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LITIGATION

Should Counsel at Foreign Language Depositions and Trials Be Bilingual?

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What happens when a plaintiff testifies at a deposition in a language that is different not only from the language that the defendant and defendant's counsel speak, but different from that of the plaintiff's own attorney?

Imagine a situation in which the plaintiff speaks Spanish, a language that neither attorney at the deposition speaks. Both attorneys will, of course, rely on an interpreter's translated version of the testimony. But, neither attorney can be sure whether the interpreter accurately translated the questions or testimony. Since the English transcription is the official record of the deposition, it is impossible to know whether the interpreter captured the correct tense, nuances and cultural significance of the plaintiff's statements.

In another problematic situation, imagine that only one attorney speaks the plaintiff's foreign language and that attorney's bilingual skills provide an advantage to that side. Either attorney can, of course, challenge the translation as incorrect, particularly if subtle language and cultural differences are not captured in the translation. But, if only one attorney actually speaks the language and challenges the translation during the deposition, the non-bilingual attorney cannot argue the point.

Is it ill-advised for an attorney to take or defend a deposition of a non-English speaking deponent when that attorney does not understand the foreign language? In such circumstances, it is strongly recommended that the non-bilingual attorney enlist his own interpreter for the deposition



Doroteo Jimenez addresses the court with the help of a translator in Stockton.

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to cue him in whenever his questions or the testimony are not accurately translated. Of course, the cost involved in hiring an additional interpreter may prevent many from going this route. However, the cost must be carefully balanced against the possibility that a translation error may occur. Attorneys spend considerable time preparing for depositions by carefully planning their questions. That time and effort will be wasted if the nuances of the questions are not accurately conveyed in the translation.

The bilingual attorney has an advantage because he or she is more able to fully represent the client at

such depositions. The bilingual attorney can quickly use his or her judgment in deciding whether to: let an inartfully-translated answer stand without compromising or interrupting the momentum or flow of the interrogation and testimony; pursue different lines of questioning if the deponent's intonation or emphasis on certain words in his native language testimony indicate sarcasm, skepticism, etc.; forgo challenging minor errors in the translated testimony in the interest of time; make instant judgment calls as to whether certain technical words or slang are not susceptible to literal translation; decide that although the testimony was not translated verbatim, the translation, nonetheless, captures the meaning of the deponent's testimony; or object to the



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translated testimony on the grounds it is not completely accurate.

Most importantly, because a bilingual attorney understands the subtle nuances of the testimony, he or she is in a better position to assess the deponent's credibility. These same considerations are more critical during a trial. There, a counsel's ability to make instantaneous judgment calls based on a party's native language testimony may affect the presentation of the client's case before a jury, as opposed to second-guessing an interpreter in the presence of a judge or jurors.

There are other intangible dynamics at play when the deponent knows that the deposing attorney speaks and understands his language. The deponent may be more careful or forthright when testifying. Further, the deponent may feel at ease with the bilingual attorney, particularly when the other individuals in the deposition room only speak English.

Other safeguards include ensuring that interpreters are familiar with the dialect or culture of the deponent to avoid mistakes such as assuming that a Spanish interpreter educated and trained in Spain is fully capable of translating the testimony of a Spanish-speaking immigrant from Guatemala. Attorneys can also provide the inter-

preter with copies of the complaint or other operative documents so he can familiarize himself with the relevant terminology. A good rule of thumb is to retain interpreters

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who are able to translate industry-specific or practice-specific word usage or terms of art, and to take frequent breaks during the deposition as the interpreter may become fatigued during long stretches of interrogation or distracted if the subject matter of the testimony is tedious.

Interpreters should also be required to provide consecutive, rather than simultaneous, translations. Consecutive translations afford counsel the ability to listen to the deponent's foreign language testimony and then listen to the translation to determine whether the translation is accurate. If the interpreter is speaking at the same time as the attorney or deponent, this will be difficult to determine. Further, if two people are speaking at the same time, there is a chance of confusing the court reporter, thereby making the reporter more prone to mistakes.

Videotaping the deposition is another good idea. While this can be expensive, it may be the only way for a non-bilingual attorney to determine whether errors were made in the translation. Generally, a deposition transcript and corresponding

videotape are provided to the parties two or three weeks after the deposition. If, at that time, a non-bilingual attorney compares the videotape to the transcript with the assistance of his own interpreter and objects on the grounds that the translation was not completely accurate, has the non-bilingual attorney waived his right to the objection by not raising the mistake at the deposition? Does the objecting attorney move to re-open the deposition at that time? If so, who bears the costs of re-opening the deposition? Does the attorney have the deponent insert the corrected response in the transcript? If so, does the deponent insert the corrected response in his native language or does the objecting attorney provide a translation of the corrected response? Is the opposing party deprived of the opportunity to examine the deponent on the corrected response or the translation of that corrected response in the transcript?

Plaintiffs and defendants face many challenges when bringing or defending a lawsuit. If one of the parties does not speak English, the dynamics during depositions and at trial change. As demographics in the United States change, particularly in areas such as Los Angeles where approximately 60 percent of the population is Spanish-speaking, counsel must be prepared to address the challenges posed by foreign-language depositions and trials to effectively represent their clients in litigation.

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