PROVING IT UP AND GETTING IT IN: FOREIGN LAW AND FOREIGN EVIDENCE

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Member, Supreme Court Advisory Comm. on Rules of Civil Procedure (1994-2002); Chair, Subcommittee on Rules 16-165a
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Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (1999) (2 Volume Set)

Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)

Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal, 41 SOUTH TEXAS LAW REVIEW 111 (2000)

Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)

Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

Characterization of Marital Property, 39 BAY. L. REV. 909 (1988) (co-authored)

Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines, 13 ST. MARY'S L.J. 477 (1982)

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State Bar's Advanced Family Law Course
Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000)

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Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000)

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State Bar's Advanced Evidence & Discovery Course
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State Bar's Advanced Appellate Course
Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000)

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Proving It Up and Getting It In: Foreign Law and Foreign Evidence©

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I. INTRODUCTION. This article discusses the procedures for using foreign law in court proceedings in Texas and U.S. Federal district courts. It also discusses the use of foreign depositions and documents. And, it discusses the evidence rules and procedures for using interpreters in court proceedings in Texas and Federal district courts.

II. PRESUMPTION OF SIMILARITY OF FOREIGN LAW. Where neither party establishes the law of another jurisdiction, and the court does not otherwise take judicial notice of it, then it will be presumed that the law of the other jurisdiction is identical to Texas law. *Ogletree v. Crates*, 363 S.W.2d 431, 435 (Tex.1963). As noted in Olin Guy Wellborn III, *Judicial Notice under Article Ii of the Texas Rules of Evidence*, 19 ST. MARY'S L.J. 1, 28 (1986):

> [I]f no party establishes the content of applicable foreign law in accordance with the provisions of the rule, the absent law will be supplied by the common-law presumption of identity. That is, Texas courts will presume that the unproved foreign law is identical to Texas law.

III. USING FOREIGN LAW IN TEXAS CASES.

A. JUDICIAL NOTICE. In Texas courts, the trial judge can take "judicial notice" of certain information, which relieves any party from having to "prove" that information through the offer of evidence to the fact-finder (judge or jury). Tex. R. Evid. 201-203 govern judicial notice. Rule 201 deals with judicial notice of "adjudicative facts." Rule 202 deals with determination of the law of other states of the United States. Rule 203 deals with determination of the law of foreign countries. Tex. R. Evid. 203 reads:

> Rule 203. Determination of the Laws of Foreign Countries
>
> A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

1. Commentary. The following commentary on the Texas Rules of Evidence relating to judicial notice is helpful. Murl A. Larkin, *Article II: Judicial Notice*, 30 HOUS. L. REV. 193, 198 (1993):

> The judicial function of determining law is traditionally characterized as within the concept of judicial notice. [FN25] "Law" includes, of course, not only the law of the forum [FN26] but also the law of sister states [FN27] and foreign countries. [FN28] When the content or applicability of law of the forum is to be noticed, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. [FN29] When other than domestic law is involved, determination of the law is generally considered a question of fact, which is

> subject to the requirements of formal pleading and proof. [FN30] Regardless of the type of law to be determined, the requirements of general knowledge or indisputability are inapplicable.

2. Case Law. The proper manner of proving Mexican law was considered in the case of *Ossorio v. Leon*, 705 S.W.2d 219 (Tex. App.--San Antonio 1985, no writ):

> Appellees' reply raises procedural issues concerning the timeliness of the filing of appellant's summary judgment motions and the quality of the summary judgment proof. A discussion of these matters must precede a discussion of the substantive law of this case.
>
> A hearing was held in June 1983 on the motions for summary judgment, after which the trial court took the motions under advisement and asked for briefs from parties. Judgment was not rendered until July, 1984. In the interim, in addition to the requested briefs, the following documents were filed with permission of the court; (1) Appellant's Second Amended Motion for Summary Judgment (replacing the First Amended Motion for Summary Judgment filed without leave of court); (2) Appellant's attorney's affidavit concerning General Ossorio's will; (3) a copy of the English translation of the Civil Code of Mexico; (4) a copy in Spanish of the Civil Code of Mexico; (5) a notarized copy of appellant's affidavit (substituted for unsworn one filed earlier); (6) sworn legal opinions of Mexico's law by lawyers McKnight and Steta (substituted for unsworn opinions filed earlier).
>
> Appellees complain that the documents were untimely filed and are therefore not proper support for appellant's motion for summary judgment. TEX. R. CIV. P. 166-A(c) (Vernon Supp. 1985) provides, however, that a summary judgment can be based on "pleadings, depositions, answers to interrogatories, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court ..." (emphasis added).
>
> Since the court specifically granted leave to file the above documents, the documents were properly before the trial court and before this court on appeal. The trial court's judgment recites that he considered the pleadings, the briefs, the arguments of counsel, and summary judgment evidence. We assume that he considered all the documents in his possession that can be characterized as fitting into the above categories.
>
> Appellees further contend that some of the affidavits offered by appellant were based on hearsay. Granted that Mrs. Ossorio's and Mr. Salinas' statements include some hearsay as to the intent of the deceased, but there is abundant evidence of his intent completely separate and apart from those affidavits. Both the contract of deposit itself, signed by the deceased, and the will evince his intent to make a gift to his wife of the funds in their joint account, if his wife survived him. The affidavits of McKnight and Steta, both being legal opinions, are properly based on the facts as related to them, and are not considered hearsay.
>
> Appellees objected to the proof of foreign law offered by appellant because the appellant failed to plead the foreign law, because appellant filed no motion to take judicial notice of the foreign law, because appellant attached no affidavit to the Civil Code of Mexico, and because appellant failed to produce a statute book of the Federal District of Mexico "purporting to have been printed under the authority thereof." Appellant is apparently referring to article 3718 of the Revised Civil Statutes, which was repealed in 1983. *222Rule 203 of the Texas Rules of Evidence (Vernon Supp.1985), and Rule 184(a) of the Texas Rules of Civil Procedure (Vernon Supp.1985), provide:
>
> > A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish to the opposing party or counsel copies of any written materials or sources that he intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish to the opposing party or counsel both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a

> party or admissible under the rules of evidence, including, but not limited to affidavits, testimony, briefs, and treatises.
>
> If the court considers sources other than those submitted by a party, it shall give the parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. Its determination shall be subject to review on appeal as a ruling on a question of law. When appellant introduced the foreign law, she requested, and the trial court granted, a postponement in order to comply with the above rules.
>
> We find that the appellant, with leave of court to file the documents offered, and with the postponement granted by the court, complied fully with the applicable statutes in calling the foreign law to the attention of the court. We have considered the other reply points raised by the appellees, regarding acknowledgments and jurats and find that appellant complied with TEX. R. CIV. P. 166-A(e) (Vernon Supp. 1985) regarding form of affidavits to document her summary judgment proof.

In *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 896 (Tex. App.-- Houston [14th Dist.] 2000, pet. denied), the court of appeals made the following comments about Rule 203:

> Rule 203 is a hybrid rule by which presentation of the law to the court resembles presentment of evidence, but which the court ultimately decides as a matter of law. See Ahumada, 992 S.W.2d at 558; Gardner v. Best Western Int'l, Inc., 929 S.W.2d 474, 483 (Tex. App.--Texarkana 1996, writ denied). The determination of the law of a foreign country may present the court with a mixed question of law and fact. Id. Summary judgment is not precluded when experts disagree on the interpretation of the law if, as in this case, the parties have not disputed that all of the pertinent foreign law was properly submitted in evidence. Id. Where experts disagree on application of the law to the facts, the court is presented with a question of law. Id. at 558-59. On appeal, we must determine whether the trial court reached the proper legal conclusion. Id.; see also Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984); Salazar v. Coastal Corp., 928 S.W.2d 162, 166 (Tex. App.--Houston [14 th Dist.] 1996, no writ).

Mentioning the intent to rely on foreign law in a motion for summary judgment met the requirement to give notice by pleading of intent to rely on foreign law.. *Lawrenson v. Global Marine, Inc.*, 869 S.W.2d 519, 525 (Tex. App.--Texarkana 1993, writ denied).

Sometimes a litigant will need to refer the court to international law. That can be done through the procedure of judicial notice. According to Professor Olin Guy Wellborn III, *Judicial Notice under Article Ii of the Texas Rules of Evidence*, 19 ST. MARY'S L.J. 1, 28 (1986):

> Although it is not covered by rule 203, international law is subject to judicial notice as a matter of common law, because international law is "part of our law." [FN138] In addition, in Texas, Spanish and Mexican law, when and to the extent that they are applicable as the law of the former sovereign, have always been subject to judicial notice for that purpose. [FN139]

IV. USING FOREIGN LAW IN FEDERAL CASES.

1. Judicial Notice in U.S. Federal Court. While Federal Rule of Evidence 201, like Texas Rule of Evidence 201, permits a court to take judicial notice of adjudicative facts, there is no federal counterpart to Tex. R. Evid. 202 (law of other states) or 203 (law of other nations). Thus, the Federal Rules of Evidence do not expressly permit the court to take judicial notice of laws of other countries. However, that authorization is granted by the Federal Rules of Civil and Criminal Procedure, as explained below.

2. FRCP 44.1. Federal Rule of Civil Procedure 44.1 governs the use of foreign law in federal district court.

> Fed. R. Civ. P. 44.1. Determination of Foreign Law
>
> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

3. FRCrimP 26.1.

> Rule 26.1. Determination of Foreign Law
>
> A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

4. Commentary. Commentary from Murl A. Larkin, *Article II: Judicial Notice*, 30 HOUS. L. REV. 233, 234 (1993), sheds light on the federal procedures regarding proof of foreign law.

> The first sentence of the federal rule, concerning notice, is designed to avoid unfair surprise. [FN202] The second sentence, which permits consideration of any relevant material, including testimony, whether *234 otherwise admissible, recognizes that the ordinary rules of evidence are often time consuming, inefficient, expensive, and generally inapposite to the problem of determining foreign law. [FN203] The second sentence also permits the court to engage in its own research and to consider any relevant material free of the confines of evidentiary rules because the court may have at its disposal better foreign law materials than are presented by counsel. [FN204] The final sentence makes the determination of an issue of foreign law equivalent to a ruling on a question of law, not fact, so that appellate review will not be narrowly confined. [FN205]

5. Case Law. As noted in the case of *United States v. Mitchell*, 985 F.2d 1275, 1280 (4th Cir.1993):

> The determination of foreign law is a question of law to be established by any relevant source, whether or not submitted by a party or admissible under the Federal Rules of Evidence. See Fed.R.Crim.P. 26.1; United States v. Peterson, 812 F.2d 486, 490-91 (9th Cir.1987). The broad discretion afforded a court in considering evidence to determine foreign law derives from the general unavailability of foreign legal materials, and the frequent need for expert assistance in understanding and applying the materials. In determining questions of foreign law, courts have turned to a wide variety of sources including affidavits and expert testimony from an Australian Federal Judge, United States v. Molt, 599 F.2d 1217, 1220 (3rd Cir.1979), a Peruvian Minister of Agriculture, United States v. 2,507 Live Canary Winged Parakeets, 689 F.Supp. 1106, 1009 (S.D.Fla. 1988), and a South African attorney, United States v. Taitz, 130 F.R.D. 442, 446 n. 2 (S.D.Cal.1990); certified translations of Bolivian Supreme Decrees, United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare, 636 F.Supp. 1281, 1285 (S.D.Fla. 1986); foreign case law, United States v. Peterson, 812 F.2d 486, 491 (9th Cir. 1987); a student note in a Philippine Law Review, id.; information obtained by a law clerk in a telephone conversation with the Hong Kong Trade Office and presented ex parte to the court, United States v. Hing Shair Chan, 680 F.Supp. 521, 524 (E.D. N.Y. 1988); and the court's "own independent research and analysis" of a Yugoslavian law. Kalmich v. Bruno, 553 F.2d 549, 552 (7th Cir.), cert. denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977).

Statutes, administrative material, and judicial decisions can be proved by offering into evidence an official or authenticated copy supported by expert testimony as to their meaning. Litigants or the court may also use secondary sources such as texts, journals and even other unauthenticated documents relating to foreign law. *Republic of Turkey v. OKS Partners*, 146 F.R.D. 24, 27 (D. Mass. 1993).

Once the case is tried and has gone up on appeal, in determining foreign law the appellate court is not limited to what was presented to the trial court. The appellate court may consider any relevant information. *U.S.A. ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3rd Cir. 1977); *Grand Entertainment Group v. Star Media Sales, Inc.*, 988 F.2d 476, 688 (3rd Cir. 1993) (appellate court not limited to material presented to trial judge in analyzing issues involving foreign law, and may do its own supplemental research).

6. Court-Appointed Experts. Federal Rule of Evidence 706 permits the court to appoint an expert witness to assist the court. It may be done on motion of a party, or on its own initiative. The witness must advise the parties of his or her findings, and the expert's deposition may be taken by any party. The expert can be called to testify by any party or the court. The expert is entitled to reasonable compensation set by the court, and in ordinary civil litigation that expense can be imposed on the parties in a proportion set by the court. While Rule 706 doesn't mention the appointment of an expert to assist on determining the law of foreign countries, that could be the basis of the appointment.

V. AUTHENTICATING FOREIGN GOVERNMENT RECORDS.

A. AUTHENTICATION GENERALLY. The general rule of authentication in both state and federal courts is Rule of Evidence 901. The requirement of authentication is met by evidence sufficient to support a finding that the matter in question is what its proponent claims.

You can authenticate a document by:

- testimony of a witness with knowledge;
- as to handwriting, lay opinion on genuineness;
- as to voice, identification by someone who has heard the speaker speak.

Some evidence is "self-authenticating," meaning that no sponsoring witness is required to lay the predicate for authenticity:

- certified copies of government records;
- official publications;
- newspaper and periodicals;
- commercial paper; and
- business records with business record affidavit.

In order to be admissible, court records must first be authenticated–i.e., it must be shown that the document is what its proponent says it is. Once the document is authenticated then the normal rules of admissibility apply. For example, a properly-authenticated government record may be inadmissible hearsay if offered for the truth of the matter stated and no exception to the hearsay rule applies.

B. AUTHENTICATION IN TEXAS COURTS. Texas Rules of Evidence 901 and 902 govern authentication in Texas civil and criminal proceedings. The rules, as they relate to government records, are as follows [omitted language is reflected by an ellipsis . . . .]:

> Tex. R. Evid.Rule 901. Requirement of Authentication or Identification
>
> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
>
> * * *
>
> (10) Methods provided by statute or rule. Any method of authentication or identification provided by statute or by other rule prescribed pursuant to statutory authority.

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic Public Documents Under Seal. . . . .

(2) Domestic Public Documents Not Under Seal. . . . .

(3) Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person, authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the

> official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.
>
> (4) Certified Copies of Public Records. . . . .
>
> (5) Official Publications. . . . .
>
> (6) Newspapers and Periodicals. . . . .
>
> (7) Trade Inscriptions and the Like. . . . .
>
> (8) Acknowledged Documents. . . . .
>
> (9) Commercial Paper and Related Documents. . . . .
>
> (10) Business Records Accompanied by Affidavit. . . . .
>
> (11) Presumptions Under Statutes or Other Rules. Any signature, document, or other matter declared by statute or by other rules prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.

1. Commentary. The following commentary explains the operation of Rule 902(3). R. Doak Bishop, *International Litigation in Texas: Texas Rules of Evidence and Recent Changes in the Texas Rules of Civil Procedure*, 36 BAYLOR L. REV. 131, 150 (1984):

> The new Texas evidence rule is taken both from Rule 44(a)(2) of the Federal Rules of Civil Procedure and from section 5.02 of the [Uniform Interstate and International Procedure Act, 13 U.L.A. 459 (1980)]. The last sentence of the new provision abolishes the requirement for final certification of a foreign document if both the United States and the foreign country in which the records are kept have entered into a treaty or convention that deletes such a requirement. This provision has been added in order to authorize Texas courts to make use of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, [FN77] which greatly simplifies and expedites the authentication of official documents in one country for use in another. Thirty countries are now parties to this Convention. [FN78] Unfortunately, this Convention may not be self-executing and binding on state or federal courts unless implemented either by rule or legislation. [FN79] In any event, this sentence would provide specific authorization to Texas lawyers to proceed in accordance *151 with any treaties or conventions entered into by the United States, and will have the added advantage of calling to the attention of the bar the existence of conventions that may affect their clients' rights. Under the Hague Public Documents Convention, the requirement of a final certification is abolished and replaced with a model apostille, which will be issued by officials of the country where the records are located. [FN80] The apostille certifies the signature, official position, and seal of the attesting officer. [FN81] The authority who issues it must maintain a register or card index showing the serial number of the apostille and other relevant information recorded on it. [FN82] A foreign court can then check the serial number and information on the apostille with the issuing authority in order to guard against the use of fraudulent apostilles. [FN83] This system provides a reliable method for maintaining the integrity of the authentication process, and the apostille can be accorded greater weight than the normal authentication procedures, because foreign officials are more likely to know the precise capacity of the attesting officer under foreign law than would an American official. [FN84]

C. AUTHENTICATION IN FEDERAL COURT. Proof of government records in U.S. Federal court is governed by Fed. R. Civ. P. 44 and Fed. R. Evid. 901 & 902.

1. FRCP 44. Federal Rule of Civil Procedure 44 governs proof of government records in federal district court. Federal Rule of Civil Procedure 44 provides:

> Rule 44. Proof of Official Record
>
> (a) Authentication.
>
> > (1) Domestic. An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of

record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

> (2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

2. Federal Statutes. Several federal statutes refer to the use of foreign government records in U.S. Federal district courts.

> 28 U.S.C. § 1741. Foreign official documents
>
> An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure
>
> 28 U.S.C. § 1745. Copies of foreign patent documents
>
> Copies of the specifications and drawings of foreign letters patent, or applications for foreign letters patent, and copies of excerpts of the official journals and other official publications of foreign patent offices belonging to the United States Patent and Trademark Office, certified in the manner provided by section 1744 of this title are prima facie evidence of their contents and of the dates indicated on their face.

VI. TAKING DEPOSITIONS IN OTHER COUNTRIES.

A. IN TEXAS COURT CASES. Texas Rule of Civil Procedure 201 governs depositions taken in foreign countries for use in Texas court proceedings. Rule 201 provides:

> 201.1. Depositions in Foreign Jurisdictions for Use in Texas Proceedings
>
> (a) Generally. A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this State. The deposition may be taken by:
>
> (1) notice;
>
> (2) letter rogatory, letter of request, or other such device;
>
> (3) agreement of the parties; or
>
> (4) court order.
>
> (b) By Notice. A party may take the deposition by notice in accordance with

> these rules as if the deposition were taken in this State, except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken.

(c) By Letter Rogatory. On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must:

> (1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken;
>
> (2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and
>
> (3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory.

(d) By Letter of Request or Other Such Device. On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must:

> (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and
>
> (2) must state the time, place, and manner of the examination of the witness.

(e) Objections to Form of Letter Rogatory, Letter of Request, or Other Such Device. In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived.

(f) Admissibility of Evidence. Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules.

(g) Deposition by Electronic Means. A deposition in another jurisdiction may be taken by telephone, video conference, teleconference, or other electronic means under the provisions of Rule 199.

The Supreme Court of Texas' comment to TRCP 201 provides:

> Comments to 1999 change:
>
> 1. Rule 201.1 sets forth procedures for obtaining deposition testimony of a witness in another state or foreign jurisdiction for use in Texas court proceedings. It does not, however, address whether any of the procedures listed are, in fact, permitted or recognized by the law of the state or foreign jurisdiction where the witness is located. A party must first determine what procedures are permitted by the jurisdiction where the witness is located before using this rule.

Section 20.001 of the Texas Civil Practice and Remedies Code indicates who can take a deposition in a foreign country for purposes of court proceedings in Texas courts:

> § 20.001. Persons Who May Take a Deposition
>
> (c) A deposition of a witness who is alleged to reside or to be outside the United States may be taken by:
>
> (1) a minister, commissioner, or charge d'affaires of the United States who is a resident of and is accredited in the country where the deposition is taken;
>
> (2) a consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States who is a

> resident of the country where the deposition is taken; or
>
> (3) any notary public.
>
> (d) A deposition of a witness who is alleged to be a member of the United States Armed Forces or of a United States Armed Forces Auxiliary or who is alleged to be a civilian employed by or accompanying the armed forces or an auxiliary outside the United States may be taken by a commissioned officer in the United States Armed Forces or United States Armed Forces Auxiliary or by a commissioned officer in the United States Armed Forces Reserve or an auxiliary of it. If a deposition appears on its face to have been taken as provided by this subsection and the deposition or any part of it is offered in evidence, it is presumed, absent pleading and proof to the contrary, that the person taking the deposition as a commissioned officer was a commissioned officer on the date that the deposition was taken, and that the deponent was a member of the authorized group of military personnel or civilians.

B. IN FEDERAL DISTRICT COURT CASES. United States courts have the power to require that a party or witness, over whom they have jurisdiction, comply with a discovery request. *See, e.g., Societe Internationale v. Rogers*, 357 U.S. 197, 204-06, 78 S.Ct. 1087, 1091-93, 2 L.Ed.2d 1255 (1958).

Testimony of witnesses in a foreign country can be taken pursuant to the Federal Rules of Civil Procedure 28(b), or under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. According to *Madanes v. Madanes*, 199 F.R.D. 135 (S.D. N.Y. 2001):

> courts must determine based on the facts of each particular case whether it is more appropriate to take discovery abroad under the Hague Convention or under the Federal Rules of Civil Procedure.

1. Depositions Under the Federal Rules. Federal Rule of Civil Procedure 28 provides for depositions in foreign countries:

> Rule 28. Persons Before Whom Depositions may be Taken
>
> (a) Within the United States. . . .
>
> (b) In Foreign Countries. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.
>
> (c) Disqualification for Interest. . . .

2. Letters Rogatory. International discovery can be accomplished through letters rogatory. As noted in *The Signe*, 37 F.Supp. 819 (E.D.La. 1941):

> "Letters rogatory" are the medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country, and such request is usually granted by reason of the comity existing between nations in ordinary peaceful times.

According to *Compagnie Francaise d'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 26 (S.D.N.Y.1984):

> The Hague Convention is an international treaty designed to bridge the differences in the taking of evidence between common law and civil law countries. In civil law countries, such as France, the taking of evidence before trial is accomplished primarily by the courts. In common law countries, like the United States, evidence is gathered by lawyers; it is a more private matter. As a result, when American lawyers--prior to the Hague Convention---sought to take evidence in a civil law country, it was sometimes considered an unlawful usurpation of the public judicial function and an illegal intrusion on the nation's judicial sovereignty. The Hague Convention was designed to establish a method for taking evidence that would be tolerable to the state where the evidence is located and useful in the forum *27 state.

In U.S. Federal courts the letters rogatory procedure is governed by 28 U.S.C. § 1781.

> § 1781. Transmittal of letter rogatory or request
>
> (a) The Department of State has power, directly, or through suitable channels--
>
> > (1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and
> >
> > (2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.
>
> (b) This section does not preclude--
>
> > (1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or
> >
> > (2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

The letters rogatory procedure has been adopted by both the United States of America and the United Mexican States through ratification of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

C. IN FEDERAL TAX COURT CASES. The United States Tax Court has adopted a rule of procedure that applies to foreign depositions. Tax Court Rule 81 provides:

> Rule 81. Depositions in pending case
>
> (a) Depositions to Perpetuate Testimony. . . . .
>
> (b) The Application. . . . .
>
> (c) Designation of Person to Testify. . . . .
>
> (d) Use of Stipulation. . . . .
>
> (e) Person Before Whom Deposition Taken.
>
> > (1) Domestic Depositions. Within the United States or a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States (see Code Section 7622) or of the place where the examination is held, or before a person appointed by the Court. A person so appointed has power to administer oaths and to take such testimony.
> >
> > (2) Foreign Depositions. In a foreign country, depositions may be taken (A) before a person authorized to administer oaths or affirmations in the place in which the examination is held, either by the law thereof or by the law of the United States, or (B) before a person commissioned by the Court, and a person so commissioned shall have the power, by virtue of the commission, to administer any necessary oath and take testimony, or (C) pursuant to a letter rogatory or a letter of request issued in accordance with the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. A commission, a letter rogatory, or a letter of request shall be issued on application and

> notice and on terms that are just and appropriate. The party seeking to take a foreign deposition shall contact the United States Department of State to ascertain any requirements imposed by it or by the foreign country in which the deposition is to be taken, including any required foreign language v translations and any fees or costs, and shall submit to the Court, along with the application, any such foreign language translations, fees, costs, or other materials required. It is not requisite to the issuance of a commission, a letter rogatory, or a letter of request that the taking of the deposition in any other manner be impracticable or inconvenient; and both a commission and a letter rogatory, or both a commission and a letter of request, may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." A letter of request is addressed to the central authority of the requested State. The model recommended for letters of request is set forth in the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444. Evidence obtained by deposition or in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions within the United States under these Rules.

(f) Taking of Deposition. . . .

(g) Expenses . . . .

(h) Execution and Return of Deposition. . . . .

Tax Court Rule 81, 26 U.S.C.A. foll. § 7453.

VII. USING TRANSLATIONS OF FOREIGN DOCUMENTS.

A. TRANSLATIONS IN TEXAS COURTS. Texas Rule of Evidence 1009 governs the admissibility of translations of documents in a foreign language in Texas court proceedings. Rule 1009 provides:

> Rule 1009. Translation of Foreign Language Documents
>
> (a) Translations. A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.
> (b) Objections. Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation. Such objection shall be served upon all parties at least 15 days prior to the date of trial.
>
> (c) Effect of Failure to Object or Offer Conflicting Translation. If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.
>
> (d) Effect of Objections or Conflicting Translations. In the event of conflicting translations under paragraph (a) or if objections to another party's translation are served under paragraph (b), the court shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trier of fact.
>
> (e) Expert Testimony of Translator. Except as provided in paragraph (c), this Rule does

> not preclude the admission of a translation of foreign language documents at trial either by live testimony or by deposition testimony of a qualified expert translator.
>
> (f) Varying of Time Limits. The court, upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this Rule.
>
> (g) Court Appointment. The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

B. TRANSLATIONS IN FEDERAL TRIAL COURT PROCEEDINGS.

1. No Specific Rule Applies. The Federal Rules of Procedure and Evidence do not specifically address translations of foreign language documents other than government records. In *United States v. Chalarca*, 95 F.3d 239, 246 (2d Cir. 1996), the Court of Appeals held that "[t]he decision to receive in evidence English translations of foreign-language transcripts lies in the discretion of the district court." The 11th Circuit Court of Appeals has adopted the following rule in that circuit, *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir.1985):

> This circuit has adopted the following procedure for challenging the accuracy of an English-language transcript of a conversation conducted in a foreign language: Initially, the district court and the parties should make an effort to produce an "official" or "stipulated" transcript, one which satisfies all sides. If such an "official" transcript cannot be produced, then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version.

2. Court-Appointed Experts. Federal Rule of Evidence 706 permits the court to appoint an expert witness to assist the court. It may be done on motion of a party, or on its own initiative. The witness must advise the parties of his or her findings, and the expert's deposition may be taken by any party. The expert can be called to testify by any party or the court. The expert is entitled to reasonable compensation set by the court, and in ordinary civil litigation that expense can be imposed on the parties in a proportion set by the court. While Rule 706 doesn't mention the appointment of an expert to assist in translating documents in a foreign language, that could be the basis of the appointment.

C. TRANSLATIONS IN FEDERAL COURTS OF APPEAL. In most instances foreign language documents that are relevant to an appeal will bear translations admitted into evidence at trial. However, sometimes legal authorities will be cited to the appellate court as part of the briefing.

The First Circuit Court of Appeals has adopted a court rule that relates to the use of foreign language materials in a proceeding in that court. It is Rule 30, which reads in part as follows:

> Rule 30. Appendix to the Briefs
>
> (a) Number of Copies. . . . .
>
> (b) Filing of Designation. . . . .
>
> (c) In Forma Pauperis. . . . .
>
> (d) Translations. The court will not receive documents not in the English language unless translations are furnished. Whenever an opinion of the Supreme Court of Puerto Rico is cited in a brief or oral argument which does not appear in the bound volumes in English, an official, certified or stipulated translation thereof with three conformed copies shall be filed. Partial translations will be accepted if stipulated by the parties or if submitted by one party not less than 30 days before the oral argument. Where partial translations are submitted by one party, opposing parties may, prior to oral argument, submit translations of such additional parts as they may deem necessary for a proper understanding of the holding.
>
> (e) Sanctions. . . .
>
> (f) Inclusion of Sealed Material in Appendices. . . . .

D. TRANSLATIONS IN THE U.S. SUPREME COURT. U.S. Supreme Court Rule 31 governs the use of translations in U.S. Supreme Court proceedings. Rule 31 says:

> Rule 31. Translations
>
> Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation made under the authority of the lower court, or admitted to be correct, the clerk of the court transmitting the record shall advise the Clerk

> of this Court immediately so that this Court may order that a translation be supplied and, if necessary, printed as part of the joint appendix.

28 U.S.C.A. U.S.Sup.Ct. Rule 31.

VIII. INTERPRETERS.

A. INTERPRETERS IN TEXAS COURTS. Texas Rule of Civil Procedure 183 authorizes the appointment of interpreters for use during court proceedings.

> Tex. R. Civ. P. 183 Interpreters
>
> The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Texas Rule of Evidence 604 sets certain qualifications for interpreters in Texas court proceedings. Rule 604 reads:

> Tex. R. Evid. 604. Interpreters
>
> An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

The following commentary reflects some of the issues surrounding translators in the courtroom. R. Doak Bishop, *International Litigation in Texas: Texas Rules of Evidence and Recent Changes in the Texas Rules of Civil Procedure*, 36 BAYLOR L. REV. 131, 152-53 (1984):

> [Rule 604] introduces into our state practice the requirement that an interpreter be qualified as an expert under Rule 702 in order to practice the profession of translating from one language to another. This standard is sensible, since a reliable translation can be critical to a case. The Administrative Office of the United States Courts has even begun a program of testing and certifying Spanish-English language translators for federal courts. [FN85] This program is timely because of the increasing *152 recognition of the need for qualified interpreters. [FN86]
>
> Two New York cases, which reached opposite results on a significant legal point because of differing translations, illustrate the importance of having an interpreter qualified in the technical area with which the substance of the testimony is concerned. In Rosman v. Trans World Airlines, [FN87] the New York Court of Appeals held that the French words 'lesion corporelle' contained in the Warsaw Convention meant bodily injury and did not connote psychic damage. The official text of the Warsaw Convention, regulating certain aviation claims, is written in French. The English translation made by the United States Department of State is unofficial only. In Palagonia v. Trans World Airlines, [FN88] however, a lower New York court later decided that 'lesion corporelle' had a broader meaning as a technical term in French legal usage, and included the concept of mental injury. In so deciding, the court rejected the testimony of defense experts and interpreters who were highly qualified in international law, the Warsaw Convention, and French lexicography and semantics, because they were without experience in translating technical French legal documents. The plaintiff's expert, on the other hand, was a lawyer with vast experience in international aviation law, in dealing with the Warsaw Convention in the French language, in teaching law in French, and in translating French legal documents.

Consequently, counsel should bear in mind that if the witness will testify about technical subjects (such as detailed engineering or legal matters, for example), then the translator may be required to have a technical background, as well as having sufficient language training and experience. An interpreter's expertise is generally shown either by a stipulation between the parties or by questioning the interpreter, on the record and under oath, at the beginning of a proceeding, about his or her qualifications.

Rule 604 also provides that an interpreter should take an oath or affirmation that he will make a true translation. This accords with present Texas practice, [FN89] even though in one case the plaintiff's counsel was permitted to act as interpreter without being sworn. [FN90] This unusual procedure was only upheld because the court reporter was bilingual and confirmed the translation; but even so, the court strongly recommended against this practice. Texas Rule 604 conforms with Rule 604 of the Federal Rules of Evidence.

If the trial court fails to administer the required oath to the interpreter, an objection must be made at the time or else it is waived. *Lara v. State*, 761 S.W.2d 481 (Tex. App.--Eastland 1988, no pet.).

B. INTERPRETERS IN FEDERAL COURTS. Federal Rule of Evidence 604 provides for interpreters in the trial of federal cases.

> Rule 604. Interpreters
>
> An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

The decision of whether or not to use an interpreter is a matter within the sound discretion of the trial judge. *U. S. v. Rodriguez*, 424 F.2d 205 (4th Cir. 1970), *certiorari denied*, 400 U.S. 841, 91 S.Ct. 83, 27 L. Ed.2d 76. In the case of *U. S. v. Addonizio*, C.A.3 (N.J.) 1971, 451 F.2d 49 (3rd Cir 1971), *certiorari denied*, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812, it was held that the trial court properly permitted a witness's wife to act as "interpreter" for a witness who was unable to speak loudly and apparently had difficulty in making himself understood. The trial judge examined the wife thoroughly as to her ability to translate and her motives to distort testimony.

Rule 604 applies to depositions given in a foreign tongue. However, a translator who was not sworn at the time of the original deposition could be sworn and his translation ratified by live testimony before the judge at an evidentiary hearing held prior to the deposition testimony being offered in trial. *U.S. v. Kramer*, 741 F.Supp. 893 (S.D.Fla. 1990).

Rule of Evidence 604, requiring an oath for interpreters, applies only to interpreters who translate testimony of witnesses on the witness stand, and does not apply to a language expert who took the stand under oath, to translate previously recorded conversations, and subjected himself to cross-examination. *U.S. v. Taren-Palma*, 997 F.2d 525 (9th Cir. 1993), *certiorari denied*, 511 U.S. 1071, 114 S.Ct. 1648, 128 L.Ed.2d 368.