

Legal Translation and Interpretation in International Litigation



October 27, 2023 from 3:30 to 4:30 pm
Miami, FL
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Disclaimer:

The information presented in this session is for educational and informational purposes only, and should not be construed as legal advice or as an offer to perform legal services on any subject matter. This session focuses on legal interpretation.



Interpreters in the Litigation

Federal Court systems classifies interpreters into three categories:

- Certified Interpreters (complete the certification oral and written exam)
- Professionally Qualified Interpreters (State Department conference or seminar interpreter test)
- Language-Skilled/ Ad Hoc Interpreters

Dynamics in the legal proceeding



Caption:
If your client comes to court dressed like this, do not let him take the stand.

Being slob with an untucked shirt = sympathy points with the jury? No!

Who has the right to interpreter?

The right to an interpreter for criminal defendants who do not speak the language of the court is guaranteed in International Covenant on Civil and Political Rights.

U.S. law: Indigent criminal defendants have a constitutional right to a court-appointed interpreter.

Negron v. New York, decided in 1970, was the first federal case on this issue. **Facts of the case:** The defendant in *Negron* was 23-year-old from Puerto Rico. He neither spoke nor understood any English. His court appointed counsel only spoke English. Twelve witnesses testified against Mr. *Negron* in English only. The English testimony was not translated simultaneously but merely summarized for him by the interpreter in ten or twenty minutes during recess.

Holding: Lack of adequate interpretation rendered the trial “lack the basic and fundamental fairness required by the Due Process Clause of the Fourteen

Dos and Don'ts in international litigation interpretation

Dos:

Interpret for the witness, attorney and the judge

Interpret when the judge addresses the attorneys or jurors and when attorneys address the court, even when the statement is not directed to the witness

Interpret short attorney-client privileged conversation immediately preceding and following the courtroom hearings

Dos and Don'ts in international litigation interpretation

Don'ts:

Avoid shorten, explain or summarize what is said

Avoid having side conversations with witness

Avoid explaining legal proceedings to the witness

Court-appointed interpreter cannot be used for lengthy follow-up conversations outside the courtroom, unless it's authorized by the court.

Questions: What is everything is said everywhere all at once?

Who can appoint interpreters in litigation?

Short answer: the court

If the court deems an interpreter necessary, it has the power to appoint one of its choosing.

Only court-appointed interpreters can serve as official interpreters in the courtroom.

What if the use of an interpreter is contested?

The most challenging cases are those where the witness possesses some proficiency in English, but not fully fluent.

The opposing counsel can object to the use of an interpreter.

What if the witness or juror have some English proficiency?

Case study #1:

In a contentious deposition session, the witness who claims that he doesn't speak English, answered the counsel's question immediately after it was asked in English, without waiting for the interpreter to speak first. It indicates that the witness actually understands English.

What if the witness or juror have some English proficiency?

Case study #2:

In *Hernandez v. New York*, the U.S. Supreme Court held that the prosecutor moved to strike two bilingual Latino jurors is race-neutral and not a violation of the Equal Protection Clause.

Reasoning: “Jurors should base their deliberation on a common and official records of the court, not on their independent knowledge, linguistic or otherwise.”

What if the witness or juror have some English proficiency?

Case study #2:

In *Hernandez v. New York* exchange:

Juror: Your Honor, is it proper to ask the interpreter a question? I'm uncertain about the word La Vado [sic]. You say that is a bar?

Court: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me.

Juror: I understood it to be a restroom. I could better believe they would meet in a restroom rather than a public bar, if he is undercover.

Court: These are matters for you to consider.

Juror: I understand the word La Vado [sic]. I thought it meant restroom. She translates it as bar.

Interpreter: In the first place, the jurors are not listen to the Spanish but to the English. I am a certified court interpreter.

Juror: You are an idiot!

What if the witness or juror have some English proficiency?

Case study #2:

In *Hernandez v. New York* , what happened in the end?

The witness stated after further questioning, that the conversation in question did not happen in the restroom. (The interpreter was correct.)

The juror later apologized and explained that she had said: “it’s an idiom.” She was ultimately dismissed from the jury.

Using a “check” interpreter in international litigation

What is a “check” interpreter?

In high-stakes litigation, the party defending a deposition or during trial often employs a “check” interpreter. The check interpreter monitors the official translation and offer corrections.

Some courts allow because a second interpreter is “reasonable and necessary”, other courts do not allow it.

What if the official interpreter and “check” interpreter disagree?

See whether the two interpreters can reconcile the translations on records. If the parties cannot reach an agreement on the translation, they should note the objection and move on.



Discussion question:

Is the point of disagreement purely linguistic or legal?
Who's your client?

When to raise your objection as a “check” interpreter?

If you discover an error in the translation during deposition or trial, raise your question immediately.

A delayed response can result in waiving the right to object.

When to raise your objection as a “check” interpreter?

Case study:

Short answer: immediately

The plaintiff speaks Spanish. She brought her daughter to the deposition to “check the quality of the translation.” As it turned out the interpretation and the records contained errors, neither the attorney nor the daughter spoke up until the deposition was over and the court-appointed interpreter had left.

The court held that the delay waived the right to object.

How to interpret leading questions?

What is a leading question? Why is it important?

A leading question points out the desired answer. The answers are embedded in leading questions.

In general, leading questions are not allowed during direct examination of a witness. If asked during trial, the opposing counsel can make an objection, and the judge is likely to sustain.

A leading question could potentially influence or control the witness' testimony, and affects what is admissible evidence.

How to interpret leading questions?

Leading question is not allowed in direct examination.
A direct examination i.e. Jonny Depp's counsel questioning Jonny Depp.

Leading question is allowed in cross-examination.
A cross-examination i.e. Jonny Depp's counsel questioning Amber Heard.

How to interpret leading questions?

Non-leading questions provide a more “natural” flow of the information based on witness’ personal knowledge and recollection of the events.

Counsel should not be allowed to “tell the story” by simply asking leading questions.

The interpretation should not make the leading questions “systematically less leading.”

How to interpret leading questions?

Examples of leading questions:

Example 1:

A leading question: “You reported the incident, did you not?”

Interpreters can interpret the sentence as “Did you report the incident?”

Example 2:

A leading question: “Didn’t you only drink water all night while the defendant had four glasses of wine?”

How to interpret leading questions?



Discussion question:

What if counsel objects before the leading question is interpreted?

How to interpret leading questions?



What questions the witness does not have to answer?
Counsel objects the question. Court sustained objection. If Court overrule the objection, the witness will have to answer, unless the questions are concerning:

1. Private information: i.e. health, personal, etc.
2. Privileged information: conversation between client and lawyer, doctor, psychiatrist, priest, etc.
3. Irrelevant information:

Interpretation with cultural nuances

01

Eye contact

Direct eye contact v. avoid eye contact (credibility issue)

03

Facial expression

Emotionless state has a cultural indication

02

Tone or raised voice

Tone v. content of the speech

04

Indirect communication

Impact on the translation

Interpretation with cultural nuances

Eye contact:

In the U.S., people tend to communicate assertively and look at one another. In many other cultures, direct eye contact is perceived as “rude.”

Case study: *Morales v. Artuz*, the Second Circuit had to decide whether the witness can refuse to remove her sunglasses on the witness stand. The court noted that whether a person’s eyes are seen has been “explicitly mentioned as of value in assessing credibility.”

Interpretation with cultural nuances

Tone v. content of the speech:

Case study:

In many high context cultures, raised voice shows negative emotion, though the content of the speech remains respectful and polite.

Interpretation with cultural nuances

Facial expression:

Who's a better actor? Leo DiCaprio v. Jeremy Strong



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Interpretation with cultural nuances

Facial expression:

In *State v. Mak*, a Chinese immigrant was convicted and sentenced to death for murdering of thirteen people at a gambling club in Seattle's Chinatown. The Ninth Circuit affirmed the reversal of Mr. Mak's death sentence, finding that his legal team failed to introduce the mitigating cultural evidence that expert testimony that his apparent emotionless state did not necessarily indicate coldness or disinterest, but was consistent with cultural expectations of Chinese males.

Interpretation with cultural nuances

Facial expression:

Story to illustrate previous point: When President Obama went to China in 2009 and met with President Hu Jintao, during a prolonged and sleepy negotiation session, President Obama attempted to lighten up the atmosphere. After having learned that the massive Great Hall of the People had been built in less than a year, he joked saying “Give me the name of your contractor”. The joke was met with a blank stare.

Interpretation with cultural nuances

Indirect communication:

In many cultures, indirect communication help prevent embarrassment of rejection or open disagreement among partners.

Case study:

Chinese business partner never said No to proposals. It does not mean approval of the proposals, even if they may say: “Great. We like the proposal.” If there’s no detailed follow-up questions and inquiries, it’s likely to be a dead-end in negotiation.

Interpretation with cultural nuances

Indirect communication:

In direct communication: “Can you close the door?”

Indirect communication: “It is somewhat cold today.”

Case study:

In personal injury cases, people who suffer an injury may be less likely to vocally complain about the suffering due to cultural norms. The jury may consider the lack of complaints to be a measure of the extent of the injury.

Best practices for interpretation in international litigation

The parties can agree on a mutually acceptable interpreter.

If the witness has some English proficiency, the witness can testify in English to the extent possible, an interpreter will stand by to assist with interpretation.

At the preparation meeting: Before deposition/trial, meet the counsel and develop key words and phrases in advance of a deposition.

Best practices for interpretation in international litigation

Before deposition/trial, develop a protocol if agreement cannot be reached on certain translation, i.e. state alternative translations on records, note the difference and move on.

Establish best mode of communication with your team: texts, emails, WhatsApp, calls,

Frequency of contacts: establish healthy boundary

Q & A





Thank you!