

Litigio! Litige! 訴訟 Soshō, Rechtsstreit! Special Considerations When Your Client is from Another Part of the World

This note touches on issues that will be discussed in the program, which will be a moderated fireside chat with a US Federal District judge and experienced litigators from around the world. Many other points may arise during the program, and questions and observations from the audience will be welcome.

Know your client

Check your client's credentials thoroughly, especially if the client is not coming to you through a foreign law firm that you know and trust. Fraudsters from any country can be credible, and thieves like the Internet. Your hard-won reputation and good standing are important assets. As the Dutch say, a good reputation arrives by foot and departs by horseback.

Taking instructions

Meet your new client face to face, or at minimum by video link, early in the case.

Cultural differences may be obvious or subtle. Even sophisticated clients and their lawyers from other cultures may have expectations about litigation that are different to yours. In some cultures, open disclosure (cards on the table) is unknown in litigation. Clients from these countries may be reluctant to give you, their lawyer, all the facts. They may not understand legal privilege.

Remember, also, that due to the Internet and the ease of electronic communication, information travels. So the opponents may learn about an adverse judgment against your client in another jurisdiction, for example. You need to know the facts, from your client, rather than being surprised later in court.

Do not be misled by your cultural bias (we all have biases). It is important to build trust with a client who has no, or little, experience of adversarial litigation. Assure them that you are there to help.

Comprehension barriers are another difficulty. Even English speakers can be at cross purposes – remember Winston Churchill's quip about Americans and Britons being one people divided by a common language.

New cheap translation technology such as DeepL can help you save money and time with foreign language documents. But even with these technologies, be mindful of subtle and not-so-subtle

differences in meaning when using legal terminologies. French has a term, “false friends”, for words that are spelt the same as words in another language but have a very different meaning.

If your client is not a fluent English speaker, you will need a human translator for meetings, mediation and court. Pick the best translator that your client can afford, as nuances may be critically important.

Do not assume. Question and listen. Be aware that a client who nods and agrees with what you say may not in fact understand, or fully understand.

Explain your system

Explain in plain language the reason for procedures, such as depositions, that may look strange to foreign clients. Bear in mind likely misconceptions that may arise from movies, which are the main source of information about US courts for many foreigners. Try and understand the legal system in your client’s country (the Internet may be a good source of information) so that you can explain your courts’ procedures by contrast or comparison.

Good and bad documents

Document discovery in the common law is a mystery to clients from countries with civil or other systems of law (e.g. Sharia law in Islamic cultures). You must ensure that the client understands the scope of the discovery applicable in the jurisdiction you are litigating in, or risk big problems later.

In most non-common law systems, opponents do not show each other bad documents. The client may not wish to show you any bad documents. Explain that although they must reveal relevant, non-privileged, bad documents, it is often possible to mitigate or overcome their effect through showing context etc. And what constitutes a privileged document may vary between jurisdictions.

Clients may say they have no documents that are responsive to a particular request or issue in dispute. Humour in response may help encourage openness. For example, when faced with a request for prior testing or quality testing in a product liability claim, you might ask: *“OK so the products just ended up on the assembly line one day with no prior planning or testing?”*

Send your client a discovery check-list in plain English, with a legal hold notice, and advise the client to send the legal hold notice to his or her colleagues. Legal hold notices are not well known outside North America. Advise thoroughly about the duty not to destroy possibly responsive documents and data and the potential catastrophic consequences if the client breaches this obligation.

Keep in mind that foreign clients, as well as some of our local clients, may not be “geared up” for discovery. There may lack in-house departments used to searching and providing electronic documents and data for lawyer review. There may be no institutional knowledge of where such documents and data are. If that is the case, discuss with the client what should be done, and how your firm and perhaps consultants in the client’s jurisdiction can help with the search and review.

Experts

In civil law systems, the court usually decides what experts are called, and asks most questions of the experts. Often the foreign court wants only one expert per issue. The culture of expert as “hired gun” is rare outside the common law world and even in many common law countries, the courts seek to limit the role of experts. So explain to your client how important a good, reputable expert may be to the case, how much work the expert may have to do in the case with you and the client, and how

much this will cost. Foreign clients are often very surprised at the costs of experts in adversarial litigation.

Sometimes clients ask you to use an expert from their home country, with whom they have worked before. Consider the cultural and linguistic fit of the expert as well as the expert's credentials in assessing whether that expert would be successful in your court. If you think it is a bad idea, explain why to your client.

Your client giving evidence

Make sure that your client understands the rigours of cross-examination and prepares thoroughly for any deposition or court appearance. You should explain to your client that a party in an adversarial system must usually prove what it asserts, by calling evidence to court. Explain the significance of juries in the US courts. The emphasis on oral evidence and oral submissions in common law countries surprises many foreign clients and lawyers.

Coaching

Foreign lawyers may be surprised by how thoroughly US lawyers discuss evidence with intended factual and expert witnesses. Some foreign jurisdictions forbid lawyers from coaching witnesses. Point out that in the US, intended witnesses may receive suggestions from lawyers about lines of questions that may be posed at trial and lawyers may draw intended witnesses' attention to relevant facts, literature and so forth.

ADR

Most civil cases eventually settle these days. Many judges encourage early mediation. Talk through with your foreign client the strategy and tactics of mediation in disputes. How to be confident and not appear weak in proposing mediation or settlement. Clients, local and foreign, often misconceive ADR, so explain and do not assume. Ensure that the mediator chosen is likely to listen and to communicate carefully with your foreign client. Your client should attend the mediation, as mediators like to see the clients in person, and clients being there usually helps negotiations.

Fees

You should explain the economics of litigation in your country/state to the new client. Set out details about costs and costs risks in writing fully. Unless your client is Microsoft or the like, get a retainer to cover your costs exposure and have it topped up as the case progresses so that you are not left with unpaid bills at the end. Warn in writing about the high cost of discovery, experts, transcripts, translations and other aspects of litigation. If your jurisdiction has a loser pays rule, be sure to explain that to the client early in the case.

Staying out of trouble

Cover yourself. As with any clients, devise a strategy and convey it to the client and explain it may not work. Get buy-in from the client as people support what they helped to create. Show that you are not being reactive or pushed around by the other side.

Managing expectations is usually a bigger challenge with foreign clients however. Not putting time into this could lead to disputes over fees or complaints to the local Bar regulator. Support your

younger lawyers dealing with foreign clients as they may not have sufficient experience to spot difficulties and dangers.

Conclusion

Communication is key. Make sure that your advice does not get lost in translation. If you do a good job, you will get further recommendations or referrals from foreign lawyers, and grateful clients may spread the word too.

Don't forget to avail of IADC as a gateway for international contacts and referrals, and as a source of information.