

When Japanese Witnesses Testify in U.S. Courts: Answers to Nine Common Concerns

One of the most challenging encounters between a Japanese company and the U.S. legal system is when a Japanese witness must testify before a U.S. jury at trial. This update reflects observations on this subject that one of our senior trial lawyers, Mr. Francis Morrison, has taken away from a career involving over 70 trials, in several of which he has conducted examinations before U.S. juries of witnesses whose first language was Japanese, German, or Spanish. Mr. Morrison's comments address questions concerning:

- The challenges facing witnesses in U.S. court whose first language is not English
- The role of interpreters
- How to prepare witnesses for the experience of trial
- Extra steps that can be considered for the “big ticket” case

Concern 1: “An employee is going to testify as a witness for our company in an American court in front of American jurors. Will the jurors really base their impression of our company on the performance of this employee?”

Yes, they often do. As is evident from post-trial juror comments, a witness is the company in the eyes of the jury. Witnesses represent their companies before an American court and jury. Because a single witness can affect the court's or jury's impression of an entire company, no witness's importance should be underestimated.

Concern 2: “What characteristic is most important for a witness?”

Witness credibility can make or break a case. American jurors place great weight on witness credibility, and small mistakes create big issues with credibility. A well-prepared, believable witness can persuade a jury, while an underprepared or anxious witness can undermine a case. American juries have almost unlimited discretion to believe or disbelieve witness testimony. American courts tell juries that if they conclude that a witness has deliberately testified falsely on even a single fact, the jury is free to disregard the witness's entire testimony.¹

Concern 3: “Our witness has not lived in America and does not speak English very well. Will this adversely affect how jurors view the witness's credibility?”

With the right preparation, foreign witnesses will be credible in the eyes of an American jury. The United States has become far more multicultural, and jurors are increasingly accustomed to hearing non-native speakers of English. However, most witnesses, including native English-speakers, feel intimidated in an American courtroom. To those without strong English proficiency, time on the stand is especially daunting. Witnesses

¹ The harshness of permissible credibility judgments is summed up in the so-called “false in one, false in all” instruction that judges commonly give to juries, which states: “If you find that a witness has been mistaken in some of what he or she has testified to, you can bear that in mind in assessing the witness's credibility. If you find that a witness has intentionally misstated a fact, you may disregard all of his or her testimony—the law has an expression—false in one, false in all.” See Transcript of Trial at 1970-71, *DePuy Synthes Products, LLC v. Globus Med., Inc.*, No. 11-652-LPS (2013) (No. 354); see also N.J. Model Civil Jury Charges § 1.12M.

may worry that the interpreter will not use the precise words, right tone or body language to convey the intended meaning. Jurors can misapprehend any sign of anxiety as an indication of dishonesty or uncertainty rather than the natural stress of testifying. Proper preparation can help the non-native English speaker meet these challenges and convey credibility to the jury.

Rightly or not, American jurors view witness credibility through the lens of American norms and culture. Whether American jurors find a witness credible depends on whether the witness exhibits the characteristics and behavior that Americans expect from individuals they view as trustworthy from their own cultural point of view. For example, Americans perceive a witness who does not directly answer a question as evasive and therefore less trustworthy. In other cultures, an individual who answers in an overly “direct” way might be perceived as overconfident or arrogant and unlikable. Some cultures have standards of politeness that urge people to nod as another person asks them a question. Such courtesy can be misplaced in an American courtroom because jurors may see this action as agreeing that a question is fair, or that opposing counsel has a good point. Under the pressure of concerns about how the jury is viewing them, a foreign language-speaking witness may become precise and careful; a U.S. jury may view this as defensive, artificial and untrustworthy.

There are ways to address these challenges. The first step is to recognize that they are real and that Japanese witnesses will have to deal with them. The next step is to thoroughly prepare those witnesses, so that they will be able to approach testifying in a manner that will convey confidence and skill to the jury without looking forced or uncomfortable. Consideration must be given to the extent of a witness’s familiarity with the English language and American customs. Interpreters and witness coaches (described below in detail) can help Japanese witnesses adapt their approach to responding to questions to comport with American norms.

Concern 4: “Should we seriously consider providing an interpreter for our witness?”

With rare exceptions, Japanese witnesses should have an interpreter at trial and in preparation for trial. Use of the right interpreter is often critical to whether a witness’s testimony is credible and persuasive. An interpreter, particularly one who has worked with the witness in preparation, can help the witness understand important questions, phrase issues precisely where precision is essential, and persuade the jury of the witness’s credibility. On the other hand, there can be extremely serious consequences when a witness with limited English forgoes an interpreter and testifies under oath without fully understanding the subtleties of the questions and the impact of the answers. A witness may have sufficient proficiency in English to converse on everyday, routine business matters. Trial is a different matter. Witnesses must be alert to every nuance of a question and frame their answer in the most precise terms. For this exercise, an interpreter is generally essential, even for the executive who has a working knowledge of business English. Care must be taken that the witness’s personal and professional pride (“I don’t need an interpreter—I do business in America all the time without one”) does not interfere with the determination whether to use an interpreter. It is not a weakness for the witness to admit that he or she would benefit from an interpreter’s help. As an old adage says, pride goes before a fall.

A few words are in order about the role of interpreters in U.S. courts. It is generally the responsibility of the parties to provide interpreters in civil proceedings.² A federal court can provide qualified interpreters, with the parties paying the associated expenses. More commonly, parties retain and pay for interpreters for witnesses that they call to testify. Interpreters, whether hired by a court or a party, are “officers of the court,” and have legal and ethical duties to the court as well as to the party that employs them.³ Interpreters have an obligation to the court to tell the truth and avoid evasion. A judge can discharge an interpreter if the judge concludes that the interpreter has failed to meet the obligation of accurate translation.⁴ It is also typical for a party’s interpreters to serve as “check interpreters” on translations provided by the interpreter for the opposing side. A check interpreter can raise an objection if they disagree with a translation. The court decides disputes between interpreters, which, because very few U.S. judges understand Japanese, is largely based on which interpreter the judge finds more convincing and reliable over-all.

Concern 5: “How can the interpreter affect the jury’s view of the witness, our company and our case?”

At trial, juries tend to identify more with the interpreter than the witness.

Interpreters speak directly to the jury: they have a more immediate human communication with the jury than does the witness. Interpreters speak the same language as the jury; they spend a lot of time together with the jury. The jury has to rely on the interpreter for explaining something jurors would otherwise not understand—testimony in a foreign language. Because the only thing that jurors can understand about a witness’s testimony comes from the interpreter, the interpreter effectively becomes the witness. For that reason, everything that matters with an important witness also matters with an interpreter, including likability, clarity of speech, and the ability and motivation to understand and absorb complex facts regarding the company’s business. The jury will be judging the witness’s credibility in significant part based on the demeanor of the interpreter, who should look friendly, candid, and eager to help the jury understand the case. Without these skills, an interpreter may detract from, rather than enhance, the witness’s credibility before the jury.

That insight is illustrated by one of Mr. Morrison’s trials. Mr. Morrison represented a Japanese company that was a defendant in a patent case. The interpreter for his client had a bright smile and winning way, was comfortable with American vernacular, and was also clearly liked by the jury. Plaintiff’s interpreter spoke English with a heavy accent, appeared formal and uncomfortable, and did not seem “at home” with American jurors. When he rose as a check-interpreter to question a translation provided by the interpreter for Mr. Morrison’s client, the judge said in the presence of the jury, “I can’t understand you.” That statement suggested to the jury that the judge had doubts about the reliability of the plaintiff’s interpreter, while underscoring his “foreignness” and the contrasting appeal of Mr. Morrison’s interpreter.

² Guide to Judiciary Policy Vol. 5 § 260.

³ Guide to Judiciary Policy Vol. 5 § 350. Interpreters in the federal courts must be “certified interpreters,” “professionally qualified interpreters” or “language skilled/ad hoc interpreters.” The details of each category are beyond the scope of this article.

⁴ See, e.g., *People v. Starling*, 315 N.E.2d 163, 167-68 (1974) (holding that the trial court abused its discretion by failing to dismiss an interpreter who was not fully, completely and accurately translating the questions and answers of a key witness). A court can also require an interpreter to disclose to the court and the parties any prior involvement with the case or any party or witness in the case. Guide to Judiciary Policy Vol 5. § 340.20.

The lesson is simple: an interpreter is effectively a witness for the case. If the interpreter presents poorly before the jury and the court, they can damage the witness's credibility. If the interpreter speaks clearly and understandably and possesses a professional and pleasant demeanor, it will further the client's case in the eyes of the jury.

Concern 6: "What qualities should we look for in an interpreter?"

Interpreters should be vetted for both their translation skills and their appeal to a jury. The interpreter should be interviewed in the presence of the witness and others at the company who speak the witness's language. There should be a good rapport between witness and interpreter. They should be able to talk freely in their shared language, with a mutual understanding of nuance and meaning. The interpreter should be able to convey any technical or legal concepts relevant to the case in a clear and understandable manner, both in the witness's language and in English. The interpreter should also be considered for the same qualities one would look for in a witness: are they clear and engaging? Will they connect with a U.S. jury? Will a U.S. jury find them credible?

The usual procedures that come with vetting expert witnesses, such as confirming credentials and exploring past representations, should also be applied to interpreters. That includes reviewing the interpreter's past engagements to identify business or legal conflicts and any criticism of the interpreter's work. Opposing counsel will seek for such material and may raise it at a time when it is too late to replace the interpreter. U.S. courts will sometimes conduct voir dire examinations before an interpreter is permitted to act, and could exclude an interpreter based on questions about their qualifications.

Concern 7: "How do we best prepare our witness for a trial where an interpreter will be used?"

Interpreters should be vetted for both their translation skills and their appeal to a jury. The best method of preparation is almost always to use the same interpreter for trial preparation and at trial. The witness and interpreter thereby become accustomed to working together and learn the case together. Both interpreter and witness should have a clear understanding of the factual and legal themes in the case, understand the strengths and weaknesses of the case, recognize areas that are sensitive and where precise language is important, and be familiar with and understand each of the key documents.

Ideally, such preparation should take place in person. Trial counsel can then observe the working dynamic between the witness and interpreter and ensure that they are a good "fit" and that the interpreter is appropriately articulating the witness's answers. Counsel can work with the witness and interpreter on the pace of examination and the persuasiveness of the story being told.⁵

⁵ Witnesses who do not speak English will sometimes want to rely on a printed list of questions and answers as a shortcut. This must be resisted. Such a list is likely to be subject to production in discovery or at trial. It can make witnesses look insincere, and create the impression that they are just saying what they were taught to say. It also creates a false sense of security. In the courtroom, under pressure, witness memory of such material often fails. There is no substitute for proper preparation—ideally in person and with an interpreter present.

A party-retained interpreter, who has been involved in the preparation of the witness, can also play a crucial role in securing important trial testimony in the best form. Choice of precise words is often of crucial importance in U.S. legal proceedings. Certain words can make all the difference—for example, whether parties in an antitrust case “agreed” or merely listened. At the same time, the words and expressions used to express these concepts can be complex. An interpreter who has worked with a witness will understand nuance, and can ensure that the witness’s words are quoted precisely in a way that conforms with case strategy and U.S. legal principles. For example, the word “invention,” is critically important in patent testimony. In German, the word for invention is “Erfindung,” not “Idee” or “Ahnung,” which, means “idea”— a difference that may be trivial in many contexts, but could cause a court to dismiss a patentee’s claim. There are also situations where straightforward translations can ignore the idiomatic meaning that a native speaker would hear. The French words “sans doute” are literally translated “without doubt.” A fluent French speaker, however, would hear uncertainty in this phrase. The difference between “some doubt” and “no doubt” could have obvious relevance to a litigation that, for example, concerned alleged fraudulent statements.⁶

Issues about translation have surfaced in auto parts antitrust litigations involving many Japanese defendants, which have been going on for some years in the United States. In an antitrust case, it will be evident that there is enormous potential legal significance to whether competitors “coordinated” or “adjusted” in light of each other’s decisions. It is also of obvious importance in an antitrust case whether a piece of evidence, like an email, was referring to existing business or new business. The following chart shows actual positions taken by the U.S. government and defense counsel for Japanese companies regarding the translation of certain Japanese words in one of the auto parts litigations.⁷ The competing translations offered by the parties make clear the crucial importance of interpreters in U.S. legal proceedings:

Japanese	U.S. Government’s Translation	Defendants’ Translation
商権	Commercial Rights	Existing Business
既得権	Obtained Business	Existing Business
整合	Coordinate	Adjust
調整	Coordinate	Adjust

One more benefit of employing the same interpreter for preparation and trial often appears during redirect examination. This is the moment at trial when, after cross-examination by opposing counsel, a party’s attorney has the opportunity to question the witness again to address issues raised during cross-examination, clarify or correct the witness’s testimony, and rehabilitate the witness’s credibility. In most jurisdictions, court sequestration rules preclude

⁶ Whether a lawyer has a duty to correct translations that they know to be false is an interesting question that is beyond the scope of this update.

⁷ Based on evidence presented in criminal trial in U.S. court: *United States v. Tokai Kogyo Companies* (S.D. Ohio 2017).

discussion between a witness and their counsel after the witness begins to testify, and therefore prevent conversation between the attorney and witness between cross-examination and redirect examination. This creates one of the most challenging situations for a witness. One can never be certain what topics opposing counsel will raise, and therefore, despite the best preparation, an attorney and witness must be prepared to respond to unexpected issues on redirect examination. The witness must respond to their attorney's questions, sometimes without knowing why the questions are being asked. A skilled interpreter, who knows the case and has worked with a witness in preparation, can help guide the witness through this difficult process in a way that would not be objectionable to the other party's check interpreter.

Concern 8: "Are there risks in using an interpreter?"

It must be remembered that interpreters are part of the "theater" of trial. Juries watch every interaction between a witness, the interpreter, and other parties. All of those interactions must be carefully orchestrated to ensure that the witness's testimony is clear and credible and that the need for the interpreter is evident.

The translation process should not get in the way of obtaining persuasive testimony from the witness. The sequence of questioning a witness through an interpreter can be time-consuming and confusing for a jury. Maintaining a good pace and clarity of presentation are critical to persuading a jury. A witness must also avoid the appearance to the jury that the interpreter is unnecessary and only being used as a strategic advantage for the witness. Witnesses should not speak English in the presence of the jury unless ordered by the court. During direct or cross-examination, witnesses should be prepared to respond to emails or other documents written to or from the witness in English, and explain why an interpreter was not needed.

Witnesses can be asked about their preparation for trial. If they prepared with a lawyer who did not speak Japanese, without the help of an interpreter, this can again lead the jury to believe that the interpreter is not necessary, but rather a tactic to give the witness an unfair advantage.

Another damaging situation can occur when there is prolonged discussion between the interpreter and the witness about a question that results in the witness simply answering "yes" or "no." Jurors, suspicious about the use of a language that they cannot understand, may believe that the interpreter has given the witness the answer. With proper preparation, such situations should be few. When they do occur, the interpreter should be prepared to explain to the judge and jury what is going on—e.g., "the witness has asked me to repeat the question," or "the witness has asked me whether I meant to use the term 'X'." The appearance of such situations to the jury can benefit where the opposing party has a check interpreter who does not object. Any objections from the check interpreter need to be dealt with seriously and with complete candor. How any dispute between the interpreters is resolved will have an impact on the jury's view of the witness's credibility.

Concern 9: “This case is very important to our company. Are there any additional steps we can take to better prepare our witness?”

Additional precautions can be taken for the “big ticket” case or a high profile witness. We offer three suggestions:

1. Mock examinations. Witnesses should be provided opportunities to practice direct, cross, and re-direct examinations with their interpreters. Their testimony can be captured on video and reviewed with counsel. The exercise can increase the witness’s comfort, uncover linguistic challenges, and deal with unhelpful body language, such as nodding to indicate understanding a question rather than assent to it. Witnesses from other cultures need to learn about how to act before a jury in the very artificial situation of being examined by their own attorneys and then cross-examined. They need to learn about eye contact, about how to communicate with and appeal to the jury, and how to avoid appearing deferential to a hostile cross-examiner. Practice examinations can be taken to a further level by conducting them before a mock jury. Mock jury proceedings are common in U.S. cases where significant amounts are at stake. They typically involve ordinary citizens from the same locality that will supply jurors for a trial, who listen to argument from lawyers, deliberate among themselves, and express their views—all of which are videotaped, allowing lawyers and, where appropriate, witnesses, to review these observations repeatedly and learn from them.

Where the testimony of a witness is vital, an individual witness can be examined and cross-examined by their counsel in front of a mock jury. The expense may not be justified in every situation. But an examination of a witness before a mock jury provides unrivaled guidance about the persuasiveness of the examination, can detect linguistic and cultural challenges facing the witness, and provides invaluable experience for the witness, as it recreates the pressures of the courtroom.

2. Attending a trial. Before testifying, an important witness should spend a few hours watching another U.S. jury trial – if possible, in the courthouse where the case will take place and before the judge who will preside over the trial where the witness will testify. The witness will begin to comprehend and appreciate the trial setting, the jury’s role, the demeanor of the trial judge, the conduct of cross-examination by an opposing counsel, and the procedures that will be followed to present testimony and physical evidence. For any witness, especially one unfamiliar with American courts, such a visit can be invaluable.
3. Witness coaches. Professional “witness coaches” can help foreign witnesses who have difficulty adapting to a U.S. trial setting and to American cultural norms in presenting their testimony. Such a coach does not tell the witness what to say. Rather, the coach, who speaks the witness’s language, helps the witness understand how to feel comfortable and express themselves in the unfamiliar circumstances of a U.S. courtroom in a manner that will be more convincing to an American jury.



Final Observations

In 2021, Japanese witnesses should expect that they will get a fair hearing in U.S. courts. They should testify with confidence, and Japanese companies putting forward witnesses should be equally confident that their witnesses will be received without bias by a U.S. jury.

At the same time, it is essential to confront the real challenges that arise for any foreign witness testifying in a U.S. court due to language gaps and the need for interpreters. These are not small issues. An interpreter may become the face of the witness to the jury. Trial must be approached with that dynamic in mind.

With proper preparation, a Japanese witness and the company they represent should face no disadvantage before U.S. courts or in U.S. jury trials. And, with proper preparation, the need to involve an interpreter can work to a foreign party's benefit when it is seeking to tell its story, clearly and without bias, to a U.S. jury.

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