

Ethical Problems in Legal Interpreting

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Chris Poole

May I first of all say what an honour it is for me to be given the opportunity to present a paper at this conference.

My presentation is anecdotal rather than the result of any systematic research. It is based on a couple of problems I encountered in the course of legal interpreting – a description of these problems, of how I responded to them and an explanation of my reasons.

My experience in legal interpreting is limited, having been involved in no more than a dozen or so court cases, and the few ethical problems that I have come across stand out in my career as unusual events, although it is probably misleading to put it like that. If we take as a reference point the expectations that NAATI (National Accreditation Authority for Translators and Interpreters) has of interpreters when testing them in exams, it might be better to say that in my work I am presented with a much wider variety of ethical problems.

I had a rather pointed introduction to this in my Level Three exam. If I may be unethical for a moment, I would like to relate to you the content of my Level Three exam, where during the questions on ethics a question in English began "Should you expect payment from one or other of the parties for whom you are interpreting?" It took three repeats before I realised that was the end of the question. Perhaps I was a bit nervous. I thought they were asking "If you expect payment.." and would go on to ask if I'd prefer cash or a cheque. When I realised what they were really asking, I felt like leaping from my chair and saying "You bet I do!" Fortunately in the same instant I saw that there must be interpreters out there whose daily experience consists of nothing more than providing a service on behalf of the government, to lawyers, social workers and doctors. The NAATI exam seemed to be tailored to this type of work, of which I had next to no experience.

My reaction to the NAATI exam was a bit of a standard nowadays - they're out of touch with Japanese and so on - but I'm sorry I thought that. On further reflection, it is quite sensible that NAATI concerns itself with no more than those areas such as legal, medical and government interpreting. The reason is that these circumstances and the nature of the relationships when interpreting for a lawyer and client or for a doctor and patient are reliably of a uniform type, and there can be established expectations of certain standards of conduct. For which there are, in turn, established mechanisms of responding to complaints, investigating conduct and perhaps levying penalties.

I have a trade background, and at least half of my work has been in industry. In fact there is great variety of work. In the space of a month I might spend two days watching videos of Australian comedy shows and explaining them to buyers from NTV, a week crawling around on a factory floor helping to install a chocolate moulding machine, or passing myself off as a researcher to Australian farmers in the hope that I can get some video footage of them using agricultural chemicals, on behalf of a Japanese investigative reporter.

I am called on all the time to perform tasks that fall well outside the strict job description of

an interpreter. Choosing to do them does not entail overriding any ethical considerations. It's simply a matter of making a living. If they want me to carry their bags, well that's fine by me.

It would be an undertaking of diabolical complexity for NAATI to formulate a canon of acceptable behaviour from which they could derive their ethics questions for exams and which allowed for the wide variety of problems I might encounter in these jobs alone.

So perhaps we should look at how crawling around on factory floors has prepared me to cope with ethical problems. The first incident took place in the following circumstances. A number of Japanese people had been arrested and charged with a very serious offence. I was employed by the legal firm to attend a meeting with the defendants five days after their arrest. They had not yet instructed the solicitor I accompanied, or any other, to act for them. Indeed, the meeting was to explain what they had to do before the solicitor could act for them.

At this stage they knew virtually nothing about the Australian legal system. The picture they had of their situation was so far from realistic that they thought that their committal mention in fourteen days was 'the trial', and that they would be flying home the next day. Whereas in fact the seriousness of the charges meant that they would be waiting perhaps up to two years in remand before going to trial. They were very confused and unsure of whom they could trust. There was an inordinate amount of work to be done by whoever was to represent them in the two weeks before their appearance in court.

During the meeting, while I was interpreting a conversation between the solicitor and one of the party, I noticed another of them writing on my notebook. While the meeting was still in progress I managed to read it. It was a message for someone in Japan, a phone number and a request that I make the call and pass the message on. The man signaled to me not to tell the solicitor. I ought to add that the solicitor had given me no special instructions such as to confide in him everything I might hear or not to speak to the defendants directly.

I'd like to get some audience participation going here. Before I'm so very foolish as to tell you what I did, in a minute I'd like to get a show of hands to see what everyone else here would have done. Please don't put your hands up now. I'd like you to think about it. Let's say the opinions are as follows. If this had happened to you, would you have:

1. declined immediately and explained that you couldn't do anything without telling the solicitor;
2. told the solicitor immediately, and let the defendants know you were doing so;
3. said OK, but told the solicitor later;
4. made the phone call and then told the solicitor;
5. done exactly as asked?

To help you think, I'll keep talking. I will introduce here a concept that I think is central to most ethical problems.

We all have in mind the notion that an interpreter's role ought to be unobtrusive, that it ought to tend towards the utterly impersonal, that ideally we are there as machines. There's an expression 'the black box'. I'm not sure where it comes from. A colleague of mine calls

herself 'the fly on the wall', and I use the expression 'the invisible man', which is of course both politically and statistically incorrect.

The difficulty, if not the impossibility, of maintaining an ideal like this is immediately apparent in this simple event.

These people were under stress, perhaps irrational, and desperately in need of someone in whom they could place some trust. The minute I read the that note I was involved. The man who wrote it had certain expectation of me simply as a human being. If I had not lived up to them, I would have, I believed at the time, seriously damaged the rapport we were building up. Furthermore, I believed that this rapport was crucial if the solicitor was to be given enough preparation time to properly represent the defendants in court.

Can I have a show of hands now.

Actual results (Approx):

1. 25
2. 30
3. 12
4. 2
5. 0

I chose number 4. I chose not to decline at the meeting, firstly because it was practically impossible. I couldn't enter into a private discussion with the gentleman on my right on whether or not I would make the phone call while I was in the middle of interpreting a fairly lively discussion between two gentlemen on my left. Moreover, there was the general reason that I have already outlined above, in that I didn't want to do anything that might damage the relationship of cooperation we were developing.

Once the meeting had finished I did have time to think about the specific request, and in the end my reasoning for making the phone call was quite simple. That is, every other detainee has the freedom to make phone calls, without their solicitor or anyone knowing about it, and it was due to nothing more than the language barrier that the Japanese were unable to enjoy the same right. Although I told the solicitor afterwards, I did not relate the content of the call to him.

In fact it wasn't until about a month later, when I was back there at the request of the remand centre to spend half a day explaining the rules and regulations, that we finally made arrangements for the defendants to receive phone calls from overseas. So except for that one call I made, they had spent the whole time unable to communicate with their families. It became apparent then that I had been truly their only possible link with the outside. Maybe that further vindicates me, or maybe just thinking about these things and coming to my own decisions is clearly not the responsibility of an interpreter and is therefore unethical.

I can't pretend that all this reasoning appeared to me quite so neatly the instant the defendant wrote the note. But then I don't think that I'm just rationalising after the fact. Rather I am trying to analyse the events in terms of the ethical considerations, if only because the results of this examination further equip me to deal with similar problems in the

future.

Well, what did I learn from this event? Next time I work with a solicitor, I will make no assumptions concerning his sensitivity to these matters, and will obtain from the solicitor clear instructions concerning my conduct while working. I have since found the same plainly written in section ten of the Victoria College Ethics & Procedures code for interpreters. I have no excuse there.

We will make it plain to the clients at the outset that I am there simply as an assistant to the solicitor and am not to be addressed directly. But we still might come up against someone who listens patiently and then halfway through the meeting might say 'Ne...'. Back to square one.

Now, interpreters ostensibly try to become totally detached. They try to be machines. We're used to that. But to the general public, with whom we must deal in the course of our work, it is an idea that takes a lot of getting used to. They are, in fact, an unknown quantity with respect to their grasp of such an abstract concept. And ten minutes before the end of visitors' hours, ten days before the trial, is probably not the time to start trying to educate them.

The second example I have concerns not something that happened to me, but rather something I did. Because of the unique vantage point enjoyed by interpreters, they are often the only witness to inadvertent misunderstandings and terrible waste. I could see that a considerable impediment of the effective legal representation of these people was developing because of the lack of information the defendants had on which they could base decisions concerning their own affairs – the first and most important decision being, of course, to instruct a solicitor to act for them.

The reason they had so little information was that the solicitor has so far found it prudent to refrain from explaining the full gravity of their situation for fear of upsetting them. There was the danger that they might, metaphorically, shoot the messenger – that they might associate this bad news with their solicitor. They could have been forgiven for seeing only that many aspects of their situation seemed to favor the commercial interest of the legal firm. Far from just damaging the rapport we were building up, it may have caused them to cease to have anything to do with us, in the hope that another legal firm might offer them better prospects. This would have been largely an ill-considered thing to do, and whoever was to ultimately represent them may have been thus inadvertently deprived of valuable preparation time.

Once I had perceived this Situation, I felt that something had to be done about it. So I spent about two hours of my own time writing a memo to the solicitor, making the following suggestions:

That the law firm employ a consultant to visit the Japanese and brief them thoroughly on their situation and answer all their question frankly.

Some of the things they needed to have explained to them were:

- the seriousness of the charges against them and the punishments applicable;
- the court system of this country and how it would apply to them;

- an estimate of how long that would take;
- how lawyers are paid in this country;
- an estimate of how much a defense like this would cost;
- how legal aid works, and the criteria for eligibility.

Above all, it had to be made plain to them that the harsher aspects of their situation would remain the same regardless of which legal firm represented them.

I recommended a person with a wide knowledge of both legal systems and both languages, the solicitor agreed with my suggestion and we proceeded to arrange it. However, the effectiveness of this whole proposal depended on the consultant being seen as absolutely independent. I therefore recommended that the cooperation of the consulate be obtained, to the extent of sending someone to accompany the consultant as though she were there at their request.

So to kick off the list of ethical problems that accompany this example, we have the problem of telling a bare-faced lie. A five-year-old can tell you that's unethical. I will have to skip forward a bit now and explain that while we were in the middle of arranging all this, for quite unrelated reasons, another law firm got the job. So none of this ever went ahead. But you can see the problem here. The whole proposal seemed to come complete with two sets of rationalisations. One, the noble one, is the interests of the defendants, their adequate representation and defense of their rights. The other is the commercial interests of the law firm - months, maybe years of high-profile work for solicitors, barristers and, need I add, the interpreter.

As far as we went, I was satisfied that these two sets of reasons coincided. But to pursue a course of action for one set of reasons, perfectly pleased to find that everything you do for the clients also happens to benefit you, demands a high degree of vigilance lest one discover suddenly that the original set of reasons is no longer valid and that the whole thing is propelled by nothing more than financial interests.

The very fact that I had departed from the strict role of an interpreter and had initiated a cycle of action that contained this risk is the first thing that worried me. But I had decided that the questionable nature of what I was doing was offset by the benefit to the process in general of representing these people. And anyway; all I did was suggest it to the solicitor. Thereafter it was his responsibility.

There's an easy way out of all this. It requires saying 'that's not my problem'. This comes close to being enshrined in the various codes of ethics, and quite rightly too. That is, to draw from section one of the Victorian Ethnic Affairs Commission Code of Ethics 1 '..nor undertake responsibilities outside his/her areas of competence...'. Now that NAATI has produced a booklet containing all these examples of codes of ethics, I'm not sure how ethically sound it is to go through the whole thing selecting just those items that suit particular arguments. On the other hand I don't think we'll ever see the mother of all codes. But some of these I found are quite complementary.

Sometimes saying 'that's not my problem' may not be the end of the story. This is subtly alluded to in section 15 of the University of New South Wales Ethics of the Profession and General Rules, where, after stating unequivocally that an interpreter is contractually obliged

to execute his or her duties regardless of disapproving of the purpose, tendency, membership etc., the code states that 'It should be noted that there are two schools of thought on this'. I think that second school gets a look in section 6 of the Victoria College Professional Ethics and Procedures code, where it states:

Maintain a personal integrity that will enable you to intervene if the course of the interview appears to be neglecting a matter you judge to be important, or if you are placed in a role that appears to be inappropriate.

I think that between the University of New South Wales and Victoria College an interpreter has a great deal of latitude. But however much of a Pandora's box it may be to refer to matters that the interpreter judges to be important, I would have to claim that my writing the memo was an extension of this principle. Once I had aware of the situation, my conscience would not allow me to do nothing while the defendants labored in ignorance to make sense of their situation and the lawyer shilly-shallied around trying to get them to sign on the dotted line.

Looking at something and saying 'that's not my problem' is something that of necessity most people do some of the time. But I wouldn't want to live in a world where all of the people did it all of the time.

Of course, many people will be thinking that this was a job for the consulate, and I do too. All I can report is that they didn't.

A couple of months later I met the defendants again at their committal hearing. They still seemed to me not to comprehend the proceedings at all. When I mentioned this to the lawyers of the new firm, they replied 'They know very well what's going on'. So I don't know what had taken place ...

Now I would certainly not suggest the word 'inevitable' to describe an interpreter's confusion and occasional failings. I believe wholeheartedly that embracing ideals such as the invisible person, unattainable though they may be, is a valuable thing to do. Rather, I would argue that we are obliged to be keenly aware of our shortfall in pursuing these ideals, and that as a component of our ongoing development and education as interpreters we frankly address all the issues raised and strive to place them within a coherent ethical framework.

My reasoning, you will have noticed, contains several gaping holes that I have left there deliberately that they might be filled with lively contributions from the audience and panel during the discussion period. I look forward to this and I thank you for your kind attention.