Translator As Accomplice
Igor Vesler

CONFIDANT, n. *One entrusted by A with the secrets of B confided to herself by C.*
INTERPRETER, n. *One who enables two persons of different languages to understand each other by repeating to each what it would have been to the interpreter's advantage for the other to have said.*

— Ambrose Bierce, ***The Devil's Dictionary***

Interpreters' criminal liability for incriminatory concealment or disclosure of information, documentation, or facts entrusted to them by third parties has recently become a serious issue for individuals and professional associations. Individual linguists need adequate protection from being prosecuted for carrying out professional duties, and professional organizations need to navigate these turbulent waters between the Scylla of obedience to the law and the Charybdis of protecting members from unreasonable interference. Due to the very nature of our trade, interpreters and translators deal with foreign entities and individuals. We act as intermediaries in communication between parties, and become aware of the content and extent of parties' relationships and transactions. On many occasions, information disclosed to a translator or interpreter in non-legal settings is on a non-confidential basis and has no legal consequences. However, if the parties' communication (in which a translator or interpreter participated) involves wrongdoing in the eyes of the government, any translator/interpreter immediately becomes a suspect.

U.S. response to the tragic events of September 11 drastically changed many aspects of public life and gave rise to increased vigilance. Newly adopted homeland security legislation, together with closer law enforcement scrutiny of a wide range of communication activities involving foreign entities and persons — especially those suspected of terrorism, money laundering, drug trafficking and arms trading — expose translators and interpreters to a new kind of professional risk. New moral dilemmas also result. Risks include criminal prosecution as a co-conspirator; moral dilemmas present hard-to-make choices between refusing to testify (and being held in contempt) or being disloyal to the client (and facing a potential lawsuit to compel disclosure). [1]

In this article I will first review recent cases of translators and/or interpreters who became suspects or defendants in federal cases. Second, I will examine legal doctrines pertaining to privileged communication and parse the nature of the translator/interpreter privilege. Third, I will discuss non-privileged communication, with examples of exposure to legal action and ways that the government may seek to obtain information. Finally, I will propose some protective measures to mitigate the risks of a translator or interpreter being subject to a criminal investigation.

RECENT CASES

1. Ahmad Al-Halabi

Al-Halabi, age 24, Syrian-born and a senior airman in the U.S. Air Force, is accused of spying for Syria, allegedly using his position as a translator to gather top-secret information about suspected al-Qaeda and Taliban operatives held at Guantánamo.[2] More serious charges of aiding the enemy, which would have carried a death penalty, were dropped against Al-Halabi late last year.

2. Ahmad F. Mehalba

Mehalba, a civilian interpreter, was charged with lying to federal agents when he denied that computer discs in his possession contained classified information from Guantánamo.

3. Mohamed Yousry

Yousry, an Arabic translator and interpreter with a security clearance from the Justice Department, was arrested and charged together with three other defendants. The government alleged that, while working as interpreter, Yousry was "covertly passing messages between IG [the Islamic Group] representatives and Shaykh [Omar] Abdel Rahman relating to IG's activities." [3] The indictment charge:

> h. On or about May 19, 2000, during a prison visit to Sheikh Abdel Rahman in Minnesota by STEWART and YOUSRY, YOUSRY read letters to Sheikh Abdel Rahman from SATTAR and Musa addressing, among other things, the issue of the cease-fire, while STEWART actively concealed the conversation between YOUSRY and Sheikh Abdel Rahman from the prison guards by, among other things, making extraneous comments in English to mask the Arabic conversation between Sheikh Abdel Rahman and YOUSRY.
>
> i. On or about May 20, 2000, the second day of the prison visit, Sheikh Abdel Rahman dictated letters to YOUSRY and issued his decision to withdraw support for the cease-fire, while STEWART actively concealed the conversation between YOUSRY and Sheikh Abdel Rahman from the prison guards.

The interpreter's role here apparently was limited to rendering into English a text dictated in Arabic, for the benefit of the defense attorney. Later the attorney allegedly disclosed this material to the media in violation of the agreement requiring Special Administrative Measures (SAM) that Stewart had signed in a written affidavit to the U.S. attorney's Office.

It would appear that Mr. Yousry was acting in a professional capacity and that the attorney-client privilege indisputably extended to him. However, even without this protection, the interpreter's role here appears to be grossly misunderstood and misinterpreted by the government.

It is quite possible that Yousry played no part in attorney Lynne Stewart's decision to go public; as with any colleague in similar circumstances, he would be neither qualified nor entitled to do so. The interpreter's only duty is to convey messages accurately and to the best of his knowledge from one language to another, from the legitimate originator to the legitimate recipient, regardless of content and intent. The indictment appears to charge Yousry simply for acting as an interpreter. As of this writing, the case is on trial.

It has now become common practice in high priority federal cases to closely monitor all contacts between interpreters and suspects or inmates. Communications may be videotaped to later determine whether interpreters have (a) omitted or changed the original, or (b) passed along secret messages interwoven into the legitimate flow of speech.

PRIVILEGED COMMUNICATION

Privilege is a legal concept that protects certain types of communication between persons who stand in special relationships to one another (attorney-client, husband-wife, doctor-patient, clergy-parishioner, etc.)[4] from being divulged under compulsion of law in a judicial proceeding. More practically, privileged communication is defined as immunity that exempts people from having to testify in court. In this context, communication is construed to encompass not only the content of conversations but of physical documents as well. (Although an important part of privilege, the work-product doctrine is not separately addressed here due to space limitations.) In addition to some federal legislative acts, laws regarding privileged communication as determined by each state define by whom and under what circumstances privilege can be invoked.

Although laws and regulations vary from state to state, for a qualified professional to invoke privilege (unless other laws require disclosure or the originator and/or recipient has waived privilege), the following criteria must be met:

1. In written or oral communication, the recipient must be a qualified professional acting in a professional capacity to serve the needs of the message originator.
2. The message originator, in communicating with the recipient, must expect the communication and information entrusted to remain confidential. However, the message originator possesses the privilege and alone may waive it.

Attorney-Client Privilege

According to a 1989 Supreme Court case,[5] "the attorney-client privilege under federal law [is] the oldest of the privileges for confidential communications known to the common law." Confidentiality is key to the lawyer-client relationship and part of the reasonable expectation of privacy protected by the Constitution's Fourth Amendment, which prohibits "unreasonable" government intrusions.

The attorney-client privilege extends to any agent of the attorney, i.e., employees of the attorney or holders of confidential communications such as legal assistants, paralegals, secretaries, stenographers, investigators, translators, and interpreters. Anyone working on client matters who has access to a client's confidential information can be held to the attorney-client privilege.

Under this umbrella, legal translators and interpreters may feel protected from government pressure to disclose information or produce documentation connected with work for legal counsel. But this privileged communication enclave is the *only* safe haven where the translator/interpreter is fully identified with and considered an intrinsic part of the attorney, enjoying the same treatment with respect to any disclosure of confidential information. Therefore, it is better to be hired not by the client directly but by an attorney.

Moreover, existing court rulings effectively acknowledge the notion of such privilege extension by imposing a so-called ***restrictive necessity standard,*** according to which, for the privilege to be preserved, "the presence of third parties must be more than just useful and convenient: instead the third party's involvement must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications." [6] This necessity standard favors professional translators and interpreters' over occasional bilinguals. For example, when a Japanese business executive who spoke English brought his retired predecessor with him to serve as an interpreter

with corporate counsel, the fact that a former executive was present was held to have waived the privilege protection.[7] Thus, attorneys should exercise caution when bringing an outsider into attorney-client communication. If an interpreter or translator is needed, it is preferable to employ a trained and certified professional.

Other Types of Privilege

Accountant-Client Privilege

Some states have adopted the accountant-client privilege. However, it was only in 1998 that the Internal Revenue Service Restructuring and Reform Act gave taxpayers a new federal privilege relating to tax advice (written or oral) received from a tax practitioner. Under Internal Revenue Code Section 7525, a taxpayer now possesses a statutory privilege of confidentiality and protection. Thus, CPA clerks, assistants, translators, and interpreters are afforded the same treatment as anyone with access to a client's confidential tax information. It should be noted, however, that this privilege may be asserted only in any non-criminal tax matter before the IRS, or any non-criminal proceeding in federal court.

It is symptomatic, however, that this privilege has made its way to a statute through three remarkable court cases based on the presumption that the accountant privilege is an extension of the attorney-client privilege in a very special way.

Beginning in *United States v. Kovel,*[8] courts have extended the attorney-client privilege to cover certain communications involving accountants when the accountant participates in lawyer-client communication in furtherance of legal, rather than accounting advice. In *Kovel,* the Second Circuit held that the privilege will not be waived where the "presence of the accountant is necessary, or at least highly useful, for the effective consultation between client and lawyer."

The *Kovel* case allows us to use the interpreter analogy to argue that attorney-client privilege should apply to any communication between client and interpreter to aid the attorney in providing legal advice to a client who speaks a foreign language, regardless of whether the interpreter is an employee of the lawyer.

Two other court rulings[9] lend support to this argument by persuasively drawing a distinction between an advisor to an attorney who provides new information (no matter how useful) to a client, and an expert who merely improves communication by being a conduit between attorney and client, in the manner of a translator or interpreter.

Physician-Patient Privilege

The physician-patient privilege limits the medical information a physician can disclose without a patient's consent. State statutes create physician-patient privilege and it usually applies to testimony at trial or in administrative actions.

Although federal common law does not recognize the physician-patient privilege, in a majority of states, legislation clearly states that the healer-patient privilege (similar to attorney-client privilege) is extended to nurses, physician aides, medical office personnel and medical interpreters.

Clergy-Parishioner Privilege

This type of privilege (sometimes called "priest-penitent privilege") is also embodied only in state legislation. Due to the rapidly growing number of bi- and even trilingual churches and religious denominations, a religious interpreter may become an important figure in intra-church communications by directly participating in and witnessing confessions, counseling, etc. It may seem logical that the same protection from disclosure should be extended to cover them.

Privileged Enclaves

As unusual as they may be, some other privileged communication environments are recognized by courts. Several years ago a federal judge ruled that conversations between members of Alcoholics Anonymous have the same sort of privilege as contacts between clerics and parishioners, and overturned a murder conviction.[10]

In another case, a judge ruled that potential jurors in Dona Ana County (New Mexico) cannot be eliminated simply because they do not speak English.[11] A further example is seen in the First Amendment-based right of journalists to keep materials confidential, protecting them from court order to disclose notes and research information. Some states have so-called "shield laws" granting media professionals a right to refuse to testify before a grand jury, while other states do not recognize such privilege. In Texas, for example, freelance writer and book author Vanessa Leggett served 168 days in jail for refusing to testify before a federal grand jury or turn over research materials. Leggett was held in civil contempt under 28 U.S.C. § 1826 as a recalcitrant witness in a murder case, and was incarcerated longer than any reporter in U.S. history for refusing to disclose research collected in the course of

newsgathering. As is usual in states with no shield laws, neither the district court nor the Circuit showed leniency for Leggett's professional integrity and loyalty to confidential sources. She served the maximum term.

Interpreter Privilege

As shown by the examples above, case law has held that linguists are facilitators or agents of a professional (attorney, physician, priest, etc.) and therefore also enjoy privileged status.

Federal legislation is silent with respect to any interpreter privilege.[12] In many states, however, the interpreter is given privileged status regardless of subject area and type of umbrella privilege. For example, in Minnesota:

> An interpreter for a person handicapped in communication shall not, without the consent of the person, be allowed to disclose any communication if the communication would, if the interpreter were not present, be privileged. For purposes of this section, a "person handicapped in communication" means a person who, because of a hearing, speech or other communication disorder, or because of the inability to speak or comprehend the English language, is unable to understand the proceedings in which the person is required to participate. The presence of an interpreter as an aid to communication does not destroy an otherwise existing privilege.[13]

In Kentucky, the language is even broader:

> 30A.430 **Interpreter** not to be examined as **witness** — Other privileged communications.
> Every person who acts as an interpreter in circumstances involving the arrest, police custody or other stage in a criminal, civil, or other matter of a person coming under KRS 30A.410 shall not be examined as a witness regarding conversations between that person and his attorney, when the conversations would otherwise be subject to the attorney-client privilege, without the consent of that person. Interpreters shall not be required to testify regarding any other privileged communications without the consent of the person for whom they are interpreting.[14]

Thus, in some states an interpreter (whether certified, registered, or non-credentialed) is given — at least, in theory — a double layer of protection: first, as an extension, aide or facilitator of communication for an attorney, medical doctor, priest, etc., and second, as an interpreter *per se,* provided that such privilege is explicitly articulated by a relevant statute in the state where the interpreter is practicing.

The Model Code of Professional Responsibility for Interpreters in the Judiciary recommended by the National Center for State Courts (NCSC) contains the following commentary under Canon 5:

> In the event that an interpreter becomes aware of information that suggests imminent harm to someone or relates to a crime being committed during the course of the proceedings, the interpreter should immediately disclose the information to an appropriate authority within the judiciary who is not involved in the proceeding and seek advice in regard to the potential conflict in professional responsibility. [15]

Similar to the novelty introduced by the American Bar Association (see below), this creates a situation where the interpreter's decision to disclose is purely discretionary. It might be argued that it is unfair to impose the burden of such a decision on a person who in most cases is not qualified to make it.

In the absence of a federal statute defining an interpreter's rights and responsibilities, all certified staff interpreters with the federal courts have to sign an acknowledgment of the "Code of Professional Responsibility of the Official Interpreters of the United States Courts" containing 14 canons which interpreters swear to comply with. Canon 4 reads: "Official court interpreters, except upon court order, shall not disclose any information of a confidential nature about court cases obtained while performing interpreting duties." Under this rule, an interpreter faces a dilemma: if ordered by the court to disclose content of interpreted communication, either refuse to testify and risk being held in contempt, suffering whatever sanction the judge imposes; or testify in compliance with court order and the federal Code of Professional Responsibility, sacrificing impartiality and, possibly, reputation.

Whether these 14 canons are legally binding and have the force of law is not clear. Unlike state legislative acts approved by the Supreme Court of the respective state, the federal Code of Professional Responsibility has never been approved by the Judicial Conference, the policy-making body for the federal courts.

Erosion of Privilege

Less than a month before September 11, Adam Cohen bitterly noted:

> Time was when the confidential professions were reliably confidential. A lawyer kept your crimes and financial mischief to himself; a priest took your sins to the grave. Even nonprofessionals had codes of confidence: secretaries, clerks and anyone

with access to Coke's secret formula or Colonel Sander's 11 herbs and spices kept a lid on it. [16]

He was commenting on the erosion of a long-lasting tradition as seen in policy changes by two very different organizations, the American Bar Association and the Catholic Church.

In 1998, the American Bar Association introduced a novelty that expanded an area of exceptions to the attorney-client privilege by establishing a rule allowing lawyers to disclose client secrets to prevent "reasonably certain death or substantial bodily harm." This new policy lets lawyers speak out even if the potential for harm is not immediate and the act is not criminal.

In the wake of sexual abuse and child molestation investigations, similar measures have been taken by some church authorities under media and public pressure. In Massachusetts, for example, legislation added priests and other clergy to a list of professionals, including teachers and social workers, legally required to report suspected child sex-abuse to the authorities.

Many professions have experienced similar changes in what used to be the area of privileged communication. A physician with an HIV-positive patient who says he will not tell sexual partners about his infection faces not just a moral dilemma but also a legal quandary. An attorney who learns that a corporate client is planning to dump dangerous toxic waste next to the local water supply system faces the same dilemma.

The events of September 11 and resulting changes in the legislative environment and law enforcement practice seriously eroded the notion of privileged communication. Privilege may shrink in response not only to exceptional cases but also as a result of institutional pressures.

All this has special meaning for professions involved in handling people's secrets. Translators and interpreters frequently fall under the extended umbrella of such professions' privileges. Unfortunately, translators and interpreters are in the first rank of potential suspects by virtue of the fact that they communicate with people who speak a different language, have a different ideology, display different behavior, or have different cultural and social habits.

TRANSLATORS AND INTERPRETERS IN NON-PRIVILEDGE ENVIRONMENTS

The above discussion addressed freelancers only, because in-house translators and interpreters work under a different set of rules with respect to privileged communication. But let us look now at a non-privileged environment: U.S. companies communicating with foreign entities and domestic limited-English speakers.

When working for U.S. companies or nonprofit organizations interacting with foreign entities, a linguist is always at risk that the company may be covertly engaging in illegal operations such as money laundering, bribery, arms trade, etc. In these cases, a U.S.-based interpreter or translator may be the only witness available.

Interpreters and translators working for corporate clients are easy prey for the following reasons:

(1) Parsimonious corporate clients frequently hire cheap freelancers with no professional credentials who, by judicial standards, may not qualify for meeting the restrictive necessity standard.
(2) Freelance translators and interpreters with moderate income may not be able to hire a top-notch lawyer.
(3) Freelancers are under greater IRS scrutiny than full-time employees; the possibility of a comprehensive audit may make them talk more easily.
(4) Corporate clients do not generally indemnify and hold harmless a freelance interpreter or translator from litigation or government actions; nor do agencies. When corporations outsource translation and interpreting services (through an agency or directly), they do not think much about legal consequences and tend to underestimate the value of the documents released for translation.

Hypothetical Case #1

Mr. M., a professional translator experienced in international banking and financial matters, is contracted by John Doe to translate documentation generated by his office into two Slavic languages. The total volume of translated material over a two-year period is 600 pages; translation fees exceed $22,000. Mr. M. is never told the purpose of the translated documents, or anything about his client's activities. Later John Doe is accused of involvement in a scheme in which conspirators collected significant "advance fees" from potential borrowers by fraudulently promising to arrange pre-approved multimillion-dollar loans from eastern European lending institutions. The victims were falsely told that the conspirators had been successful in obtaining funding for

numerous clients. John Doe was in charge of arranging the loan commitments from European banks through some Eastern European banks. The evidence of his deception is fictitious contracts in Slavic languages (as translated by Mr. M). A jury convicts John Doe of one count of conspiracy and four counts of wire fraud in connection with his participation in the fraudulent loan scheme.

In the early stages of the case, Mr. M. was a suspect due to his intimate knowledge of the essence of the scheme and failure to report it to a law enforcement agency. During the investigation, Mr. M. is repeatedly forced to testify against John Doe. Among other things, the prosecution suggests that Mr. M's fees were out of proportion and therefore represented his share of illicit gains from participation in the scheme. An IRS audit of Mr. M's tax returns follows and irregularities are found. The total amount of Mr. M's liabilities plus interest and penalties is $1,470. Fortunately, Mr. M's lawyer persuasively demonstrates to the court that he was not a member of the conspiracy. Legal fees total $21,000.

Hypothetical Case #2

Mr. N., a U.S.-based freelance translator and interpreter of African descent, is hired by an American investment bank in connection with financing for an oil project in his native country. He is hired over a period of years to translate bank correspondence with host country government agencies and private concerns. He also accompanies investment bank vice president Mr. F. to Africa as his personal interpreter at negotiations with government officials and corporate management.

The U.S. government investigates the bank's activities in the African country, and alleges that in order to win a project financing services contract, the bank violated the Foreign Corrupt Practices Act (FCPA). Responding to a subpoena, the bank produces only part of its correspondence and documentation related to transactions in Africa, claiming that the rest is covered by executive privilege of the vice president of the host country. An FBI agent on the case approaches the translator and requests that he produce translations of bank correspondence and notes made during meetings. The FBI tells the translator that if he refuses to cooperate, the FBI would have reason to believe that he was a co-conspirator, helping the bank circumvent the FPCA by facilitating information exchange. The FBI suggests that Mr. N. knew or should have known from the materials translated and the conversations interpreted that the bank had actually bribed host country officials. If he did know, and never reported it to the government, he could be charged with a federal crime, misprision of felony (see definition below).

TRADEOFFS, NOT SOLUTIONS

Finding oneself a suspect or witness in a criminal case puts any freelance translator or interpreter between a rock and a hard place. Frequently in investigations involving corporate transactions with foreign entities and aliens, an interpreter or translator is the only source of information and potential witness because of (1) presence at key and confidential negotiations and (2) familiarity with the content (and even intent) of certain translated documents intended for the foreign party.

Any linguist so implicated should not operate under the illusion that there is a way to demonstrate innocence to the government and at the same time preserve a business relationship with the client. Once one's name appears on a prosecutor's list of potential witnesses in a case, there is no immediate solution. Any action taken in these circumstances would constitute a tradeoff where something is sacrificed in exchange for something else. Any investigation of corporate misdeeds is time-consuming and costly, and therefore the prosecution does its best to press the potential witnesses or sources hard for information.

One may decide under pressure to produce all documents and information in one's possession, thus becoming a material witness for the government. Needless to say, one's professional reputation may be gravely damaged due to disloyalty to the client. Moreover, if the government's case proves weak later on and is dismissed, the client may well sue the linguist for disclosure of confidential information and claim damages of enormous proportions.

On the other hand, a linguist may decide to refuse to cooperate with the investigation or testify in court, and face the unpleasant and costly alternative of hiring a lawyer (unless the linguist's corporate client agrees to pay legal fees), running the risk of being charged with conspiracy, contempt, obstruction of justice, misprision of felony, etc.

The linguist involved must understand that a tradeoff is inevitable and give serious consideration to what can be sacrificed (and later lived with). One must understand there is always a tradeoff of loyalty to a corporate client versus the threat of government inquiry (for example, the prosecution may request that the linguist disclose documents translated or the content of negotiations interpreted and issue a subpoena to that effect). At this point, a linguist must seriously think of hiring a lawyer or going to corporate counsel for legal advice.

The Carrot and the Stick

One of the many sticks used by the federal government to make a translator or interpreter report suspicious activities is a crime reporting statute:

> Title 18 U.S.C. § 4. Misprision of felony.
> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both. *(June 25, 1948, ch 645, section 1, 62 Stat. 684)*

A simple explanation of ***misprision*** is taking action to conceal or cover up a crime. The term ***felony*** is defined as any offense punishable by a prison term exceeding one year.

In order to sustain a conviction for misprision of felony, the government must prove that a felony was committed, that the defendant had knowledge of the felony, that he failed to notify the authorities, and that he took an affirmative step to conceal crime.[17]

The crime of misprision of felony comprises four elements, assuming that a felony has already been committed and is cognizable by a court of the United States. The first element is the relationship between the person who committed a felony (in our case, the client) and the one accused of misprision (the interpreter or translator). The second element is "knowledge of the actual commission of a felony." Probably very few interpreters or translators, other than those who work in the legal field, would be familiar with how a felony is defined in order to determine if any actions or deeds described in a document or conversation constituted a felony. Nor would it be easy to determine whether the felony was "cognizable by a court of the United States" — meaning that a U.S. court has jurisdiction over the crime. So the interpreter or translator must be certain that what was learned from a conversation or document is a *fait accompli* — not a plan or intent but an act committed; must know the act is a felony; and must know that the particular felony is cognizable by the U.S. courts. The third element is failure to notify the authorities. It is highly improbable that a freelance linguist would report suspicions to authorities every time a conversation or a document seems peculiar. Moreover, the failure to report a felony is not sufficient. Title 18, § 4 requires some positive fact designed to conceal from the authorities the fact that a felony has been committed.[18] This leads us to the fourth element, an affirmative act of concealment, such as destruction of evidence. As a precedent court ruling establishes, "…conviction for violation of 18 USC Section 4 requires proof of affirmative act of concealment in addition to failure to disclose."[19]

If a freelance linguist becomes aware of a felony committed by a client, one option is to report it to the government before the government makes its first move. In consideration of a potential lawsuit and other damages (such as potential damage to the linguist's reputation), a monetary reward may be sought to cover potential legal fees and loss of work.

Crime information is a valuable commodity, with rewards offered for information leading to the arrest, conviction, or apprehension of felons. The person to contact regarding rewards is generally an FBI agent. A tipster's anonymity is guaranteed by federal law for providing confidential information or evidence against a lawbreaker.

There is no prohibition against comparison shopping for rewards. The FBI may not like competing with other agencies, but if negotiations bog down, a different agency may have a better offer, provided that the crime to be reported is within their jurisdiction. White collar and high-tech crimes involve many law violations and may fall under the jurisdiction of the FBI, Customs, SEC, or other federal government agencies.

To successfully prosecute someone for misprision, the intent to conceal or cover up must be proven. Withholding details while negotiating for a reward is not an act of concealment. The tipster has the right to withhold details until negotiations are successfully concluded. On the other hand, the tipster might also be forced by subpoena to appear in front of a grand jury to testify under oath.

PROTECT YOURSELF — NO ONE ELSE WILL

Listed below are some protective measures to aid a freelance translator or interpreter in maximizing the protections of linguist-client privilege and minimizing the risk of losing it.

Identify yourself properly at all times

1. Clearly specify your professional credentials (such as accreditation, certification, diplomas, etc.) in your stationary and all correspondence with your client. While acting in a professional capacity, always wear a badge with your name and the word

INTERPRETER or TRANSLATOR in BOTH LANGUAGES.

2. Clearly specify your professional functions in any correspondence with your client by using language such as
   … in response to your request for English-Spanish translation of the attached document… or
   … I will be glad to provide English-Swahili interpreting services during the upcoming negotiations…

Always acknowledge in your correspondence that the subject matter of a meeting or the content of a document is confidential, that matters discussed and information provided should not be disclosed to or shared with others.

Use your knowledge

3. Have a clear idea of (a) whether or not your client enjoys any privilege, and (b) whether such privilege extends to you and your work product, rendering any translated material protected.
4. When the communication is privileged, make notes of the names and titles of those present and avoid talking in the presence of noninvolved personnel at meetings during which privileged matters are discussed.
5. Know your state statute provisions for interpreters and translators; when going on assignment to another state, check the relevant statute provisions in that state (see chart, opposite page).

Establish and maintain a document retention and handling policy

When working for a client whose communication may be deemed privileged and/or confidential, design, implement and rigorously maintain a uniform document retention and handling policy — or, at least, follow some simple rules, such as:

6. When interpreting, take detailed notes if possible, noting key words for each major idea. Notes accumulated for a specific project or assignment should be returned to the client along with your invoice (to be mentioned in your invoice or cover letter) or else destroyed.
7. For translation, both original and translated documents on a specific project or assignment should be returned to the client along with your invoice, to be mentioned in your invoice or cover letter by adding the following language:
   Attached herewith please find all original documents and their respective translations resulting from the assignments hereby invoiced. I do hereby certify that I destroyed and/or otherwise disposed of all other materials related to the same.

It is acceptable to retain any derivative products like project glossaries, reference materials, and the like (but not personal and business name lists, contact data, specifics concerning content of certain documents, etc.). However, the best approach is to keep all documents on the client's web/ftp site and download them only for the purpose of translation.

8. Maintain a ***special*** file for all materials and correspondence between you and your privileged client, and keep your work product (for interpreters, handwritten notes taken during interpretation; for translators, original and translated documents) separate from other materials and correspondence.
9. Where appropriate, mark your notes, documents and communications as Privileged and Confidential, but be consistent in the application of this marking. Always have a sheet of stickers and date your materials.
10. Suspend application of the policy and retain all documents if an investigation or litigation commences or becomes imminent.

Make proper contractual arrangements

11. When accepting an assignment, try by all means to execute a binding document containing provisions which ensure both you and client some degree of protection, as follows:

Client

"… Client shall indemnify and hold the Linguist harmless of any lawsuit or other legal action or proceedings resulting from the assignment…"

"… Client hereby acknowledges that the subject of the assignment does not violate any federal or state laws and regulations…"

Linguist

"… Linguist undertakes to keep all information confidential and not to disclose or reveal any information to any per*son* ***other than those explicitly authorized by the Client except as required by applicable law, regulation, rule or order of a duly empowered court, tribunal or any other governmental entity of proper jurisdiction…"***

CONCLUSIONS

Under current circumstances, freelance translators and interpreters need to be well informed and take preventive measures to avoid legal action or, at least, to mitigate its consequences. Such measures are based on (1) rules and practices of professional

activities and (2) knowledge of risk factors and precautions.

At the same time, our professional organizations (such as ATA, NAJIT and other court interpreter associations) should (1) lobby their state legislators in order to enact laws protecting translators and interpreters from unreasonable interference and (2) educate judiciary and law enforcement officers of our role in multilingual environments.

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DISCLAIMER

Neither this article nor any part thereof constitutes legal advice or opinion nor shall be construed as offering such. The article reflects the author's personal views and beliefs as a non-legal professional. Except where explicitly stated to the contrary, all names, persons, places, events, and situations described herein are fictitious, provided solely for illustrative purposes. Any resemblance to actual situations is purely coincidental.

[This article is an edited version of a paper read at the New York University Conference on Global Security, June 4, 2004. The author, a freelance ATA-certified English-Russian translator and Berlitz-certified English-Ukrainian interpreter and translator, is also an information specialist. He can be reached at: www.DikenResearch.com).]

NOTES

1 As a recent whistleblower's case shows, government linguists face challenges, too, although in a different context. Sibel Edmond's revelations highlight the staff translator's dilemma if foreign language documents in government agencies are mishandled. *New York Times*, July 29, 2004, p.1.
2 "Arrested translator Ahmad Al-Halabi mostly a mystery." Toni Locy and Dave Moniz. *USA TODAY* 9/25/2003.
3 Indictment 02 Cr. 395 United States District Court, Southern District of New York, *United States of America v. Ahmed Abdel Sattar, et.al.*
4 For example, State of Tennessee legislation codifies the following privileges: accountant-client privilege, attorney-client privilege, attorney-investigator privilege, clergy-penitent privilege, deaf person-interpreter privilege, disciplinary board–complainant privilege, grand jury–witness privilege, legislature–witness privilege, medical review committee–informant privilege, news reporter's privilege, psychiatrist-patient privilege, psychologist and mental health professional-client privilege, social worker-client privilege, spousal privilege.
5 *United States v. Zolin,* 491 U.S. 554 (1989).
6 *National Educational Training Group, Inc. v. Skillsoft Corp.,* 1999 U.S. Dist. LEXIS 8680 (SDNY, June 10, 1999).
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