

Preparing the Foreign-Born Witness for Trial: Beyond the Language Barrier



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MOST ARTICLES COVERING THE TOPIC of foreign-born witnesses focus on language barriers and the impact of using an interpreter during courtroom testimony. While an important topic, it is a rare occurrence and is not a common challenge that trial teams face as they prepare for trial. However, what is quite common in today's courtrooms is foreign-born, English-speaking witnesses whose role is to convey believable, persuasive (and critical) testimony to a panel of jurors. There is a misconception among trial attorneys and corporate counsel that the "language barrier" is the primary obstacle to effective courtroom testimony with foreign-born witnesses. The heart of the matter is that foreign-born witnesses are often very poor communicators in the courtroom, not because of the language barrier, but rather because of deep cultural traits that hinder their ability to get their messages across to jurors. With millions, if not billions, of dollars at stake in civil litigation matters, the unique verbal and nonverbal communication challenges associated with foreign-born witnesses can leave trial attorneys and their clients economically vulnerable in the courtroom. Therefore, as the country continues to diversify culturally, and the number of foreign-born witnesses continues to increase over time, trial teams will need to alter and supplement their witness preparation efforts.



Foreign-born Witnesses: Who are They?

These witnesses were born and raised abroad and have subsequently immigrated to the U.S. Some of

these individuals were formally educated in their home countries prior to immigrating, while others were educated in U.S. universities after immigration. English is usually their second language, but most importantly, *American culture is their second culture*. The employment roles of these witnesses are wide-ranging, from executives, to middle managers, all the way down to administrative staff and blue-collar employees. Importantly, they are now present in all industries in the U.S., from A to Z.

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Today, foreign-born witnesses testifying in U.S. courtrooms is not only commonplace, but is a trend that will continue to grow exponentially. For example, a growing number of foreign-born executives and senior managers currently hold top positions at U.S. Fortune 500 companies. This trend makes sense, as large businesses—like Alcoa, Pepsi, Coca-Cola, and AIG—are already global businesses that generate a significant percent of their sales abroad. Therefore, large U.S. companies know that it is vitally important to have culturally-diverse executives and managers who are comfortable operating around the world. However, these same large companies also face frequent civil litigation challenges that can leave them vulnerable, and their foreign-born employees will be called upon to provide critical testimony to jurors when the case reaches the courtroom.

Similarly, the U.S. health care system has become increasingly culturally diverse over the last 20 years. Currently, one in four U.S. physicians and surgeons were born abroad. Like all other physicians, foreign-born physicians are prime targets for medical malpractice claims. As a result, these foreign-born physicians are regularly testifying as both defendants and experts in U.S. courtrooms, and this trend will only increase with time. Hospitals and their employees, mainly nurses, are also major targets for medical malpractice lawsuits. In those matters, nurses are usually providing the key testimony at trial, as patient care is their primary job responsibility. Due to a persistent national nursing shortage and low enrollments at U.S. nursing schools, the demand for foreign-born nurses is exploding and will continue to grow indefinitely. The more foreign-born nurses are hired at hospitals across the nation to counter the shortage increases, the more they will be called upon to deliver credible, believable testimony to jurors in the courtroom.



Credibility and Believability of Foreign-born Witnesses

Surprisingly, the factors that kill witness credibility and believability are identical between U.S.-born and foreign-born witnesses. In other words, the communication problems that plague U.S.-born witnesses are the very same problems that plague foreign-born witnesses. The only difference is the underlying cause for the flaw. Poor eye contact with jurors; negative facial expressions; unprofessional body language; a defensive and/or argumentative attitude; displays of irritation, anger or apathy;

responding to questions too quickly; and inconsistent testimony. These are all factors that hurt witnesses' credibility regardless of their cultural backgrounds. Importantly, it is the cause of the flaw that needs attention. For example:

- U.S.-born witnesses might not make sufficient eye contact with jurors because they feel they need to respond back to the questioning attorney to prove their points, whereas foreign-born witnesses might do the same because culturally they find it rude to make direct eye contact with others while speaking.
- U.S.-born witnesses might be timid and soft-spoken because of significant anxiety and nervousness, whereas foreign-born witnesses might do the same because their primary culture defines that communication style as respectful and courteous (with assertiveness often being seen as aggressive).
- U.S.-born witnesses might persistently respond to questions too quickly because they are anticipating questions rather than listening and thinking carefully, whereas foreign-born witnesses might respond quickly because in their culture a quick response conveys confidence and competence.
- U.S.-born witnesses might use various gestures while they are testifying because they are angry and frustrated with the questioner, while foreign-born witnesses might use the same gestures because it displays honesty and candidness in their culture.

Identifying a foreign-born witness's verbal and non-verbal communication flaws is certainly an important part of the witness preparation process. However,

determining the true cause of the flaw is the key to effectively discussing it with the witness and correcting it through intense training during witness preparation efforts. Simply instructing foreign-born witnesses to “change” their communication style is insufficient and ineffective, usually resulting in frustration, decreased confidence, and diminished trust.

Finally, just as foreign-born witnesses are increasing in number as the country continues to diversify, the number of foreign-born *jurors* is also increasing at an alarming pace. These jurors can be naturally empathetic towards foreign-born witnesses in some cases, as they can identify with each other on many levels, particularly having English as a second language and American culture as a second culture. However, diversity in the jury box can also present unique obstacles for the foreign-born witness, as some cultures have natural conflicts and a long history of distrust. For example, in a 2010 trial in Cook County, IL the defendant, a physician from Pakistan, informed the trial team that no one from India could possibly be on the jury under any circumstances because he believed there was no way an Indian would accept and believe testimony from a Pakistani, given the long term tension and distrust between the two countries. Therefore, it is important for legal teams preparing for jury selection and trial to be aware that nationalism can play a powerful role in the cultural identities of both witnesses and jurors, and that trust and credibility can be instantly compromised when a cultural conflict is present between the witness stand and the jury box.



The “Real” Language Barriers

To jurors, words alone are not reality. Words from the witness are combined with the jurors’ *perceptions of the witness* to create the whole reality of the message. Therefore, the first “real” language barrier occurs when the witness’s tone, attitude, and non-verbal behavior obscures and distorts the message to the jury. Tone, attitude, and non-verbal behaviors are strongly linked to witnesses’ emotional status during their testimony. Negative emotions impede core communication skills for all witnesses and are the top barrier to effective courtroom testimony. One could argue that the foreign-born witness has a much higher emotional burden compared to U.S.-born witnesses because:

- **The U.S. Court System:** The emotional burden of litigation is higher for foreign-born witnesses because they have the additional stress of being very unfamiliar with the U.S. court system and the procedures of civil litigation. Many foreign-born witnesses, particularly ones from non-democratic nations, instinctively perceive courts and government as oppressive, violent and/or dangerous, due to their previous experiences in their native countries. In other words, many foreign-born witnesses have *intense fear* of anything related to a court system or government procedures.
- **Jury of “Peers”:** Many foreign-born witnesses feel the jury system is unfair as the jury composition rarely looks like their peers. Foreign-born witnesses often feel that they will be discriminated against from the start of the trial, particularly witnesses who were born in

countries that the U.S. is currently at odds with (e.g., Iraq, Iran, Syria, Libya, Afghanistan, Korea, or Cuba). This results in significantly increased levels of fear and anxiety for the foreign-born witness.

- **Witness Order:** Most foreign-born witnesses feel it is deeply unfair for them to be called as an adverse witness during trial. This often results in feelings of resentment and bitterness, as foreign-born witnesses believe it is unjust to be examined by the opposing attorney prior to being questioned by their own attorney.

This higher than normal emotional burden creates significant anxiety, fear, and discomfort, which can easily impede communication skills, which in turn can severely hurt foreign-born witnesses' credibility and believability when they testify.

To jurors, words alone are not reality.

The second "real" language barrier is rapid speech. Foreign-born witnesses, especially those with strong accents, often speak too fast. As a result, part or most of their answer might be misunderstood or misinterpreted by jurors. When rapid speech persists, especially with foreign-born witnesses, jurors tend to get frustrated and tune out as the struggle to understand the witness is too burdensome. Fast-speaking foreign-born witnesses need to be trained to do the following:

- **Breathe More:** Rapid speaking witnesses breathe very shallow or don't breathe at all when

they testify. This results in increased anxiety and tension, which fuels the rapid speech problem. Training them to breathe more and to breathe deeper will force them to become calmer and to slow down their speech. Slower, calmer speech conveys poise and confidence.

- **Pause More:** Pausing gives jurors a chance to cognitively digest the information the witness is providing. Foreign-born witnesses need to understand that jurors have poor attention spans and often struggle to comprehend the information being directed at them. Pausing allows the jurors a chance to "keep up" with the witness, rather than "fall behind," which results in testimony being lost or ignored.
- **Empathize More:** Jurors are put into a very challenging and demanding situation. They are paid poorly; have to sit in uncomfortable chairs all day; spend long hours listening to large volumes of information; can't discuss the case with each other until the end; and in many venues, can't take notes or ask questions. In other words, being a juror isn't fun. Foreign-born witnesses need to be sensitive to what jurors must endure, and recognize that jurors naturally struggle to hear and understand testimony at times. The foreign-born witness must be trained to understand the trial from the jurors' perspective and learn how to meet jurors' unique needs. This will provide the witness with plenty of motivation to slow down the pace of speech.

The third "real" language barrier comes in the form of inefficient information processing. Specifically, foreign-born witnesses often do not process information the same way U.S.-born witnesses do. U.S.-born witnesses listen to the question, process

the information in the question, think about their response, and then respond accordingly. However, many foreign-born witnesses instead do the following:

- Listen to the question,
- Translate the question into their native language,
- Process the information in the question,
- Think about their response in their native language,
- Translate their answer into English,
- Then deliver their answer to jurors.

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Consequently, it often takes the foreign-born witness longer to complete the question-answer cycle, which can be misperceived by jurors. Hesitations, longer pauses, and awkward silences can be perceived by jurors as signs of evasiveness, uncertainty, and guilt. Therefore, depending on the case and the witnesses involved, the trial team might have to introduce this information processing issue to jurors in *voir dire* to ensure that jurors know precisely why some foreign-born witnesses may not answer questions as fluidly as U.S.-born witnesses. Jurors are usually very understanding about this issue and do not hold it against the witness as long as the trial team makes the issue crystal clear during *voir dire*. Finally, it is important to mention that some foreign-born witnesses process information much more effectively and efficiently than others. This can

create perceptual discrepancies with jurors, which can negatively impact a witness's credibility if one foreign-born witness can't process information as quickly as another. Again, it is critical to discuss this issue with jurors during the *voir dire* process so they clearly understand why communication skills may vary widely between various foreign-born witnesses.



How to Prepare the Foreign-born Witness for Trial

1. **Build Trust:** With any witness, trust is often difficult to form and takes time, as most witnesses are highly skeptical and distrustful of attorneys and the legal system. With foreign-born witnesses, trust does not come easy. First and foremost, they need to be welcomed as a valued member of the team, rather than just an important witness. Plenty of time must be dedicated to answering their questions and addressing their emotional concerns about the case, as well as identifying their role and setting expectations. At this point, trust is the key element in helping the foreign-born witness overcome natural feelings of distrust, discomfort, and vulnerability. A trustful bond must be formed between the witness and members of the legal team, otherwise most witness preparation efforts will be ineffective.

Common Mishap: This step usually gets rushed, if not skipped altogether. Jumping ahead too soon prevents trust from forming and actually increases levels of distrust. Earning trust with a foreign-born witness requires

persistent time, attention, and empathy. In other words, attorneys need to step out of the legal role early and step into the human role.

2. Psychological Evaluation: Emotional instability is the top factor that inhibits effective witness performance. Every foreign-born witness has some form of emotional “build up” that needs to be vented, understood, analyzed, and addressed. Anger, anxiety, frustration, fear, and dread are very common feelings for witnesses to experience as their testimony approaches. When problematic personality traits and cultural differences are combined with these emotional imbalances, the situation becomes exponentially complicated. If undetected or disregarded, these factors can severely impact a witness’s ability to testify effectively. Three key issues here:

- a. Foreign-born witnesses with emotional problems have great difficulty learning new skills and information (which is the crux of witness preparation).
- b. Emotional witnesses make devastating verbal and nonverbal mistakes during trial testimony.
- c. Problematic personality traits and cultural differences need to be handled very carefully and incorrect strategies can increase frustration and decrease trust.

Common Mishap: This step is usually skipped completely, as most attorneys a) don’t realize that emotional and personality factors are key predictors of witness performance, especially with foreign-born witnesses, and b) don’t know how to accurately assess and analyze psychological

constructs. Therefore, many attorneys simply tell the witness that they need to “relax” or “calm down,” which is highly ineffective and usually results in increased stress and tension.

3. Communication Skills Evaluation: Both verbal (e.g., tone, length of answers, assertiveness and confidence) and non-verbal (e.g., facial expressions, body language, gestures and eye contact) communication skills need to be assessed carefully, early in the witness preparation process. However, the two most important communication skills occur well before the witness responds to a question: *listening and thinking*. Most witnesses are terrible listeners and ineffective thinkers, regardless of their intellectual capacity, language, or cultural background. This is because people are now cognitively hard-wired to listen and think simultaneously when communicating with others. From a neuropsychological standpoint, a respondent is extremely vulnerable to error because concentration and attention are split between two activities—listening and thinking—instead of dedicated to one cognitive activity. Listening and thinking simultaneously as a witness results in poor answers, because the witness does not hear the question in its entirety and does not spend enough time thinking prior to responding. Therefore, it is important to assess the listening and thinking skills early and to do the appropriate teaching in the education phase. This is especially true for foreign-born witnesses who might have to translate before responding.

Common Mishap: Few attorneys understand

how cognitive resource imbalances and the interaction effects of listening and thinking can lead to persistent damaging answers. Therefore, many attorneys simply *tell* the witness to “listen more carefully” and “be more patient,” rather than *training* them to use their cognitive resources more effectively.

- 4. Awareness:** If foreign-born witnesses are not aware of their psychological and communication flaws, preparation efforts will be ineffective. Witness must be informed that their communication style and/or persona need to be adjusted. Some witnesses in this stage are unaware (or are in denial) of their communication and/or persona problems. Once witnesses exhibit awareness and acceptance of their communication flaws, preparation efforts can proceed. Additionally, witnesses need to know that a) the flaws are natural and common and b) the witness preparation program can and will help them improve.

Common Mishap: Most attorneys attempt to make witnesses aware of their flaws first, during mock testimony, rather than introducing it to them beforehand and helping them cope with their shortcomings. This leads to discouragement, helplessness, and frustration. Instead, this process needs to be handled in a comforting, sensitive, and constructive manner.

- 5. Education:** Once the psychological and communication skill evaluations are completed, and witnesses are aware of their flaws, foreign-born witnesses are ready to be taught the “nuts and bolts” of effective witness testimony.

Skills to be introduced to the witness during this step consist of the following: controlling the pace of the examination; identifying and categorizing open and closed ended questions; using appropriate tonal and non-verbal communication; answering concisely and on-target; detecting “trick” questions; identifying high-value questions; maintaining emotional control; and learning the appropriate LISTEN first-THINK second-then RESPOND cognitive sequence. Many questioning attorneys struggle to manipulate and intimidate witnesses who listen carefully, think patiently, and answer concisely. This is exactly why teaching these communication skills to witnesses needs to be a top priority. The manner in which this information is conveyed to foreign-born witnesses is critical, and should be modified appropriately based on their cultural backgrounds and unique characteristics. Foreign-born witnesses cannot practice testifying until they get acquainted with the playing field and the rules of the game. Practice before education leads to early failures and high levels of anxiety and frustration.

Common Mishap: Many attorneys introduce their custom-made “tips” concurrent with simulation of testimony, which is ineffective as it overloads the witness and prevents proper memory encoding. Additionally, this information is rarely tailored to the witness’s culture, personality, learning style, and communication ability, which can impede the learning process.

- 6. Basic Training:** Mistakenly, this is where most witness preparation efforts usually start. The foreign-born witness needs to complete steps

1-5 to be optimally “ready” to begin training and to be in the position to learn, grow, and develop as a witness. This step focuses on helping witnesses modify their communication style and persona in order to overcome their weaknesses. Basic training involves implementing the skills learned in the education phase and receiving constructive feedback on how to improve. During this step, witnesses practice listening and answering questions in an informal, safe, and nurturing training atmosphere. Practice questions during this step are not case specific, but rather more benign “softball” questions regarding background, training, policy, and other general areas. The goals are to a) build confidence in the witness, b) have them make mistakes, c) help them identify and work through the mistakes (i.e., learn), and d) get them accustomed to the pace and structure of questioning. Success and confidence with “training wheels” first is very important, as foreign-born witnesses are often highly intimidated of the process.

Common Mishap: Many attorneys like to jump right into the more difficult (and stressful) case-specific questions, rather than letting the witness experience success with the more benign introductory questions. “Hammering” your witnesses too early will not only increase their anxiety and fear, but can also destroy trust between the witness and the attorney.

- 7. Advanced Training:** This is the final and most advanced step in which the foreign-born witness works to consolidate the gains attained during steps 1-6. This step includes fully-simulated mock direct and cross-examination that is often videotaped and played back to witnesses while

they receive constructive, yet encouraging feedback. This is the step where “practicing like you will play” is key. Therefore, it is critical that the testimony practice be done in front of others who can play the role of jurors (other attorneys, staff, secretaries, or even a hired panel of mock jurors), as the trial atmosphere is very different than that of a deposition. Recreating the intensity of a courtroom atmosphere is very important in this stage, so the questioning should not be informal or casual.

Common Mishap: Again, many attorneys inadvertently “throw the witness into the deep end” and make them sink or swim first, and then try to prepare them from that point. That is a huge mistake, as it increases anxiety and frustration, and also damages trust. Additionally, many attorneys resist putting the time, effort, and resources into creating a realistic atmosphere for mock questioning. Forcing your witness to deal with objections, documents, and jurors for the first time during the actual trial is very unwise, as those are all important factors that witnesses must be comfortable with if they are to deliver effective testimony.



Conclusion

It is undeniable that companies across the nation, both big and small, are culturally diversifying at an amazing rate. The diversification is widespread, ranging from the boardroom all the way down to the janitor’s closet. As companies approach civil litigation battles in the courtroom, the communication abilities

of their foreign-born witnesses will play a central role in jurors' perceptions of liability and damages, both now and well into the future. Trial teams with foreign-born witnesses in key testifying roles need to be fully aware of the unique communication challenges they will face and they must have the ability to effectively train their witnesses to be credible and believable communicators at the jury level. However, most attorneys do not receive formal training in cultural diversity, communication science, or psychology, putting them in a difficult position when facing the unique challenges of foreign-born witnesses. Therefore, retaining an expert who specializes in developing foreign-born witness communication skills is very wise, as the strategic and economic benefits are extraordinary. Otherwise, your witness's message may be "lost in translation," resulting in jury misinterpretation, or even worse, defeat in the courtroom.

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