



**A Guide to Understanding
the Role of Foreign Language
Translations in eDiscovery**



Divergent Language Solutions is an international language service provider headquartered in San Francisco, California, with offices in New York, NY, and London, UK. Divergent provides a comprehensive selection of language services specializing in time-sensitive legal, financial, technical, and corporate language projects worldwide. We are the preferred partner to an array of international leaders within regulated and other industries: Global 100 law firms, eDiscovery providers, financial institutions, insurance providers, technology businesses, and pharmaceutical and life-science companies. Support is available 24 hours a day, seven days a week.

Attorneys and their litigation support teams can best mitigate risks if they are prepared to competently handle the challenges foreign language documents present within the full discovery process, including eDiscovery.

Underestimating the importance of subject matter expertise early in the litigation or investigatory process can lead to serious issues downstream.

The consequences of poor preparation or misinterpreting key evidence can include sanctions*, the exclusion of evidence, or additional time and expense for clients. Relying on a single tool or technology to manage translation, much like in eDiscovery itself, can also lead to additional challenges. This guide aims to illustrate how different types of foreign language challenges may present themselves throughout the Electronic Discovery Reference Model (EDRM) and how to best prepare for the eventual need of foreign language experts.

Key Translation Terms

Although some of the following terms may be familiar, it is worthwhile to clearly define them given common misconceptions:

- **Translation.** The process of rendering the written word from one language to another.
- **Interpretation.** The process of rendering the spoken word from one language to another.
- **Linguist.** A professional who translates and/or interprets. In the case of Divergent, we work with expert

linguists who are not only subject to vetting and regular testing, but also have vast experience in the specific subject matter of the content being translated and/or interpreted.

- **Machine Translation (MT).** Automated translation performed by a computer without human involvement.
- **Certified Translation.** A translation that is endorsed by a professional translator and/or agency for use in a public or official forum. This assurance is something that should only be issued to translations performed by expert human linguists. Legal professionals should exert caution when working with translation providers to ensure machine translations are not being used as a basis to post-edit and subsequently certify. As for the actual certification, there is unfortunately no universal standard. Depending on the jurisdiction and body, requirements vary as to what kinds of certifications are acceptable, who can certify, and how the certification process is carried out. In some instances, a court may require a translator affidavit, while in other scenarios it may be perfectly acceptable to present a certification crafted by a translation agency and signed by a representative of the agency. In countries such as Germany and France, certain bodies will require certified translations carried about by pre-approved "court sworn" translators (e.g. beglaubigt Übersetzung, traduction assermentée).

*<https://slator.com/poland-rules-on-lsp-using-google-translate-defines-professional-translator/>

Translations and the EDRM

Using the EDRM model, here are some key points in the process in which foreign language documents may present issues, and how to distinguish what you may need at that point in the process.

Identification and Preservation

In the identification and preservation stages of the EDRM, the focus is on identifying the key custodians who may possess information that is potentially relevant to an issue in the pending legal matter. It is also necessary to identify the various sources of electronically stored information (ESI) and to take sound, defensible steps to preserve the relevant ESI. While there is unlikely to be a need at this point to translate foreign language documents, it is important to have an understanding that foreign language documents may exist in the universe of potentially relevant ESI.

Collection

During collection the focus is on gathering and segregating ESI using forensically sound procedures to ensure documents and the associated metadata are not altered or destroyed during the collection process. Again, translation may not be necessary at this stage, but through interviews with custodians and IT personnel, it should become clear whether foreign language documents are contained within the universe of ESI that is collected. If so, legal professionals should start considering how they will best manage this aspect.



Divergent Language Solutions is a provider of translation and other language services to lawyers and legal professionals worldwide.

Processing

In processing, the purpose is to take ESI from disparate sources and convert it to a uniform format for review by attorneys or others who need to review documents. It is also the point at which ESI is filtered and culled to reduce the overall volume. A variety of culling and filtering methodologies may be used, including de-NISTing, deduplication, file type or date filters, or keyword searching. It is within the realm of keyword searches that translation once again comes into play. When filtering through vast amounts of documentation to pinpoint relevant material, a keyword search conducted only in one language limits the return. Using professional linguists to cast a wider net of translated keywords along with likely used synonyms will produce more comprehensive results. Processing is also the first opportunity to address the need to handle foreign language documents because in the review stage that follows, attorneys and others who are reviewing documents will need to make judgments on the relevance of all documents, including material in other languages.

Depending upon the volume of foreign language documents, it may make sense to translate the documents prior to the review stage. Machine translation is one approach. Full human translation by an expert linguist is another approach. Each approach has its pros and cons.

The cost and time that would be incurred by having linguists translate hundreds or thousands of pages can prove extensive. Machine Translation can cover a greater volume of documents at a lesser cost, but the technology does have a margin of error that must be considered. Using machine translation to narrow the

total universe of your production to potentially relevant documents for review is generally considered an effective approach. However, it is important to note that machine translation does not provide an accurate enough end product that one should blindly rely upon, let alone a level of work that should be certified.

Document Review & Analysis

During document review it is necessary to make more formal decisions about the handling of foreign language documents. If machine translation is the tool that has been used to help a litigation team identify which foreign language documents might be relevant, we next need to determine which translation approach is the most suitable:

- Proceed to fully machine translate every document tagged as possibly relevant,
- Utilize machine translation with post-editing, or
- Proceed straight to full human translation.

When a large volume of documentation – as in hundreds of thousands or millions of files – has been identified as potentially germane, it is often more cost and time effective to use machine translation as a first step. Legal professionals should keep in mind, however, that this depends on the language in question as well as the format of the source material. Present day machine translation technologies are not able to produce equally good machine translation results across all languages nor process all file formats that may be contained in the content requiring translation. Where a language such as Spanish is generally quite "machine translation friendly," one must keep in

mind that while machine translations might appear to read well, that is by no means proof that the translations are actually accurate or even complete. Some text may have been missed and left untranslated and key terms may have been translated out of context. That said, where MT does prove successful in rendering foreign language documents intelligible enough to decide whether or not to retain certain material as the case moves forward, the next question is how best to polish the machine translations so that they can be relied upon.

Having professional linguists review and improve those machine documents is what the language services industry defines as machine translation post editing, and it is a solution very much worth considering.

Of course, if a document is clearly relevant and one likely or certain to be used as evidence (thereby increasing the chances it will need to be certified), a much sounder approach is to have it fully translated from inception.

Presentation

Depositions, trials, and hearings will typically require the use of translated documents. It is advisable to use certified translations at this stage, since it is likely the document will in fact be used as evidence. While providing post-editing of

machine translations is a growing trend, legal professionals should be wary of any provider who offers to certify a post-edited machine translation. There are specific and serious limitations to this approach. This is the crucial moment when it is best to move away from technological solutions and put them in the hands of real experts.

The translators may also be called upon, in a witness capacity, to verify or defend their translation(s) in the courtroom. The need for an interpreter may also arise. Non-native English speakers, for example as a witness, plaintiff, or defendant, may require assistance to communicate. There is an option of remote or in-person interpreting for court and depositions. As courts and offices reopen, in-person will likely again become more common.

Depositions typically use the consecutive mode of interpreting. This is a model whereby one person speaks and once finished, the linguist interprets everything that was said. Simultaneous interpreting (imagine the UN meetings where interpreters speak into the diplomats' earpiece in real time) is another option but one that is inherently different and presents an entirely different set of requirements meaning it may or may not be the right fit. Since simultaneous interpretation requires that the linguist interpret what the speaker says at the same time the speaker is talking, it is a physically a much more grueling



undertaking. Because of this, qualified professional interpreters asked to provide simultaneous interpreting will require to work as a pair with another interpreter allowing them to regularly switch back and forth every 20-30 minutes. In fact, providing simultaneous interpretation in pairs is a requirement of various international interpreting associations put in place to ensure their members can provide a consistent high level of quality.

Lastly, simultaneous interpreting – while faster – does require two interpreters and equipment such as headphones (and possibly booths) which does increase costs.

Conclusion

Proper awareness ahead of foreign language challenges allows a legal team to fully serve their client and will guide preparation for such matters. Expectations of cost, translation/interpreting timelines, and accuracy can be baked into your casework from the planning stages. This will not only greatly assist the management of a case but also best serve the client, saving considerable time and money.



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