# TRAINING TO BE A SERVANT OR A SLAVE: LEARNING TO BALANCE CONFIDENTIALITY AND DISCLOSURE

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## THE (IN)DEFINABILITY OF CONFIDENTIALITY

The duly of confidentiality is one of the cornerstones of the translation and interpreting profession, the others being more mundanely those of doing a good job and supplying it on time. The duty to disclose is the citizen's duty to inform law enforcement agencies of any suspected unlawful activity.

In order to understand the interaction between those two duties, it is necessary to understand first what is meant by each of them. Confidentiality proves harder to define than its counterpart disclosure. When and how does confidentiality arise? Once it has arisen, can it be disapplied or waived and if so, under what circumstances and by whom? Do translators and interpreters perceive these duties in the same way as their clients? And what does the legislator have to say about it all? Is the duty of confidentiality a simple, invariable one, unaffected by either circumstances or the passage of time?

Given that confidentiality has been our creed for so long, it is important to realize that these fundamental questions have remained unanswered.

## THE PROFESSION'S VIEW

Many translators' and interpreters' organizations make provision for the observance of confidentiality by their members. The Codes drawn up by the Dutch Translator's Association (NGV) state that "(Translators) shall observe strict confidentiality in respect of all they learn in the course of their work" and "shall refrain from benefiting or allowing parties to benefit from knowledge acquired in the course of their work"[1]. The Codes add that such duty is owed, even if it is not expressly required by the client: "The court interpreter shall observe strict confidentiality (...), where he knows or has reason to believe such matters to be confidential". In recognition of the fact that the court interpreter tends to work in conflictual situations, the NGV's Code of Conduct for Interpreters suggests a measure of protection: "The court interpreter shall not give evidence about any matters that may have come to his knowledge whilst acting as an interpreter at a meeting at which any one of the participants enjoys privilege; in these circumstances the interpreter may claim delegated privilege". The court interpreter must decline work "that would need to be carried out on conditions that are not reasonably acceptable". (There is no definition of "reasonably")[2]'. A court interpreter in criminal proceedings "shall inform the defendant that he, the interpreter, has no privilege and must interpret all that is brought to his knowledge in the course of criminal proceedings"[3].

Although upon closer scrutiny, the NGV's set of Codes proves insufficient, it has the merit of recognizing that different situations may give rise to different issues and therefore require different answers and degrees of protection for the translator or interpreter. This cannot be said of some other Codes of Conduct that I have seen[4].

## THE CLIENT'S VIEW

The client does not necessarily have the same view of confidentiality. He tends to see the translator or interpreter as working to his specific instructions. He therefore believes he

can ask the translator to translate any text about any subject for any purpose, or the interpreter to work at any meeting. If the client feels that a translator (or interpreter) is not sufficiently bound by confidentiality as set out in the relevant Code of Conduct, he will seek to reinforce that duty by including an express confidentiality provision in the contract.

## THE LEGISLATOR'S VIEW

The legislator adds his view by making it possible for the client to sue on the contract or by implying a trust on the knowledge acquired. The legislator also allows "restraint of trade" clauses protecting commercial knowledge. In other words, the translator's duty of confidentiality is defined in relation to what would constitute a breach of confidentiality. That negative approach is further underlined by the imposition of a duty to disclose in certain circumstances.

## THE DUTY TO DISCLOSE

There is a general civic duty not to become involved in criminal actives at the risk of being charged with conspiracy, joint enterprise, accessorial liability, recklessness, etc. That general duty may be further defined by express legal provisions applicable in specific situations. In a world of increasing drugs dealing and money laundering, authorities try to halt the flow of dirty money by imposing a legal duty on banks, accountants, lawyers etc. to report any suspicious (trans)actions.

International conventions were followed in the UK by national legislation (the Drug Trafficking Offences Act 1986 and the Criminal Justice Act 1993 ss. 23A-26C[5]) and in the KC by community legislation (Council Directive 91/308/EEC).

## THE CONFLICT

There are therefore circumstances in which the two duties may come into conflict. On what basis is the translator or interpreter then to decide whether the text or the meeting with which he is concerned falls within either the general or the specific duty to disclose? And to whom should he disclose his knowledge or suspicion?

Take the following examples:

– A quantity of French language documents contains a number of bank accounts in the names of "Madame Caniche", "Monsieur Bryart", "Mademoiselle Epagneul" and "Michel Leyvrier" etc. These seem to be persons and therefore their names would normally remain untranslated. The only person to appreciate the unlikelihood of so many Mrs. Poodles, Mr. Pyrenean Sheepdog, Spaniel and Greyhound holding accounts is the translator. What should he do with that suspicion? Would his decision be different depending on whether he is a staff translator or a freelance, or whether his client is a commercial company or a law-enforcement agency? Could his decision not to mention his suspicion be affected by subsequent developments, i.e. when the documents become evidence in legal proceedings? Could the fact he failed to disclose his suspicion be used against him at any later stage?

– A translator is requested by a government agency to translate documents that he knows or has reason to believe to be in breach of government guidelines. Should he notify anyone? Would his duty be different if he were employed by the apparently infringing government agency or called in on a freelance basis? And where he should disclose the suspected infringement, to whom should he do so?

– Supposing a translator or interpreter becomes aware of grossly excessive commission charged by a commercial agency to a public authority for his services. Where is the dividing line between that authority's duty to spend tax-payer's money sensibly and the agency's right

to make a commercial profit? Is it the translator's (or interpreter's) duty to bring the matter to the someone's attention? If he blows the whistle, would he be protected?

– When we translate advertising copy for a new market, we may have to change the text quite drastically. In doing so, we follow in the footsteps of hundreds of Bible translators. But many of us would baulk at deliberately altering a contract so as to deceive its recipient. Interpreters, too, have been asked to leave misunderstandings unamended because it suited the client. The client's justification seems to be that the other side should be providing his own translator or interpreter. Is the translator covered by the principle that he is a mere intermediary acting on his client's instructions? Can he decline to comply with the client's request and return the work or walk out of the meeting?

From these examples it should be clear that the translator's duty of confidentiality is a very complex matter involving the translator's present and future relationship to client and text.

## THE CONTINUOUS FAILURE TO CONSIDER THE CONFLICT

There seem to be few, if any, instances of the profession considering the issue seriously. Very occasionally, a colleague tries to initiate a discussion – to no avail. We continue to argue that ours is a serving profession, that we act on request from a client and that our output goes back to the client to be used by him at his discretion. We are therefore mere intermediaries in a communication process.

The argument is hopelessly inadequate: the fact that we are intermediaries does not discharge us from our legal duty to disclose. If we claim, as we do regularly and vociferously, that we are thinking people, then we must accept the collateral responsibility towards the work we undertake.

## THE CONSEQUENCES OF THE FAILURE TO DISCUSS

The consequences of the failure to consider the conflict can he grave for translators and interpreters. There are instances of clients, rather than ourselves, deciding when we have breached the duty or when we can no longer claim privilege. These include:

– A client asked a translator not to mention certain omissions from a text where these are clearly visible in the source text. What is the translator's position if he subsequently discovers that the client's request flowed from the intention to deceive the recipient of the translation? The client may complain about the translator to either his professional body, or to a court. A law enforcement agency may take the view the translator failed to inform them of a possible criminal offence. In the absence of clear guidelines, any clarification of this situation will be post facto. That is undesirable because it opens the possibility of non-professionals telling us how to do our work[6].

– A prospective client required an interpreter to disclose the names of previous or present clients so as to take them up as references. This may well not only a breach of confidentiality but also a potential threat to our personal safety. Yet if the interpreter declines to provide such names, he may not get the work offered.

– Courts like to define the nature and the extent of an interpreter's duties whilst working on an assignment. In R -v-De Arango the interpreter was not offered the opportunity to explain or defend her view of her duties. Not surprisingly, the interpreter was found to have failed in her duty – as defined retrospectively and unilaterally by the court[7].

– The Dutch Supreme Court upheld an examining magistrate's decision to call an interpreter as a witness to matters that would have remained confidential had the suspect not had the benefit of an interpreter's services. This is an example of a court retrospectively denying the existence of delegated privilege[8]'. The judgment publishes the interpreter's name.

How much trust would any future client have in that interpreter? Would anyone trust any interpreter in future?

## THE NEED FOR DEBATE

The need for serious and informed debate has become more urgent because of the growing power of translation agencies and the rapid spread of money laundering.

Translation agencies cut us off from the client: our means of sussing out the client and the purpose of the work are severely curtailed. And whereas some colleagues argue that this discharges the translator or interpreter from much of the responsibility in relation to the assignment, it is not at all clear how the translator or the interpreter would be affected by a subsequent possible waiver of the privilege by the client or a court order to disclose. The Dutch Supreme Court case referred to above shows that the translator or interpreter can be fully and publicly exposed. Would the translator or interpreter still be liable for the consequences of the failure to disclose?

The fast growing money laundering industry is the second reason for debating the issue, for here, the translator or interpreter may be faced with criminal charges for having failed to disclose a suspicious transaction[9]. If, as a result of the CJA 1993, the English lawyers have begun to worry about their position in relation to professional privilege, surely it is time that we, who at best enjoy only delegated privilege. began to rethink our position?

## THE FORM OF THE DEBATE WITHIN THE PROFESSION

To seek refuge behind the „mere intermediary" concept is to suggest that we are slaves. Yet some of us decline assignments relating to the meat industry, or arms manufacturing, or the promotion of racism as a matter of principle. So we do take the decision to accept or reject, we are not as mindless as we pretend to be. Anyway, we are usually quite insulted if any one dare suggest that we cannot think, since we only translate other people's thoughts[10].

There are other professions that owe confidentiality to their clients. They recognize that duty may lead to conflict. Doctors may be required by law to breach their Hippocratic oath and report bullet wounds, suspected child abuse, wife battering or infectious diseases. Whether they do so is often a matter for their conscience. Lawyers are now required to report certain transactions or attempts to seek advice for the furtherance of criminal activities. We are therefore not alone in having to carry out a delicate balancing act between our two duties.

Doctors and lawyers can turn to their professional guidelines and if necessary to their advisory bodies for further advice. This approach offers a measure of protection to members whilst enabling professional bodies to collate the experiences and refine or amend their guidelines.

Our unwillingness to discuss the conflict exposes us unnecessarily to uncertainty and criticism. It also lowers our prestige in the eyes of other professions that have had to come to grips with the issues. Our ambivalent position suits most clients since it gives them the opportunity to behave like slave masters who impose their rules upon us. If we continue to fail to discuss and define our duties ourselves, others will do so for us. Their post facto decisions may become a new code of conduct in which we had no say and which gives us no rights.

## INCLUDING THE ETHICAL ISSUES IN THE TRAINING

Ultimately, the problem should not only be debated at professional, but also at pre-professional level. Professional ethics are part of the syllabus of student doctors and lawyers and there is no reason why translation and interpreting students should not be given the means to identify and recognize the potential conflict. Forewarned, they will be forearmed.

Coping with ethical considerations is not something that can be learnt overnight, it takes a long time to learn to distinguish between major and minor issues, to decide for oneself or to refer to the professional advisory body. Professional ethics should be taught at the same time as the other, more typically technical skills. It could be done by teaching students to systematically evaluate the (fictitious) client before accepting or rejecting the assignment. It is important that they should appreciate that translation is part of wider communication and not some isolated, purely income generating incident. They must learn to take and hold the initiative at every assignment. Only then will the profession be effectively armed for the conflict. Only then will we be proud servants instead of incapacitated slaves.

**NOTES**

*1*. NGV, Code of Conduct for Translators, 1992, paras. 6 and 7.

*2*. NGV, Code of Conduct for Interpreters (1992), paras. 2-7.

*3*. NGV, Code of Practice for Interpreters in Criminal Proceedings, para. 4.

*4*. The UK's National Register of Public Service Interpreters has a single Code of Conduct which not only fails to recognize the multiplicity of interpreting situations and to offer any protection to the interpreter but is in fact in conflict with the oath court interpreters take in English courts.

*5*. Of particular relevance to interpreters and translators in the UK is section 26B CJA 1993: „( l )A person is guilty of an offence if (a) he knows, or suspects, that another person is engaged in drugs money laundering, (b) that information, or other matter, on which that knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, and (c) he does not disclose the information or other matter to a constable as soon as is reasonably practicable after it comes to his attention (...). (10) No information or other matter shall be treated as coming to a professional legal adviser in privileged circumstances if it is communicated or given with a view to furthering any criminal purpose".

*6*. Van Taal tot Taal (March 1994, p. 22 and April 1994 pp. 23-25)

*7*. R. v De Arango, 1993 CA. „(The interpreter) certainly did not volunteer that she did what one might have thought she would have done, which was to ask (further questions). We must assume that she did not ask that question although one would have thought it was the obvious question to ask (...) The question for us is whether the interpreter (...) went far enough and took sufficient steps.

*8*. Nederlandse Jurisprudentie, 1986, Nr. 347, Hoge Raad.

*9*. Banks are under a similar duty and it is worth noting they are not sure what constitutes a „reportable" transaction: in the US it is any sum over $10.000, in the UK is any „suspicious" transaction.

*10*. A fashion possibly started by the otherwise intelligent Baron de Montesquieu (Lettres Persanes, Letter 133).