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LITIGATION PRACTICE

Notes from the Field

Translation Protocols: The Time Has Come

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TRANSLATION IS BOTH A FITTING AND TIMELY TOPIC. The number of U.S. litigants who are not English proficient increases every year, with the most recent statistics estimating that at least 20 percent of litigants in U.S. courts are limited English proficient (LEP).[1] Courts and litigators thus now routinely confront the challenges posed by the need for extensive translation of exhibits and interpretation of testimony. Given our global economy, there has also been an extraordinary increase in cases pursued in U.S. courts that involve foreign parties who are often LEP.

In particular, translation and interpretation issues are routinely faced by antitrust lawyers defending companies in cartel matters involving foreign parties. Court rules and case law have not caught up to this development, however. While existing law deals well with a case involving an occasional translated document or perhaps one witness testifying with interpreters, the rules and related case law do not address adequately those cases in which most of the documents and testimony needs to be translated and interpreted.[2] This absence of established law is both a subject for concern and an opportunity for advocacy.

In any case involving a substantial number of documents that will need to be translated and witnesses who will testify at deposition and at trial in a language other than English, it is imperative that counsel develop a court-endorsed protocol to handle translation and interpretation. Why do I say this? As described below, both translation and interpretation can be outcome determinative. Moreover, neither is a rote, mechanical exercise; rather, they are complex, difficult tasks involving educated judgment calls by the translator or interpreter. Experienced lawyers understand that inaccuracies in translation and interpretation are fairly common, but judges underappreciate this risk.

Translation and interpretation are also both very expensive, and they will affect the time it takes to complete discovery and trial. Courts and clients will, of course, want to control cost and promote efficiency, but these objectives must be balanced against those other factors to make sure that translation quality is not sacrificed on the altar of efficiency. A translation protocol (which typically addresses the related issue of interpretation) is one way to strike this balance.

To explore these interesting and competing issues, I interviewed several lawyers experienced with translation and interpretation, as well as several translators. These interviews were invaluable, and I want to acknowledge the assistance of John H. Chung, White & Case LLP; Kevin B. Goldstein, Weil, Gotshal & Manges LLP; Ian Simmons, O'Melveny & Myers LLP; Mark L. Krotoski and Hill B. Wellford, Morgan, Lewis & Bockius LLP; Layne E. Kruse, Fulbright & Jaworski LLP; Wheatleigh Dunham, Attorney Translation Services, LLC; and my Foley Hoag colleagues Thomas Ayres, Claire Laporte, and Jeremy Younkin. I also reviewed translation protocols we have developed at Foley Hoag, as well as several protocols used in recent cartel cases, and quote liberally from them later in this column. Intrigued by what I heard in these interviews, I dusted off my college textbooks on the philosophy of language, and actually reread several essays on translation to remind myself of the academic community's views on translation outside the legal context.[3] Lastly, I reviewed the ABA's own Standards for Language Access in Courts, adopted in February 2012.[4] I served on the project advisory group that developed these standards, and as the chair of the ABA's Standing Committee on Legal Aid and Indigent Defendants, I have had the privilege of speaking to judges around the country regarding implementation of these standards.

Translation Matters

In perhaps the most famous antitrust example of the importance of translation, the District of Massachusetts granted the defendant's motion for acquittal in *United States v. Nippon Paper Industries*, at least in part because of a translation dispute. Nippon contested the translation of the Japanese word "*Sando*" by the government's translator.[5] According to the government, *Sando* meant "agreement"; according to Nippon, it meant "concurrence." The litigants were never able to resolve their dispute

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about these warring translations. The competing translations went to the jury, along with explanatory testimony from competing expert translators, and after a hung jury, the court granted Nippon's motion for judgment of acquittal.

In *Murphy v. Lazarev*, the court reversed a judgment previously entered granting a motion for summary judgment when the court was subsequently presented with complete translations of the contracts at issue.[6] The parties had previously only partially translated documents at summary judgment. The complete translation of the contract was inconsistent with the meaning ascribed to it by the court at summary judgment, and the court reconsidered and reversed its previous ruling. Poverty lawyers from across the country have reported legions of examples of injustices worked on limited English proficient litigants when adequate translation and interpretation services have not been provided by courts.[7] This was one of the motivating factors for the development of the ABA's Language Access Standards.[8]

Translation Is Complex

Another reason that a translation protocol is imperative is that translation is a complex and difficult exercise. Lawyers need to appreciate that translation and interpretation is not a rote exercise or exact science, and to help courts understand this as well. In a recently published article from the *Chicago Law Review*,[9] Casen Ross surveyed literature on translation:

> "Translation" has been defined as "the replacement of textual material in one language [the source language] by equivalent textual material in another language [the target language]"; the "central problem" of translation is finding the "equivalent" in the target language.[10] This equivalency is a "complex concept" that is not "mathematical or logical."[11]

In the *Southern California Review of Law and Social Justice*,[12] Annette Wong also cited from academic literature on translation:

> The conventional understanding of interpretation is that it is a mathematical formulae process whereby a word in one language has an "exact, corresponding word in another."[13] According to this understanding, the process of interpretation is a simple matter of "decoding, or transliteration."[14] However, language involves "ambiguous processes not susceptible of mathematical solution."[15] While court interpreters are mandated to give the most accurate translation without "embellishing, omitting, or editing," interpretation inevitably changes the meaning of the speaker's words.[16] In a report written by Elda Ellis, a certified court interpreter, she writes "verbatim renditions should be avoided, as they tend to distort the real meaning [of the interpretation]."[17]

As the language experts cited in both the Ross and Wong articles recognize, one of the reasons that translation is such a complex and difficult exercise is that "there is not a one-to-one relationship between languages."[18] Citing from a number of sources, Ross explains this very well:

> "It is generally accepted that translation of any kind . . . involves some measure of approximation." A translator's objective is not "linguistic transcoding." Rather, a translator must convey the speaker's "meta-meaning" that "arises out of the [speaker's] intention to have communication established with someone else." This conveyance involves inherent subjectivity and discretion because a translator chooses how best to communicate the speaker's message.[19]

Further complicating the exercise, Ross notes that "different cultures may put a certain gloss on meaning."[20] Complicating things still further, translation can be particularly difficult when the word to be translated simply does not exist in the target language.[21] Another fundamental aspect of translation is that "the context of the translation itself comprises a key component of the communication as both a translated interaction and the translator's own cultural background influence the manner in which statements are translated."[22]

Philosophy of language and literary criticism scholars have recognized these basic points about translations for decades,[23] but the concepts are underappreciated in the legal context. For example, federal circuit courts of appeal are still in conflict as to whether a criminal defendant has the right to confront and cross-examine the interpreter who interpreted out-of-court statements made by the defendant. Some courts view the interpreter as simply an agent of the defendant or a conduit of the defendant's words albeit translated and thus rule that the defendant has no constitutional right to confront the interpreter at trial. More recently, some courts have recognized the fallacy of such a concept and in so doing recognized the complexity and discretion involved in translation. Those courts have acknowledged the defendant's right to cross-examine the interpreter.[24]

The lawyers and translators I interviewed were uniform in their assessment that translation is a complex and difficult exercise. The lawyers also acknowledged that translation is particularly challenging and important in cartel matters. Proving the existence of a conspiracy almost always involves evidence of a tacit agreement, rather than an express agreement, and circumstantial evidence is typically an important part of the government's case. Even conspiracy cases involving English-speaking defendants typically involve a big fight over words. The parties will dispute what was said, and what was meant by what was said. If a code was used to facilitate the cartel, the issues are even more complex. When the complexities of translation and interpretation are added to the mix, it is easy to see how translation and interpretation can play a central role in a cartel case involving non-English-speaking defendants.

A consistent theme in my interviews with lawyers who have handled cartel cases involving foreign parties was that some terms common to cartel cases have different meanings across different languages and cultures. For example, there apparently are two permutations of the word agreement in the Korean language, one which has a bilateral meaning and one which means understanding. In a Korean to English dictionary, both words are defined as "agreement." But they have different connotations to a native speaker in Korea. In another example offered, a lawyer explained that in Japanese culture, it is common for a meeting participant to nod his head to indicate that he understands what another speaker is saying. That nodding of the head is very different from nodding in agreement. In short, the key cartel concepts of agreement, consent, collaboration, consensus, and dis-

cussion vary significantly from language to language and culture to culture.

The Need for a Quality Control System

The lawyers I interviewed all acknowledged that inaccuracies in translation and interpretation are fairly common and can have significant consequences if not detected. Given the importance of quality translation in cartel cases, it was not surprising that the interviewees all counseled that translation needs to be addressed with rigor and vigilance. Senior trial counsel needs to be involved. Counsel should address translation issues early so that translators are not rushed and there is time for effective quality control. In seeking out interpreters and translators, do not rely on the fact that a translator has been court-certified as an indication of quality. Instead, obtain references and review samples of the translator's work, and make sure he has had experience translating in the legal context. There is a shortage of capable translators and interpreters for some languages, so it is also important to be careful about conflicts.

It is critical to have a good quality control system in place. Later in this column, in the context of discussing the elements of a good translation protocol, various approaches to the use of "check" translators and interpreters will be discussed. A check interpreter, for example, will attend a deposition on behalf of the party who has not retained the interpreter of record and will make objections on the record to any interpretation made by the interpreter of record believed to be in error. That is one method of quality control.

The lawyers I interviewed discussed a number of other quality control systems. Some law firms have translators on staff to review externally prepared translations. Other law firms retain contract lawyers who are bilingual, and some multi-national clients will have in-house translators who can help with quality control. At a minimum, batches of translated documents should be spot checked, and translations of any key documents should be carefully reviewed by a well-respected, knowledgeable translator and counsel before they are finalized.

Translators also need to be reminded not to ignore hand written aspects of a document, such as marginalia. Whenever reviewing translations, you need to have the original next to the translation to check on these matters. When the original is full of characters, it can be difficult for an American lawyer to see that aspects of the document have not been translated. Check translators are particularly important in that instance. It is very common for there to be a process of going back and forth with draft translations before a final translation has been agreed to. Translation is an iterative process, and there should be enough time built into the system to allow for this important back and forth process.

Because context matters so much to translation and interpretation, it is important to educate translators about the context of a particular case. This context should also inform who you retain as translators and interpreters. The skills required for an interpreter and a translator are different, and, therefore, it makes sense to retain different individuals to serve in these distinct roles. For a translator, it is important to have a native speaker with an understanding of the idiomatic language being translated as well as English usage. The translator should also understand the antitrust context as well as the industry context and the particular issues in the case. The nuances involved in a cartel case can be lost without these skills and background. You also need to sit down with the translator and the key witnesses so that the witness can quickly identify key documents and phrases.

[T]he process of translation and interpretation is an expensive undertaking in any litigation matter. While it is important to have a resource management plan, it is also important to temper the drive for efficiency with the need for rigor, given the importance of translation and the likelihood of material errors.

When retaining an interpreter, it is important to recognize that the skills needed are different, because it is a real-time exercise. Not all translators have the right personality to handle the pressures of interpretation. Interpreters prefer, especially when doing simultaneous or consecutive interpretation, to take breaks every 20–30 minutes. Therefore, at trial, it is imperative to have two interpreters who can take turns. In depositions, most interpreters would prefer to have the same system, but that is not as common because of the expense. Deposition interpreters, therefore, need to be particularly calm and resilient.

Plainly, the process of translation and interpretation is an expensive undertaking in any litigation matter. While it is important to have a resource management plan, it is also important to temper the drive for efficiency with the need for rigor, given the importance of translation and the likelihood of material errors. Bilingual attorneys or other consultants can be used to cull documents initially to avoid the expensive exercise of certified translations of all documents. Informal translations can be used to identify key documents and issues, and then software can be used to search foreign language documents for additional key documents to be translated in full. The translators I interviewed also suggested that translation firms can help with this culling process. If the parties can agree on using the same interpreters, then all parties can save substantial funds. However, it is rare for parties to agree to this at the outset of the case. Only over time, during the course of depositions, for example, will counsel begin to recognize which interpreters are the most effective and agree to use the same interpreters regardless of who is taking the deposition.

One issue to think through when coming up with your translation plan is whether informal translations prepared by bilingual attorneys assisting in the case will be protected by the work prod-

uct doctrine. You also need to sort out whether the official translations that you have prepared and the documents that you selected for translation will be protected as work product (unless you chose to use the translated documents in a court filing or at deposition or trial). Most courts find that translations prepared at the direction of counsel, which would necessarily reflect counsel's selection of key documents, are protected opinion work product. However, there are a few cases going the other way.[25]

The Elements of a Good Translation Protocol

Given the current paucity of court rules regarding translation and interpretation, the complexity of the task, and its potential significance in an antitrust matter, counsel are well advised to negotiate a translation protocol with opposing counsel for endorsement by the court. In addition to protecting the parties, this will also minimize unnecessary expense. What follows is a discussion of the various topics to be addressed in a protocol, together with some proposed language based on protocols entered in other matters.[26]

■ **What will be the language of record for deposition?** In most federal court proceedings, English is the language of record in depositions and at trial. In this instance, there is one court reporter and one transcript. There will be an audio (and perhaps video) recording of the deponent's testimony in his native tongue but no separate transcript of the testimony in the native language. An alternative approach frequently used in International Centre for Settlement of Investment Disputes (ICSID) proceedings is to have two court reporters and two transcripts—one in English of the interpreted testimony, and one in the language of the deponent.[27] Errata sheets are then prepared of both transcripts.

Here is some proposed language for this aspect of the protocol:

> The language of record for all depositions shall be English. For depositions in which the native language of the deponent is a language other than English and the deponent so requests, all questions, objections, and colloquy will be translated into the deponent's native language, and the answers may be given in that native language and, in such case, will be translated into English.

■ **Who selects the interpreter for the deposition?** There are a number of approaches to the question of who will have the right to select an interpreter for a deposition. Frequently, the party noticing a deposition will select the interpreter, and that interpreter will be the interpreter of record for the deposition. However, in some cases, counsel have negotiated the right for the witness to designate an interpreter, and, in still other instances, when parties have been unable to reach agreement, the courts have designated a list of interpreters from which either side may select for depositions. If parties negotiate a provision that gives the party to be deposed the right to designate the interpreter, counsel should be sure to clear with the other side any limitations on who can serve in that role. In one antitrust case, the plaintiff's counsel learned that defense counsel had been working with the interpreter of record during witness prep sessions. Plaintiff's counsel objected, and the special master who resolved the dispute ruled that no interpreter who had met privately with one side or the other should serve as an interpreter of record.[28]

Closely tied to the question of who selects an interpreter for a deposition is the question of who pays for the interpreter. This is typically the responsibility of the party taking the deposition. But in those instances in which the witness requesting an interpreter has the right to designate the interpreter, the witness would most likely be responsible for paying for interpretation.

Here is some sample language on this subject from a protocol used in another matter:

> For all depositions at which either party or the deponent indicates that the deponent will testify in a language other than English, which indication shall be made no later than 30 days prior to the deposition, the party noticing the deposition shall provide an interpreter to be present at the deposition. The noticing party's interpreter shall be the interpreter of record for the deposition.

And here is an alternative approach:

> Any party or witness intending to use an interpreter shall give notice that an interpreter will be required within 10 days of receiving notice of the deposition. The party requesting an interpreter shall bear the expense of providing an interpreter.

■ **Will there be check interpreters at the deposition?** Given how challenging interpretation and translation can be, it makes good sense to utilize check interpreters and translators. Because the use of check interpreters can lengthen a deposition significantly, and because disputes regarding interpretation and translation lengthen litigation in both discovery and at trial, judges may get frustrated with the disputes and concomitant delay. It is therefore critical to address the right to use check interpreters and translators in the protocol, while also committing to do one's best to resolve disputes regarding interpretation and translation to avoid undue delay.

Here is some language addressing this topic for use in a protocol:

> The parties and the deponent shall each be permitted to have their own interpreters ("the assisting interpreters") present at any deposition taken in the action. The parties and the deponent ("or deponent's counsel") may object on the record to the translation offered by the interpreter of record and, when stating an objection, may offer for inclusion in the record an alternative translation that the assisting interpreter believes to be accurate. Parties and deponents shall endeavor to limit translation-related objections to circumstances in which they believe the interpreter of record has made an error in translation that changes the substance of the testimony in a meaningful way, and shall in good faith refrain from making frivolous objections.
>
> In the event an objection is made to the translation of the interpreter of record (by either party, the deponent, or any assisting interpreter), the deponent's assisting interpreter shall have an opportunity to provide, on the record, an alternative translation of the objectionable question

before the deponent is required to answer. The deponent's assisting interpreter shall also have an opportunity to provide an English translation of the deponent's answer. Additionally, non-English speaking deponents shall be entitled to consult with their assisting interpreter on the record when they believe such consultation will assist them in providing fair and accurate testimony or in understanding any objections or colloquy. The same procedure shall apply to any objections made during cross-examination, redirect and re-cross-examination of the deponent.

Here is some alternative language addressing the same topic in far less detail:

> If a "check" interpreter objects to any portion of the official interpretation, the objection shall be stated simply for the record. The interpreter of record need not respond. All questions, answers, objections, and colloquy between counsel shall be interpreted for the witness; however, all counsel shall refrain from unnecessary colloquy and lengthy speaking objections so as not to obstruct the depositions.

■ **What will be the process for objecting to translations?** Because disputes regarding translations are inevitable, it makes sense to provide a process for raising objections to translations or interpretations in the protocol. However, there are a number of strategic issues and competing concerns to weigh in crafting this part of the protocol.

In any protocol, there needs to be a notice period within which time a party who wishes to object to a translation must submit objections together with an alternative translation. However, there are different approaches as to when notice is provided. Some protocols provide that any document to be used at a deposition should be translated in advance of the deposition so that disputes regarding the translation can be resolved before the deposition takes place. Other protocols do not require advance notice because of the work product concerns with revealing well in advance the translated documents likely to be used in the deposition. In that instance, translations are presented at the deposition, and objections to the translation, if any, are made after the deposition. While this protects the surprise value of any translated documents used at the deposition, the possibility of material disputes regarding the translation may very well not get resolved until after the deposition, creating some challenging issues with whatever testimony was obtained at the deposition.

One lawyer I interviewed said that when deposing a witness about non-English documents either created by the witness or in his native language, she conducted depositions using informal translations, but did not provide these translations to the witness or opposing counsel. She simply questioned the witness using the original document, and effectively asked the witness to translate the document at the deposition. Yet, if I were the defending lawyer in those circumstance, I would not want to be in the position of having to translate a document for the first time during the deposition while my client was also being questioned about the document. I would insist on at least receiving an official translation of any document used at the deposition, and I would probably insist on some advance notice.

Here is an example of one approach to this issue.

> At any deposition of a non-native English-speaking witness, no document shall be marked for use at such deposition unless the document is accompanied by a certified translation of the document into the witness' native language (to the extent it is not in the witness' native language), and/or into English (to the extent the document is not in English). The preceding sentence will not apply to any document in English that the witness authored, which shall include but not be limited to (i) documents that on their face identify the witness as an author or signatory; (ii) documents that constitute or memorialize communications in English in which the witness was a participant; (iii) documents that a witness had primary responsibility for drafting, as indicated in [answers to interrogatories]; and (iv) documents that the witness edited, either by handwritten notation, redline, or otherwise; nor shall the preceding sentence apply to the extent that a witness has indicated, within seven calendar days of being served with a notice of deposition or equivalent instrument, that the witness is sufficiently fluent in English to be questioned on documents in English without accompanying document translations into the witness' native language. At any deposition of an English-speaking witness, no document not written in English shall be marked for use at such deposition unless the document is accompanied by a certified translation of the document into English.
>
> Except as set forth in paragraph ___ above, if the party noticing a deposition wishes to mark as exhibits or show to the deponent any document that is written in a language other than English, or any document that is written in a language other than the witness' native language (hereinafter "Translatable Document"), that party must serve notice to opposing counsel of all such documents, identified by production number, not later than 60 calendar days prior to the commencement of any deposition at which any Translatable Document is to be used. Such notice shall include: (i) in regard to any Translatable Documents that are written in a language other than English, a certified translation of those documents into English; and (ii) in regard to any Translatable Documents that are written in English, a certified translation of those documents into the deponent's native language. No Translatable Document may be marked as an exhibit or shown to a witness at a deposition unless notice and translations are provided in accordance with this paragraph. However, the party intending to use the Translatable Document need not identify the specific deposition at which it intends to use the document. Although it is the intent of the parties to exchange pursuant to this deposition protocol, all Translatable Documents that they intend to use at depositions to the extent possible, this paragraph shall not preclude either party from showing to a deponent or marking as an exhibit at a deposition a document intended to be used solely for the purpose of impeaching the testimony of the deponent, provided, how-

ever, that such a document must be accompanied by a certified translation at the time it is marked, and that the right of the other party to object to the proper translation is preserved.

The provisions of paragraph ___ of this deposition protocol shall also apply to any Translatable Document that the non-noticing party wishes to mark as an exhibit or show to the deponent at a deposition, provided, however, that the non-noticing party shall be required to serve the notice required no later than 40 calendar days prior to the commencement of the deposition in question.

■ **How will translation objections be resolved?** Most protocols state that the parties will endeavor in good faith to resolve translation disputes, and the lawyers I interviewed agreed that it is generally in everyone's interest to reduce the number of disputes regarding translation before depositions and certainly before trial. The following is an excerpt from one translation protocol addressing how disputes over translation are handled during the discovery process:

To the extent a party objects to a certified translation provided by the other party, all objections shall be stated no later than 25 calendar days after receipt of the certified translation (the "objection period"), at which time the objecting party shall also provide an alternate certified translation of each Translatable Document to which it has an objection. The parties shall then confer in good faith to resolve any disputes over translation. To the extent a party does not object, that translation will be the translation of record for all depositions or other uses in the litigation, provided, however, that nothing in this deposition protocol shall waive any party's right to raise additional objections to a translation after that translation has become the translation of record.

With respect to any Translatable Documents about which the parties are unable to resolve their dispute over translation within five calendar days of the objection, the parties shall proceed with a deposition, noting the disagreement, and the translation offered by the party noticing the deposition shall be the translation of record at any deposition at the document is used. The other party's alternate certified translation shall be attached to the disputed translation if the disputed translation is marked as an exhibit at the deposition, and that party will thereby preserve its right to challenge the disputed translation's use at that deposition and in any further proceeding in this litigation.

■ **How will disputes regarding translation be resolved if the parties cannot agree on a resolution?** While counsel should endeavor to reach agreement on disputes regarding translations, this will not always be possible, and sometimes the dispute will relate to key issues in the case, such as the dispute in the *Nippon* case described earlier. In that matter, the parties tried to work out disagreements regarding translations in long meet-and-confer sessions in advance of the trial. However, despite those negotiations, there remained a dispute about a number of key documents that went to the heart of the case. The court submitted the disputed translations to the jury and also allowed the parties to call expert witnesses to testify as to the translation issues. As the court explained:

> [T]here were warring translations of documents and testimony, and warring views of the inferences that could reasonably be drawn from certain acts and statements. *NPI* (*Nippon*) attempted to show that acts that may appear nefarious to Americans, had no such patina in Japan. Where the contested issues involve language, the translators were urged to resolve their differences; where they could not, the jury was given the evidence of both translations.[29]

The court further noted in her decision that it was *Nippon*'s responsibility to present evidence about the differences between American and Japanese culture that would have an impact on what inferences could be drawn from the evidence:

> It is commonplace to talk about how factfinders are asked to draw reasonable inferences from the evidence based on their "shared perceptions" and their common understanding of the "habits, practices, and inclinations of human beings." *United States v. Ortiz*, 966 F.2d 707, 712 (1st Cir. 1992). Here American "shared perceptions" and the common understandings of the significance of particular acts may well be at odds with the meaning given those acts in Japan. To the extent that this was so, it was incumbent upon NPI to present evidence to that effect to the jury.[30]

The court also acknowledged some of the difficulties of translation in her decision, recounting testimony from one of the government witnesses regarding Japanese:

> [This government witness] stated that in Japanese "Sentences often don't have a subject, but at the beginning of the text the subject is identified, and then in subsequent sentences . . . the subject would not be repeated." An interpreter would be obliged to infer who the subject is. Moreover, he noted the Japanese history is "longer than our history is so there's some shared values that the Japanese have and are understood through history, culture and language." Sometimes those values are implied, "written between the lines, and can be difficult to understand for a non-native."[31]

■ **Are there any limits on who can serve as an interpreter of record at a deposition or a trial?** Some protocols include qualifications for translators and interpreters. Others leave the subject completely to the parties. Most protocols also require that interpreters and translators sign any protective orders in effect in the case, certify each translation, and be sworn in as an interpreter at trial. Here is an example from one protocol that dealt with the qualifications of a translator:

All translations entered as an exhibit during deposition or offered in connection with a motion shall be certified by a professional translator accredited or certified by, or holding a certificate in translation from a program approved by, the American Translator's Association; another member organization of the Federation Internationale de Traducteurs; and those approved and authorized to translate in California courts including this District, by judicial conferences of California. By consent of the parties, the selected firms may also employ translators with comparable qualifications in order to meet a high volume of requests. These translation

companies shall be required to execute Exhibit A to the Stipulated Protective Order.

■ **What will be the necessary elements of a translated document?** Most protocols will contain a section addressing the necessary requirements of a translated document. Some courts have rules that establish the requirements of a translated document. Most protocols and rules require three parts: (i) the source language text (i.e., a copy of the document); (ii) the translation; (iii) a certification of the translation signed by the translator. Here is one example:

> For purposes of this deposition protocol, a certified translation will consist of three parts: the source language text (i.e., a copy of the document in its original language); the translation; and a statement signed by the translator or translation company representative attesting that the translator or translation company representative believes that the translation is an accurate and complete translation of the source language text. In addition, the protocol will often require that parties use consistent markings on translated documents so that it is clear that the translation is in fact a translation and that its markings bear some resemblance to the source language text document that is being translated.

Protocols might also spell out whether all parts of a document need to be translated. Here is an example of protocol language on this issue:

> A party submitting a document for translation shall have the following portions translated, unless there is good reason not to and the party gives notice to other parties: (i) for correspondence and memoranda, the entire document should be translated, unless the produced materials incorrectly batch multiple, separate documents into a single document, in which case only the pages appropriately belonging to the correspondence and memoranda need to be translated; (ii) for e-mails, the entire e-mail string should be translated, unless the produced materials incorrectly batch multiple, separate documents into a single document, in which case only the pages appropriately belonging to the e-mail string need to be translated; (iii) calendars, notebooks, annual reports, financial statements and regulatory filings need not be translated in their entirety; (iv) attachments to a particular document, memoranda or e-mail string need not be translated. If a party wants to enter an attachment into the record in conjunction with an e-mail string or parent document, the attachment shall be translated in its entirety and labeled with a subsequent exhibit number pursuant to this protocol. Any party may request the translation of additional parts of a document, or all or part of an attachment, at its own expense. Document translation shall bear the same confidential or highly confidential designation as the original. Each page shall be Bates numbered and marked "translation." Because languages occupy different amounts of space to say the same thing, it is impracticable for the translation to be paginated in the exact same way as the original. The parties should insure that the Bates numbers are located in the same location within the text as would be found in the underlying document. Unless otherwise agreed, document translations shall use the same Bates number as the original followed by a .01, .02, etc. for any additional pages required for the translated text. A translation may not contain independent notes that are not within the text of the original document (e.g., notes from the translator or counsel). Emphasis in the translation (e.g., bold, italics, underline) must appear in the same form as in the original document. However, translator notations such as "original text as in English," "original text as handwritten," or "untranslatable symbol" may be included in brackets.

■ **What role, if any, does a witness's testimony about what a document means have in a case when the witness disagrees with a certified translation?** The protocol should also anticipate and address the subject of the role the preparer of a document has in opining on the correctness of a translation. In one case, two different translators had interpreted a document. While these translations were not the same, none of the defendants had objected to either one. Later, the individual who prepared the document subject to these translations was deposed, and he disputed both of the translations. The matter was brought to the special master, who held that the defendants had waived the right to object to the translation by not objecting within the time period established in the protocol and that the official translation would be the translation of record. It is critical to review translations with the witnesses before the translations are submitted or if it is a translation prepared by opposing party, before the objection period has run. It may make sense to address this topic in the protocol as well, perhaps preserving the right of witnesses to dispute translations of documents they prepared or received.

■ **What impact, if any, will there be on discovery time limits?** A protocol should also address the impact of the need for interpretation or translation on any time limits contained in the discovery rules. Most protocols will provide that any deposition of a witness requiring interpretation throughout may be double in length the typical seven-hour duration. Here is an example of how one protocol dealt with this subject:

> To the extent a witness requests an interpreter, the parties anticipate that the interpreter will be used either for all of the deposition or only for a small number of questions. To the extent the interpreter is used for all or nearly all of the deposition, the time limit set forth above shall be doubled. In all other situations, the parties will cooperate in good faith to extend the deposition time to account for the use of the interpreter, guided by the principle the deposition time during which an interpreter is used should be counted at 50% or one-half the actual amounts against the above-set limits.

■ **What special rules at trial should a protocol address when interpretation and translation will be used extensively?** The lawyers I interviewed all counseled that it is important to eliminate disputes regarding interpretation and translation

if possible in order not to frustrate the jury or the court with the extra time and confusion associated with warring translations. Some translation protocols will provide that all disputes regarding translation shall be resolved in advance of trial by a special master or some other neutral designee. However, given the importance of translated documents in cartel cases, and the challenges posed by translation, in most instances I think counsel would not be well advised to agree to such a dispute resolution provision and should instead insist that translation disputes be submitted to the jury, if necessary, with explanatory testimony from expert translators on the interpretation and translation disputes. Educating the court about the complexity of translation and the real possibility of disputes among interpreters and translators will be imperative given most court's reluctance to agree to any procedure that would add significant time to a trial.

In addition to translation disputes, there are other issues to be addressed at trial. The court should insist that interpreters take an oath and receive some instruction from the court on the responsibilities of an interpreter. The court and counsel should also address any limits on an interpreter's behavior before the jury, including whether the interpreter may take on a different tone of voice from the witness, such as appearing very animated when the witness is very flat or vice versa.

Counsel will also have to determine whether witnesses will testify in English at trial even though they testified with an interpreter at deposition. Most counsel agreed that it was important to have at least a few defense witnesses testify in English. With any witness who needs an interpreter, cross-examination will be difficult and will of course not be fast-paced. The lawyers that I interviewed counseled that the examining lawyer needs to ask questions to get an answer that when translated or interpreted will advance your case. This will require much more planning than the typical cross-examination.

Another interesting issue that will need to be resolved is whether any bilingual jurors may serve on the jury. Typically the court instructs the jury that the certified translations are the translations of record and that the jury should ignore its own language abilities and not try to interpret or translate documents independently. Some courts have eliminated bilingual jurors from the jury to avoid this interesting dilemma.

Conclusion

The need for a translation protocol and for significant attention and care regarding translation should be apparent to any experienced antitrust litigator. Thus, negotiating the details of a protocol with other counsel in the case should not be difficult. However, counsel should anticipate some resistance from the court unless it has had past experience with such matters. Translation and interpretation controls impose additional burdens on courts already struggling with limited resources. To be sure, the complexity of translation potentially threatens the fairness and integrity of our adversary system. However, courts that have not confronted these issues in the past may need some assistance in understanding these challenges in order to justify the additional court resources required.

As more courts confront these issues, a body of case law will develop to assist the advocate in arguing for the need for a translation protocol. In the meantime, it may make sense for counsel to retain translators as experts to testify regarding the complexities of translation. These experts can also testify regarding disputed translations. Lawyers should also bring to the court's attention the best practices followed by those few courts who have dealt with these issues and the troubling consequences when sufficient attention is not given to translation. ■

If you have had experiences dealing with translation and interpretation, please send them to me at lwood@foleyhoag.com.

[1] Annette Wong, *Note: A Matter of Competence: Lawyers, Courts, and Failing to Translate Linguistic and Cultural Differences*, 21 S. Cal. Rev. L. & Soc. Just. 431, 441 (2012) (citing U.S. Census Bureau, Language Use in the United States 2007 at 3 (Apr. 2010) ("Linguistic minorities comprise a rapidly growing segment of the national population. According to a 2010 U.S. Census Bureau Report analyzing information from the 2007 American Community Survey, of the 281 million people aged 5 and up, 55.4 million or 20% spoke a language other than English at home. This figure represents a 140% increase from 23 million in 1980.")). Casen B. Ross, *Comment: Clogged Conduits: A Defendant's Right to Confront His Translated Statements*, 81 U. Chi. L. Rev. 1931, 1934 (2014) (citing Public Accessibility and Service, *Director's Annual Report* (Administrative Office of the U.S. Courts 2013), http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2013/the-courts/public-accessibility-and-service.aspx), and Mark Motivans, Federal Justice Statistics 2010—Statistical Tables 20 (DOJ Dec. 2013), http://www.bjs.gov/content/pub/pdf/fjs10st.pdf) ("In fiscal year 2013, District Courts reported that they used interpreters more than 330,000 times to translate 117 languages.")).

[2] Lee F. Berger, *Translation Protocols in Cross-Border Antitrust Litigation*, Law360 (Aug. 22, 2013). To be sure, there are a few federal district courts that have rules to address these subjects because they have been dealing with these issues for a long time—e.g., the Federal District Court for the Southern District of Florida, in Miami. There are also other fora which have rules, such as the ITC and ICSID.

[3] George Steiner, After Babel, Aspects of Language and Translation (1975); Ludwig Wittgenstein, Philosophical Investigations (Blackwell, 1953).

[4] ABA Standing Committee on Legal Aid and Indigent Defendants, ABA Standards for Language Access in Courts (Feb. 2012) [hereinafter ABA Standards], *available at* http://www.americanbar.org/groups/legal_aid_indigent_defendanta/initiatives/language_access.html.

[5] 62 F. Supp. 2d 173,182–85, 196 (D. Mass. 1999).

[6] Order at 7–9, Murphy v. Lazarev, No. 3:10-cv-0530, ECF No. 69 (M.D. Tenn. Dec. 12, 2012).

[7] *See, e.g.*, Daniel J. Procaccini, *What We Have Here Is a Failure to Communicate: An Approach for Evaluating Credibility in America's Multilingual Courtrooms*, 31 B.C. Third World L.J. 163, 175–76 (2011) (recounting translation errors that impacted outcome in criminal trials).

[8] ABA Standards, *supra* note 4, at 1–2.

[9] Ross, *supra* note 1, at 1966.

[10] *Id.* (citing J.C. Catford, A Linguistic Theory of Translation: An Essay in Applied Linguistics 20–21 (1965)).

[11] *Id.* (footnotes omitted) (citing Catford, *supra* note 10; Albrecht Neubert, *Competence in Translation: A Complex Skill, How to Study and How to Teach It*, *in* 2 Translation Studies: An Interdiscipline 411, 413–14 (Mary Snell Hornby et al. eds., 1994)).

[12] Wong, *supra* note 1, at 435.

[13] *Id.* (citing Muneen I. Ahmad, *Interpreting Communities Across Language Differences*, 54 UCLA L. Rev. 999, 1031 (2007)).

[14] *Id.*

[15] *Id.*

[16] *Id.* (citing Cal. R. Ct. 2 890(b); Joshua Karton, *Lost in Translation, International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 Vand. J. Transnat'l L. 1, 3 (2008))).

[17] *Id.* (citing Ahmad, *supra* note 13; Cal. R. Ct. 2890(b); Karton, *supra* note 16; Elda Yazmin Ellis, *Simplifying the Updated Ethics Code Required for California Court Interpreters*, Daily J. 1,1 (2010), http://www.exelegallanguage solutions.com/The_Daily_Journal.pdf).

[18] Ross, *supra* note 1, at 1967.

[19] *Id.* (citing Vermeer, *Translation Today*, *in* 2 Translation Studies, *supra* note 11).

[20] *Id.* at 1969 (citing Daird Bellos, *Is That a Fish in Your Ear? Translation and the Meaning of Everything* 77 (2011)).

[21] *Id.* at 1971.

[22] *Id.* at 1972 (citing Catford, *supra* note 9, at 2).

[23] *E.g.*, Edith Grossman, Why Translation Matters (2010); Theories of Translation, An Anthology of Essays from Dryden to Derrida (Rainer Schulte & John Biguenet eds., 1992); Arthur Schopenhauer, *On Language and Words* (Peter Mollenhaur trans.), *in* Theories of Translation, *supra*, at 33:

> Not every word in one language has an exact equivalent in another. Thus, not all concepts that are expressed through the words of one language are exactly the same as the ones that are expressed through the words of another . . . . Sometimes a language lacks the word for a certain concept even though it exists in most, perhaps all, other languages: a rather scandalous example is the absence of a word in French for "to stand." On the other hand, for certain concepts a word exists only in one language and is then adopted by other languages. . . . At times, a foreign language introduces a conceptual nuance for which there is no word in our own language. Then anyone who is concerned about the exact presentation of his or her thoughts will use the foreign word and ignore the barking of pedantic purists. In all cases where a certain word cannot render exactly the same concept in another language, the dictionary will offer several synonyms. They all hit the meaning of the concept, yet not in a concentric manner. They indicate the directions of meaning that delineate the boundaries within which the concept moves. . . . this causes unavoidable imperfection in all translations. Rarely can a characteristic, terse, and significant sentence be transplanted from one language to another so that it will produce exactly the same effect in the new language.

[24] *Compare* United States v. Charles, 722 F.3d 1319, 1327 & n.9 (11th Cir. 2013) (rejecting the language conduit theory) *with* United States v. Hieng, 679 F.3d 1131, 1139–41 (9th Cir. 2012) (holding that conduit theory remained viable, and cross-examination not required).

[25] *Compare* Order, *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M07-1827SI, MDL No. 1827 (N.D. Cal. Jan. 21, 2010) (citing Sporck v. Peil, 759 F.2d. 312, 315–16 (3d Cir. 1985) (holding information is protected); *In re* Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil, Fleischman v. McDonalds, 244 F.R.D. 434, 440 (N.D. Ill. 2007) (holding information is protected)) *with In re* Air Crash Disaster Near Warsaw Poland, No. MDL 787, 1996 WL 684434 (E.D.N.Y. Nov. 19, 1996).

[26] *See* Case Management Order, *In re* Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917 (N.D. Cal. Apr. 3, 2012); Translation Protocol, Highfields Capital LTD et al. v. SCOR, SE, No. 06-3464-BLS 1 (Mass. Super. Ct., Suffolk Cnty. Sept. 10, 2008).

[27] The ICSID Rules do not address this issue, but many of the lawyers I interviewed reported that this is a commonly accepted practice in ICSID proceedings.

[28] *In re* Cathode Ray Tube (CRT) Antitrust Litig., Case No. 07-5944 SC, MDL No. 1917 (N.D. Cal. Mar. 12, 2013) (Report and Recommendation of Special Master Charles A. Legge (Ret.), ECF No. 1592.

[29] United States v. Nippon Paper Indus., 62 F. Supp. 2d 173, 182–83 (D. Mass. 1999).

[30] *Id.* at 182 n.15.

[31] *Id.* at 183 n.16.