Transparency and Functional Equivalency: Core Principles of U.S. Relay Policy

Karen Peltz Strauss, Consultant
Rehabilitation Engineering Research Center on Telecommunications Access
Gallaudet University, Technology Access Program
and University of Wisconsin, Trace R&D Center

Presented at:

ITU-T Workshop
The Impact of the United Nations Convention
on the Rights of Persons with Disabilities on the work of the ITU-T
Geneva, 2 November 2009

Overview: This paper addresses the extent to which a communications assistant providing telecommunications relay services should have to announce that he or she is on a relay call in order to protect the privacy interests of the hearing party to the call. These privacy interests stem from concerns about third parties eavesdropping, monitoring, or recording the contents of calls. The memo concludes that such announcements would be counter to the full transparency of the call, which is needed to achieve functionally equivalent telephone service for people with hearing loss.

I. Caller Transparency: A Mainstay of Functional Equivalency

Title IV of the Americans with Disabilities Act (ADA) mandates the provision of TRS for individuals with hearing and speech disabilities that is *functionally equivalent* to voice telephone services.[1] This functional equivalency standard has served as the touchstone in determining how TRS providers must provide services to consumers: the goal is to have the features, functions, and capabilities of these services mirror voice telephone services as closely as possible.[2] In its efforts to achieve full functional equivalency, over the past seventeen years, the U.S. Federal Communications Commission (FCC) has crafted a series of intricate rules, including functional requirements, guidelines, and operational procedures which govern the manner in which relay services must be provided. These rules direct relay services to operate 24 hours per day,[3] define the skills that communication assistants (CAs) must have,[4] prohibit the imposition of charges beyond those applied to functionally equivalent voice telephone calls,[5] prohibit CAs from "intentionally altering a relayed conversation,"[6] and prohibit

[1] 47 U.S.C. §225(a)(3). See also S. Rep. No. 116, 101st Cong., 1st Sess. 77 (1989), discussing the requirement for functional equivalency services.
[2] *See* 47 C.F.R. §64.604.
[3] 47 C.F.R. §64.604(b)(4)
[4] 47 C.F.R. §64.604(a)(1).
[5] 47 C.F.R. §64.604(c)(4).
[6] 47 C.F.R. §64.604(a)(2)(ii)

CAs from refusing calls or limiting the length of any relayed calls.[7] FCC rules also specifically require CAs to transmit conversations verbatim and in real time.[8]

The FCC's regulations impose very strict guidelines for call confidentiality by specifically prohibiting CAs from "disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call."[9] These privacy guarantees, which originated with the FCC's very first regulatory Report and Order on relay services, were the result of intense debate at the FCC over the extent to which the Congressional directive for functional equivalency would nevertheless allow state relay programs to force CAs to disclose conversations involving obscene or illegal calls, calls involving child or spousal abuse, and calls containing verbal sexual assaults. Many states had imposed outright prohibitions on such calls before passage of the ADA, and even after the passage of this statute, wanted CAs to disclose information pertaining to such conversations that were "overheard" in the process of relaying calls.

After careful consideration, the FCC concluded that such state disclosure laws could not hold up against the functional equivalency mandate. The Commission ruled that CAs were intended to act as "transparent conduits relaying conversations without censorship or monitoring functions,"[10] and issued rules disallowing all state statues that affirmatively required relay operators with knowledge of child, spousal or elderly abuse to disclose that information to law enforcement authorities. Such affirmative disclosure statutes, the FCC said, conflicted with the ADA's mandates requiring relay providers to maintain strict confidentiality of all relay calls and to handle all calls without disclosing their content.[11]

Since this 1991 ruling, the FCC has been consistent in its characterization of CAs as a "transparent conduit" (rather than a "third party") to the relay call. Several such rulings also have equated establishing a connection to a CA with accessing a dial tone. For example, in its March 2000 ruling, the FCC explained that "reaching a CA ready to place the relay call is equivalent to getting a dial tone when picking up the phone. Thus, this portion of the call is the first crucial step to making the TRS calling experience

---

[7] 47 C.F.R. §64.604(a)(3)

[8] 47 C.F.R. §§64.604(a)(1) and (2)(ii).

[9] 47 C.F.R. §§64.604(a)(2).

[10] First TRS Report and Order at ¶13.

[11] The one exception to the rule that CAs never disclose the content of any relayed conversation is where CAs must divulge communications "in response to a subpoena issued by a court of competent jurisdiction," 47 U.S.C. § 605(a)(5) (2000), or "on demand of other lawful authority." 47 U.S.C. § 605(a)(6). See 47 C.F.R. §64.604(a)(2)(i). The FCC has interpreted these exceptions to apply only to "authorized requests by government officials in connection with specific incidents of possible law violations," and to be "extremely rare." *First TRS Report and Order* at ¶14, n.14.

functionally equivalent to placing a voice call . . ."[12] In 2004, the FCC further explained that the guidepost for the provision of TRS – that the relay service should be "functionally equivalent" to voice telephone service – means that the CA "serves as a *transparent conduit* between two people communicating through disparate modes. In other words, the CA's role is simply to convert typed (or signed) messages into voice messages, and vice versa, so that the parties to the call can communicate back and forth, as any parties to a telephone call would do. It is because of this limited, transparent role of the CA that [the FCC has] frequently stated that completion of the initial call to the TRS facility, and connecting to a CA, is equivalent to receiving a dial tone."[13]

II. Applying Principles of Relay Transparency to Real Life Situations

FCC orders released in subsequent years have upheld the above line of reasoning, with the FCC consistently and unequivocally confirming that CAs are not third parties that can make independent judgments on relayed calls.[14] In addition, the need for and guarantee of CA transparency was tested and affirmed in two very specific cases:

---

[12] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. 98-67, FCC 00-56, 15 FCC Rcd 5140 (March 6, 2000) at ¶170. The FCC relied upon this reasoning in taking an action that would reduce delays experienced by relay users when placing calls through relay services. See also *id.* at ¶60.

[13] *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Dkts. 90-571, 98-67; CG Dkt. 03-123*,* FCC 04-137, 19 FCC Rcd 12475 (June 30, 2004) at ¶154 (citations in quote omitted).

[14] In 2005 and again in 2006, the FCC stated that the "first step for the TRS user, the completion of the outbound call to the TRS provider, is the equivalent to reaching a 'dial tone.'" *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order and Order on Reconsideration, CG Dkt. No. 03-123, FCC 05-203 (December 12, 2005) at ¶3, n.12; *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities,* Declaratory Ruling and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, FCC 06-57 (May 9, 2006) at ¶10. In the latter case, the Commission explained that it was not permissible for one relay provider to block access to competing VRS providers under Section 225's functional equivalency mandate, because "[v]oice telephone users reach a dial tone almost instantaneously every time they pick up the telephone. For TRS users, the Commission has recognized that reaching a CA ready to handle the call is essentially the same as reaching a dial tone." *Id.* at ¶30. Most recently, in its order directing Internet-based relay providers to issue ten-digit numbers to all relay users, the FCC again spoke of the obligation placed on TRS providers to "handle calls consumers choose to make, when they choose to make them, *i.e.*, to be the 'dial tone' for a consumer that uses relay to call to a voice telephone user. . ." *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers,*

A. Health Insurance Portability and Accountability Act

In 2004, the FCC was asked to respond to concerns raised by medical personnel about the possibility that TRS calls were violating the Health Insurance Portability and Accountability Act (HIPAA).[15] HIPAA disallows the disclosure of health information without the patient's consent. Health professionals were concerned that discussing health related information via TRS created "a possible violation of the Privacy Rule because a 'third party,' the TRS CA, hears the information being discussed as the call is relayed."[16] Some of these professionals were demanding that CAs sign disclosure forms (generally called "business associate contracts") before they would agree to use TRS to contact patients. When this matter was brought to the FCC however, the Commission concluded that no such disclosure agreements were needed. Instead, the FCC ruled that all forms of TRS could be used to facilitate calls between health care professionals and patients without violating HIPAA. The FCC's ruling on this issue was again consistent with the general principle that CAs do not constitute third parties, but rather are mere transparent conduits in a telephone call.

B. Germano Case

Last year, the United States Court of Appeals for the Seventh Circuit agreed with the FCC on the transparent nature of CAs. In a case decided on September 12, 2008, Germano v. International Profit Association, a deaf man appealed an earlier court's decision to dismiss his claim of employment discrimination. The lower court had not allowed into evidence a telephone conversation between the deaf job applicant and a potential employer because the conversation had taken place via a relay service. This, the court had concluded, made the job applicant's statements inadmissible (under U.S. law) as "hearsay." Hearsay is an out of court statement offered in court by someone other than the person who made the statement. U.S. courts are reluctant to accept such statements as evidence of the truth of what was said.

The Seventh Circuit overturned the lower court and ruled that statements made by deaf individuals during TRS calls are admissible and that these are not hearsay simply because they are going through an individual. This higher court explained that a CA is "no more than a language conduit" who "simply reads out the English words from the text she sees, and then types in the English words from the voice she hears."[17] According to the court, the following characteristics of relay services contributed to the transparency of the communications assistant: (1) instead of selecting the CA, the deaf job applicant

---

Report and Order and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, WC Dkt. No. 05-196, FCC 08-151 (2008) at ¶145.

[15] HIPAA is contained at Pub. L. No. 104-191, 110 Stat. 1936 (1996).

[16] *Clarification of the Use of Telecommunications Relay Services and HIPAA*, FCC Public Notice, DA 04-1716, 19 F.C.C.R. 10677 (June 14, 2004).

[17] *Germano v. International Profit Ass'n*, -- F.3d --, 2008 WL 4191269 (7th Cir. Sept. 12, 2008) (slip opinion at 8-9).

had been randomly connected to this operator; (2) the CA had no motive to mislead, to distort or to transmit statements inaccurately because she had no prior relationship with either of the parties to the call; and (3) CAs in general were assured to be reliable because their qualifications and language skills were prescribed by federal regulations. The Court also relied on the following express FCC requirements to sustain its decision that transmitting statements through a CA did not add a layer of hearsay, and that the conversation should be treated as if the applicant and employer had spoken to each other directly over an ordinary phone for purposes of its admissibility: (1) the prohibition against CAs "intentionally altering a relayed conversation";[18] (2) the requirement for CAs to "relay all conversations verbatim";[19] (3) the prohibition against CAs "keeping records of the content of any conversation beyond the duration of the call";[20] and (4) the prohibition against CAs "disclosing the content of any relayed conversation."[21]

Finally, the court relied on the ADA's "strong policy reasons" in deciding to admit testimony about the content of the TRS conversation:

> Congress mandated the creation of a telecommunications system for persons with hearing and speech disabilities that is "functionally equivalent" to those used by nondisabled persons. 47 U.S.C. § 225. Denying the admissibility of statements made during a TRS conversation would strip those with hearing disabilities of a vital source of evidence available to hearing persons. Deaf persons could not conduct important day-to-day affairs over the phone, such as calling the bank or the doctor, with the same ability to rely on the statements made to them by the other party that is enjoyed by hearing persons. Such a result is at odds with Congress's intent to make disabled persons full and equal participants in society.[22]

In part, the Germano Court was guided by cases involving spoken language interpreters, which consistently had held that such interpreters are no more than "language conduits." Indeed, decisions in those cases used reasoning that was remarkably similar to that used to describe the function of CAs. For example, in Commonwealth v. Vose,[23] the court explained that when two people who cannot understand each other communicate through an interpreter, "they choose a mode of communication, they enter into conversation, and the words of the interpreter, which are their necessary medium of communication, are adopted by both, and made a part of their conversation as much as those which fall from their own lips."[24]

---

[18] 47 C.F.R. § 64.604(a)(2)(ii).
[19] *Id.*
[20] 47 C.F.R. § 64.604(a)(2)(i).
[21] *Id.*
[22] Germano, Slip op. at 12, citing 42 U.S.C. § 12101(a)(8).
[23] Vose, 32 N.E. 355 (Mass. 1892); See also Lee v. United States, 198 F. 596 (7th Cir. 1912); United States v. Beltran, 761 F.2d 1, 9 (1st Cir. 1985).
[24] Vose, 132 N.E. at 355; Lee, 198 F. at 602. The Germano court went on to cite the opinions of various other circuits to support this ruling. For example, the Second Circuit has explained that "an interpreter is 'no more than a language conduit and therefore his

What the Germano court recognized is that, by their very definition, CAs are not placed on calls to participate in any way other than to transparently relay the conversation between the parties of those calls. Rather, CAs are under a strict FCC mandate to relay conversations verbatim, as close to real-time as possible, and so there is no way that they can be considered independent third parties that might be eavesdropping, monitoring, or making any willful (and certainly not any malicious) attempts to learn the content or meaning of the communication that they relay.

III. The Ability of Newer Types of Relay Services to Achieve Greater Transparency

When Title IV was enacted, the only form of relay technology available was that which enabled a TTY user and a voice telephone user to converse with one another by having the CA read TTY messages to the voice telephone user and type back responses from that hearing person. Over the years, advancements in technology have provided relay users with relay options that offer far greater functional equivalency. One such advancement is video relay service, which uses video links and sign language interpreters to enable native sign language users to communicate with voice telephone users. The sign language user typically accesses video relay services through a high speed Internet service, using either stand-alone video equipment or software downloaded into a computer. The CA then uses the video link to see the caller and interpret between that caller and the voice party. While to date, VRS has not typically been used for other purposes, video relay connections could also be used for lipreading by people who have hearing loss but do not sign, and by people with speech disabilities who would benefit by having others see their gestures.

VRS allows individuals to communicate with each other naturally and in real-time, without the delays that have been characteristic of TTY (text telephone) relay services. Although the primary objective of the ADA's mandate for relay services was to provide services that paralleled the experience of voice telephone services, TTY-based relay services had always met with limited success for ASL users. It is not natural to type out an entire conversation in English when this is not one's primary language. In

---

translation [does] not create an additional level of hearsay.'" United States v. Lopez, 937 F.2d 716, 724 (2d Cir. 1991) (quoting United States v. Koskerides, 877 F.2d 1129, 1135 (2d Cir. 1989) (brackets in original). Also analogous is the case of United States v. Dempsey, where the court was presented with whether a defendant had been denied a fair trial just because a deaf juror had used a sign language interpreter in the jury room. Ruling that a fair trial had been provided, the court explained that although the interpreter constituted a thirteenth person in the room, that individual was only there to interpret, and society has "come to view such interpreters more as part of the background than as independent participants. 830 F.2d 1084, 1091-2 (10th Cir. 1987). The Dempsey court understood, as did Congress in enacting the ADA, the importance of allowing third parties to perform this background role in order to assist people who are deaf and hard of hearing to communicate with other individuals.

addition, TTYs required the hearing party to the call to wait through long pauses to receive responses from the TTY user, which discouraged the use of relay by businesses and employers.

By vivid contrast, video relay services have allowed deaf and hard of hearing people who use sign language to converse naturally, inserting emotional context and voice inflection to convey non-verbal information.[25] The ease of using VRS enables individuals to more effectively transact business, find jobs, make appointments, and participate in daily affairs when these involve phone communications. A VRS user may choose not to alert the called party that the call is being handled through a relay service. When this is done, because of the real-time nature of the call, the receiving party may never know that the caller is not the voice on the telephone.

Since the inception of relay services, users of these services have been frustrated with the practice of some businesses and individuals to reject relay calls, believing these calls to be marketing attempts or other calls in which they have no interest. These hang-ups have occurred because relay calls are typically announced as such, and bear resemblance to tele-marketing calls to some hearing people who are unfamiliar with them. Over recent years, the increased incidence of fraudulent relay calls perpetrated primarily by hearing persons pretending to be deaf callers has resulted in a dramatic rise in hang-ups on relay callers. Overseas fraudsters using IP-based text relay have masqueraded as purchasers of large quantities of goods, and pranksters have taken to using this anonymous form of calling to make anonymous calls or falsely represent their identities.[26] As a result, legitimate businesses and financial institutions have begun turning away relay calls with increasing frequency. A new requirement to register for IP-based relay services in the United States has been instituted that may serve to curb some of these abuses by discouraging non-legitimate callers from signing up to use this form of relay.[27] But as a self-help measure, a number of relay providers now report that an increasing number of relay consumers are directing CAs not to announce their existence on relay calls – simply to avoid having their calls rejected. Many VRS callers prefer this

---

[25] Peltz Strauss, Karen, "A New Civil Right, Telecommunications Equality for Deaf and Hard of Hearing Americans" (Washington, D.C.: Gallaudet Press), 2006 at 133.

[26] IP text relay allows a user to access relay services through the Internet, using a computer, personal digital assistant, web phone, or other IP-capable device. Once the connection is made, calls are generally relayed in the same way that they are relayed using TTY-based relay services, by having the CA read to the voice telephone user what the IP text user types and type back responses from the hearing person.

[27] See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, WC Dkt No. 05-196, FCC 08-151, 23 FCC Rcd 11591 (2008); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, WC Dkt No. 05-196, FCC 08-275 (December 19, 2008).

approach, as it allows these individuals to have their calls treated in exactly the same way as calls between voice telephone users.

Another type of service that allows its callers to achieve transparency in their calls is captioned telephone relay service. Captioned telephone allows the user to speak directly to another party with his or her own voice while reading the words of the other party and, if he or she has residual hearing, listening to the voice of the other party. The captioned telephone user dials the number of the person he or she wishes to call and is automatically connected to both that individual and a captioned telephone CA. The CA then uses a voice recognition technology to generate captions for everything that the called party says by re-voicing that party's responses and having voice recognition technology automatically transcribe that content into text. The caller (with hearing loss) then reads the text on a specialized captioned telephone device or a computer screen – the latter if the individual is using an Internet version of the service. In this manner, the captioned telephone user can speak directly to another party with his or her own voice, listen to the actual voice and inflections of the other party, and read the text of the conversation to support and clarify what that party is saying.

When the FCC approved captioned telephone relay service in 2003, it praised the new technology's ability to achieve functional equivalency through its transparency:

> The captioned telephone user does not need to dial an 800 or 711 exchange to reach the TRS facility and set up the call, nor is there any interaction with the CA (by either party to the call). . . . Throughout the call the CA is completely transparent and does not participate in the call by voicing any part of the conversation.[28] Captioned telephone VCO service offers consumers the benefit of operating more like conventional voice telephone service, with direct dialing of the called party's number and the nearly simultaneous delivery of the actual voice of the called party and written text of what the called party has said as generated by the CA re-voicing the message. The record reflects that it is less intrusive and more natural for the call participants, and that users who become hearing impaired later in life may find it easier to adjust to captioned telephone VCO service than to traditional TRS services.[29]

The FCC further agreed with consumers that a proposal that would have allowed captioned telephone CAs to interrupt the conversation would "interfere with the natural flow of the conversation and largely defeat one of the central features of the captioned telephone VCO service, *i.e.*, that the CA is transparent during the set-up and throughout the call."[30]

---

[28] *Captioned Telephone Declaratory Ruling* at ¶4.

[29] *Id.* at ¶16. Because the CA does not speak in these calls, the FCC was able to waive its existing requirement that callers be able to select the gender of their CAs. *Id.* at ¶47. The FCC explained that the functionality of being able to directly call the destination party "would be defeated if gender preference had to be accommodated." *Id.* at ¶48.

[30] *Id.* at ¶50.

When, a few years later, the Commission approved an Internet-based form of captioned telephone relay service, it reiterated its expectation that

> "the new service will be provided in a way that is automated and invisible to both parties to the call. For example, presently with captioned telephone service the consumer does not communicate directly with a CA to set up the call; similarly, we expect that IP captioned telephone service should permit the consumer to directly dial the called party and then automatically connect the CA to the calling party to deliver the captions.[31]

One of the primary benefits of both video relay service and captioned telephone relay service is that these advanced relay technologies allow users to speak to each other just as if they were not using a relay service. CAs do not have any relationship or interest in any of the relayed communications that are taking place. Rather, they are there as transparent conduits whose only job is to make sure that the content of the conversations that they relay is accurately received by the other parties to the call. It is this attribute – transparency – that both consumers and the FCC have recognized as being pivotal to achieving functional equivalency.

Conclusion

A communications assistant on a relay service call should not have to announce that he or she is on the relay call in order to protect the privacy interests of the hearing party to the call. This employee plays a role that is no greater than telephone wire connecting two telephone users. As such, CAs should not be treated as third parties to a call, and notice of their presence on these calls is unnecessary and inappropriate.

When Congress directed the creation of a national relay system in the ADA, it recognized that, "[g]iven the pervasiveness of the telephone for both commercial and personal matters, the inability to utilize the telephone system fully has enormous impact on an individual's ability to integrate effectively.[32] Likewise, the FCC has stated that "[i]f people with hearing or speech disabilities cannot communicate by telephone, their ability to compete and succeed in today's job market is threatened. Being able to place a phone call to a prospective employer, to answer an advertisement for a job, to receive training, and to advance one's career through formal and informal networks depends largely on one's ability to communicate with many different individuals and entities."[33]

---

[31] *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, Internet-based Captioned Telephone Service*, Declaratory Ruling, CG Dkt No. 03-123,FCC 06-182 (January 11, 2007) at ¶23.
[32] S. Rep. No. 101-116, at 77 (1989).
[33] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. 98-67, FCC 00-56, 15 FCC Rcd 5140 (March 6, 2000) at ¶7.

In order to achieve relay services that are truly functionally equivalent to voice telephone services, attaining transparency in the relay conversation is essential. Accordingly, consumers need to be allowed to communicate with the parties to whom they are making calls without having the CA on those calls announce themselves to the called parties. The choice of whether to have the CA "announce" the call as a relay call is the consumer's. Forced announcements would severely undermine the goals of the ADA, increase the risk of having relay calls rejected by businesses and individuals, and force relay users who have grown accustomed to the transparent nature of this service to move backwards, rather than forwards, in their efforts to achieve a telephone experience that parallels that of their hearing peers and colleagues.

Acknowledgment and Disclaimer: The contents of this publication were developed under a grant from the Department of Education, NIDRR grant number, H133E040013*, a Rehabilitation Engineering Research Center on Telecommunications Access. However, these contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government.*