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Representing Asian Clients in High Stakes US Jury Trials – A Conceptual Framework and Basic Considerations

This paper addresses some of these elemental considerations and is intended to provide a conceptual framework for practitioners who represent Asian clients in US litigation

"[Preparation] is the be-all of good trial work. Everything else - felicity of expression, improvisational brilliance - is a satellite around the sun. Thorough preparation is that sun."
- Louis Nizer Newsweek, December 11, 1978

Introduction

When it comes to trial practice, there are not short cuts to success. High risk trials are not won by the best trial lawyer in the courtroom-but rather by the lawyer who is best prepared. A successful strategy for trial preparation in a complex case is multi-faceted. When representing an Asian company or firm at trial, special considerations should be factored into the strategic plan to ensure a successful result.

We live in an ever expanding global economy. With that growth, the presence of Asian businesses in the US marketplace has steadily increased over the last several decades. As a consequence, Asian firms have discovered that litigation is one the costs of doing business in the United States. Representing Asian clients in the American court system presents certain unique challenges ranging from client interaction, deposition and trial testimony to fact-finder bias. This paper addresses some of these elemental considerations and is intended to provide a conceptual framework for practitioners who represent Asian clients in US litigation.

The Attorney-Client Relationship

When it comes to interactions with other cultures, the American tendency has been to devalue language and cultural knowledge. On a larger scale, Americans have often mirror-imaged their own value system on other cultures. As a result, Americans have struggled to understand other cultures. This has manifested itself in American foreign and domestic policy as well as in the business world.

In the international marketplace American businesses have faced many challenges in their dealings with Asian companies. For example, most Asian cultures believe that trust is the most critical component of any business relationship. Americans, in contrast, have struggled with this concept in business and historically, have approached such relationships from the view that a deal should be closed as quickly as possible. By failing to recognize cross-cultural differences and to grasp the importance of building a foundation for mutual respect, American companies have often lagged behind the competition in the global marketplace particularly when doing business with Asian companies.

Like US companies, the American legal community also struggles to grasp the significance of language and cultural differences when representing Asian clients. We approach the representation as we would any other client. We assume that the substantive law and the rules of procedure apply equally to every party in a litigation. We can cite well-settled case law holding that jurors are presumed to follow the Court's instructions. And, we assume that the process of jury selection, without more, will ferret out any juror bias amongst the venire. When representing Asian firms who are parties in US litigation, however, we must do much more than rely upon our standard approach.

What are the challenges? How do we address them at the outset of the case? It is axiomatic that successful representation begins and ends with a strong and viable attorney-client relationship. From our first day of professional responsibility to our first day in practice, we are taught to that we must have our client's candor and trust from the very inception of the representation. To accomplish this, we may sit down with a new client and explain the importance of candor and trust and why we need to have it from the client from day one. Quite simply, we ask for a client's candor and trust and we assume that they are given to us if we have done a good job of explaining their importance in the attorney-client relationship.

When representing Asian firms, however, we must do much more than ask for our client's candor and trust. Here, a different approach is essential. It must consist of a communication strategy that conveys an understanding of and respect for a different language and a different culture. The

Prepared and Presented by:
Lisa M Marchese
Trial Group
Dorsey & Whitney LLP

Contributing Authors:
Paul T Meiklejohn
Douglas F Stewart
Intellectual Property Litigation Dorsey & Whitney LLP

following elements are offered as a guide to establishing and ensuring a viable attorney-client relationship throughout the litigation.

Communication

Patience, humility, respect and sincerity are the qualities that should define our communication strategies with Asian client representatives. Further, clear and effective communication skills are essential in representing Asian firms. As referenced herein, respect plays a crucial role in gaining trust. You must endeavor to convey a respect and understanding of cross-cultural differences. Many Asian cultures, such as the Japanese, prefer clear instructions and explanations with facts and data. Do not assume that what is common sense for you is also common sense for your client.

Language may be a barrier even in communications with a client who speaks excellent English. Do not assume that your client understands merely because he/she has a proficiency or fluency with English. The Japanese have an adage that 'the nail sticking up gets hammered down.' As a result, the tendency is for your client representative not to ask questions-particularly in a group setting. Preferred communication, therefore, should be in person or one on one where feasible. Here, it is important to be pro-active by asking questions to ensure that you have conveyed information fully and completely.

Email has become the preferred means of communication in business and legal communities throughout the world. It is far more efficient and convenient than drafting letters. When dealing with overseas clients in Asia, email is an essential means of communication. If not used with care, however, it also can be the biggest source of difficulty. In the era of electronic communication, it is all too easy to dash off an email `updating' our client on a recent case development in between our daily multi-tasking. Here, cryptic or brief explanations and/or omitted details can cause considerable problems when they are read by our clients. Thus, great care should be taken when drafting emails to the client. They should be clear and concise. If feasible, they should be vetted internally with colleagues before being sent.

Discretion

Loyalty and confidentiality are highly respected values of many Asian cultures. In Japan, for example, the intimacy and longevity of vendor-purchaser relationships is perhaps the most difficult aspect of Japanese business for many foreign companies doing business in Japan. Business relationships after five or 10 years are considered unbreakable. Additionally, confidentiality and secrecy are the hallmarks of the Japanese business culture. In Japan, personal space is highly valued due to the densely populated areas in which they live. Thus, privacy and confidentiality are essential to the cultural value system.

In the context of the attorney-client relationship, you should demonstrate a special sensitivity to loyalty and confidentiality in all dealings with the client. Again, things that we take for granted in our culture do not necessarily translate the same way with our Asian clients. For example, it would not be well taken to request a conflict waiver from an Asian client. While generally permissible under our rules of professional conduct, such a request may be viewed as an unacceptable act of disloyalty to an Asian client.

Consensus Decision-Making

There is a strong hierarchical structure in the Asian business culture, particularly in Japan. It is important to show greater respect to the eldest members of the client business. Negotiations, for example, begin at the executive level and continue on to mid-level managers. Most decisions, however, are the result of group deliberation. In the attorney-client relationship, you should anticipate that all key decisions likely will be the result of a consensus or group decision making process. The decision-makers may include both in-house legal counsel as well as business personnel. Therefore, it is critical that you understand the dynamics of this process with respect to your client's internal structure and organization. From the outset of the representation, you should accept that all significant client decisions will be the result of a long and deliberative group process. For that reason, it is important to determine the internal management structure of Asian companies, especially for larger companies with many internal divisions.

Trust

There is no short cut to gaining the trust of an Asian client. You must earn it by demonstrating that you are worthy of it. Here, the importance of conveying an understanding and respect for cross-cultural differences cannot be over-stated. In Japan, for example, there are three basic values that embody its culture:

Wa

This concept is the most valued tenet. Literally, "wa" means harmony. In the business culture, it is reflected in the preservation of relationships in the face of differences and the avoidance of individualism. In the context of the attorney-client relationship, for example, 'wa' may manifest itself in the client's indirect expression of 'no.'

Kao

This concept refers to "face." Face forms the foundation of one's reputation and status. 'Kao' is preserved by avoiding confrontations and direct criticisms whenever possible. In the context of the attorney-client relationship, acting in such a way that causes your client representative to lose face - eg criticizing a decision or recommendation, can have disastrous consequences for the viability of the relationship.

Omoiyari

This concept relates to the sense of empathy and loyalty which are valued in society and practiced in the Japanese business culture. Literally, it means "to imagine another's feelings". In the context of attorney-client, a strong relationship can only be built on trust and mutual feeling.

Preparation for Deposition and Trial Testimony

Pretrial litigation is a multi-faceted process. Written discovery, document production, motions practice and live testimony are all important devices in preparing for trial. When representing Asian clients, each has special considerations. However, preparing for deposition and trial testimony presents unique challenges. We must be able to effectively communicate our case theory through live witnesses and sworn testimony. Here, we must formulate an effective strategy to develop such testimony that reflects an understanding of language and cultural differences and accounts for the use of interpreters.

Deposition and Trial Testimony

The overall objective of witness preparation whether it be for deposition or trial is to convey a message. That message, in turn, supports the case theme and theory. To successfully convey a message, the client witness must communicate accurately and effectively. More specifically, the client witness must be able to effectively control the level of detail in his/her answers. This can only be accomplished through a methodical and focused preparation. Video-taping a mock direct and cross examination, for example, has proven to be a very effective means of witness preparation. Video review provides a very tangible means of working with your client to effectively prepare him/or her for sworn testimony. Use of interpreters should be strongly encouraged.

(As discussed under the sub heading `Effective Use of Interpreters' below).

Rule 30(b)(6) Depositions

The concept of Rule 30(b)(6) tends to be a difficult one for most Asian client representatives to grasp. Client representatives identified for given topics will tend to narrow their area of expertise. They will not typically want to expand the scope of their topic(s) into seemingly or logically related areas. As a result, you should anticipate an institutional bias that will result in the designation of multiple corporate representatives on the listed topics of a given notice. Here, it should be noted, that the legitimate use of multiple deponents to respond to a Rule 30(b)(6) notice can also provide a strategic advantage to the party against whom discovery is sought.

Effective Use of Interpreters

Finding and selecting a court-certified interpreter is merely the first step. All too often, attorneys do not realize that interpreters must prepare for depositions in order to be effective. Thus, it is advisable to provide your interpreter with key case pleadings such as the Complaint and Answer so that he/she can become familiar with the basic facts and issues in the litigation. You should also consider providing the interpreter with key documents that will be used in the deposition. This will enable the interpreter to become familiar with core terminology in the case. It also will allow the interpreter to become comfortable with document text that will be quoted from during the examination or that contains a translation.[1]

You should anticipate and prepare for the following when using an interpreter for discovery depositions and/or trial testimony:

Consecutive Interpretation

Many foreign languages allow for simultaneous interpretation in a court proceeding. Given the nature of most Asian languages, however, an accurate interpretation cannot be done in such a manner. Thus, you need to anticipate that the pace of questioning and the length of the deposition will be affected by a consecutive interpretation of questions and answers. The general rule of thumb is that the length of the deposition will be about three times longer with the use of an interpreter than it would without one. This slowed pace can be very challenging for both the attorney questioning and the attorney defending the witness. Thus, use of video review to prepare your client for deposition can also serve as an effective means to prepare yourself for the pace and flow of the deposition with the presence of an interpreter.

Check Interpreter

In most depositions involving an Asian language and English, a 'check interpreter' is often used in addition to the lead interpreter. The check interpreter is typically provided by the party defending the deposition. When defending a client at deposition, use of a check interpreter is highly advisable. You should not assume that your opponent has retained a qualified interpreter. Here, the check interpreter can identify and raise any issues as to the accuracy of the lead interpreter's work. This provides an important safeguard to the process.

Objections and Attorney Exchanges

Objections are a necessary part of the deposition and trial testimony process. In a case without interpreters, they can become disruptive and they can have a chilling effect on the witness if abused by an attorney or if the deponent has not been fully prepared for this dynamic. With the added layer of an interpreter, special challenges are presented. Where practical, counsel should work out an agreed procedure for making objections in advance of the deposition. With consecutive interpretation, attorneys have a tendency to make an objection while the interpreter is relating the question to the witness. As a result, the interpreter likely will have difficulty relating the objection accurately. Here, use of real-time software on a monitor has helped to address this problem. In addition, some interpreters will interpret the objection before the question. This order is problematic and likely unacceptable to opposing counsel. Thus, it is preferable to work out an agreement with counsel regarding the order of interpretation before the start of the deposition.

Attorney discussions during a deposition, while common and often necessary, also present challenges for the interpreter. Providing an accurate interpretation of counsels' discussions often can be more difficult than interpreting the subject matter of the litigation. As a result, all efforts should be made to keep these colloquies to a minimum-and very short. In addition, it is advisable to reach agreement with opposing counsel, where feasible, on the manner and timing of the interpretation of attorney discussions during the deposition.

In summary, an overall agreement with opposing counsel before deposition discovery commences is strongly encouraged. Such agreements help ensure the accuracy of the record and they facilitate efficiencies for all parties in the litigation.

Method and Manner of Inquiry

When preparing to take a discovery deposition or conduct a direct or cross examination at trial, some special considerations are essential. Short and simple questions are the objective of any trial lawyer. When conducting an examination through an interpreter, however, this objective takes on heightened importance. Lengthy and compound questions are difficult under normal circumstances. To an interpreter, they become a nightmare. To the fact-finder, they serve as an obstacle to the important testimony you seek to elicit.

You should speak directly to a witness when conducting an examination through an interpreter. Often, attorneys become distracted during an examination and will speak directly to the interpreter; eg "ask her..." or, "did he understand what I just asked him?" Use of the `third person' as a means of questioning a deponent should be avoided at all costs. It is disrespectful to the witness and it impermissibly forces the interpreter into a substantive role in the examination.

During an examination at deposition or a trial, an attorney may quote from previous sworn testimony, a witness statement or a document. Here, an examining attorney should be aware of the limitations of attempting to quote from a single word, phrase or sentence. The nature of the Japanese language is illustrative of this limitation. For example, short phrases or single words do not necessarily translate verbatim from English to Japanese. Often, the interpreter must add words that are implied given the syntax of either the question or response so that an accurate interpretation can be rendered.

In summary, it is strongly advised that the examining attorney endeavor to learn about the basic characteristics of a given language as part of the preparation. Little things, such as learning the basic word order can be very helpful in grasping the essence of testimony through an interpreter. In Japanese, for example, the verb is often at the end of a sentence. Additionally, personal pronouns are not typically used, unlike English. Excessive use of pronouns in questions, therefore, can cause confusion for the witness. Thus, a basic understanding of the deponent's native language is both invaluable and essential.

Key Considerations at Trial - Addressing Fact-Finder Bias

> "If a foreign country doesn't look like a middle class suburb of Dallas or Detroit, then obviously the natives must be dangerous as well as badly dressed..." - *Lewis H Lapham Money & Class in America (1988)*

The express objective of jury selection is to find 12 members of the venire who can render a fair and impartial verdict that is based upon the facts and the law as provided by the trial judge. In reality, however, jurors come from all walks of life. They bring with them their life experiences, their education, their work history, political and religious views and their socioeconomic status. The trial lawyer has the daunting task of probing bias of potential jurors within the ever diminishing time allotments of jury selection. In representing Asian businesses in US litigation, we must first acknowledge the areas of potential bias amongst the venire and be willing to pursue inquiry in those areas without reticence. When it comes to racial stereo-typing, the American jury system historically has been particularly vulnerable.

Like all other racial minorities in the United States, Asian Americans are subjected to a variety of stereotypes that have emerged from an unfortunate history of discrimination in this country. In recent history, Asian Americans have been widely celebrated as the "model minority." Although the definition of this phrase has varied amongst commentators, it is used to refer to a non-white segment of American society that has obtained social acceptance and educational and economic affluence through hard work and a conservative value system. Asian Americans, however, were subjected to a contradictory stereotype long before receiving praise as the "model minority." This stereotype has been referred to throughout history as the "yellow terror" or "yellow peril", a phrase that emanates from the US immigration waive of 1800s. Many historians have documented the many cruel and unfavorable views Americans held of the early Asian immigrants. These views were also reflected in the laws of the day.

In 1882, Congress passed the Chinese Exclusion Act, a law that placed a 10 year ban on the immigration of Chinese, "lunatics" and "idiots" into the US. This legislation was renewed in succession until it was later repealed in 1943. In repealing this law, however, Congress merely allowed a quota of only 105 Chinese immigrants per year.

The internment and incarceration of over 120,000 people of Japanese ancestry during World War II is a tragic and painful chapter in American history. During this era, the United States Supreme Court upheld imposition of a curfew, the evacuation and incarceration of Japanese Americans on the basis of 'military necessity.'[2]

It was some 40 years later that the federal government took any meaningful action to redress its tragic and discriminatory action. In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians. After lengthy public hearings, the Commission concluded that Executive Order 9066 [authority by which Japanese Americans were incarcerated during World War II] was not justified by any valid 'military necessity.' Rather, the Executive Order was rooted in racial prejudice, wartime hysteria and an overall failure of political leadership. Based upon the Commission's recommendations, Congress passed legislation providing for wartime reparations to those who were incarcerated and an official apology was issued by President Reagan. Despite the government's public recognition of its wrongful conduct and acceptance of responsibility, a residual undercurrent

remains. Indeed, during the Congressional debate on the Commission's recommendations in the 1980s, Senator Jesse Helms from North Carolina opposed passage of the legislation, arguing instead that the Japanese Government should agree to compensate the families of those who were killed at Pearl Harbor. While clearly a minority view, Senator Helms's diatribe unfortunately represents an invidious belief held to this day by some segments of the American population. These same individuals can be called to jury duty just like anyone else in this country.

There are many recent and well-publicized jury trials that provide anecdotal evidence of juror bias against Asian Americans. In 1982, a 27 year old Chinese-American engineer was beaten to death by two white unemployed auto workers in a brawl outside of a Detroit bar. The defendants thought the victim, Vincent Chin, was Japanese and beat him to death with a baseball bat. During the fight, witnesses heard the defendants shout, '[i]t's because of you little mother f___ers that we're out of work." At trial, the jury acquitted one defendant and found the other guilty of manslaughter. At sentencing, the trial judge imposed an unusually lenient sentence of three years for the defendant found guilty of Chin's death, a decision that set off outrage in the Asian community throughout Michigan.

In 1992, a 16 year old Japanese foreign exchange student attending school in Louisiana, Yoshihiro Hattori, was shot to death while he and his American friend were on their way to a Halloween party. Hattori and his friend mistakenly knocked on the door to a home where they thought the party was being held. When a woman answered the door that the two boys did not recognize, they tried to explain that they were looking for a Halloween party. The woman became frightened and screamed for her husband to get a gun. In response, her husband came to the door and confronted Hattori, saying nothing to his American friend standing nearby. The husband pointed his gun at Hattori and ordered him to "freeze!" Hattori, who spoke English with a pronounced accent, did not understand what that term meant. Thus, he continued to approach and attempted to explain that they were looking for a Halloween party. Without hesitation, the husband shot Hattori in the chest.

Although the husband was charged with manslaughter, he was acquitted at trial based upon a claim of self-defense. Jurors found his claimed fear of death and/or imminent harm to be reasonable despite testimony that Hattori had no weapons and appeared to be of a very small build. Nevertheless, the defendant insisted that Hattori was 'scary' and 'frightening'.[3]

A medical malpractice case was tried to jury verdict in Spokane County Superior Court in the State of Washington last December, 2007. In that case, the jury returned a defense verdict exonerating a local doctor from malpractice. The plaintiff's lawyer, Mark Kamitomo who is of Japanese descent, brought a motion for a new trial post verdict. Unlike typical assignments of error, Mr. Kamitomo presented uncontested affidavits from two jurors about misconduct during the deliberations. In these affidavits, the jurors recounted how five other jurors mocked him during deliberations, referring to him as "Mr. Kamikaze", "Mr. Havacoma" and "Mr. Miyagi" (a character from the movie, *The Karate Kid*).

The defense lawyer in that case, Brian Rekofke, obtained affidavits from other jurors who sat on the case in an effort to oppose plaintiff's motion for a new trial. These jurors acknowledged that the derogatory names were used in reference to Mr. Kamitomo but denied that they were uttered as racial insults. Rather, these jurors claimed that the names were used to refer to Mr. Kamitomo during deliberations because certain jurors were having difficulty remembering his name.

The trial judge properly granted plaintiff's motion for a new trial, noting in part that these same jurors had no difficulty pronouncing or `bastardizing' Rekofke's "Middle European" name. Perhaps more ominous was the Court's observation from the bench when rendering his ruling, "[w]e'd hoped we'd moved beyond this, and we apparently have not. It's upsetting..."[4]

Asian companies have also experienced certain stereo-typing in US jury trials. Some legal commentators have observed that American companies enjoy a distinct home field advantage injury trials where the opponent is an Asian -and particularly Japanese-business. In 1992, for example, Honeywell successfully sued Minolta in a patent infringement dispute and obtained a landmark $96.3 million dollar verdict.[5] That case often is cited by commentators, jury consultants and trial lawyers for just how powerful a home court advantage can be for an American firm involved in litigation with an Asian company.

Jury consultants around the country have developed a variety of special analytical models for Asian business clients aimed at identifying 'anti-Asian bias' in American jury pools. If the complexity of your cases warrants it, use of mock juries and focus groups run by qualified jury consultants can provide invaluable information about likely race bias in a given case. Whether you use a mock jury or not, you should in all cases give careful consideration to the demographic make up of the venire when picking a jury. Age, education, economic status and military service are likely to yield important information on race bias with a prospective juror. To the extent that attorneys are allowed to conduct questioning during jury selection, conclusory inquiries like, "can you be fair?" should be avoided as they are not likely to reveal any useful information. Most jurors, whether biased or not, are loathe to admit that they cannot before fair in a group setting such as jury selection. Additionally, use of questionnaires with prospective jurors is highly recommended. Questionnaires provide a 'safe' opportunity for prospective jurors to provide confidential and substantive responses to questions involving race-based bias.

In the landmark case of Batson v Kentucky, the US Supreme Court held a prosecutor's use of peremptory challenges based upon race to be constitutionally impermissible.[6] The

Court expanded the scope of Batson in subsequent decisions. For example, the Court later held that a criminal defendant cannot exercise peremptory challenges based upon race.[7] The Supreme Court also has extended Batson's prohibitions against race based peremptory challenges to civil litigants in private causes of action.[8] Most states have adopted similar "Batson" prohibitions with regard to the exercise of peremptory challenges in criminal and civil cases. The trial lawyer should be fully aware of the scope of Batson and its progeny as these types of challenges may become warranted in any given case.

Conclusion

In summary, representing Asian clients in high stakes US jury trials presents a unique set of circumstances and challenges for the trial lawyer. A successful representation requires focused preparation. The lawyer must demonstrate a knowledge of cross cultural differences and a sincere and profound respect for those differences. The lawyer must step outside of a traditional approach and examine the case from the unique perspective of the client-not the mindset of the attorney. Additionally, the attorney must be careful not to mirror image an American value system on the Asian client. Rather, the lawyer will earn the respect, candor and loyalty of the client by demonstrating knowledge of and respect for the client's cultural value system. The conceptual framework outlined herein is offered to aid the trial lawyer in this endeavor.

Notes:

1. Some attorneys use the words "interpreter" and "translator" interchangeably. In fact, the terms denote different professional activities to the Asian client representative. For example, an "interpreter" renders oral speech in one language into another. A "translator" renders written words from one language into another.
2. See *eg, Korematsu v US*, 323 US 214 (1944); *Ex Parte Endo*, 323 US 282 (1944); *Hirabayashi v US*, 320 US 81 (1943); *Yasui v US*, 320 US 114 (1943).
3. For a discussion of the facts of the criminal case, *see Hattori v Peairs,* 662 So 2d 509 (La Ct App 1995). While the defendant was acquitted of manslaughter, it should be noted that Hattori's parents successfully prosecuted a wrongful death action against the defendant after the criminal case concluded.
4. "Racial Remarks Prompt New Trial: Judge Cites Jury's Nicknames for Lawyer", by Karen Dorn Steele, *The Spokesman Revie*w, January 26, 2008.
5. *Honeywell v Minolta Camera Co, Inc*, 1990 WL 66182 (DNJ May 15, 1990). The case was tried to verdict and later settled for $127.5 million.
6. *Batson*, 476 US 79 (1986).
7. *Georgia v McCollum*, 505 US 42, 59 (1992).
8. *Edmondson v Leesville Concrete Co*, 500 US 614, 616 (1991).