

Six Tips for Defending Foreign Language Witness Depositions

JUNE 15, 2020

Defending the deposition of a witness who speaks a foreign language presents significant challenges for defense counsel. As an initial matter, it is very difficult for a foreign language witness to connect with the jury given that the testimony is coming through an interpreter. It is also more difficult to prepare the witness to give favorable testimony for the record whether it be for summary judgment or at trial. In addition, preparation can be more difficult because the witness is likely to be totally unfamiliar with the discovery process in the United States. And the language barrier can also make it more difficult to build trust between the counsel and witness, making it more challenging to counsel and advise the witness.

All of these challenges are exacerbated during the unique circumstances of the COVID-19 pandemic when face-to-face preparation and in person depositions are not possible. With all of these challenges, preparing to defend a foreign language witness is akin to flying blind with instruments. However, with the right instruments, sufficient time, and proper preparation, counsel can successfully confront the challenges that such a deposition presents.

Following a recent ABA Antitrust Law Section panel titled “It’s All Greek to Me: Taking and Defending Foreign Language Witnesses Depositions,” Winston & Strawn attorneys Jeff Amato and Lauren Duxstad compiled a list of key considerations and tips to keep in mind as you prepare for and defend a deposition of a foreign language witness.

1. Utilize Document Reviewers Who Can Properly Analyze the Relevant Foreign Language Documents

Preparations for a deposition of a foreign language witness begin at the very outset of the case, or even beforehand if there was a government or internal investigation, when documents are reviewed to build an understanding of the case and potential defenses. It is imperative that defense counsel has the support of document reviewers who can read and analyze the relevant foreign language documents and filter and translate the important information to the case team.

When reviewing documents, the key is to have an infrastructure of document reviewers who can understand both English and the foreign language and also understand the key legal and factual issues relevant to the case. At Winston, we rely heavily on foreign legal advisors (such as visiting attorneys seconded from Japanese law firms) as well as dedicated document review practice attorneys who are fluent in both English and the foreign languages at issue and who work closely with the case team to understand the facts and the legal issues and defense at issue.

As the foreign legal advisors identify relevant and sensitive documents, you should have documents translated on a rolling basis and as early as possible to avoid rushed translations that are more expensive and more likely to have errors. You should also keep careful and accurate records of all documents that are translated to avoid duplicated efforts.

2. Select an Appropriate Interpreter Who is Familiar with Case Terminology and Key Legal Issues

Selecting an appropriate interpreter for the prep session and the deposition will help to make the deposition run smoothly. There are several types of interpreters related to a deposition of a foreign language witness, each with different roles: (1) the prep interpreter, hired by the defending attorney to translate the prep session; (2) the main interpreter, hired by the examining attorney to interpret the questions of the examining attorney, any objections, and the witness's answers at the deposition; and (3) the check interpreter, hired by the defending attorney (and sometimes the examining attorney) to confirm the main interpreter's translations.

For the preparation session, it is good practice to include a foreign legal advisor and in-house client legal staff who can speak both English and the foreign language and who are familiar with the legal issues involved in the case. These case team members can help the witness understand concepts and be prepared to use the proper terminology when testifying so that the record is accurate when translated. It is also helpful to meet with the prep interpreter in advance of the prep session to give background on the parties and case issues and to review key technical vocabulary.

If the case protocol allows, it is helpful to use the same interpreter for the prep session and as the check interpreter for the deposition. Having the check interpreter involved in the prep session allows the interpreter to confer beforehand over key terms, job titles and issues. In this regard, you should also consider negotiating a deposition or translation protocol at the outset of discovery to identify qualified interpreters at the outset of the case. This will minimize problems that can arise where the main interpreter is only selected by the examining counsel and the check interpreter is continuously having to correct the record, making for a long and inefficient deposition. The protocol can also address how to object to written translations, including the timing for such objections and how to resolve disputes over written translations.

The check interpreter should feel comfortable interrupting and challenging the main interpreter, but should not object every time that there is an alternative word choice that is equally correct. As defense counsel, you should empower the check interpreter to watch for issues that will matter to the testimony. Some of these issues may be language-specific. For example, Japanese language often omits personal pronouns and subjects. In Japanese depositions, the interpreter should therefore be on the lookout for translations which assume the subject of any particular action when the witness did not designate a specific subject.

3. Familiarize the Witness with All Aspects of the Deposition

It is important to remember that when preparing a foreign witness, it is not just a language barrier that is at issue. The witness is likely unfamiliar with the legal system in the United States, discovery in litigation, what a deposition is and the purpose of the deposition, and attorney client privilege. All of these topics must be fully explained before getting into the substantive preparation for the deposition.

You should take the time to go over every detail of the logistics of the deposition with the witness, including where the witness will sit, who else will be in the room, and the requirement to take an oath. You should also explain objections, including why objections are made and how they will be used during the deposition. It is important to clearly explain the concept of attorney-client privilege in particular, including what the witness should do if you instruct the witness not to answer, as this instruction can sometimes be lost in translation. Remember that, given the fact that the witness will be testifying in a foreign language, it may be too late to stop the testimony and instruct the witness not to answer by the time the interpreter is translating the witness's answer containing privileged information.

After explaining these topics, it is important to practice questions that might come up during the deposition. In particular, you should practice questions that might implicate privileged information, like questions about the prep session and documents used during the prep session. It is also helpful to practice the pacing of the deposition with

the witness, which is unique for a foreign language deposition. The deposition of a foreign language witness will typically have the following sequence: (1) the examining attorney poses a question in English, (2) the main interpreter translates the question into native language (and potential objections by the check interpreter), (3) possible objection by the defending attorney in English, (4) the main interpreter translates the objection, (5) the witness provides answer in native language, and (6) the main interpreter translates the answer into English (and potential objections by the check interpreter).

4. Prepare for Key Language Interpretation Issues

During the prep session, you should work with the witness to prepare him or her for any language interpretation issues that may get lost in the translation. For example, there are 22 different ways to express the word “agreement” in Japanese. It is important that the witness understands the distinctions of the translations and potential implications for the case.

Similarly, you should prepare the witness regarding key phrases that often come up during depositions. For example, it is important that the witness understand the difference between “I don’t know” and “I don’t remember,” and the different nuanced terms used for those concepts in the foreign language, and which ones are best to use when testifying.

5. Prepare the Witness to Not Get Tricked into Agreeing to Loosely Translated Phrases or Documents

As with any deposition, it is important that the witness is prepared to carefully review the entire document an examining attorney puts before the witness so that the witness does not get tricked by only looking at a particular portion of a document. For foreign language depositions, it is also important that the witness does not rely solely on the interpreter’s translation of a document, but rather reads and understands the document in the witness’s native language.

You should also review any interpretation issues particular to the relevant language. For example, there are common phrases that are used in email correspondence in Japanese that may seem much more problematic when translated into English. You should review these phrases with the witness and explain how examining counsel may try to trick the witness to accept the more problematic translated language, as opposed to the actual meaning in the native language.

6. Preserve Objections During Deposition

The job of defending counsel does not end once the preparation session is complete. In addition to preserving the objections that counsel would typically make in any deposition, keep in mind that you may want to object to how documents have been presented, translated (or sometimes only partially translated), and marked as exhibits. It is important to have the case protocols handy to review the rules and to clearly make objections on the record as to any mistakes that the examining attorney makes in contravention to the protocols.

As always, you should reserve the right to correct the record consistent with any case protocols. As with preparation, you should rely on collaboration with foreign legal advisors to correct any mistakes or translation issues in the transcript.

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