

INTERSECTIONS RADIO

JUNE 1, 2016 -- INTERVIEW WITH AMBER FARRELLY

TRANSCRIPT

SARIKA MEHTA: You are listening to KXRY Portland on 107.1 FM, 91.1 FM, and streaming online at XRAY.fm. I'm Sarika Mehta. Welcome to Intersections Radio, a new independent podcast which also airs on XRAY. Intersections Radio is the show where we geek out on all things intersectionality.

This is the first episode in a two part series that discusses the deaf community's complicated relationship with the justice system. The deaf community is at a unique intersection of linguistic minority and disability access. And so deaf people can find themselves in particularly frustrating circumstances when it comes to our justice system. Amber Farrelly is a criminal defense lawyer who specializes in representing deaf clients in various counties in Texas. Recently, she found herself nearly in contempt of court due to refusing to pay for interpreter fees. But I should mention, it wasn't actually her responsibility to pay for those fees, nor was it the responsibility of her client. We talked about the conflict of access to communication, and the right to a fair trial. This is one of the many stories and lessons Amber FARRELLY shared with me over Skype during a very insightful interview.

This is Intersections Radio. Well, Amber Farrelly, thank you so much for taking the time and joining me on Intersections Radio.

AMBER FARRELLY: Thank you for having me.

SARIKA MEHTA: In fact, you're the only certified sign language interpreter and licensed attorney, I mean, I think that combination, you're the only one in the country. So as a practicing lawyer who specializes working with deaf clients, you're not doing the two at the same time, obviously, you know, you're not interpreting and defending your clients simultaneously, that's something we want to make very clear right off the bat. So how does the interpreter component of your skillset play in serving your deaf clients?

AMBER FARRELLY: And you're absolutely right, that cannot occur at the same time, I can only wear one hat at a time. When I first started practicing law, I decided that it probably would be better for my clients if I were a certified interpreter myself, and so I took several certifications, and now court certified advance interpreter in Texas. And I think it just helps them in the situation of, if there is an emergency, and the judge wants to ask the person a question or admonish them as to something, rather than having to reset the case and wait three weeks to order a court certified interpreter when my client and I are communicating fine, then I can at that moment go, I'm court certified, I can swear under oath and take off the lawyer hat, put on the court certified interpreter hat, and be able to allow the judge to speak with my client, if that need occur.

And that's important, because oftentimes the client is in jail, and we don't want to make them sit in jail longer, just so the judge can speak to them or admonish them, or ask them questions about their case. And I just thought it was just better for my clients to be able to have that confidence in me, in my ability or sometimes unfortunately inability to communicate with my clients. And I think, you know, it started off just as a client issue, and then later developed into me developing and teaching workshops for legal interpreters, or people who are wanting to become legal interpreters. And so that kind of grew

and became a second component of my life.

SARIKA MEHTA: Part of the reason for this interview is actually a recent event that occurred, in which you were nearly held in contempt of court for not paying interpreter fees to the courthouse. First, give us the background of the story, and who is in fact responsible for these kinds of expenses?

AMBER FARRELLY: Sure. And it's oftentimes difficult for people to understand this, even interpreters, to understand the difference between civil law and criminal law. In civil law, you have the option to sue somebody, you have the choice to be there, whether you're fighting, you know, in small claims court, or divorce, things like that, where the risk of being there is going to be either financial, property, or custody of children. In the criminal side, you don't choose to be there, there's no option for you to be there. You're caught up in the criminal justice system, and it's the state of Texas, or the government, against the defendant. And on this side, you're looking at the consequence of losing your liberty or even your life. So, the two are very different, and when I look at the interpreter situation and the issue, a lot of confusion comes from, my client has a constitutional right to be able to help his attorney in his defense, to be able to understand the proceedings against him, and to be able to defend himself, meaning that I am entitled to an interpreter from the moment that that client hires me and we step foot into court from day one.

That's given to me under the constitution and Texas law. If the court wants to proceed, or do anything kind of proceedings against my client, in either a hearing or plea agreement, or a trial, the court provides the interpreters for the proceeding. They also however must provide the interpreter for counsel, the private interpreter that helps me and my client communicate. I'm entitled to that by right and law. If I were in the civil side, the court would provide the interpreters for the court, but I would have to provide the interpreter for my client if we need to meet at my office or something like that, because that client has hired me to either defend them or to sue someone, or something like that. That's a totally different story, and that right to communicate is not really a right, so much as it is a privilege. So that's where a lot of confusion happens.

I don't deal with any civil law, I only do criminal law. And so all of my interpreters, I'm entitled to them under the constitution, and should be paid for by the government, either the court or the state, some entity that has those interpreters. In this situation that happened, I had a client who had been arrested and was charged with a crime in Burnet County, a county about an hour and a half away from me. The settings there, are very typical as they are in pretty much, all over the state of Texas, is, you pretty much, you go up to court once a month.

On one such occasion in February I had a conflict, I couldn't be at two courts at the same time, so I filed a motion for continuance, just to get a reset for the next month with Burnet County, and the motion was granted. However, when we showed up the next time, the interpreting agency still charged the court because it was 23 hours out, rather than 24 hours of the cancellation policy. Well, I was not aware of a 24 hour cancellation policy, and I don't even order or schedule the interpreters, the court does. So, the judge wanted my client to pay the \$250 bill from the month ago. I explained to the judge that the Americans with Disabilities Act protects deaf people and says you cannot be charging them anything in relation to accommodations under the ADA, with the government, under Title II. That's just forbidden, you can't do that. So, then, the issue became, okeh, well then you, attorney, will pay for it. Well, I don't ever pay for my interpreters, they're all provided to me through the court as our right. I'm not going to pay that.

I explained to her that there's a lot of case law on this, the statute provides for it. I told her I would

provide that to her, came up the next month, nothing happened. Then the next month, just recently, this month, actually, I got served Wednesday morning for our setting Tuesday after -- excuse me, Thursday afternoon, to show up for a show cause hearing of why I should not be held in contempt. Thankfully, I have a wonderful attorney friend who represented me, wrote a great brief, and we gave her all of the law and the statute, and AG's opinions, that say exactly that. Any fee that you cannot assess to a person, be it interpreters under Texas law, you cannot assess to the defense attorney because we are one and the same person.

The real issue here, and I stressed this with her, is, the issue that you're having here and your problem is really with the agency, not me. I understand that you're upset, but that money comes from the court. It's something that you have to provide for. And I can't acquiesce and pay that, because it is not helping the greater good of this deaf client, or any other future deaf clients. Because the judge did not, at that point, understand the law, and was trying to assess the fee to me, my job is to educate the judge, explain the law, provide her with the law, and then hopefully educate her as to how to interact and deal with deaf people from then on out.

SARIKA MEHTA: I guess my first question that comes off of that is, the daunting role that that is, because you are trying to defend your client and play that, no offense, but it, you kind of have to play a game in the courtroom, I assume.

AMBER FARRELLY: Absolutely.

SARIKA MEHTA: And at the same time, you have to advocate for the profession of interpreting as well, and for yourself what the rights are. So I guess my first question is, you know, how do you address that? Because the judge has the ultimate power, I assume, in that circumstance, and when you're advocating for your profession, and at the same time -- like, this is one of those situations where you couldn't just take off one hat and put the other, you had to wear two hats.

AMBER FARRELLY: Absolutely. One of the first things that I do when I sign up, and especially when I go to a new county and I don't know anybody there, I don't know how the judge is going to react to me, because I'm going to be asking for them to pay a lot of money to have a qualified interpreter come and interpret for my client. And oftentimes when they see me communicating with my client, or talking to my client, they think, well, why do we need an interpreter if you can sign and you can communicate with your client. Well, the greater good and the bigger issue is, I'm entitled to an interpreter. And we may get to a point where we're not communicating very well. I don't always communicate effectively with my clients, there's sometimes I need certified deaf interpreters.

And I'm also making sure that that deaf person is understanding everything that's going on, when I'm up at the bench -- yes, how important it is that they understand everything that's going on in the courtroom. They need to understand is this judge, you know, a nice judge, are they easy, are they rehabilitation oriented or are they punishment oriented. They need to know what everybody else is getting, you know, if everybody else is getting a great deal, then they could know, oh, well, you know, everybody seems to be getting a good deal, I should be able to get a good deal as well. They need to be able to understand me when I go up there and argue in front of the judge, and speak to the judge or to the prosecutor or something of that nature.

And then on the other side, it's educating the courts of -- this is a deaf person, every time that we come we're going to need an interpreter, every single time. To just educate them on how to get an interpreter, the fact that I have the right to have an interpreter, and should issues come up related to my client's

deafness or an interpreter arise down the road, then we're already on that train, we're not having to start from the very beginning and explain why I need an interpreter. And my philosophy in all of that is, we're not going to be bending or breaking the rules until we're first following the rules and they know what they're supposed to be doing.

So, it's my job to make sure that all of that is taking place. It sometimes can get pretty tough, and pretty hairy sometimes, but for the most part, it's been a good experience, it's been a good experience going and educating judges and court staff on interpreters, and allowing that process to be open and fair for the deaf person.

SARIKA MEHTA: I'm glad that for the most part it's been a good and open process. The other shocking part to me was that, you know, it's one thing when we are working within different systems, and people are just simply not aware that this person has the right to an interpreter, and it is the other entity's job to fund it because of the Americans with Disabilities Act. And in this case, you're lawyer, and you're working with a judge, and presumably everybody is a legal expert in this circumstance, and you still had to educate on a law that, I mean, it is old, it's 25 years old, but it was passed in 1990, so I think that's a bit shocking and a bit hard for me to wrap my head around, because you all are the legal experts, you, this is what you do, is work with the law, and you had to educate somebody on the law. Can you talk about that?

AMBER FARRELLY: It is kind of mind blowing in a way, I guess you could say, having to educate a judge on the law. I think that the issue comes in, is that most judges and most court staff and courtrooms, they don't have a lot of experience with deaf people. And so, it's a random thing for them, and a new thing, a very novel thing, whenever a deaf person is in a criminal courtroom, they kind of freak out a little bit and go, I don't know what to do, I don't know what to do. And, I think the confusion there is treated as if it were a spoken language, and in the state of Texas, the judge has the ultimate discretion whether to provide the non-English speaking person with an interpreter or not.

Well, in this situation, deaf people and American Sign Language interpreters are in a separate section in the Texas Code of Criminal Procedure, they have their own section. It's separated out from spoken languages. And the reason being is that deaf people are a disabled class, they're a protected class under the law. And therefore, the legislature saw fit to provide them with extra protections, and require them to have an interpreter from day one. There's no discretion made by the court, it is a shall be appointed, an interpreter, as soon as they find out that the defendant is deaf, and the fact that they have to provide multiple interpreters for trials or hearings or anything like that can get a little bit weary sometimes.

SARIKA MEHTA: So, we were talking about deaf people as a protected class under the Americans with Disabilities Act, and part of the problem is that courts are just not, they don't interface with a lot of deaf people, and so it, it becomes your job to educate them. So, this is a good segue to my next question. The unique thing with the deaf community is that they're at the intersection of being a linguistic minority and having access as provided by the Americans with Disabilities Act. The other part of this is that I assumed that people who require spoken language interpreters should also be a protected class as dictated by the Civil Rights Act, that, you know, they shouldn't be discriminated against because of a number of classes, including that they are a linguistic minority. Am I correct in this?

AMBER FARRELLY: Yes, and no. Yes they do have that civil right. The issue becomes, with a spoken language person, is typically whenever they hire an attorney, that attorney speaks the same language that they do. The only time that an interpreter would be required is if they go have a hearing or some

kind of formal proceeding or trial, something like that, in the court. And then the court decides on its own whether or not this person needs an interpreter, if they're entitled to have an interpreter, based upon how much English that they do understand. So, they can actually reject providing an interpreter for someone who speaks another spoken language, simply because, well, your English is really great, and this whole concept of good enough, you can understand most of the proceedings. That's that, the flexibility and the discretion that the judge has on spoken languages.

The difference is, there is no discretion with deaf people. I've had judges try to have my client sit behind the court reporter, and just read over their shoulder, or why can't you just later explain it to them. And obviously, you know, from this side, that request is ridiculous. What I'm trying to explain to the judge in those situations are, my client has a right to understand, in the language that he understands. Not every deaf person signs American Sign Language. Most of them do, but not everyone does. Some of them sign a different form of sign language. I have to have whatever interpreter is needed for my client for that accommodation, that it's required, and it's not negotiable, and it's not up to the discretion of the judge in the court. So that seems to be a difference, I think, in how some of the judges in the courts are viewing it and looking at it, it's that they're just not educated on deaf people, their languages, how they communicate, and the hindrances that not being able to hear has on them understanding everything that's going on.

SARIKA MEHTA: I didn't know you had dealt with requests like just watch the court reporter, and things like that. And then at the same time, you were saying that it's up to the judge's discretion, which is also dangerous, because you said that they are looking at a defendant who, in the case of not deaf but speaking other languages, like, oh your English seems good enough. And that's a very dangerous line to walk, with somebody who is trying to be on their best behavior because their lives are literally in the hands of this judge. To me, as somebody who used to teach ESL, that just doesn't seem ethical at all.

AMBER FARRELLY: I would agree with you, unfortunately the way that case law has developed through the years and the final decision being with the Supreme Court, those people who have English as a second language are not deemed to have that right. They believe that if you speak English well enough, then you're not entitled to an interpreter. It's up to the judge whether they want to pay for it or not.

SARIKA MEHTA: And on top of it, it's legal English, it's not even, can you understand the conversation taking place, maybe or not, but this is a whole different variety and level of English that's taking place.

AMBER FARRELLY: That's what I think a lot of people don't understand as well, especially when it comes to interpreting. We do speak legal-ese, which is in and of itself a language. It's a language used by lawyers and the government, and the criminal justice system, that is designed to be complicated, and is designed to be fancy and sound different. We use a lot of borrowed words from French and Greek and Latin. It's very complicated, and then, when you put on top of that, the person who is being accused, the defendant, having to try to figure out what these words mean, and oftentimes won't ask the question, or won't stop the person and say, I'm sorry, I don't understand. They just kind of accept it and try to just figure their way, and work their way throughout what's happening to them. It's terrible, it's absolutely terrible.

SARIKA MEHTA: This brings up another question, if this is something that happens, it may be rare. I'm curious about the notion of wrongful convictions and sentencing due to interpreter error. Is this something that happens, does it happen often?

AMBER FARRELLY: I think we know for certain that this absolutely happens. The hardest part about it is finding those people and proving that it has happened.

SARIKA MEHTA: Right.

AMBER FARRELLY: Because oftentimes, especially with sign language, the interpreter is the only one who knows what they're hearing and what they're interpreting. So it's very difficult to object to an interpretation when you don't understand what is being spoken or what is being said. And so they kind of hold that information in their head, and nobody else can see it. So after the fact, after the gavel's been swung and the conviction is done, it's very hard to go back and try to fix something when the remedy was, well you should have objected to the interpretation during trial. Well, especially the deaf person is not going to be able to make the objection, and certainly most of the time the lawyer doesn't understand sign language and can't make that objection as well. So, it seems to be only caught a very small number of times. There is a few cases in case law that I've read out there, but I know for a fact that it must happen way more than what is being reported, or being caught, and, for certain, effectively overturned, getting that person a new trial.

SARIKA MEHTA: Now, I live in Oregon, which is one of the flagship states for legal and court interpreters, which is to say, in order to work in the system, you have to be certified in the legal system, an SC:L. This is not the case nationwide. So, can you talk about the case of Texas state regulations, and how it compares to the rest of the US?

AMBER FARRELLY: Sure. So, in Texas, we're very blessed to have a statute that prohibits anyone who is not legally certified or court-certified under either the Texas Board for Evaluation of Interpreters, or the Registry of Interpreters for the Deaf, which is nationwide, the SC:L. It prohibits anyone who does not hold those certifications from interpreting in legal proceedings for a deaf person. And under several Texas laws, the government code, the admin code, the code of criminal procedure, the civil codes and practice remedies, it's laid out in every facet. So, as an extra layer of protection for deaf people, a violation of interpreting at a court proceeding or a legal proceeding without having a legal certification is a class A misdemeanor, which is punishable by up to a year in jail or up to and including a \$4,000 fine. We are probably the only, if not very few, states that have that extra added protection for deaf individuals that are in any type of legal situation. Most states don't have that protection, they don't have any, they codified, making that a requirement for interpreters for deaf persons in the court system.

The issue seems pretty straightforward, except for defining the term what is a legal proceeding. Me, as a defense attorney, I'm going to argue that anything connected with the court or the legal system is a legal proceeding. That's going to include mediation, anything a court orders, probation, any kind of classes that the individual is supposed to take. And so that's kind of -- it's not well defined in that sense, but we do have that protection here in Texas.

SARIKA MEHTA: And this brings up another issue, the reason you were nearly held in contempt. The cost of hiring interpreters for clients or defendants or plaintiffs or jury members, even. There's always a complaint about cost, which is interesting, because this is a justice system, and everybody has the right to a fair trial, so can you comment on that?

AMBER FARRELLY: It is very ironic, the issue is cost, complaint is cost. It's kind of sad, from any perspective, I think. When you look at that and you think, you're trying to either take away this person's

children, or their liberty, and you're worried about the cost of accommodating them so that they can understand the proceedings and what's going on. I think that the problem is, is that it's a reoccurring cost. That, judges and courts look at this and go, well, you know, we comply with the ADA every day, we have wider bathroom stalls that are accessible, we have ramps on the outside of the courthouse. That's a one-time installation fee, and then they're done and they're compliant forever. The issue is, is that you have to continually be providing this accommodation for deaf persons, because it is a language, having a live person there, coming out and providing these services. Unfortunately, that's just the nature of being deaf, and I think that that's where they kind of balk at it a bit, simply because it's a recurring cost.

And interpreters of this nature, being as qualified and certified as they're required to be, are not cheap. And they're rare. We only have about 135 court certified interpreters in the state of Texas. Nationwide, it's not very many. So, I think that the recurring cost and the amount of money that they make is what judges kind of balk at, and they get all -- they get upset about.

SARIKA MEHTA: Absolutely. You know, between this and your own personal situation of being nearly held in contempt of court, how do you feel about what this says about the flaws in our justice system generally?

AMBER FARRELLY: I think that this -- it's very telling, what this says about the state of our criminal justice system, that a defendant in 2016 in the United States of America has to fight so that he can understand and participate in his own trial and defense, in this country, in the legal justice system. I think it's very sad. It's very telling to show that this request is being ignored, it's being denied, oftentimes, and it shouldn't be like that. In this day and age, you should expect, especially with the number of wrongful convictions and exonerations that we have, that this would be just automatically provided. Of course you should be able to understand the proceedings against you. This is America, of course you should be able to talk to your defense attorney and understand everything that's going on. The fact that this is not something that is known throughout our legal system, the fact that this is something I have to actually, not just point out the law, and the court go, okeh, I see what you're saying, not a problem. The fact that I have to fight for it, that I have to dig my heels in and be stubborn and demand it, not just once but over and over and over again, I think is very telling of how we view the individual in the criminal justice system, how we treat them, how it's not fair and it's not innocent unless proven guilty, it's completely the opposite.

SARIKA MEHTA: Absolutely. Do you have any other remarks that you want to share with the audience, or some issues we didn't bring up in our interview today?

AMBER FARRELLY: You know, I think for a lot of people that are not familiar with deaf people, there's also the issue of, okeh, fine, we're going to get an interpreter. Well, here's an interpreter. Now everything should be fair and equal, and just throughout the rest of the proceeding, and the rest of the preparation of the case. And that actually is unfortunately not true. There's a great article called An Interpreter Isn't Enough. And part of that goes to, just getting someone in there to interpret what is said, there's still a lot of other issues when dealing with deaf clientele that most people don't know or are unfamiliar with.

Most deaf people have very little knowledge of the criminal justice system. They don't have the opportunity that hearing people have in picking up 60 percent of our information is from background noise, and just superfluous talk and information that just is absorbed by us, figure out through context the meaning of those words. For example, every hearing person on the planet probably knows what a

prosecutor is. At least they've heard that word. They hear it on TV all the time, they hear it on movies. Everything. Well, deaf people don't have that opportunity. Imagine everything that you've ever learned had to be sat down and taught to you one on one. And it has nothing to do with intelligence, it has nothing to do with intellectual ability at all. It's just exposure. And so, whenever I get a new client who's deaf, I have to literally teach law school every time, because I have to explain to them, there's a person called a prosecutor, explain what their job is, explain the entire process and proceeding. And this takes a lot of time. And it's a lot of time of catching them up, to try to put them on an even playing field as a hearing person would be. Trying to get them up to basic knowledge, to understand what's going on, and to understand what your rights are.

And if you don't know that those are the gaps that you're going to have to fill in as an attorney, then you're missing a whole lot of your job with that deaf person, because they have no idea what you're talking about. Oftentimes the interpreter, if they do have an interpreter, doesn't step up or doesn't think that it's their job to go, they don't know what the word plea means, they don't know what the word prosecutor means, they don't know any of this stuff. You're going to have to explain all of that. So, when nobody's stepping up and advocating for that deaf person, and that deaf person doesn't want to look less than, or is very intimidated by the whole system, and even including their lawyer sometimes, they won't stop and say, hey, excuse me, I don't understand. Can you please explain this to me.

So, understanding that, that, and then noticing and recognizing that oftentimes in the defense of a deaf person, you have cultural issues. Deaf people use touch very frequently as a way to get someone's attention, because they can't just yell hey, look at me. They'll tap the person on the shoulder or on the leg, or something of that nature. And sometimes it can be very hard. That's not assault, that's an attention getter, you know. And so, understanding that there are cultural differences as well as language issues, as well as knowledge and exposure issues, it's so much more in defending a deaf person than just getting an interpreter.

SARIKA MEHTA: Absolutely. And I really appreciate you articulating that. Amber Farrelly, thank you so much for joining me on Intersections Radio.

AMBER FARRELLY: Thank you for having me.

SARIKA MEHTA: Amber Farrelly is a criminal defense attorney who specializes in representing deaf clients in the state of Texas. To listen to the podcast of this interview, check out [IntersectionsRadio.Wordpress.com](https://IntersectionsRadio.wordpress.com). Visit the same website for previous episodes of this podcast. And, join the facebook community at facebook.com/IntersectionsRadio. I'm Sarika Mehta, and this is Intersections Radio. Thanks for listening.