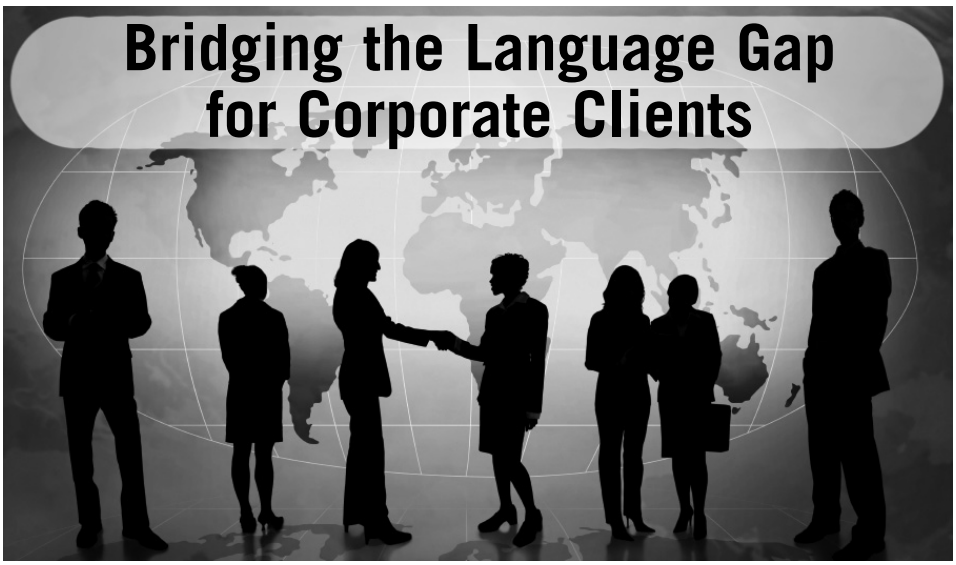
Bridging the Language Gap for Corporate Clients



By Lee Webb

Spanish is the only foreign language I speak. Why then do I tell people I speak three languages? Because I speak fluent English, Spanish and "Legalese."

As both lawyers and laypersons will agree, Legalese is a distinct language unto itself. It is in no way intuitive and it requires years of study and practice to perfect. To translate legal documents without being fluent in Legalese will most certainly invite trouble.

I once thought that the only way I might combine my love of Spanish and the practice of law would be to become an attorney for migrant workers or perhaps an immigration lawyer. As it turns out, however, the language barrier issue is not a problem exclusive to recent immigrants to this country. Indeed, language barriers can cause difficulties for corporate clients as well.

When such problems occur, it is crucial that a bilingual attorney, or a sophisticated translation company that regularly uses attorney consultants, is used to review foreign language documents or draft legal translations in a way that ensures the legal meaning is conveyed in the target language.

As the global economy expands and the world grows ever smaller, you can expect that your corporate clients will eventually encounter some situation where a language barrier complicates an already complex legal scenario. The same is true even if your clients' businesses do not reach beyond our borders.

The question then becomes, how can you most effectively serve your corporate clients when they find themselves dealing with non-English speakers in a legal context? The answer is "It depends." It depends on the context and on the complexity of the issue with which you are dealing.

What it should not depend on is cost, though this is very often the driving consideration for clients in a struggling economy where everyone is looking to minimize costs.

There is no question that it will cost more to have an attorney knowledgeable in the language, subject matter and legal terminology review the translation of legal documents than it will to have a layperson do it. However, given how much time, thought and effort attorneys put into perfecting the nuances of legal documents in English for other English speakers, it makes perfect sense to also have an attorney translate these nuances into the target language. Otherwise, all of the hard work your client has paid you for could literally be "lost in translation." Not only might the initial investment in your valuable legal knowledge be lost, but the mistaken or confusing translation could expose your client to liability.

There are, of course, several different ways to deal with foreign language documents. The least expensive and most basic tools are the online machine translators, such as Babbelfish.com or Google Translate, which are products created by a computer program that use no human judgment or review.

Because computer translators are easy to use, readily assessable and free, it is tempting to use these products. Indeed, there are situations in which machine translators can be an appropriate resource, though they should be used with caution.

Specifically, these automatic translation products are good for getting the gist of documents coming to you or your client. For example, if a supplier sends your client a short e-mail asking for more time to comply with the delivery terms of a contract, an appropriate first step for your client might be to cut and paste the e-mail into an online machine translator to get a general idea of its subject and of the complexity of the issues. Almost certainly, the translation will not be entirely accurate, but it can give your client an idea of the appropriate next steps to take.

A word of caution here however—any information input into online translators is discoverable and is not subject to attorney client privilege. Therefore, you should never use these programs if the information contains confidential or privileged material.[1]

Also, while machine translators are acceptable for simple, incoming documents, you should never rely on them for translating outgoing documents, unless you plan to have a knowledgeable, bilingual reviewer look at them before sending them.

There are websites devoted to comically erroneous machine translations that were never reviewed by a trained human eye, and neither you nor your client wants one of your letters or documents to end up there.

Another inexpensive translation resource that clients will often turn to is a bilingual employee, someone who is neither linguist nor lawyer. This is typi-

cally a very bad idea. Regardless of the language skill level of the employee, proper document translation takes training and time, and an in-house employee whose job is something other than full-time translator, probably lacks both.

Similarly, beware of "Mom 'n Pop" translation companies, where a native speaker of your target language simply hangs out a shingle declaring him or herself to be a translation company. Bilingualism, in and of itself, does not qualify a person to translate sophisticated legal documents. Nor does bilingualism and ownership of a foreign language legal dictionary qualify a person to translate legal documents, any more than owning a Black's Law Dictionary qualifies a non-lawyer to draft a contract.

Knowledge of the subject matter and an understanding of the legal context of the words being translated are as crucial as bilingual fluency. Therefore, when using the services of a translation company, check it out first. Get references and ensure yourself and your client that you will receive the kind of high quality translation that your own high quality legal work deserves.

Fortunately, most corporate clients likely can afford to invest in superior legal translation. However, convincing a client to invest in the kind of translating and/or interpreting that will survive scrutiny in a legal context is often difficult. Clients will all too frequently opt for less expensive alternatives only to find out in the long run that they should have invested more up front.

Sometimes clients decide not to address language issues at all, and instead leave it to their workers to overcome the language barrier on their own. Take, for example, a situation where the client's workforce is largely non-English speaking. Although the client may have wisely taken attorney advice to have an employee handbook drafted and distributed to all new employees, if the handbook is written only in English, then a large number of the employees will not understand it. The client might just as well not have bothered giving them a handbook at all.

While it is true that employees could ask friends, family members, or co-workers to translate the handbook for them, it is highly unlikely they will do so. Moreover, even if an industrious employee did seek out such informal translation assistance, there is no way to ensure that the translation will be accurate and appropriate.

Failure to have an employee handbook translated into the native language of a sizable language subgroup of employees is, therefore, tantamount to providing no handbook at all to those employees. This, in turn, exposes the employer to potential liability.[2]

Having a document translated, but using a cut-rate translation service, can result in even greater problems for your clients, because the legal issues conveyed can become twisted and even more confusing if translated poorly.

Indeed, much of what I do involves fixing poorly translated legal documents that were initially translated by a layperson who did not understand the legal ramifications of the words being used. The following are a few examples of translations gone awry.

- A notice to employees translated into Spanish used the words "plan of retreat" instead of "retirement plan." While, no doubt, many retiring employees may feel that they are running away from the work-a-day routine, I suspect it was not the intent of the ERISA lawyer who drafted the English version of the document to provide employees notice of the employer's exit strategies.
- An employee handbook section discussing employees' eligibility for vacation time and other fringe benefits translated the term "meeting the requirements" as "getting together with the requirements" or "gathering with the requirements," as opposed to the intended meaning of "fulfillment of" or "compliance with" requirements.
- A form for employees to sign upon their discharge read, as translated: "It is my intention, by signing this agreement, to completely and finally liberate Acme Company from all actions and omissions . . . ." What the drafter actually intended that language to convey was: "It is my intention, by signing this agreement, to completely and finally release Acme Company from all acts or omissions . . . ." The crucial word here, of course, is "release." When using the word "release" in English, the drafter of the document intended to convey the meaning "absolve" or "discharge from responsibility." However, a Spanish-English dic-

tionary provides several word choices in Spanish to be used to convey the meaning of "release." The translator must understand the way the term "release" is intended in the legal context, and must choose the appropriate option in order to give the legal document effect, thus bypassing inappropriate word choices in Spanish such as "liberate," "emit," "publish," "let go," and "un-jail." Doing so requires both knowledge of Spanish and the law.

- A document was entitled "Agreement of Separation and Freedom." A key provision of that document stated: "I agree that this Agreement, including, but not limited to, the company's liberation, was made wisely." The attorney who drafted the agreement for the company entitled it "Separation Agreement and Release," and the crucial provision should have read "I agree that this Agreement, including but not limited to the company's release, was made knowingly."
- Finally, one of my favorite mistranslations was a document entitled "The Draining of Power of Liabilities." The English version of this document, which was to be executed in conjunction with the separation agreement and release, should have been translated as "Discharge of Liabilities." However, the translator, unfamiliar with the nuanced legal meaning of the word "discharge" did not understand how to properly translate the phrase which resulted in the awkward and silly "draining of power" translation.

At times, a document will use a legal term of art, such as the phrase "opt out" in a notice of class action settlement, that has no literal equivalent in the target language. If the translator does not understand the meaning of the word or phrase, he or she may simply put the English words in quotation marks and leave it to the reader to figure out the meaning of the words. Other times the words are simply translated literally, i.e., "choose out," which of course conveys no real meaning to the reader.

In instances in which a legal term of art is used in the original language and the term cannot be translated exactly into the target language, the translator must have enough training and legal knowledge to be able to explain the meaning of the phrase or word in the target language rather than to translate it literally. Again, this is why clients should have a bilingual attorney translate legal documents, or at a minimum, review documents that have been translated by a lay person.

Document Review

On more than a few occasions during discovery, a colleague or I will run across a random document in a foreign language. On other occasions, an entire production is made in another language. When this happens, the most economical option is to contract with a bilingual attorney to review the documents.

Anyone who has ever plowed through a massive document dump knows that often the vast majority of documents produced in complex litigation will be entirely irrelevant. It does not make economic sense to pay someone to translate all the documents first, and then pay attorneys to review them. Instead, your client can keep costs down by having a bilingual lawyer search for the smoking gun, and have only the appropriate documents translated for the litigation team.

Interpreting

Of course, not all client translation needs arise in the written context. Often, what a client needs is an interpreter, someone who orally translates the spoken word. Working with interpreters can be tricky business for a variety of reasons.

In a typical scenario, there are certain "rules of engagement" of the well-trained interpreter that should always be used in formal legal scenarios, as opposed to casual conversations. For this reason, it is advisable that your client employ a highly trained inter-

preter who understands how to interpret in a formal context, whether in court, a deposition, or a business negotiation.

First, the interpreter must understand that it is his or her obligation to translate what the witness is saying in the voice of the witness. The translator should never say "he said," or "she said," but rather, should speak in the first person as if he or she were the one making the statement. In other words, if the witness says, "I saw the car run through the red light," the interpreter should say, "I saw the car run through the red light," not "He said he saw the car run through the red light."

This will result in a transcript of the proceeding that reads as if the non-English speaking deponent is actually speaking into the record and will prevent any confusion about who is saying what as the testimony is memorialized.

Even more importantly, once questioning begins, an interpreter must never engage in a conversation with the person for whom he or she is interpreting. *An interpreter's role is to be nothing more than a parrot of the words spoken by the witness and attorney.* He or she should never take the initiative to clarify a question or re-phrase a question or to make an answer more understandable to the attorney. This is actually much easier said than done, because it is human nature to want to facilitate understanding.

Interpreting requires very specific training and a good degree of self-control. Therefore, you should always use great caution when hiring an interpreter. Simply because a person is bilingual does not mean that he or she is trained or equipped to interpret in a legal context. If possible, it is always wise to have someone else present who understands both languages and can correct or control inappropriate straying from strict interpretation.

Ask for references when hiring an interpreter. Specifically, check with other attorneys for whom the interpreter has worked, and with any employers such as a court system or translation company, to be sure that the translator has experience and has adequately performed in the past.

Another word of caution. Although it might be more efficient for the client, the bilingual attorney should not act as interpreter in a deposition or hearing. As an advocate for the client, the attorney's interpretation would immediately become suspect because there would simply be no way for anyone to determine from the record whether the attorney might have skewed the interpretation to fit his or her client's objectives.

Clients would be wise however, to have a bilingual attorney sit in on depositions and other examinations of non-English speakers to observe the interpreter and the answers provided by a foreign language-speaking witness.

As all lawyers know, the devil is in the details, and often lay people (regardless of the language issue) simply do not appreciate how an entire case can turn on a word or a phrase. I once sat in on a deposition in an automobile collision case, in which the plaintiff-deponent was a non-English speaker from Guatemala suing the driver she had collided with, who was insured by my client.

The question posed by the attorney in my firm was, "If you had seen the light change, would you have tried to stop?" The interpreter translated that question as "Did you see the light change and try to stop?" The deponent responded "No." I immediately interrupted and explained in both English and Spanish for the benefit of attorneys and the interpreter and deponent, that the question was not a simple past-tense question, but rather was a hypothetical question using the subjunctive tense. Once the nuances of the question and the grammatical differences were explained, the deponent changed her answer to "Yes."

In the same deposition, the following exchange occurred between the attorney, the interpreter, and the deponent:

Attorney: [In English] "And did the airbags deploy?"

Interpreter: [In Spanish to the Deponent] "And did the bags of air explode?"

Deponent: [In Spanish] "The bags of air?"

Interpreter: [In Spanish] "Yes. You know, the safety device in cars that explodes into a sort of pillow when the car crashes?"

Deponent: [In Spanish] "Yes?"

Interpreter: [In Spanish] Did those blow up to protect you when the car crashed?"

Deponent: [In Spanish] "Oh. Yes. Yes they did."

Interpreter: [In English, to the attorney]
"Yes."

Attorney: [Looked to me with frustrated and confused look on his face.]

What the non-Spanish speaking attorneys in the room heard was as follows:

Attorney: [In English] "And did the airbags deploy?"

Interpreter: "Blah blah blah .... ?"

Deponent: "Blah blah blah?"

Interpreter: "Blah blah blah. Blah blah blah . . . . "

Deponent: "Si."

Interpreter: "Blah blah blah . . . .?"

Deponent: "Blah. Si. Si, blahblah."

Interpreter: [In English to attorney] "Yes."

Technically, the dialog between the interpreter and the witness was inappropriate, and the interpreter should have simply conveyed the deponent's initial confused question to the attorney. Ultimately, however, the exchange was harmless and I was able to give my colleague assurances that no inappropriate conversation or coaching had transpired under his nose.

The moral of this story is this — when your corporate client encounters a language barrier, encourage the client not to succumb to the temptation to use low cost, poor quality translators or interpreters to keep costs down. Doing so will only increase the risk of liability that can occur when legal meaning is lost in translation.

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ENDNOTES

1. *See* Google Terms of Service: Your Content In Our Services, March 1, 2012 ("When you upload or otherwise submit content to our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content.").
2. *See Quiles v. Fin. Exch. Co.,*879 A.2d 281, 288 (Pa. Super. Ct. 2005)(court invalidated arbitration agreement where employee with limited English proficiency signed form printed in English acknowledging receipt of Employee Handbook that contained provision compelling arbitration); *Benitez v. Am. Std. Circuits, Inc.,* 678 F. Supp. 2d 745, 759 (N.D. Ill. 2010)(although employee handbook contained a policy prohibiting harassment, court found it was not clear that company actually put policy into practice because its employees spoke myriad languages—Spanish and Hindu, among others—but company's employee handbook was printed only in English); *EEOC v. V & J Foods, Inc*., 507 F.3d 575, 578 (7th Cir. Wis. 2007)(Harassment complaint "mechanism must be reasonable and what is reasonable depends on 'the employment circumstances,' . . . and therefore, . . . on the capabilities of the class of employees in question. If they cannot speak English, explaining the complaint procedure to them only in English would not be reasonable.")(Internal citations omitted). *See also Munoz v. Oceanside Resorts, Inc.,* 223 F.3d 1340, 1344 (11th Cir. Fla. 2000)(when employee does not speak or read English, reprimands should be given in employee's native language).*Cf. Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 387(Tex. 2005)(Spanish speaking employee's signature on document verifying receipt of Spanish version of employee handbook containing leave-of-absence policy demonstrated employee had knowledge of the one-year limit permitted by policy).