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# Young Lawyer Focus: Tips From The Trenches

## Taking a Deposition in a Foreign Country

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In today's global business climate, it is increasingly common for litigation pending in the United States to involve witnesses in foreign countries. Depositions outside the US require significant advance planning, meticulous compliance with applicable immigration and treaty requirements, and an in-depth understanding of local customs and practices. In most cases, for the reasons discussed in this article, counsel should make every effort to arrange for the witness to come to the US for deposition. In cases where that approach is not possible or practical, below are some important points to keep in mind when preparing to conduct depositions in a foreign country.

The first thing to do when faced with the prospect of a deposition in a foreign country is to thoroughly research the international law that will govern the scheduling and taking of the deposition. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention") provides specific and detailed deposition procedures for signatory countries. Countries that are not signatories to the Hague Convention often have bilateral treaties with the United States describing

the conditions and procedures for the taking of depositions. If the procedures are unclear or you need additional information, consider contacting the country's embassy or consular office in the US for additional guidance. The US State Department's website and the website of the host country also can provide valuable information.

You also must recognize that unless you have a "willing" foreign witness, it will be virtually impossible to go forward with your foreign deposition. Many countries view the US pre-trial discovery process with skepticism and distrust, and are loath to require their citizens to testify under oath for the benefit of US litigators. If you think that your case may require depositions of foreign witnesses, be sure to raise the issue early in the case and seek a stipulation from opposing counsel that specific overseas witnesses will appear voluntarily. Even with a stipulation from opposing counsel and a US court order, however, an unwilling foreign witness will derail your deposition plans, and the complexities of international relations effectively neuter the power of the US courts to intervene. Therefore, make sure that opposing counsel has secured

the attendance and cooperation of all witnesses to be deposed.

Prior to traveling to a foreign country to take a deposition, immigration rules often require that you procure a temporary work/business visa, and in some cases even a special “deposition visa.” This is true even for many countries that typically do not require US travelers to obtain a visa for normal business or leisure visits. Failure to follow the requirements of the host country may not only lead to you being turned away at the border by immigration officials, but it might also land you in a local jail if you falsely report the reason for your visit. Further, in some countries, such as Japan, a US consular office may insist that you – and anyone else attending the deposition with you – show your passport and a valid deposition visa prior to commencement of the deposition. If you don’t have the right credentials, you will be in serious trouble (and, of course, your deposition will not proceed).

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Specialized visas, such as Japan’s deposition visa, can be extraordinarily difficult and time-consuming to obtain. Before submitting your application, you likely will have to obtain a US court order specifying the witnesses to be deposed and all personnel (including court reporters, videographers and interpreters, if needed) who will be attending. Applications normally must be submitted to the US-based embassy or consulate, which then forwards the paperwork on to foreign officials for review and approval. The approval process easily can consume months of time (and much longer if the reviewing country is not

particularly friendly with the US), so plan ahead and keep in regular contact with consular officials about the status of your application. If you expect to make multiple visits to the same country for depositions, be sure to tell the consular officials because you may be able to secure a visa valid for multiple entries. Otherwise, your passport may spend more time back and forth between countries than you will.

You also will need to find a suitable and permissible location to conduct the deposition, which can be a major consideration in some countries. The bilateral treaty governing the taking of depositions for US litigation in Japan, for example, effectively restricts the taking of depositions in Japan to the US embassy in Tokyo or US consulate in Osaka. The embassy has only one room for such depositions, while the consulate has two. With global litigation on the rise, these rooms often are booked many months in advance. Because these are the only three legally permissible rooms in which to conduct US depositions in Japan, a booked schedule will delay your discovery efforts for months or years. You also should consider the myriad additional practical restrictions imposed by conducting depositions in official US buildings overseas, such as limited hours of operation, numerous holiday closures, heightened security procedures for entry and exit, and cramped working space. Even in countries where depositions may be taken in offices or hotels, such as Korea and the UK, advance planning is critical to make sure that everyone attending the deposition knows where to go and that all necessary equipment, documents and supplies arrive on time.

Taking depositions overseas often also means using the service of interpreters. It is important to research individual interpreters carefully and to obtain references from other US attorneys to evaluate the interpreter’s skill, expertise and familiarity with the deposition process — all of which can vary greatly. Of course, the official interpreter should be “neutral” to the parties, but legitimate translation disputes can and do arise during translated depositions.

Because the English transcription is the official record of the deposition, it is a good idea to hire and bring along a “check interpreter” to make sure the record is accurate.

With multiple check interpreters for different parties, the record quickly can become muddled and the deposition process bogged down with disputed translations. To minimize wasted time during the deposition, establish a protocol before the deposition regarding disputed translations and try to keep extended disputes among interpreters to a minimum.

Perhaps the biggest pitfall in the planning of foreign translated depositions is the failure to allocate sufficient time to complete the deposition. A good rule of thumb is that a translated deposition will yield about 80-100 transcript pages per day, or about  $\frac{1}{3}$  to  $\frac{1}{2}$  of a standard deposition. The actual substantive yield can be much less, however, because everything at an interpreted deposition must be translated, including questions, answers, objections, check translator comments and disputes among counsel. Further, due to intricacies of translation and interpretation, it is not unusual for a witness to repeatedly ask for questions to be re-read (or re-translated), nor for translators and

attorneys to get into disputes about the words or phrases used for the official record. Lastly, for all of the reasons discussed above, you may not be able to easily continue a foreign deposition to another day or extend the deposition beyond strictly-imposed business hours. Therefore, you should plan for (and ask for) at least three days for every “standard” day of testimony you think you will need with a foreign witness.

In summary, research, advanced planning and patience are the key elements to conducting a successful deposition in a foreign country. And don’t forget to set aside some extra time to take in the local sights before heading back to the States.

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