cross-section of the entire community and recognition must be given to the fact that eligible jurors are to be found in every stratum of society.[28]

Later, in *People v. Wheeler*,[29] the court explained that cross-sectionalism is a requirement under the state constitution as well as the federal constitution.[30]

An observation about the practical meaning of the cross-section principle is in order. Cross-sectionalism does not require representation of every group in the community on every or any jury actually chosen.[31] As the California Supreme Court aptly noted in *White*, "The principal requirement is that there be no systematic or intentional exclusion of any group or groups of citizens from the prospective jury lists."[32] Further, cross-sectionalism leaves the states free to prescribe juror qualifications as long as the pool of qualified persons is representative of the community.[33] A litigant is not entitled to a jury of any specific composition.[34]

Given the foregoing, it might seem sufficient to say that the exclusion of deaf persons is condemned by the cross-section requirement alone. The argument would be that deaf persons are a group within the community and should therefore be included.[35] This approach, however, would not distinguish deaf persons from any other collection of persons. Not just any "group" is entitled to equal consideration in the jury

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25. *See* 407 U.S. at 500 n.9.

26. Williams v. Florida, 399 U.S. 78, 100 (1970). Actually, the effect of the requirement on the states is much more apparent in *Taylor v. Louisiana*, 419 U.S. 522 (1975). Professor Daughtrey asserts that the Fifth Circuit Court of Appeals had constituionalized cross-sectionalism and made it binding on the states as early as 1966. Daughtrey, *supra* note 12, at 29-30; *see* Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966).

27. 43 Cal. 2d 740, 278 P.2d 9 (1954).

28. *Id.* at 754, 278 P.2d at 18. *See also* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); People v. Carter, 56 Cal. 2d 549, 364 P.2d 477, 15 Cal. Rptr. 645 (1961). The court's language in *White* was a paraphrase of two sentences found in *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946).

29. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

30. *Id.* at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899.

31. Taylor v. Louisiana, 419 U.S. 522, 538 (1975); *see* United States v. Potter, 552 F.2d 901 (9th Cir. 1977); United States v. Gast, 457 F.2d 141 (7th Cir. 1972), *cert. denied*, 406 U.S. 969 (1972); United States v. DiTomasso, 405 F.2d 385 (4th Cir. 1969), *cert. denied*, 394 U.S. 934 (1969); Simmons v. United States, 406 F.2d 455 (5th Cir. 1969).

32. 43 Cal. 2d at 749, 178 P.2d at 15; *see* 419 U.S. at 538.

33. 419 U.S. at 538; Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970).

34. 419 U.S. at 538, citing Fay v. New York, 332 U.S. 261 (1947) and Apodoca v. Oregon, 406 U.S. 404 (1972). *See also* 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.

35. See text accompanying note 23 *supra*.

selection process. A group must be constitutionally "cognizable" for this purpose.

2. *The Cognizability Factor*

The principle of "cognizability" in the jury selection process is universally said to have had its genesis in *Hernandez v. Texas*,[36] wherein the United States Supreme Court stated:

> When the existence of a distinct class is demonstrated, and it is further shown that the laws as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.[37]

The task of defining cognizability was left to the lower federal courts.[38] Not surprisingly, the results have varied.[39] The Court of Appeals for the Ninth Circuit observed that "[a] precise definition of what constitutes a cognizable group is lacking in the decided cases . . . . [C]ognizability will necessarily vary with local conditions."[40]

The case that has been praised as the "most thoughtful analysis"[41] of cognizability is *United States v. Guzman*.[42] In deciding that 18 to 21 year-olds do not constitute a cognizable group, the District Court for the Southern District of New York set out three factors defining such a group. First, the group must have a definite and unshifting membership.[43] This requires some characteristic that limits the group.[44] Second, there must be a "common thread" of ideas, attitudes, or

36. 347 U.S. 475 (1954).

37. *Id.* at 478. *See also* Un ed States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977); Daughtrey, *supra* note 12, at 13; JURY SELECTION, *supra* note 12, at 48. Of particular interest also is Gewin, *An Analysis of Jury Selection Decisions* (appended to the opinion in *Foster v. Sparks*, 506 F.2d 805, 811 (5th Cir. 1975)). Judge Gewin's report was originally prepared for the Committee on the Operation of the Jury System, Judicial Conference of the United States. Judge Gewin observes that the language in the text quoted from *Hernandez* "could be deemed the precursor of the suspect classification terminology," which he says the Court introduced only a short time later in *Bolling v. Sharpe*, 347 U.S. 497 (1954). 506 F.2d at 820 n.41. (It appears that the "suspect" class terminology actually originated in *Korematsu v. United States*, 323 U.S. 214, 216 (1944)). Nonetheless, "cognizability" and "suspect classification" are not identical. A class may be "cognizable" for sixth amendment purposes, yet not "suspect" for fourteenth amendment purposes. Some groups are both "cognizable" and "suspect" *e.g.*, racial groups. Women are clearly a cognizable group, *see* Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979); yet classifications based on sex have not been anointed "suspect" by a majority of the Court, *see* Stanton v. Stanton, 421 U.S. 7 (1975). *But see* Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality of four Justices held sex to be a "suspect" classification).

38. In fact, the Supreme Court has rarely, if ever, used the term "cognizability" to describe the principle announced in *Hernandez*. The term most likely originated with a lower court, although which court, and when and where do not appear in the relevant literature.

39. For a summary of the cognizability decisions to 1975, *see* Daughtrey, *supra* note 12, at 14-15 n.49.

40. United States v. Potter, 552 F.2d 901, 903 (9th Cir. 1977).

41. Daughtrey, *supra* note 12, at 13-14 n.49.

42. 337 F. Supp. 140 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973).

43. *Id.* at 143.

44. *Id.*

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46. 337 F. Supp. at 143-44.

47. *See* United States v. Potter, 552
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48. 12 Cal. 3d 55, 524 P.2d 37, 11
in California appears to have been in
523, 529 (1971).

49. 12 Cal. 3d at 60, 524 P.2d at 3

50. *Id.* at 66, 524 P.2d at 383, 115

51. 24 Cal. 3d 93, 593 P.2d 595, 1

52. *Id.* at 98, 593 P.2d at 598, 154

53. *Id.*

experiences that gives the group cohesion.[45] Finally, the group must share a community of interest that cannot be adequately represented by other groups or individuals in the population.[46] In addition to these factors, courts have sometimes required that the particular class be thought of as distinct and identifiable by the larger community.[47]

The California Supreme Court first articulated the concept of cognizability in *Adams v. Superior Court*,[48] where it was held that persons resident in the state for less than one year do not constitute a cognizable class. The court did not attempt an independent definition of cognizability; rather, the opinion adopted the "common thread" requirement of *Guzman* without comment or citation.[49] Justice Mosk, dissenting, believed the mere fact that a "group" was being discussed proved the cognizability of the group, and that any further determination was unnecessary.[50]

For nearly five years, cognizability in California hung by the *Guzman-Adams* "common thread." In 1979, however, Justice Mosk embraced the philosophy he had eschewed in *Adams* and authored the majority opinion in *Rubio v. Superior Court*.[51] Rejecting a claim that ex-felons and resident aliens are cognizable groups, Mosk laid out his own interpretation of the "common thread" and adopted the third *Guzman* requirement that the group's interests not be adequately represented by other members of the community.[52]

The "common thread" Mosk described as "a common perspective arising from . . . life experience in the group" that "impart[s] to its possessors a common social or psychological outlook on human events."[53] The explanation for adoption of the third *Guzman* require-

45. *Id.* This element is not to be narrowly construed since obviously "no racial, ethnic or socioeconomic group has a rigorous ideological cohesiveness." JURY SELECTION, *supra* note 12, at 69. Additionally, as Professor Van Dyke points out, *id.*, this "common thread" requirement appears to conflict with Justice Marshall's observation in *Peters v. Kiff* that

> [i]t is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

407 U.S. 493, 504 (1972). On the other hand, the *Guzman* "common thread" requirement need not be viewed as demanding that the group have a predictable decisional outlook. The common thread may be seen as referring to "a flavor, a distinct quality" which would be lost if the group were excluded. *See* Ballard v. United States, 329 U.S. 187, 193-94 (per Douglas, J.)

46. 337 F. Supp. at 143-44.

47. *See* United States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977), citing Quadra v. Superior Court, 403 F. Supp. 486 (N.D. Cal. 1975).

48. 12 Cal. 3d 55, 524 P.2d 375, 115 Cal. Rptr. 247 (1974). Actually, the first use of the term in California appears to have been in *People v. Hoiland*, 22 Cal. App. 3d 530, 540, 99 Cal. Rptr. 523, 529 (1971).

49. 12 Cal. 3d at 60, 524 P.2d at 378, 115 Cal. Rptr. at 250.

50. *Id.* at 66, 524 P.2d at 383, 115 Cal. Rptr. at 255.

51. 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979).

52. *Id.* at 98, 593 P.2d at 598, 154 Cal. Rptr. at 737.

53. *Id.*

ment was that the cross-section principle was designed to broaden the representation of *attitudes*, not *groups* as such.[54]

Applying the *Rubio* definition, it is apparent that deaf persons are a cognizable group. Deafness is the characteristic that gives the group a definite composition. There can be no doubt that deafness[55] supplies a "common thread" to the group that it afflicts. In the terms of *Rubio*, deaf persons share a common perspective on human events arising from their common life experience. Because deaf persons have, as a group, a life experience vastly different from the majority of citizens, it is unlikely that the interests shared by deaf persons could be adequately represented by any other group in the community. Deaf persons represent the same sort of "discrete and insular minority"[56] as

54. *Id.* In a bitter but persuasive dissent, Justice Tobriner, who had joined Mosk's dissent in *Adams*, attacks what he calls the " 'vicarious representation analysis'." *Id.* at 106, 593 P.2d at 603, 154 Cal. Rptr. at 743 (Tobriner, J., dissenting). From Tobriner's precise analysis of prior United States Supreme Court decisions, it is obvious that the cross-section rule was not fashioned merely to provide representation of attitudes wherever they might be found, but also to compel the inclusion of groups. For example, the plurality opinion in *Peters v. Kiff* pointed out:

> [T]he exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. . . . When *any* large and identifiable segment of the population is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

407 U.S. 493, 503-04 (1972) (emphasis added). See also note 45 *supra*.

The effect of the "vicarious representation" element is to exclude groups based on presumptions about group attitudes, presumptions which "fl[y] squarely in the face of the cross-section rule." 24 Cal. 3d at 112, 593 P.2d at 608, 154 Cal. Rptr. at 747 (Tobriner, J., dissenting). As Judge Gewin points out, judicial sanctions can be imposed against jury discrimination without regard to whether or not a technical "cross-section" has been achieved for the reason that "state fostered or imposed discrimination is simply inimical to the Constitution." Gewin, *An Analysis of Jury Selection Decisions*, 506 F.2d 811, 820 (1975).

The "vicarious representation" element considers perhaps the interests of the judicial system and litigants, but ignores the interests of a group excluded for the sole reason that its views are shared by another group. Also, as between two groups whose interests could somehow be divined as similar, the decision that one but not the other should represent these interests could only be made on arbitrary grounds unrelated to the ability of individual group members to perform as jurors.

Exclusion of qualified groups from jury service is essentially an equal protection issue with respect to the excluded groups, no matter what labels or standards of review may be applied. Justice Mosk had earlier recognized that in his *Adams* dissent. *See* 12 Cal. 3d at 67, 524 P.2d at 383, 115 Cal. Rptr. at 255. No other equal protection issue turns on whether or not the victims of discrimination have their interests adequately represented by other members of society.

Justice Tobriner's dissent in *Rubio* thus clearly states the correct view. Ironically, Justice Mosk's now-repudiated dissent in *Adams* remains an outstanding essay on the law in jury discrimination cases. In light of both opinions, the "vicarious representation" element of *Rubio* and *Guzman* is unquestionably erroneous. It would appear then that cognizability, an historical accident and largely a creation of the lower federal courts, has evolved far past its usefulness. The concept was essential in 1954, but is troublesome in 1980. The ends of the sixth amendment would be better served by discarding cognizability entirely. In challenges to a jury selection system brought by members of the excluded group, the more usual modern equal protection analysis should apply. In challenges brought by allegedly wronged litigants, the litigants should be allowed to assert the equal protection rights of the excluded group. *See* Peters v. Kiff, 407 U.S. 493 (1972); Barrows v. Jackson, 346 U.S. 249 (1953).

55. See note 8 *supra*.

56. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). Although this phrase arose in the context of substantive due process and has particular significance in discus-

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61. 349 U.S. 133 (1965).

62. *Id.* at 136.

63. See text accompanying

64. 452 F. Supp. 1235 (E.D
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other groups declared "cognizable" for jury selection purposes.[57] Finally, the entire social history of the treatment of deaf persons, from educational segregation[58] to the imposition of legal disabilities,[59] reveals that deaf persons have been thought of as a distinct class by the greater community.[60] The status of deaf persons as a cognizable group is meaningless, however, if their presence on juries interferes with a fair consideration of the cases before them.

B. *Fairness in the Consideration of the Case*

The United States Supreme Court pointed out in *In re Murchison*:[61] "A fair trial in a fair tribunal is a basic requirement of due process."[62] The terms "fair trial" and "due process" are synonymous with "fairness in the consideration of the case." As previously noted, courts have adhered to the position that the inability of a deaf juror to perceive the evidence precludes a fair consideration of a case and thus denies a litigant due process.[63]

In *Eckstein v. Kirby*,[64] a federal district court sitting in Arkansas sus-

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sions of equal protection, it is the most accurate description of the cognizability factor to be found anywhere.

57. See the cases cited in Daughtrey, *supra* note 12, at 14-15, n.49.

58. *See generally* Glass, *Deafness and Its Effects*, EDUCATIONAL AND PSYCHOSOCIAL ASPECTS OF DEAFNESS 66 (R. Hardy & J. Culls, eds. 1974) [hereinafter cited as Glass].

59. See note 60 *infra*.

60. In early history, deaf persons were thought to be possessed by evil spirits. *See Mark* 9:17-26. False notions about deafness continue to result in social discrimination against the deaf to this day. One popular notion is that deaf persons are "intellectually slower than hearing persons." *See* Glass, *supra* note 58. This idea arose from the common tendency to equate intelligence with language skills, and the deaf are admittedly lacking in language skills. See note 69 *infra* and accompanying text. Science has repudiated the idea that deaf persons lack the intellectual capacity of hearing persons, *see* Glass, *supra* note 58; yet even the most educated and seemingly enlightened persons refer to deaf persons as "deaf and dumb." This offensive phrase is not "just an expression" any more than "nigger" is "just an expression."

At one time, the deaf were *personae non standi judicio*. *See generally* Alex v. Matke, 151 Mich. 36, 115 N.W. 251 (1908). Modern case law dealing with discrimination against deaf persons is sparse. One reason for the paucity of litigation is that a private right of action under relevant federal law has only recently been recognized. *See* Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977). A few cases have attracted national attention. In *Southeastern Community College v. Davis*, 439 U.S. 1065 (1979), the Supreme Court held that no federal law was violated when a college refused to admit a deaf licensed practical nurse to its nursing degree program. A state university denied a deaf graduate student interpreter services, thus effectively terminating his program, in *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977). The same issue arose in *Barnes v. Converse College*, 436 F. Supp. 635 (D.S.C. 1977).

Despite the lack of extensive litigation, it is apparent that social, economic, and employment discrimination against deaf persons is common. *See* R. BENDER, THE CONQUEST OF DEAFNESS (1970); Stewart, *A Truly Silent Minority*, 2 PROFESSIONAL REHABILITATION WORKERS WITH THE ADULT DEAF, DEAFNESS [illegible] (1972).

61. 349 U.S. 133 (1955).

62. *Id.* at 136.

63. See text accompanying note 8 *supra*.

64. 452 F. Supp. 1235 (E.D. Ark. 1978). In a suit of first impression in American courts, plaintiff, a deaf woman who had been dismissed from a jury panel, sought a declaratory judgment that the Arkansas jury selection statute violated the fourteenth amendment in excluding deaf per-

tained the exclusion of a deaf person from a state court jury panel on the basis of fairness to litigants, among other reasons.[65] Finding that the deaf person "might not be able to give a litigant a fair trial,"[66] the court outlined several potential obstacles to a fair consideration of a case by a deaf juror.

First, it was urged in *Eckstein* that deaf persons necessarily have limited vocabularies and therefore verbatim translations of court proceedings would be impossible even with the aid of a skilled interpreter.[67] The court suggested that complex medical testimony or other evidence of a highly technical nature could not be satisfactorily conveyed to a deaf juror without significant delay.[68] There is no dispute that the expressive and receptive language skills of deaf persons are, *on the average*, quite deficient compared to the language skills of hearing persons.[69] But contrary to former belief, language proficiency is not a measure of intelligence,[70] and it is intelligence that is the critical factor in a juror's ability to evaluate evidence and drawn the necessary conclusions. Beyond this fact, it is documented that deaf persons participate in a number of professions with highly specialized jargon, including medicine, education, engineering, and law.[71] It may be in fact much more difficult to convey highly technical information to a hearing person of limited intelligence or education than it would be to convey the same information to a deaf person of average or above average intelligence.

Another potential obstacle to a fair consideration of a case by a deaf juror raised in *Eckstein* was the apparent inability of a deaf juror to perceive the "more subtle nuances of verbal communication" in assessing the credibility of a witness.[72] There are some "subtle nuances of verbal communication" such as hesitancy that would be visually obvious to a deaf person. Likewise, other clues perceptible to a deaf person, such as visible discomfort, wringing hands, sweating, and so forth,

sons. Jurisdiction was granted pursuant to Title 42, United States Code, Section 1983. The challenged provision declared:

> The following are disqualified to act as grand or petit jurors:
>
> . . .
>
> (c) Persons who are unable to speak or understand the English language.
>
> . . .
>
> (f) Persons whose senses of hearing or seeing are substantially impaired.

ARK. STAT. ANN. §39-102 (1977).

65. 452 F. Supp. at 1242. The court also decided that the plaintiff had no fundamental right to sit on a jury. *Id.* at 1241. See notes 125-139 and accompanying text *infra*.
66. 452 F. Supp. at 1242.
67. *Id.* at 1237.
68. *Id.* at 1242.
69. *See generally* H. FURTH, THINKING WITHOUT LANGUAGE (1966).
70. Glass, *supra* note 58, at 66-67.
71. P. CRAMMATTE, DEAF PERSONS IN PROFESSIONAL EMPLOYMENT 72-87 (1968).
72. 452 F. Supp. at 1237.

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74. H. KALVEN & H. ZIESEL, T
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77. 452 F. Supp. at 1242.
78. *See* Letter on Oakland D

might reveal a witness' apparent confusion or misrepresentation.[73] Furthermore, a hearing juror may fail to grasp the significance of some "subtle nuances" of voice inflection, and this fact will rarely be know to the parties. Finally, there is no conclusive authority that perception of voice inflection or any other "nuance" of verbal communication leads juries to "truer" or "more just" findings. In fact, authority suggests that juries base their credibility judgments more on their *visual* perception of a witness than on voice inflection, or even the substantive content of testimony.[74] Thus the excluded deaf person may be a "better" juror than the blind person now permitted to serve on California juries.

The *Eckstein* court also asserted that a deaf juror would have to keep his or her eyes constantly on the interpreter and would not be able to watch the facial expressions of witnesses as they testified.[75] This problem is easily resolved by placing the interpreter next to or behind the witness.[76] Nonetheless, this hardly seems a valid reason to exclude deaf persons as a group since blind persons who are allowed to be jurors cannot see the facial expressions of the witnesses at all. Regardless of whether an interpreter could be strategically located, the deaf juror would at least be able to see the witness before and immediately after anything was said.

Of all the potential obstacles to a fair consideration of a case identified by the court in *Eckstein*, the most serious was that a deaf juror's participation in deliberations would be impeded or delayed by having "each remark made by each juror" relayed by the interpreter.[77] This observation has not been borne out by actual trial experience with a deaf juror.[78] A hearing juror, being able to comprehend only one con-

73. *See* Letter on Oakland Deaf Juror, *supra* note 5. The "appealing notion" that deaf persons compensate for hearing loss with heightened sensitivity to nonverbal conduct is apparently without merit. B. BOLTON, PSYCHOLOGY OF DEAFNESS FOR REHABILITATION COUNSELORS 4 (1976). The visual clues referred to in the text are those that hearing persons would just as readily perceive. Also false is the idea that deaf persons, as a group, are extremely proficient at lip-reading. *See id.*

74. H. KALVEN & H. ZIESEL, THE AMERICAN JURY 382-83 (1966).

75. 452 F. Supp. at 1242. Deaf persons communicate in a variety of ways, but the preferred method is through the use of American Sign Language or "Sign." Bornstein, Woodward, & Tully, *Language and Communication* in PSYCHOLOGY OF DEAFNESS FOR REHABILITATION COUNSELORS 22 (B. Bolton, ed. 1976). Sign is not English nor is it based on English. *Id.* Thus an interpreter is needed, just as with any foreign language, when a user of Sign wishes to communicate with an English-speaker. It should be pointed out that not all deaf persons identify with Sign as a means of communication, and there are Sign-English hybrid languages and other modes of deaf communication. *Id.* But each mode requires a qualified interpreter to complete the communication process.

76. This procedure was used in the Oakland Deaf Juror Case. *See* Letter on Oakland Deaf Juror, *supra* note 5, at 2. California Evidence Code Section 754, considered more thoroughly at note 102 *infra*, requires that an action involving a deaf party or witness not proceed until the interpreter is "spatially situated to assure proper communication with the deaf person or persons involved."

77. 452 F. Supp. at 1242.

78. *See* Letter on Oakland Deaf Juror, *supra* note 5.

versation at a time, cannot always hear "each remark made by each juror."[79] The solution to this problem, if it is a problem, lies in the voluntary cooperation of the other jurors. If they seem unwilling to cooperate, and this appears unlikely,[80] the judge could impose rules for the conduct of deliberations in order to insure a fair consideration of the case. That a jury has a duty to include each juror in discussions is clear.[81] A verdict rendered without the participation of one juror is not the verdict of each juror to which a litigant is entitled.[82] Such a verdict could be impeached on the ground that a "fair and due consideration of the case has been prevented."[83] Furthermore, the common law right to a jury of twelve individuals is guaranteed by the California constitution[84] and exclusion of one juror from deliberations would violate that right.[85]

Another vital aspect of the right to a fair trial deserves particular mention. The court in *Eckstein* observed that the presence of a thirteenth person in the jury room during deliberations "violates the secrecy of the jury room and thereby deprives an accused person of their [sic] right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution . . . ."[86]

There is no doubt that an interpreter would be necessary to assist a deaf juror in deliberations. The presence of an outsider during deliberations, it is said, however, prevents a fair consideration of the case by chilling free discussion of the issues.[87] An outsider might interfere with

79. On *voir dire* in the Oakland Deaf Juror Case, Prosecutor Deal queried deaf juror Peck on the problem of multiple conversations. Through the interpreter, Peck replied, "How many people can *you* listen to and understand at one time?" Letter on Oakland Deaf Juror, *supra* note 5, at 2.

80. At the conclusion of the trial in the Oakland Deaf Juror Case, the other jurors "gave the deaf man a standing ovation and were generally extremely pleased to have sat on the jury with him. They apparently encountered no problems while deliberating. They all made a conscientious effort not to speak when another person spoke and to make sure the deaf man was able to express his views." Letter on Oakland Deaf Juror, *supra* note 5, at 3.

81. CALIFORNIA JURY INSTRUCTIONS—CIVIL (BAJI) No. 15.30 directs in part: "Each of you must decide the case for yourself but you should do so only after a consideration of the case with the other jurors." *See also* NEW YORK PATTERN JURY INSTRUCTIONS, No. 1:28; *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97-98 (1961). Instructions of this nature were tacitly approved in *Philbrick v. Weinberger*, 228 Cal. App. 2d 681, 39 Cal. Rptr. 617 (1964) and *Hutton v. Brookside Hospital*, 213 Cal. App. 2d 350, 28 Cal. Rptr. 774 (1963).

82. *See* People v. McKee, 80 Cal. App. 200, 251 P. 675 (1926) (held, error to refuse instruction that both defendant and People entitled to individual opinion of each juror). *See also* CALIFORNIA JURY INSTRUCTIONS—CRIMINAL (CALJIC) No. 17.40.

83. California Penal Code Section 1181 permits a new trial to be granted on this ground.

84. People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951).

85. *See* People v. Ames, 52 Cal. App. 3d 389, 124 Cal. Rptr. 894 (1975).

86. 452 F. Supp. at 1244. *See also* United States v. Beasley, 464 F.2d 468 (10th Cir. 1972); People v. Knapp, 42 Mich. 267, 3 N.W. 927 (1879); Birgman v. State, 350 P.2d 321 (Okla. Crim 1960); Acosta v. State, 126 Tex. Crim 618, 72 S.W.2d 1074 (1934). The *Knapp* case seems to be the seminal American decision on the matter.

87. People v. Valles, 24 Cal. 3d 121, 131, 593 P.2d 240, 245-46, 154 Cal. Rptr. 543, 548 (1979) (Mosk, J., dissenting). *See also* United States v. Virginia Erection Co., 335 F.2d 868 (4th Cir. 1974).

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90. 335 F.2d at 872.

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93. *Id.* at 127, 593 P.2d at 24
625 (Ind. 1977).

94. *Id.* at 128, 593 P.2d at 24
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70 Cal. Rptr. 918 (1968). To the
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Callahan v. Hester, 181 S.W.2d 2

the decisionmaking process so that the verdict is not one rendered by the jury alone based upon evidence presented in court. Even if the nonjuror is orally mute, he or she might convey attitudes or opinions to the jurors by intentional or unintentional nonverbal conduct.[88] So pervasive is the reverence for inviolate deliberations that, as the court in *Eckstein* noted, the prohibition against outsiders in the jury room has been extended even to alternate jurors who are not allowed to vote anyway.[89] Close scrutiny reveals, however, that the so-called "cardinal principle"[90] of jury secrecy is not as immutable as it seems.

The rule precluding additional persons in the jury room is found primarily in cases dealing with the presence of the judge, a bailiff, or counsel.[91] The presence of these persons is a matter entirely different than the presence of a disinterested interpreter. A judge might be tempted to, or be asked to, reinstruct the jury or comment on the evidence; a bailiff may by mere presence coerce a hasty verdict or raise a reasonable apprehension that the content of discussions will be reported; counsel may express an opinion or reargue the case being decided. An interpreter, not being an officer of the court as such, is not cloaked in judicial authority and would not by mere presence inhibit or coerce a jury as might a judge, counsel, or bailiff.

The California Supreme Court most recently considered the thirteenth juror problem in *People v. Valles*.[92] The court approved the distinction between the presence of an officer of the court and the presence of an alternate juror who had been with the jury throughout the trial, receiving with the other jurors the admonitions of the judge as to jury behavior.[93] The court adopted the theory of the better reasoned cases which hold there is no error in the mere presence of a nonparticipant in the jury room absent a showing of actual prejudice.[94] The *Valles* rationale applies logically to an interpreter for a deaf juror. Like an alternate juror, an interpreter would be treated identically to the

88. 24 Cal. at 131, 593 P.2d at 245-46, 154 Cal. Rptr. at 548.

89. 452 F. Supp. at 1244. *See* United States v. Beasley, 464 F.2d 468 (10th Cir. 1972); People v. Britton, 4 Cal. 2d 622, 52 P.2d 217 (1935); People v. Adame, 36 Cal. App. 3d 402, 111 Cal. Rptr. 462 (1973); People v. Bruneman, 4 Cal. App. 2d 75, 40 P.2d 891 (1935).

90. 335 F.2d at 872.

91. *See, e.g.*, Bowman v. State, 192 N.E. 755 (Ind. 1934) (bailiff); Hunsicker v. Waidelich, 302 Pa. 224, 153 A. 335 (1931) (judge).

92. 24 Cal. 3d 121, 593 P.2d 240, 154 Cal. Rptr. 543 (1979).

93. *Id.* at 127, 593 P.2d at 243, 154 Cal. Rptr. at 546, citing Johnson v. State, 369 N.E.2d 623, 625 (Ind. 1977).

94. *Id.* at 128, 593 P.2d at 243, 154 Cal. Rptr. at 546-47; *see* People v. Adame, 36 Cal. App. 3d 402, 411, 111 Cal. Rptr. 462, 467 (1973) (Brown (G.A.), P.J., concurring in result); People v. Orchard, 17 Cal. App. 3d 568, 95 Cal. Rptr. 66 (1971); People v. Martinez, 264 Cal. App. 2d 906, 70 Cal. Rptr. 918 (1968). To the same effect are *Weston v. State*, 506 S.W.2d 948 (Tenn. Crim. App. 1974), *Jardine Estates v. Donna Brook Corp.*, 42 N.J. Super. 332, 126 A.2d 372 (1956), and *Callahan v. Hester*, 181 S.W.2d 294 (Tex. Civ. App. 1944).

participating jurors and would not affect the outcome of the deliberations by mere presence.

But even if the *Valles* rule is limited to the factual situation of an alternate juror, the strict traditional rule against outsiders in the jury room has been set aside for reasons far less compelling than the necessity of an interpreter for a deaf juror.[95]

To the extent that the presence of an interpreter in the jury room threatens the integrity of the deliberative process, several remedial measures are available. The interpreter would be under the same obligation as a juror not to disclose the progress or nature of deliberations. Presumably, the court could require the interpreter to take an oath to this effect. Misconduct by the interpreter in the jury room could be proved, on motion for new trial[96] or vacation of judgment, in a juror's affidavit.[97] Furthermore, an interpreter who misbehaves in the jury room could be punished under existing provisions of the Penal Code.[98] Interpreter misconduct, however, is highly unlikely since courtroom interpreters for the deaf adhere to a stringent code of ethics.[99]

95. In *People v. Weston*, 32 Cal. App. 571, 163 P. 691 (1917), the court of appeal found no error in allowing a doctor to attend a juror who had a stomachache in the course of deliberations, even though the doctor had been a principal prosecution witness. The Texas courts thought it perfectly proper in *Newton v. State*, 26 S.W.2d 233 (Tex. Crim. App. 1930), that a "negro" was allowed to be present in the jury room to serve food to hungry jurors during deliberations. Minnesota's highest court had no problem, absent a showing of actual prejudice, in allowing the trial judge in the jury room during deliberations in *Helmbrecht v. Helmbrecht*, 31 Minn. 504, 18 N.W. 449 (1884). Of the utmost curiousity is the New York case of *People v. Flack*, 57 Hun. 83, 10 N.Y.S. 475 (Sup. Ct. Gen. Term 1890), *rev'd on other grounds*, 125 N.Y. 324 (1891), wherein the court was not the least concerned by the presence of a newspaper reporter in the jury room!

96. In civil cases, a new trial may be had for "irregularity in the proceedings of the court, jury or adverse party" or for "misconduct of the jury." CAL. CIV. PROC. CODE §657. For a similar rule in criminal cases, see note 83 and accompanying text *supra*.

97. In California, a juror's affidavit may be used to show any "misconduct on the part of either jurors or *third parties* that should be exposed, misconduct upon which no verdict should be based." People v. Hutchinson, 71 Cal. 2d 342, 350, 455 P.2d 132, 137, 78 Cal. Rptr. 196, 201 (1969) (emphasis added). Such an affidavit is limited to proof of objective facts, that is, "overt conduct, conditions, events and statements" or other "improper influences" perceived by "sight, hearing, and the other senses." 71 Cal. 2d at 349-50, 455 P.2d at 137, 78 Cal. Rptr. at 201; *see* CAL. EVID. CODE §1150. No evidence is admissible to show the effect of such misconduct on the minds of the jurors. CAL. EVID. CODE §1150(a). By its own terms, Section 1150 allows proof of misconduct "within or without the jury room, of such a character as is likely to have influenced the verdict improperly." *Id.* This provision, as interpreted in *Hutchinson*, would appear to cover almost any conceivable misconduct on the part of an interpreter allowed in the jury room. The *Hutchinson* case dealt with improper remarks by a bailiff to the jury in the course of its deliberations.

98. California Penal Code Section 95 provides:

> Every person who corruptly attempts to influence a juror or any person summoned or drawn as a juror . . . in respect to his verdict in, or decision of any cause, or proceeding, pending, or about to be brought before him . . . is punishable by fine not exceeding five thousand dollars or by imprisonment in the state prison.

99. The code referred to is that of the National Registry of Interpreters for the Deaf. A copy is on file at the *Pacific Law Journal* or may be had from the National Association of the Deaf, 814 Thayer Avenue, Silver Spring, Maryland 20910. Courtroom interpreters for the deaf in California are required to subscribe to this or an equivalent set of standards. *See* CAL. EVID. CODE §754 (discussed at note 102 *infra*).

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Finally, it should be noted that none of the "thirteenth juror" problems apparently arose in the two cases previously mentioned in which deaf persons were jurors.[100] Interpreters accompanied these individuals into the jury rooms and as far as is known, there were no breaches of the juries' confidentiality.[101] This actual trial experience should serve to substantially abate concerns about the interpreter's presence during deliberations.[102]

In assessing all of the potential obstacles to the fair consideration of a case posed by a deaf juror, it is essential to point out that actual trial experience with deaf jurors resulted in no diminution of the litigants' rights to a fair trial.[103] Furthermore, the solution in any given case is not the total exclusion of deaf jurors. Rather, a deaf potential juror incapable of rendering a fair consideration in any given litigation could be challenged for cause.[104] As one judge has pointed out, "In each

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100. *See generally* Letter on Oakland Deaf Juror, *supra* note 5.

101. See *id.* In California, it is a crime for a nonjuror to record, observe or listen to a jury's deliberations or a jury's voting without the jury's consent. CAL. PENAL CODE §167. Where an interpreter is needed to assist a deaf juror, it would be necessary, absent a statutory change, to obtain the jury's consent in order for the interpreter to accompany the deaf juror into deliberations. Understandably, there has been little judicial interpretation of Penal Code Section 167; hence, it is not clear whether "consent of the jury" requires the consent of each juror or whether consent of a majority of the jury would be sufficient. In the Oakland Deaf Juror Case, Judge Kawaichi required the consent of each juror, as well as that of the attorneys on both sides, and the defendant himself. Additionally, the interpreter swore that he would "offer no opinions or other utterances except to translate to the other jurors what the deaf man said." Letter on Oakland Deaf Juror, *supra* note 5, at 2.

102. There are, however, several other issues relating to interpreters, including the manner of selecting an interpreter, the criteria to govern an interpreter's competency, and the cost of an interpreter. A convenient framework for resolving these issues currently exists in the recent revision of California Evidence Code Section 754. *See* CAL. STATS. 1977, c. 1182, §1, at 3873-74; 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 485 (1978). This statute requires that the court appoint an interpreter in any criminal action and certain other proceedings where a deaf person is a party or witness and required to be present. CAL. EVID. CODE §754(b). The appointed interpreter must be certified by the National Registry of Interpreters for the Deaf or any other agency with equivalent standards. *Id.* §754(c). Additionally, the interpreter must be included on a list of recommended interpreters maintained by the court. *Id.* These same provisions should govern the appointment of interpreters in all actions where a deaf person has been seated as a juror.

Interpreters appointed under Section 754 are paid by the city or county at the rate paid to other interpreters. *Id.* §754(e). This should be the rule when a deaf person is a juror in a criminal case. No significant burden would result on the public fisc since the seating of a deaf juror would be a fairly rare occurrence. It appears that federal funds may be available to the state to bear part, if not all, of the cost. The federal Rehabilitation Act of 1973 permits federal grants to states to establish interpreter services and interpreter training programs, which shall be made available to deaf persons and any public or private nonprofit organization providing assistance or services to the deaf. *See* 29 U.S.C. §§774(d)(1), 777e (1976). In a civil case, the interpreter's fee should be taxed as a cost to the parties.

103. *See generally* Letter on Oakland Deaf Juror, *supra* note 5.

104. *See* McLaughlin, *Civil Practice, 1967 Survey of N.Y. Law*, 19 SYRACUSE L. REV. 501, 529 (1967). *See also* Lewinson v. Crews, 282 N.Y.S.2d 83, 88-89 (1967) (Hopkins, J., dissenting). At the same time of the amendment allowing blind jurors, California Code of Civil Procedure Section 602 was changed to allow a challenge for cause based on "a defect in the visual or auditory functions of the body." CAL. STATS. 1977, c. 591, §3, at 1957. *See* 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 392 (1978). The most recent amendment to Section 602 permits a challenge for cause for

any incapacity which satisfies the court that the challenged person is incapable of per-

case, the acceptance of the juror hangs on the assessment of his qualities to serve in the *particular* litigation."[105]

Given that there is not necessarily prejudice to a fair consideration of a case and that inclusion is mandated by the principle of cross-sectionalism, the statutory exclusion of deaf jurors appears to deny litigants a fair trial. The rights of deaf persons with respect to jury service must also be considered in analyzing the exclusion.

EQUAL PROTECTION FOR DEAF PERSONS IN JURY SELECTION

A. *The Equal Protection Concept*

The fourteenth amendment guarantee of "equal protection of the laws"[106] essentially means that persons similarly situated must be treated similarly by the government.[107] Under the traditional equal protection analysis, however, laws that treat similar persons differently are presumptively valid if they bear some rational relationship to a legitimate state objective.[108] No presumption of validity attaches to legislation that in purpose or effect classifies persons according to criteria regarded as inherently "suspect" by the courts.[109] Such "suspect classification" legislation can withstand an equal protection challenge only if the classification is necessary to further a compelling state interest[110] that cannot be achieved by less drastic or less restrictive means.[111] This strict standard of judicial scrutiny also applies to legislation that impinges upon a "fundamental" right.[112] Between the polar standards of "rational relationship" and "compelling state interest," legislation that treats persons differently meets the requirements of equal protection if it is substantially related to the achievement of important govern-

forming the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

CAL. CIV. PROC. CODE §602(2), as amended by CAL. STATS. 1978, c. 301, §3. (emphasis added); *see* 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 369 (1979). The availability of the challenge for cause in this situation gives the litigant the best of both worlds, so to speak. This litigant has the benefit of a cross-sectionally representative panel from which to select jurors, as well as a device to protect the litigant's interest in a fair consideration of the case.

105. Lewinson v. Crews, 282 N.Y.S.2d 83, 89 (1967) (Hopkins, J., dissenting).

106. U.S. CONST., amend. XIV, §1.

107. Reynolds v. Sims, 377 U.S. 533 (1964); *see* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

108. Parham v. Hughes, 441 U.S. 347, 351 (1979); Massachussets Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 60-61 (1973) (Stewart, J., concurring).

109. 441 U.S. at 351; *see* 427 U.S. at 312; 411 U.S. at 60-61 (Stewart, J., concurring).

110. 411 U.S. at 17; *see* 427 U.S. at 312.

111. Shelton v. Tucker, 364 U.S. 479 (1960); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); *see* Kahn v. Shevin, 416 U.S. 351, 357-58 (1974) (Brennan, J., dissenting).

112. 411 U.S. at 17; Hawkins v. Superior Court, 22 Cal. 3d 584, 592, 586 P.2d 916, 921, 150 Cal. Rptr. 435, 440 (1979).

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114. 22 Cal. 3d at 601, 586 P.2d at 92

115. *Id.* at 600, 586 P.2d at 926-27, 15

116. *Id. See, e.g.*, Serrano v. Priest, 1
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117. See text accompanying notes 61-

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119. See text accompanying notes 67-

120. See text accompanying notes 75

121. See text accompanying notes 86-

122. See text accompanying notes 72

123. *See* Letter on Oakland Deaf Ju

124. See note 2 *supra*.

mental objectives.[113] Legislation involving "rights important—but not 'fundamental'," or "classifications sensitive—but not 'suspect' " may be judged by this intermediate standard.[114]

The California Supreme Court has generally followed the United States Supreme Court in equal protection analysis,[115] but occasionally has found "fundamental" rights and "suspect" classifications where the federal high Court would not.[116]

If the jury selection statute fails to accord similar treatment to persons similarly situated, it is subject to review under equal protection analysis. Since the legislative goal is a fair trial for litigants, persons capable of rendering a fair consideration of a case must be regarded as similarly situated for jury selection purposes. Deaf persons, as has been illustrated, are capable of rendering a fair consideration of a case.[117] With the aid of an interpreter, a deaf juror can perceive the relevant spoken proceedings of the trial.[118] The use of an interpreter does not diminish the deaf juror's ability to fairly consider the case.[119] The interpreter can be strategically, but unobtrusively, placed in the courtroom.[120] Several measures exist to prevent an interpreter from influencing jury deliberations.[121] The deaf juror can visually evaluate the credibility of witnesses just as other jurors do.[122] Finally, actual trial experience has shown deaf jurors to be essentially similar to hearing jurors in terms of rendering a fair consideration of a case.[123]

Since the basic objection to both blind and deaf jurors is the alleged inability to perceive evidence, it would appear that persons with perceptive disabilities are similarly situated for jury selection purposes. The fact that blind persons are allowed to sit on juries[124] in California

113. Craig v. Boren, 429 U.S. 190, 197 (1976). It has been observed that it is presently unlikely that equal protection can be isolated at two polar positions or even at three distinct centers of review. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1089 (1978); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV 1, 23 (1977). The courts, however, continue to apply a definitely stratified equal protection analysis. *See* Hawkins v. Superior Court, 22 Cal. 3d at 601, 586 P.2d at 927, 150 Cal. Rptr. at 446 (Mosk, J., concurring).

114. 22 Cal. 3d at 601, 586 P.2d at 927, 150 Cal. Rptr. at 446 (Mosk, J., concurring).

115. *Id.* at 600, 586 P.2d at 926-27, 150 Cal. Rptr. at 445.

116. *Id. See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (education a fundamental right); Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (sex a "suspect" classification). *Cf.* Stanton v. Stanton, 421 U.S. 7 (1975) (sex not accorded "suspect" classification treament" San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education not a fundamental right).

117. See text accompanying notes 61-105 *supra*.

118. See text accompanying notes 67-71, 77-85 *supra*.

119. See text accompanying notes 67-85 *supra*.

120. See text accompanying notes 75 & 76 *supra*.

121. See text accompanying notes 86-102 *supra*.

122. See text accompanying notes 72-76 *supra*.

123. *See* Letter on Oakland Deaf Juror, *supra* note 5.

124. See note 2 *supra*.

while deaf persons are excluded is another indication that the jury selection statute fails to treat similar citizens in a similar manner. The statute is thus subject to equal protection scrutiny.

B. *The Compelling State Interest Test*

In order to examine the exclusion of deaf persons from jury service under the compelling state interest test, it is necessary to show that citizens have a fundamental right to serve on a jury or that deafness is a suspect classification with respect to jury service. If either is shown, the exclusion is unconstitutional unless it can be justified by a compelling state interest.

1. *Jury Service as a Fundamental Right*

In *Adams v. Superior Court*,[125] Justice Clark, writing for the majority, asserted:

> While trial by jury is constitutionally implanted in our system of justice, an individual's interest in serving on a jury cannot be held a fundamental right. The guarantee of the Sixth Amendment is primarily for the benefit of the litigant—not persons seeking service on the jury.[126]

The federal district court in *Eckstein* found this a "thoughtful" and "cogent" observation and quoted this passage in support of its conclusion that a deaf woman had no fundamental right to serve as a juror.[127]

The United States Supreme Court has defined a "fundamental" right as one explicitly or implicitly guaranteed by the Constitution.[128] The idea that jury service is a fundamental right has been implicit in recent jury selection decisions of the Court. In *Carter v. Jury Commission of Greene County*,[129] the Court unanimously upheld the right of members of an excluded group, rather than a litigant, to challenge a jury selection system.[130] The Court thereby recognized the right of equal opportunity to serve on a jury. Justice Stewart declared on behalf of the Court that a state can no more discriminate with respect to jury service than it can with respect to the elective franchise.[131]

The comparison in *Carter* of jury service and the right to vote, which

125. 12 Cal. 3d 55, 524 P.2d 375, 115 Cal. Rptr. 247 (1974).
126. *Id.* at 61, 524 P.2d at 379, 115 Cal. Rptr. at 251. *See also* JURY SELECTION, supra note 12, at 72-77; Van Dyke, *Jury Service is a Fundamental Right*, 2 HASTINGS CONST. L.Q. 27 (1975) [hereinafter cited as *Fundamental Right*].
127. Eckstein v. Kirby, 452 F. Supp. 1235, 1241 (1978).
128. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 3 (1977).
129. 396 U.S. 320 (1970).
130. 396 U.S. at 329-30; *see* JURY SELECTION, *supra* note 12, at 58.
131. 396 U.S. at 330. *See* Adams v. Superior Court, 12 Cal. 3d at 67, 524 P.2d at 383, 115 Cal.

is a fundamental right,[132] clearly
ascribed to jury service. Relying o
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may still violate equal protectio
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2. *Deaf Persons As a "Suspe*

The concepts of suspect classif

Rptr. at 255 (Mosk, J., dissenting); *Fundam*
supra note 12, at 74.
132. Harper v. Virginia Bd. of Election
garded as a more important right than votin
in the processes of government than does i
temporally and spatially immediate. *See* 1
255 (Mosk, J., dissenting). For an opposite
Rubio v. Superior Court, 24 Cal. 3d 93, 114
133. 372 F. Supp. 26 (C.D. Cal. 1974),
413 (9th Cir. 1976).
134. *Id.* at 30.
135. 18 Cal. 3d 728, 557 P.2d 929, 135
136. *Id.* at 767-68, 557 P.2d at 952, 13
137. *See* 12 Cal. 3d at 61, 524 P.2d at
138. *See* 411 U.S. at 33-39.
139. 18 Cal. 3d at 767-68, 557 P.2d at

is a fundamental right,[132] clearly indicates the status the Court has ascribed to jury service. Relying on *Carter*, a federal district court observed in *Bradley v. Judges of Los Angeles Superior Court*:[133]

> It is well established that action by a state in aritrarily depriving a person of the opportunity to serve on a jury is a violation of a right secured by the U.S. constitution . . . .[134]

Jury service, then, falls within the *Rodriguez* definition and can be considered a fundamental right under the United States Constitution. Even absent such a determination under the federal constitution, the California Supreme Court might find jury service to be a fundamental right under the state constitution. Demonstrating a penchant for greater protection of individual interests than is afforded by the federal courts, the California Supreme Court in *Serrano v. Priest*[135] described as fundamental "those individual rights and liberties which lie at the core of our free and representative form of government."[136] This definition does not require an explicit or implicit textual guarantee as does the federal definition.

Justice Clark's declaration in *Adams* that jury service is not a fundamental right was based on then existing *federal* notions about fundamental rights,[137] especially as set forth in *San Antonio School District v. Rodriguez*.[138] Thus *Adams*, insofar as it addresses the issue of fundamental rights, may bear reassessment since the California Supreme Court subsequently in *Serrano* found a fundamental right where the United States Supreme Court had not found such a right on similar facts.[139] But whether or not jury service is a fundamental right under either the federal or state constitution, the exclusion of deaf persons may still violate equal protection if the jury selection statute has created a "suspect" classification.

2. *Deaf Persons As a "Suspect" Class*

The concepts of suspect classification and cognizability are similar in

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Rptr. at 255 (Mosk, J., dissenting); *Fundamental Right*, *supra* note 126, at 29; JURY SELECTION, *supra* note 12, at 74.

132. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Jury service may even be regarded as a more important right than voting since it affords a a more direct form of participation in the processes of government than does the franchise and the effects of participation are more temporally and spatially immediate. *See* 12 Cal. 3d at 66-67, 524 P.2d at 383, 115 Cal. Rptr. at 255 (Mosk, J., dissenting). For an opposite view, see the dissenting opinion of Justice Tobriner in *Rubio v. Superior Court*, 24 Cal. 3d 93, 114-16, 593 P.2d 595, 609-10, 154 Cal. Rptr. 734, 748-49.

133. 372 F. Supp. 26 (C.D. Cal. 1974), *aff'd in part, appeal dismissed in part as moot*, 531 F.2d 413 (9th Cir. 1976).

134. *Id.* at 30.

135. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

136. *Id.* at 767-68, 557 P.2d at 952, 135 Cal. Rptr. at 368.

137. *See* 12 Cal. 3d at 61, 524 P.2d at 379, 115 Cal. Rptr. at 251.

138. *See* 411 U.S. at 33-39.

139. 18 Cal. 3d at 767-68, 557 P.2d at 952, 135 Cal. Rptr. at 368.

some respects.[140] Many groups that are cognizable for jury selection purposes are also "suspect" for other purposes. Indeed the California Supreme Court seems to regard the elements of cognizability as somewhat necessary though insufficient conditions of suspectness.[141]

In *San Antonio School District v. Rodriguez*,[142] the United States Supreme Court outlined the "traditional indicia" of suspectness as

> . . . such disabilities, or . . . such a history of purposeful unequal treatment, or . . . such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[143]

These indicia clearly apply to deaf persons. Deafness is so obviously a "disability" in a social and economic sense as much as it is in a physical sense that elaboration is hardly necessary.[144] Educational segregation and the imposition of legal disabilities show the social history of the deaf to be one of "purposeful unequal treatment."[145] Finally, as one commentator, himself deaf, has pointed out, deaf persons are truly a "silent minority."[146] They have never marched; they have never rioted; they have nothing that might be symbolically burned; they have never occupied buildings or taken hostages; no presidential candidate has championed their cause. Thus, deaf persons stand in need of "extraordinary protection from the majoritarian political process" just as much, if not more than any minority.[147]

In *Eckstein v. Kirby*, the district court concluded that Arkansas' statutory exclusion of deaf persons from jury service did not create a suspect classification.[148] The court did not, however, examine the *Rodriguez* indicia of suspectness. Instead, the court based its conclusion on the fact that the statute excluded deaf persons "of all races, ethnical groups, sexes, religions and socio-economic backgrounds."[149] By such reasoning, a statute which excluded blacks could likewise be

140. See note 37 *supra*.
141. *See* 12 Cal. 3d at 61, 524 P.2d at 379, 115 Cal. Rptr. at 251.
142. 411 U.S. 1 (1975).
143. *Id.* at 28.
144. See note 60 *supra*.
145. See note 60 *supra*.
146. Stewart, *A Truly Silent Minority* in 2 PROFESSIONAL REHABILITATION WORKERS WITH THE ADULT DEAF, DEAFNESS 1 (1972).
147. Judicial recognition of the handicapped as a class requiring extraordinary protection has been isolated. *But see In re* G.H., 218 N.W.2d 441 (N.D. 1976). Applying the criteria of suspectness to handicapped persons has been the subject of strong, well-reasoned scholarly commentary. *See, e.g.*, Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a Suspect Class under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975); Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016 (1976); Comment, *The Right to a Meaningful Education in California: Should Dollars Make the Difference?*, 10 PAC. L.J. 991 (1979).
148. 452 F. Supp. 1235, 1240 (E.D. Ark. 1978).
149. *Id.*

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characteristic of the group.

In *Sail'er Inn, Inc. v. Kirby*,[150] th
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3. *The State's Compelling Intere*

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150. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rpt
151. *Id.* at 18, 485 P.2d at 540, 95 Cal. Rpt
152. *Id.*
153. *Id.* Most of this language, which seems
Equal Protection, 82 HARV. L. REV. 1065, 1173-7
Richardson, 411 U.S. 677, 686 (1973). For this
part of the federal indicia of suspectness. *See*
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majority of the Court did not join the *Frontiero*
among the federal criteria of suspectness.
154. 5 Cal. 3d at 18, 485 P.2d at 540, 95 Ca
155. See text accompanying notes 61-105 *su*
156. See note 60 *supra*.

said not to create a suspect classification as long as it applied equally to blacks of both sexes, and all religions and socioeconomic backgrounds. The fact that a group's members may possess certain characteristics with respect to which they are treated equally does not preclude a finding of invidious discrimination with respect to the primary characteristic of the group.

In *Sail'er Inn, Inc. v. Kirby*,[150] the California Supreme Court, according "suspect" treatment for the first time to a classification based on sex,[151] described suspect classifications as those based on immutable traits, usually fortuitious circumstances of birth, that bear no relation to an individual's ability to contribute to society.[152] Another factor in the court's determination of a suspect classification was the historical "stigma of inferiority and second-class citizenship associated with" the classification.[153]

Like the federal factors of suspectness, the California definition of suspect classifications clearly embraces deafness. Congenital deafness is "a status into which the class members are locked by the accident of birth."[154] The adventitiously deaf are likewise condemned to that status through circumstances beyond their control. As has been previously noted, deafness alone does not bear on an individual's ability to contribute as a juror.[155] Furthermore, the unequal treatment historically accorded deaf persons[156] is a stigma of inferiority and a badge of second-class citizenship. Deaf persons, therefore, are properly considered a suspect class in California.

3. *The State's Compelling Interest*

It appears from the foregoing that the strict standard of equal protection scrutiny should apply to California's exclusion of deaf persons from jury service since either the existence of a suspect classification or the infringement of a fundamental right may be shown under the federal or state constitution. Thus, if the exclusion is to be constitutionally

150. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).
151. *Id.* at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.
152. *Id.*
153. *Id.* Most of this language, which seems to have originated in *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 (1969), was used nearly verbatim in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). For this reason, these factors are considered by some to be part of the federal indicia of suspectness. *See* Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1038-39 (1976). Since a majority of the Court did not join the *Frontiero* opinion, these elements are not properly placed among the federal criteria of suspectness.
154. 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.
155. See text accompanying notes 61-105 *supra*.
156. See note 60 *supra*.

valid, it must be necessary in the furtherance of some compelling state interest.

Clearly, the responsibility to secure a fair trial to litigants is a compelling state interest. But a total exclusion of deaf jurors is neither necessary, nor the least restrictive means, to achieve that goal. Not *every* potential deaf juror in *every* case raises the spectre of an unfair consideration of the case. As has been pointed out, jury service is a matter of individual capabilities in the context of a particular case.[157] Thus, a total ban on deaf jurors overreaches the state's interest. The least restrictive means to accomplish the goal of a fair trial for litigants is the availability of a challenge for cause against those individual jurors in those particular cases where it appears that a litigant's right to a fair trial may be in jeopardy.[158]

C. *The Lesser Standards of Review*

The discussion of the compelling state interest test was premised upon finding jury service to be a fundamental right or deafness a suspect classification. Dismissing these rigorous requirements, however, it is apparent that jury service, if not fundamental, is an "important" right, and deafness, if not suspect, is a "sensitive" classification with respect to jury service. Thus, in *Meyer v. Zolin*,[159] the first equal protection challenge to California's exclusion of deaf persons from jury service, the plaintiffs urged, and the trial court found, the exclusion properly reviewable under the intermediate equal protection analysis.[160] This standard requires that the exclusion be substantially related to achievement of an important state objective.[161]

Since actual trial experience with deaf jurors has resulted in no apparent diminution of the right to a fair trial,[162] the total exclusion cannot be said to be substantially related to achievement of that objective. Likewise, applying the traditional equal protection analysis,[163] actual trial experience makes it doubtful that the exclusion is even rationally related to the goal of a fair trial in many instances.

Conclusion

Experience in actual trial settings has shown that the right to have a case fairly considered is not necessarily infringed by the seating of a

157. See text accompanying note 105 *supra*.
158. See note 104 and accompanying text *supra*.
159. No. C 302883 (L. A. Super. Ct., Dec. 20, 1979); see note 3 *supra*.
160. *Id.* (ruling on Demurrer, at 2) (copy on file at the *Pacific Law Journal*).
161. See text accompanying note 113 *supra*.
162. *See* Letter on Oakland Deaf Juror, *supra* note 5.
163. See text accompanying note 108 *supra*.

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Action by the legislature and the
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no person shall be deemed incomp
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Code Section 754 is required to ex
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164. No. C 302883 (L.A. Super. Ct., D

deaf juror. While there exist theoretical obstacles to a fair consideration by a deaf juror, these do not support a total ban on deaf jurors without regard to the circumstances of particular cases. The state thus has no basis for infringing the right of litigants to have deaf persons considered for jury service as members of the community.

Likewise, the state has no basis for stripping deaf persons of a valuable participatory opportunity in the form of jury service. The state's interest in guaranteeing that juries will render a fair consideration of the cases before them can be accomplished by a means less restrictive than denying all deaf persons the chance to exercise a prerogative of citizenship.

Action by the legislature and the courts is necessary to safeguard the rights of both litigants and deaf persons. The jury selection statute, Code of Civil Procedure Section 198, must be amended to provide that no person shall be deemed incompetent as a juror solely because of the loss of hearing in any degree. Additionally, extension of Evidence Code Section 754 is required to explicitly govern procedures for selecting an interpreter when a deaf person is a juror. The legislature must remove all bars to the presence of an interpreter in the jury room during deliberations. At the same time, however, the grounds for a new trial as stated in Code of Civil Procedure Section 657 and Penal Code Section 1181 must be amended to include instances of misconduct on the part of an interpreter during deliberations.

In the judicial sphere, the decision in *Meyer v. Zolin*,[164] denying deaf persons equal protection in jury selection, must be reversed. The trial courts must insure cooperation on the part of all persons involved in a trial to minimize disruptions from the normal routine when a deaf juror is seated.

Such actions on the part of the legislature and the courts will demonstrate the state's commitment to conferring the full privileges of citizenship on the "truly silent minority."

Harold Craig Manson

164. No. C 302883 (L.A. Super. Ct., Dec. 20, 1979).

Appendix

Following the completion of this comment, a mock trial featuring two deaf jurors was conducted in the Center for Legal Advocacy ("Courtroom of the Future") at McGeorge School of Law. The trial was sponsored by the *Pacific Law Journal* and the McGeorge Trial Advocacy Program, in cooperation with the California Association of the Deaf. Most of the concepts regarding a fair consideration of a case discussed in the comment were illustrated in the trial. The proceedings were recorded by the courtroom's videotape cameras. The trial was a regularly scheduled proceeding of the Trial Advocacy Program, in which third year law students prepare and pursue cases from pleadings through trial. Typically, members of the local bar or bench serve as judges. Juries usually consist of first year law students, college students, and other members of the community.

The mock "deaf juror" trial involved a damage suit for personal injuries. The plaintiff was allegedly shot and beaten by a grocery store security guard who had accused the plaintiff of stealing a small food item. The defendant in the case was the security guard's corporate employer. This case was selected at random for the deaf juror experiment.

Four third year law students were attorneys in the case. A member of the California bar with six years' experience in civil litigation presided as trial judge. The jury consisted of first year law students, two deaf persons, and the hearing wife of one of the deaf men. The deaf persons, both over sixty, were Mr. F.A. Caligiuri, Executive Director of the California Association of the Deaf, and Mr. Willis Berke, a retired draftsman. The interpreters were Debra Parker of the Nor-Cal Center on Deafness in Sacramento, and Ed Santillanes of the California Association of the Deaf. Ms. Parker has had extensive experience interpreting legal proceedings for deaf persons. Both interpreters are members of the National Registry of Interpreters for the Deaf.

The attorneys were informed approximately two weeks prior to trial that a deaf person might be included on the jury. The *Pacific Law Journal* provided the attorneys with a package entitled "Trial with a Deaf Juror: Selected Materials for Attorneys." This package, which the attorneys received one day before the trial, included a list of suggested voir dire questions; a copy of the Code of Ethics for Interpreters; and a copy of the letter from Assistant Alameda County District Attorney Thomas Deal regarding the Oakland "deaf juror" trial discussed in this comment. The attorneys did not receive any information about the deaf persons. The attorneys were told not to make any adjustments in their planned trial presentations.

The judge likewise was provided with a package prepared by the *Pacific Law Journal*, entitled "Trial with a Deaf Juror: Selected Materials for the Court." This package, which the judge received the morning of the trial, included an explanatory letter; all the materials given the attorneys; and California Evidence Code Sections 750, 752, and 754. Copies of the attorneys' materials and the judge's materials are on file at the *Pacific Law Journal*.

The deaf persons were not given any information about the case prior to the

trial. In fact, the seating of Mr. Berke
before the trial commenced.

During the attorneys' opening staten
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A considerable amount of medical t
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per cent.

trial. In fact, the seating of Mr. Berke as a juror was decided only minutes before the trial commenced.

During the attorneys' opening statements, the interpreter stood next to and slightly behind the attorneys before the jury. During the testimony of witnesses, the interpreter was seated on a raised chair next to the witness. Thus, the deaf jurors were able to observe the facial expressions of the witnesses as well as the interpreter. The two interpreters took turns interpreting, usually switching during natural breaks in testimony or between witnesses. At one point, however, the interpreters switched during the testimony of a doctor called by the plaintiff. This was accomplished with no break in communications with the deaf jurors.

A considerable amount of medical testimony was put on by the plaintiff. In direct contradiction to the contention made in *Eckstein v. Kirby*, discussed in the comment, the deaf jurors had no difficulty understanding this testimony. This became apparent in discussions with the deaf jurors after the trial, but was also apparent in the jury's deliberations, which were taped by hidden cameras.

Problems during the presentation of evidence were virtually nonexistent. At one point, the interpreter indicated that she could not hear the rather soft-spoken trial judge. This observation benefitted several of the hearing jurors who were also having difficulty at times hearing the judge. It was necessary at another point for the interpreter to ask a nervous student attorney to speak a little slower. Finally, during the testimony of a defense witness, the interpreter received an emergency call on her electronic pager, requiring a change of interpreters.

Jury deliberations in this mock case were especially insightful. One interpreter accompanied the two deaf jurors into the jury room. Both deaf jurors and the interpreter sat at the end of the oblong jury table. The jury foreman sat across from the deaf men. The other jurors made an effort to speak one at a time. Occasionally, however, several conversations began at once. The interpreter kept up with as many as possible. The jury usually returned to order within moments. No critical information was lost to the deaf jurors.

The deaf jurors were valuable participants in the deliberations. In fact, the jury accepted two suggestions made by Mr. Caligiuri. There were two theories of liability against the corporate defendant. The jury had dismissed the first theory, *respondeat superior*, and was prepared to discount the other theory, negligent supervision, when Mr. Caligiuri pointed out a flaw in the defense on this point. Accepting his reasoning, the jury found for the plaintiff. On the issue of plaintiff's damages for lost future wages, several jurors were prepared to accept the amount suggested by counsel. Mr. Caligiuri noted that the suggested figure was premised upon the plaintiff never working at *any* job *ever* again. The evidence, Mr. Caligiuri said, indicated that the plaintiff was not totally disabled and in fact was capable of working at a number of jobs. The jury then reduced the proposed award of lost future earnings by nearly fifty per cent.

After the verdict was announced. all participants and several observers received questionnaires about the trial. All respondents were impressed with the capabilities of the deaf persons in the trial. Nearly all respondents said they would not object to having their own cases, civil or criminal, tried by a jury that included a deaf juror. Most had no suggestions as to how the proceedings could have been more efficiently conducted. Those who did make suggestions said that speaking more slowly by all parties, in their opinion, might have been helpful.

The deaf persons felt that no adjustments would be needed to improve their participation. They said they enjoyed the experience and had no trouble understanding the evidence.

The interpreters both agreed that the trial presented no problems for them at all. They indicated that the medical testimony was not at all difficult to convey. The one interpreter who had not previously participated in legal proceedings said he enjoyed the experience so much that he hoped to do more legal interpreting, perhaps on a permanent basis.

As noted previously, the trial was recorded by videotape cameras. The tape reveals a virtually flawless trial with respect to the presence of the deaf jurors. There were no delays whatsoever attributable to the deaf persons.

Copies of the various materials discussed in this appendix, including the questionnaires given to participants and observers, are on file at the *Pacific Law Journal*. The videotape of the trial is available at the Law Library at McGeorge School of Law. Further information about the videotape is available from the *Pacific Law Journal*.

Permanent Tempor
College Teachers a
Process Clause

At the outset it may be observed
the provisions of the school code

State educational policy requir
cilable goals. On one hand is th
teaching personnel whose memb
and able to give continuity to th
the need for flexibility in meetin
course demands. This dilemma
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sonnel. Contract[2] and regular[3] e
tricts for long-term stability a
substitute[4] and temporary[5] teach
flexibility in the hiring, assignm
dichotomy between these two cl

1. 58 Cal. App. 189, 190, 208 P. 356, 3
2. Contract employees were formerly
CODE §87602(a). The purpose of this classif
board sufficient opportunity to evaluate the t
The governing board is strictly limited to t
§§87476, 87604, 87605.
3. Regular employees were formerly t
ferred to as tenured teachers. Classification
tions 87601(d) and 87602(b) of the Educatio
elected to the position by the community c
failure of the community college district to te
v. Fullerton Union High School Dist., 24 Cal
working of the temporary teacher reclassifi
infra.
4. The substitute teacher classification
for elementary and secondary school teache
between temporary and substitute employee
tion Code. *See* CAL. EDUC. CODE §87604.
5. The word temporary has become a
tion see Sections 87478 and 87480-87482 of t
18-27 *infra*.
6. Peralta Fed'n of Teachers, Local 1
369, 390 n.6, 595 P.2d 113, 126 n.6, 155 Cal.
v. Peralta Junior College Dist., 11 Cal. 3d 82
92 (1974). For the role played by temporar
Los Rios Community College Dist., EERB