“Lost in Translation”: Dealing with Interpretation Issues in International Litigation

Feb 22, 2013  QuickCounsel

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Overview

Attorneys handling cross-border litigation often confront complex issues arising from testimony in foreign languages. Numerous cases involve witnesses who are unable to testify in English, or who, though proficient in English, prefer to testify in their native language in a courtroom or deposition setting.

Consider patent infringement cases in U.S. courts: inventors, engineers, and marketing personnel of one or both parties may not speak English. To elicit testimony from such witnesses at trial or deposition, attorneys must rely on the services of an interpreter. Using an interpreter, however, can raise thorny legal and practical problems.

This QuickCounsel examines the use of interpreters in civil litigation, focusing in particular on depositions, including the use of "check" interpreters. The article concludes with thoughts on how to handle commonly occurring interpretation issues.

The Right to an Interpreter

Although non-English speaking parties routinely use interpreters in judicial proceedings, only indigent criminal defendants have a constitutional right to a court-appointed interpreter. Several circuits have held that the lack of an interpreter deprives non-English speaking criminal defendants of their Fifth and Sixth Amendment rights to confront witnesses and participate in their own trials. The Court Interpreters Act also directs federal judges to appoint qualified interpreters in suits instituted by the United States (whether civil or criminal) where parties or witnesses do not speak English.

In all other cases, determining who is entitled to an interpreter – and how the interpreter should be deployed – is reserved for the court's discretion. If the court deems an interpreter necessary, it has the power to appoint one of its choosing.

Common sense would appear to dictate that a witness who cannot communicate effectively in English should be permitted to use an interpreter. In most cases, the use of an interpreter is not contested. This is particularly true where both parties seek to use interpreted testimony.

Where the parties fail to agree, however, courts have been called upon to exercise their discretion. The most difficult
cases are those in which the witness possesses some facility in English, but nonetheless seeks to use an interpreter. In one medical malpractice case, for example, a witness requested a Tagalog interpreter. The Court observed the witness's English-language ability outside the presence of the jury and in open court. Perceiving that the witness had no difficulty communicating in English, the Court denied the request for an interpreter.

A court could conceivably find that grounds exist to refuse to allow appointment of an interpreter. The process of consecutive interpretation doubles the time required for direct testimony. And if the interpreter mistranslates a question, the error may not be caught, muddying the record and possibly leading to later disputes.

An even more fundamental concern may be that interpreters may alter the questioning itself, rendering leading questions "systematically less leading." One study of Spanish-to-English interpreters in court found that even consecutive interpretation (the most accurate form) mistranslated leading questions one-third of the time. In the context of depositions, the accuracy rate for leading questions dropped to 55%. The vast majority of these errors consisted of removing the leading element of the question: "You made a report about this incident, did you not?" becomes "Did you make a report about this incident?" The study suggests that interpreters may not recognize the need for strict accuracy in translating questions, or may be trying to set the witness at ease.

In a narrow range of cases, therefore, courts could scrutinize requests for interpretation where no justification is offered. Counsel should be prepared to demonstrate that interpretation is necessary in order for the witness to provide his or her best testimony, and that it can be conducted efficiently and accurately.

Interplay of Interpreted Testimony at Deposition and Trial

Use of interpreters may also call into play issues of litigation strategy. At deposition, there is a premium on the accuracy of the written transcript. This may lead the defending party to insist on using an interpreter. But at trial, different considerations arise: the witness may prefer to testify in English to save time and build a rapport with the judge or jury. Is it permissible for the witness to use an interpreter at deposition but not at trial?

There is no definitive answer to this question. At least one court found it "easy to understand" why a witness would want an interpreter present at deposition, even if the same witness felt comfortable testifying in English at trial. Nonetheless, attorneys wishing to present trial testimony in English where a witness was previously deposed through an interpreter should be prepared to justify the switch.

Meanwhile, attorneys opposing such a move should make a record, beginning at the deposition itself. They should state their position that once an interpreter is used in deposition, fairness requires the witness to use an interpreter at trial. Counsel can ask questions about how well the witness understands English, and whether the witness uses English at work or at home. At the trial stage, counsel should consider filing a motion in limine to preclude direct trial testimony in English.

Use of Check Interpreters

In high-stakes litigation involving non-English testimony, the party defending a deposition often employs a "check" interpreter. The check interpreter monitors the official translation and offers corrections. Check interpreters often assist the defending party with deposition preparation, and may develop a detailed understanding of specialized language used by the witness, thereby leading to more accurate translation.

The use of check interpreters, however, is far from unproblematic. There is no specific legal basis for a check interpreter to participate in a deposition – and as a result, the rules governing their conduct are uncertain. Some courts have examined whether the fees of a second interpreter are "reasonable and necessary" for the purpose of taxing costs. Most often, they have found check interpreters to be "in no way necessary for litigation."
Other courts have rejected the use of check interpreters. In *Malpico v. Newman Machine Co.*, for example, the plaintiff was deposed with the help of several interpreters who "repeatedly disagreed about the interpretations," leading "to a confusing record." Frustrated with the jumble of voices on the deposition transcript, the court refused to allow either party to use any interpreter on the record other than the official interpreter.

Complications resulting from the use of check interpreters at deposition include the following:

1. **Where the check interpreter offers a correction to the official translation, how should the two translations be reconciled in the record?**

   If a check interpreter questions the official translation, should the parties seek to resolve the dispute during the deposition, or simply note the objection and move on? Neither approach is ideal. Taking time to reconcile the translations will prolong an already costly deposition process, and may not yield a clean record. In one case, the parties agreed to use interpreters "in the form of triumvirate battalions" – a chief interpreter and two check interpreters, one for each side, who were to confer when a dispute arose and choose the most accurate translation by consensus. The judge found this "enormously costly" process so daunting that he chose not to bifurcate the trial, so as not to put the parties through the interpretation gauntlet twice.

   On the other hand, waiting to address interpretation problems also has downsides. One court noted that where interpretation is poor, the witness's answers will not match the English questions. Mistakes in interpretation may also distract the attorney taking the deposition, wasting time.

   Some courts do not require consensus on translations, and instead leave it to the jury to resolve discrepancies. In general, though, courts prefer that the parties seek to resolve their differences. During one deposition conducted in Mandarin, the parties argued about the proper translation of the word "affiliated." The court expressed frustration that the deposing attorney failed to anticipate the problem and provide the witness with a written translation of the disputed word.

2. **Does using a check interpreter create a risk of waiver for the defending party?**

   Problems can arise not only when the check interpreter offers an alternative translation, but also when the check interpreter is silent. If the check interpreter fails to correct the record, is the defending party stuck with the official translation? Although authority on this question is sparse, several cases offer guidance.

   In one case, a plaintiff who spoke only Spanish brought her daughter to her deposition to "check the quality of the translation." The interpretation contained errors, but neither the defending attorney nor the daughter spoke up about them until after the deposition was over and the official interpreter had departed. The court held that this delay waived the right to object, and retained the original interpretation.

   In a similar case where the faulty interpretation occurred at trial, the defendant used purported mistakes in translation as a basis to move for a new trial. Despite having the dedicated services of his own interpreter, he made only a general objection at the beginning of the trial, rather than contemporaneous objections for each translation mistake. The court rejected the motion. The check interpreter's failure to do his job thus may have cost the defendant a new trial.

   Some judges may nonetheless permit a party armed with a check interpreter to object to translation problems after the fact. In a denaturalization hearing for a Ukrainian-born U.S. citizen accused of aiding German police during World War II, the government took several video depositions abroad using an interpreter supplied by the Soviet Union. Defense counsel brought his own designated interpreter to all the depositions, but failed to object to translations until after the depositions were completed. Out of "an abundance of caution," the court set aside portions of the video depositions involving questionable translation, but still found a basis to justify denaturalization.
The upshot is that where a check interpreter is used, counsel defending the deposition should not rely on the court's leniency and instead should direct the check interpreter to raise issues of mistaken translation immediately.

Conclusion

Whether to retain an interpreter or a check interpreter for deposition requires serious thought. Counsel must assess the English proficiency of the witness as well as the witness's likelihood of testifying at trial. To ensure accurate translation and avoid the time and expense of motion practice, counsel must also try to anticipate and resolve potential disputes.

The best approach to contentious translation issues is to seek agreement with opposing counsel before problems arise. This can take several forms. For example, counsel can identify a mutually acceptable interpreter and agree to forego "check" interpretation. The parties can also agree that the witness will testify in English to the extent possible, but that an interpreter will stand by to assist with translation if necessary.

If key words or phrases are known in advance of a deposition, counsel can exchange their proposed translations and seek to identify areas of agreement and disagreement. Pinpointing a limited number of "high priority" translations and engaging in early focused negotiations may be preferable to confusion in the deposition room. Finally, in the event that agreement cannot be reached, counsel should hammer out a protocol for stating complete alternative translations on the record and then reconciling them at a later date, perhaps with the assistance of a mutually acceptable third party or the court.

Additional Resources

- Navigating Cross-Border Litigation (The Recorder)
- Recordings, Transcripts and Translations as Evidence (Washington Law Review Association)
- Using Interpreters in Litigation (Los Angeles Lawyer)
- Language and Litigation (The National Association of Judiciary Interpreters and Translators)

Published on February 22, 2013

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