BARNES & THORNBURG LLP

NEWSLETTERS

It's All Greek To Me: Effectively Managing Foreign Language Documents In Commercial Litigation

June 16, 2016 | Atlanta | Chicago | Columbus | Dallas | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

Note: This article appears in the June 2016 edition of Barnes & Thornburg LLP's Commercial Litigation Update e-newsletter.

To ensure that English-speaking judges and jurors comprehend the evidence, proceedings in United States federal courts are, unsurprisingly, conducted in English. The United States Court of Appeals for the First Circuit has instructed, "It is clear, to the point of perfect transparency, that federal court proceedings must be conducted in English.'" *United States v. Diaz*, 519 F.3d 56, 64 (1st Cir. 2008) (quoting *United States v. Rivera-Rosario*, 300 F.3d 1, 5, 7 n.4 (1st Cir. 2002)). The First Circuit has said that this requirement also includes an obligation upon litigants to translate all foreign language documents into English. Id. "The submission of foreign-language documents unaccompanied by English translations is error and in ordinary circumstances would bar those documents from consideration by the court." Id. (citing *United States v. Contreras Palacios*, 492 F.3d 39, 43 n. 7 (1st Cir. 2007)). This holds true even before the U.S. District Court in Puerto Rico, where most of the population speaks Spanish. *See* 48 U.S.C. § 864.

Despite the requirement that federal court proceedings occur in English, the international nature of modern commerce frequently results in foreign language emails and other documents that are relevant to commercial disputes. In such cases, it is important to develop a strategy and procedure early in the litigation for ensuring that any relevant and helpful foreign language documents are both: 1) identified and understood by your litigation team, and 2) admitted into evidence. Further, research has shown that individuals are less likely to believe the veracity of statements from a non-native speaker. See, e.g., Shiri Lev-Ari & Boaz Keysar, *Why Don't We Believe Non-Native Speakers? The Influence of Accent on Credibility*, 46 J. Experimental Soc. Psychol. 1093 (2010). As such, careful consideration also needs to be given as to the jury's possible perception of foreign language documents, even if accompanied by a certified English translation.

Managing Foreign Language Documents in Discovery

First, at the initial discovery stage of any commercial litigation it is important to consider, perhaps through consultation with your client, whether there is a potential for foreign language documents to be relevant to the dispute. If so, requests for production of documents should specifically call for responsive documents in both English and any other language. It may be wise to identify key words in the relevant foreign language that will be relevant to the dispute, especially in formulating a list of search terms to exchange with opposing parties to be run across electronic document databases.

RELATED PEOPLE

Alexander P. Orlowski
Partner
Indianapolis

P 317-231-7310
F 317-231-7433
aorlowski@btlaw.com

RELATED PRACTICE AREAS

Commercial Litigation

Once foreign- anguage documents are identified, it is essential to have them translated as soon as possible. Putting off the translation process can lead to inadvertently overlooking key evidence during the document collection and deposition phase of discovery. If you have a client representative who is fluent in the language at issue, having your client provide an informal translation is often an efficient first step. This process can better inform you whether a more formal translation process is warranted. From there, it is wise to engage a professional translator. There are numerous translation companies that specialize in translating litigation-related documents as part of their business. In addition to the translation itself, be sure to also obtain a declaration or affidavit attesting to the translator's qualifications and certifying that the English translation is true and accurate. This is imperative, as Federal Rule of Evidence 901 requires that the proponent of any item of evidence also "produce evidence sufficient to support a finding that the item is what the proponent claims it is."

Once you have certified translations of the relevant foreign language documents, we recommend introducing both the original and translated documents as exhibits at depositions. Through deposition testimony of a witness who speaks the language, you can begin to further lay the foundation for the admissibility of the documents by having a deponent independently certify that the translation appears correct to the witness.

Getting Foreign Language Documents into Evidence at Trial

When preparing your trial exhibit list, we recommend listing the foreign language emails on your exhibit list along with the English translation and the certifying affidavit. For example, if a foreign language email is listed as Trial Exhibit 8, the English translation might be Trial Exhibit 8a, and the certification affidavit as Trial Exhibit 8b. By listing the documents on your exhibit list in this manner, it can often force your opposing counsel to lodge any objections to the translations prior to trial, thereby heading off any dispute over the issue from unfolding in front of the jury.

When preparing for trial, it is wise to again carefully review with your witnesses any foreign language documents and translations that you plan to use in their direct examinations. This helps prevent the unpleasant surprise of your witness saying for the first time on the witness stand that he or she does not fully agree with the translation. Further, to meet the business records exception to the hearsay rule, it may be necessary to go through a series of foundational questions with your witness. These questions could establish that he or she speaks the language at issue and that it is a common practice for him or her to keep regularly recorded business records in that language, including business email communications.

When offering the foreign language document into evidence it is, of course, also critical to offer not only the original document, but also the English translation and the accompanying affidavit certifying the authenticity of the translation. By doing this, you not only insulate against risk of reversal on appeal for failure to offer evidence in English, but you also ensure that the English translation can be used throughout the proceeding and will be available to the jury during deliberations. Further admitting the certifying affidavit into evidence may give jurors additional comfort that the document in fact says what the English translation

purports.

Where foreign language documents are likely to be critical evidence, it can be helpful to alert the jury during opening statement to expect this. Often, this is as simple as pointing out in *voir dire* or opening statements that your client or certain employees of your client have a foreign language as their native tongue, that they use that language in business communications and documents, and that the jurors will get to see certified translations of those foreign language documents. This may allay any concerns the jurors have from the outset about being the fact-finder in a case involving documents they may not be able to read.

Finally, you may want to consider submitting a proposed jury instruction to instruct the jury that certified translations of foreign language documents are to be considered accurate and should not be discounted merely because the original communication was in a foreign language. Beyond that, the weight to be given to such documents is up to the jury, just as it is with any other exhibits admitted into evidence.

Conclusion

The globalized nature of modern commerce can pose difficulties when litigating international disputes in United States federal courts. Having foreign language documents admitted into evidence, however, is a relatively straight-forward process when approached in an organized fashion with a bit of forethought. The key is to work early in the litigation to identify those documents that are central to the dispute, obtain certified English translations, and consider the most effective ways to utilize both the documents and their translations with the jury.

Authors

Dennis P. Stolle and Alexander P. Orlowski, members of the firm's Commercial Litigation Practice Group, practice in the Firm's Indianapolis office. Dennis is both a lawyer and a social psychologist. He concentrates his practice on trial consulting, jury research, and litigation. Dennis is also the President and a founder of ThemeVision LLC, which is a jury research and litigation consulting firm affiliated with Barnes & Thornburg LLP. Alex concentrates his practice on litigating complex business and commercial disputes involving a broad range of substantive areas. He is also a member of the firm's Motorsports and Logistics and Transportation Practice Groups.

If you have questions about this article, Dennis can be reached by telephone at (317) 231-7742 or by email at dennis.stolle@btlaw.com. Alex may be reached by telephone at (317) 231-7310 or by email at aorlowski@btlaw.com.

Visit us online at www.btlaw.com.

may have concerning your situation.