



# Best Practices in Translations for Legal Evidence: How to Protect Yourself and Your Clients

By Martin J. Cross

**Translating for** legal evidence makes some people nervous. They worry about disputes, certification, confidentiality, and the possibility that hundreds of millions of dollars might hang on a few unexceptional words in the middle of a document. For translators who don't want to lose sleep, it makes sense to have a set of practices designed to ensure that problems will be avoided from the outset.

## Learn to Recognize Translations for Evidence

Because translation for evidence requires a special approach, it makes sense to ask clients questions whenever certain types of documents land in your inbox. In addition to documents that are obviously legal in nature, many technical documents, such as published patents, reference books, and scientific journal articles, are used as evidence in litigation.

How do you know if you might be working on a document that could be

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used in court? The first clue is that the document is in a non-editable format, such as a PDF, and is either obviously old or bears a date. For example, a contract in MS Word is unlikely to be used as evidence, but a scan of a contract signed five years ago is definitely worth asking about. Likewise, a letter in an e-mail is one thing, but a printout of a 20-page e-mail conversation with three-month-old date stamps is another.

Also, keep in mind that although evidentiary translations are often certified, not being asked to certify the document when you receive the order does not necessarily indicate that the

translation is for information purposes only. Many agencies provide their own certification. It's also common for clients to ask for certification only after the translation is complete—sometimes months or even years after the fact. Bottom line: when in doubt, ask.

## Have an Acceptance Policy

Good translators always look over a document before agreeing to translate it, but it makes sense to spend some extra time reading text that will be used as evidence. You do not want to find yourself in the position of feeling obliged to certify a translation

in which you have little confidence.

Clients may occasionally ask you if you have ever worked for other parties involved in their case. The reason for this may not be so much the possibility of a genuine conflict of interest on your part, but rather the client's own potential difficulty in having to sing your praises in one lawsuit while calling you crazy in another. If you have worked for the parties mentioned, remember that most confidentiality agreements require that you receive permission before disclosing even the fact that you have worked for them. Attorneys are generally happy to give this permission for the purpose of conflict checks, but without it you will have to tell the client making the inquiry that you are not at liberty to respond.

### Think Like a Court Interpreter

In Italy, hot cocoa is almost exclusively a breakfast drink, so when the characters in American novels drink it before bed, Italian translators sometimes avoid confusing the reader by having them drink chamomile tea instead. While that skillful localization is appropriate for literary translations, imagine if court interpreters took it upon themselves to make the same linguistic substitution in testimony heard in a poisoning trial!

Like court interpreters, evidentiary translators must reproduce what is said without omission, embellishment, or corrections. Naturally, this approach is not a license to produce mechanistic word-for-word translations that turn idiomatic language into nonsense. The goal is to maintain a clear one-to-one correspondence between the source and target texts so that, if necessary, you would be able to draw a diagram with arrows showing how each lexeme or phrase in the target text corresponds to a portion of the source text, and vice versa. Of course, the terms and phrases themselves must also be faithful translations, and not improvements or explanations based on your own subject knowledge.

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quality of your translation. Adversarial attorneys, who may be supported by their own translators, will be happy to point out flaws or apparently arbitrary choices in your client's translations. Taking a clear one-to-one approach not only reduces the risk of errors and inconsistencies in your work, but also provides you with a rationale with which to explain and defend your translation choices if they are disputed.

If the source document includes an error, even when you can guess from the context what the author probably wanted to say, your client will not be best served by you correcting the error in the process of translation. For all you know, this could turn a document that supports your client's argument into one that contradicts it.

It is nonetheless helpful to point out errors in the source text, as well as cultural information that may be necessary for better contextual understanding, by way of providing comments (e.g., inserting “[sic]” after a clear mistake or adding footnotes). Your client may ask that this commentary be removed before the translation is certified or may choose to include it as part of the final submission.

### Be Careful When Working with References

In translations for evidence, particular thought must be given to working with existing translations of the source text or closely related documents. A law firm's internal translations may be provided as reference material when requesting a certified translation from an external translator. Likewise, translators are often asked to translate and certify a patent for which a published translation already exists.

The first thing to do is discuss it with the client. In the case of patents,

your client may be unaware of the existing translation. It is also possible that the client is aware of a previous translation, but does not want you to be influenced by it (e.g., when the accuracy of the existing translation is in question). In other cases, despite the existing translation, the client will need a new translation prepared—for example, because the document in the foreign language has an earlier publication date—and may prefer to have consistent terminology and phrasing between the two versions.

Here, it is important to remember that while it is perfectly appropriate to make use of references, translators are hired to give their judgment on the most accurate target phrasing of the source text. There is no reason to assume that an existing translation is correct just because it was provided to you or because it has been published. If you don't agree with the reference, don't follow it.

In this connection, non-English journal articles and patents sometimes include, or are accompanied by, English-language titles and abstracts. These can be of use occasionally, but it is important to keep in mind that these renderings are only made for convenience and have no official standing. In fact, English abstracts of patents are usually produced by translators who have not seen the entire specification and do not have the time to research the technology being described carefully, while journal abstracts are commonly produced by people with no real translation experience. You should feel no obligation to adopt the terminology or phrasing used in these translated abstracts. In general, the best policy is not to read them until after you have prepared the first draft of your own translation, so as not to be influenced at the outset. ➔

You may also want to use your own past translations as references. This is particularly useful when translating related documents for the same client, as consistent terminology and phrasing make it easier for the client to see similarities among different documents and may be significant for the client when making arguments based on the translations. Keep in mind, however, that before substantially reusing a translation that you specifically agreed to prepare as a work for hire, you will need to get the permission of the copyright holder.

### **Be Thoughtful in Your Communications**

While it is a good idea to discuss issues that come up in a translation, your clients may not always welcome receiving e-mail they have not requested. For example, if you believe that there is a mistake in an existing translation and write to tell the client about this, you will be creating a written record of your opinion. Your clients may prefer that you discuss the matter with them over the telephone. At that point, they can decide whether they would like you to put your opinion in writing.

### **Know Your Certification and Attestation Options**

It is not unusual for translators first to learn that their work will be used as evidence when they are asked to certify it. Unless you have agreed otherwise in advance, certification is a voluntary act, not an obligation, and translators do sometimes decline to certify translations in which they do not have much confidence. For example, if a client asks for a “quick and dirty” rush translation, and then comes back later asking you to certify it as-is, it would not be unreasonable to say no.

In such cases, or if for any reason you are not entirely confident in your translation, you may want to review and revise it before certifying it. You may even want to call on a second translator or expert to participate in the review process. It is appropriate to

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bill for the time you, or anyone else, spends on the review. It is, however, necessary to check with the client before taking such steps. They may not have the budget for a review, and it may not be convenient for them to make changes to the translation.

Many countries have specific requirements for certifying translations, but in the U.S. there are no universally accepted procedures or standards for certification. In its simplest form, a statement of certification will say that you certify that you prepared a translation of a specific document and that the translation represents an accurate and faithful rendition of the original text to the best of your knowledge and belief. A very brief description of your qualifications is sometimes appropriate. The statement of certification should be dated and signed. It also makes sense to include your contact information on the certification.

Although the simple certifications described above are routinely accepted by courts at all levels in the U.S., some attorneys and translation agencies feel the need for something spicier. These souped-up statements of certification often mention things like perjury, solemnity, and fluency. There is nothing wrong with them, as long as you agree with everything they say completely. Keep in mind, however, that since the wording may have been made up on the spot by an attorney who has never worked with a translation before, you should use your own judgment to decide if the statement is reasonable. In particular, unless you are lucky enough to be infallible, do not certify that a translation is correct without including words along the lines of “to the best of my knowledge and belief.” Even the Division of Language Services of the U.S. Department of State, an organiza-

tion that one would expect to have considerable confidence in its translations, includes those words in its certifications.

On very rare occasions, some clients may ask for a Declaration of Translator. This is a formal court submission that usually includes information about your background and qualifications, as well as details of how the work was assigned to you and possibly how you prepared the translation.

Another form of attestation is an expert witness report. These are commonly employed when there is a dispute, or the possibility of a dispute, regarding the correct translation. In addition to the things described earlier, you may be asked to set forth your opinions as to why your translation is appropriate, or as to the validity of another translation. As a witness, it is entirely possible that you will be called on to testify in person at a later date. Expert witnesses are paid for their time.

### **Be Prepared for Revisions, Corrections, and Disagreements**

As much as we strive to produce perfect translations, it is rare for any human work to be above improvement. As such, agencies or direct clients may propose changes to your translation. This input can be useful, but if you are certifying the translation, you must also remember that input from anyone else is no more than a suggestion, and the final decision rests with the translator who signs the certification. A new, freshly dated certification should be issued whenever changes are made.

Beyond editorial suggestions and simple oversights, clients may come back with questions about possible misunderstandings that have been flagged in the client's internal review

of the translation or as the result of a challenge to the translation by another party. In such cases, you should avoid the temptation to respond immediately. It's easy to find yourself agreeing or disagreeing with a criticism of your work as part of an initial emotional reaction. But in these matters, where parties often have an interest in the translation being one way or another, a careful review of all of the information available is always warranted. It may even be necessary to do additional research or discuss the matter with a native speaker and/or subject expert (provided you are authorized to do so). It is better to keep clients waiting a few days than to give them an unreliable answer.

It is also better to give clients the answer that they don't want to hear, or that you'd rather not admit to, than to make an argument that won't stand up to a challenge in court. It is possible for a professional translator to make a mistake, and it is likewise possible to be unsure as to what constitutes an optimal translation in a specific case. The best protection against future difficulties for both you and your client is to be honest and straightforward.

### Keep Good Records

If you keep copies of your translations, you will be able to refer to them in the event of future questions. If you do not and rely instead on the client's copy, you may have to recheck the entire translation before issuing any certifications, declarations, or certificates. It is also helpful to keep records of references that you consulted, should you need to explain your choice of wording at a later date.

### Sleep Well

Despite the potential for trouble, it is rare for translators to be sued. In fact, I have never heard of a translator being sued over an evidentiary translation. That said, having insurance can help you sleep better. One recourse might be to look into errors and omissions liability insurance. (ATA offers such a program at pre-

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- Although evidentiary translations are often certified, not being asked to certify the document when you receive the order does not necessarily indicate that the translation is for information purposes only.
- Your goal should be to maintain a clear, one-to-one correspondence between the source and target texts so that, if necessary, you can demonstrate how each lexeme or phrase in the target text corresponds to a portion of the source text, and vice versa.
- Adversarial attorneys, who may be supported by their own translators, will be happy to point out flaws or apparently arbitrary choices in your client's translations.
- Point out errors in the source text, as well as cultural information that may be necessary for better contextual understanding, by providing comments (e.g., inserting "[sic]" after a clear mistake or adding footnotes).
- When consulting a reference, don't assume that an existing translation is correct just because it was provided to you or because it has been published. If you don't agree with the reference, don't follow it.
- Using your own past translations as references is particularly useful when translating related documents for the same client. Consistent terminology and phrasing make it easier for the client to see similarities among different documents and may be significant for the client when making arguments based on the translations.
- If you believe that there is a mistake in an existing translation and write to tell the client about this, you will be creating a written record of your opinion, which could possibly become part of the court record.
- Unless you have agreed otherwise in advance, certification is a voluntary act, not an obligation.
- Many countries have specific requirements for certifying translations, but in the U.S. there are no universally accepted procedures or standards for certification.

ferred rates to ATA members. You can find more about it on ATA's website: <http://ata.haysaffinity.com>).

Most importantly, the knowledge that you are doing your best work,

following your own guidelines, and standing ready to correct any inadvertent errors should leave both you and your clients relaxed and confident. ■