

PRODUCT LIABILITY

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Taking or defending a deposition abroad of a foreign witness for whom English is not a native language can be tricky. The hypothetical discussion below – between a client and outside counsel—identifies and provides potential approaches to issues likely to arise in this deposition setting.

Depositions Overseas or Deposities in Het Buitenland

ABOUT THE AUTHOR



Alan Schwartz is co-chair of Wiggin & Dana's Product Liability practice group (the 2015 recipient of the *Connecticut Law Tribune's* Litigation Department of the Year Award for Product Liability). He has particular experience in the area of pharmaceutical defense. Representative assignments include being on the national defense teams in the Yaz/Yasmin litigation, the Trasylol litigation, and in the Baycol litigation. Mr. Schwartz has been involved in key aspects of the defense effort in these cases, preparing and defending witnesses at depositions in the U.S. and overseas, and preparing cases for trial. Other representative pharmaceutical assignments include local and national work for Merck in the Vioxx litigation, for AstraZeneca in the Seroquel litigation, and representing academic researchers served with third-party subpoenas. Mr. Schwartz also has represented Eli Lilly and Medtronic in cases pending in Connecticut state and federal courts. In addition to his pharmaceutical and medical device practice, Mr. Schwartz' products practice includes cases involving beer kegs, seatbacks, welding rods, hair dyes, benzene exposure, contaminated IV solutions, and grinding wheels. Mr. Schwartz also is chair of the firm's award winning pro bono program and is deputy chair of the firm's Litigation Department. He can be reached at aschwartz@wiggin.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Your client is "Speedboard," a Missouri corporation with its principal place of business in New Haven, Connecticut. Your client manufactures skate boards and sales are world-wide. The plaintiff is a 35 year old father who "borrowed" his son's board for a "joy ride." During that ride the board unexpectedly gathered speed, the father lost his balance, fell off the board, and broke each arm. The son had attached weights to the bottom of the board so that it would go faster. The father sued Speedboard in Connecticut federal court claiming that the board was defective because there was no warning on the board of an increased risk of danger if weights are attached to the bottom of the board. A team of three Dutch engineers, Gene, Rick and Steve, designed the board and prepared the warnings that were on and came with the board. The engineers left Speedboard 10 years ago, and are now living in Amsterdam working for Rick's bicycle company. Plaintiff has decided to take the depositions of the former Speedboard engineers in Amsterdam.

You have contacted each of the engineers. Gene and Steve are willing to appear for a deposition voluntarily and have spoken with you. Both have strong, well-reasoned opinions supporting the adequacy of the warnings, including focus groups who found that the safety instruction not to alter the board was sufficient to cover not adding weights to the board. Gene would make a very good witness, but Steve is an unpleasant man, does not present well, gets angry quickly, and is unpredictable. The third engineer, Rick, will not appear voluntarily, and

refuses to talk to you or anyone at Speedboard. Speedboard's in-house counsel asks you the following questions:

- What does plaintiff need to do to compel the attendance of Rick?

The testimony of an uncooperative witness may be obtained in a foreign country that is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("the Convention"). The Netherlands is one of 44 foreign countries that are signatories to the Convention. In our case, plaintiff must file an application in the District of Connecticut under Federal Rule of Civil Procedure 28(b), requesting that our judge issue a Letter of Request to the Central Authority of the Netherlands. On receipt, the Central Authority will forward the Letter of Request to the Netherlands court in the area in which Rick resides. Typically, that court will execute the Letter of Request summoning Rick for his deposition. Rick may object to the deposition on the basis of Dutch law and the Dutch court will rule on his objection. If Rick refuses without justification to participate, the Dutch court may order that Rick be brought before it. If Rick refuses to testify even after being brought to the court, he may be held in custody for up to 1 year.

Notably, the Netherlands does maintain a reservation under Article 23 to the Convention, providing "[t]he Netherlands will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law

countries." The reservation, however, does not bar the taking of evidence by deposition.

- The witnesses are native Dutch speakers and English is a second language. Do they have the option to testify in Dutch?

Yes, the witnesses have the option to testify in their native language. It makes sense that a witness should be afforded the opportunity to be questioned and to testify in the language with which he is most facile given the importance of making sure the witness's testimony is based on a complete understanding of the questions and is accurately captured on the record. It should make no difference that the witness is conversant in English and that as an employee of your company he communicated in English while performing his job responsibilities. The witness does not forfeit his right to be questioned and to testify in Dutch in order to ensure that his testimony, under oath, is accurate and responsive.

- Should all of the witnesses testify in Dutch?

Not necessarily. Witnesses retain the option to testify in English. Witnesses with superb English speaking skills and who may be experienced in testifying in English, may choose to testify in English. An important witness, whose deposition likely is to be played at trial (or multiple trials), may correctly recognize that a jury is more likely to follow, understand, and be persuaded, if he testifies in English. Other factors to consider

include the cumbersome process of a deposition with interpreters, the resulting added length, and the difficulty of "connecting" with a jury while speaking a foreign language.

Ideally, you would want your stronger, critical witnesses – those who present well and address important issues – to testify in English assuming their facility with English presents minimal risk of a record littered with misunderstood and confused questions and responses. Additionally, if you are intending to do a direct examination of this witness, to be played at trial, it is far more effective to do it in English.

On the other hand, less important witnesses, witnesses who are not good at testifying, or witnesses whose testimony is cumulative of others, should seriously consider testifying in their native language. This has several benefits, 1) the witness is likely to be more comfortable, and 2) the interpretation process will give the witness more time to make sure he understands the question, to give a thoughtful answer, and an opportunity to make real-time corrections to erroneously interpreted testimony. Finally, to the extent the witness does a poor job, makes unnecessary concessions, and otherwise hurts your case, the effect of his videotaped testimony at trial may be less harmful given the language barrier and the cumbersome translation process.

Please keep in mind that we will likely have to disclose in advance to the plaintiff whether the witness will testify in Dutch.

- Please describe the interpretation process.

The deposition process is cumbersome. In a nutshell, plaintiff will pose a question in English, the interpreter will repeat the question in Dutch, the witness will respond in Dutch, and the interpreter will repeat the response in English. (You may want to have multiple interpreters present to share responsibilities given the difficulty of the task.) The process becomes more cumbersome when the witness's attorney objects to the question, which may prompt the questioner to rephrase his question, which starts the process over again. Further delay occurs when the witness does not understand the question and responds in that manner. The questioner may rephrase the question and the process starts again. Questioners who insist on asking long, complex questions, with unfounded assumptions, often find that their examination quickly comes to a grinding halt. The use of documents, as you might imagine, also is a source of confusion. And finally, the interpreter may have difficulty interpreting case jargon, scientific and medical terms, and colloquial phrases that may not have a fixed meaning in Dutch.¹

You may want to have a representative present who also can interrupt English/Dutch. This permits you to have someone, besides the witness, available to confirm the accuracy

of the translation of the questions and the response.

Finally, the interpretation process will extend the length of the deposition by at least 50%. Thus a seven hour deposition is more likely to take at least 10.5 hours.

- Should we do a direct examination?

Given the likely inability of Speedboard to compel live testimony of these witnesses in United States courts, you should consider seriously conducting a direct to make your affirmative points, address mistakes, and clarify ambiguities in the record. The direct should be comprised of simple, factual questions that are unobjectionable and easily translated. Further, on direct you should be prepared to counter any suggestion by opposing counsel that the witness strategically chose to testify in Dutch even though his files contain over 800 e-mails and 1200 reports in English! You should be able to repair any possible damage to the witness's credibility by bringing out that his use of English in day-to-day communications in a multi-national company is unavoidable and necessary to conduct business. In contrast, when testifying under oath in a legal proceeding in response to questioning by an adversary, the risk of miscommunication potentially has far greater consequences and is avoidable.

¹ Consider this colloquy between a questioner and a translator:

Q: Did those e-mails concern you?

[The interpreter: What exactly do you mean by "concern"? Did they refer to him or did it give rise to concern?]

- Can we prepare a witness in English, even if the witness testifies in Dutch?

Yes, but it is advisable that the deposition preparation team include a lawyer or translator conversant in Dutch. The Dutch-speaking participant will have the significant role of making sure that we are communicating with and understanding the witness. Another tip – do a mock cross and direct under "game-like" conditions.

- What about deposition disputes?

If the case warrants the expense, and numerous depositions will be taken overseas, you may consider requesting the appointment of a special master to attend the depositions with the authority to rule on deposition disputes. Otherwise, alert the court when the overseas depositions will occur so the court can make itself available for a phone call from you if necessary.

A word of advice. Absent judicial guidance, work hard to resolve disputes and try not to direct the witness not to answer. You don't want to run the risk of sanctions, including an order permitting your adversary to return to the Netherlands for more questioning at your client's expense.

- Any other tips?

Yes, if witnesses are going to testify in Dutch, it is worthwhile to agree with opposing counsel to send the interpreters and the court reporter a glossary of terms, names, and acronyms likely to come up at the deposition.

- What will the final transcript look like?

It will look like any other transcript. The interpretation is not reflected in the written record, although the video will capture the entire proceeding except for discussions "off-the-record."

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