

# ASSOCIATION OF BUSINESS TRIAL LAWYERS

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# REPORT

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## PRIVILEGE AND CONFIDENTIALITY ISSUES WITH ONLINE TRANSLATORS



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Free online translators allow lawyers to bridge a language gap with just a few clicks. While retaining a professional translation service and obtaining a professional translation can take weeks, online translators can translate text instantaneously. This can be useful for communicating with a foreign client or reviewing discovery documents written in a foreign language. Online translations are especially handy for less common languages for which it is difficult to find a translator. Some courts have even admitted translations from online translators into evidence or relied on online translators in rendering opinions. *See, e.g., Butler*

*v. Fed. Express Corp.*, No. 19-3477, 2020 WL 7647396, at \*2 n. 2 (D.S.C. Nov. 9, 2020) (admitting translation from Google Translate into evidence where opposing party did not object); *Super Express USA Publ'g Corp. v. Spring Publ'g Corp.*, No. 13-cv-2814, 2017 WL 1274058, at \*7 n.9 (E.D.N.Y. Mar. 24, 2017) (relying on Google Translate in rendering opinion).

But the use of online translators raises concerns, the most obvious being admissibility. For example, a translation from an online translator would likely be found inadmissible in California state courts, which have a rule requiring that translations be

“certified under oath by a qualified interpreter.” Cal. R. Ct. 3.1110(g). Other courts have found online translations to be inadmissible due to insufficient reliability. *See, e.g., Novelty Textile, Inc. v. Windsor Fashions, Inc.*, No. CV 12-05602, 2013 WL 1164065, at \*3 (C.D. Cal. Mar. 20, 2013).

A less obvious but potentially serious concern is confidentiality. As discussed below, a court could deem the use of an online translator to be a nonconfidential disclosure of information to a third party, potentially waiving attorney-client privilege, undermining trade-secret protection, or breaching a confidentiality provision.

### Online Translators

Online translators are free machine translation services. They have translation capabilities for dozens of languages. In addition to translating typed text, some translators can translate handwritten text and text extracted from images, videos, webpages, and documents. Some online translators can also transcribe in near real time as someone is speaking.

There are four different kinds of machine translation technologies: statistical, rule-based, hybrid, and neural. Statistical machine translation generates translations based on statistical models that are created by analyzing volumes of bilingual text. Rule-based machine translation conducts an analysis of the source and target languages and relies on grammatical rules to generate a translated sentence. Hybrid machine translation uses both statistical and rules-based technologies. Neural machine translation, the newest kind, develops neural network-like models to predict the likelihood of a sequence of words in a sentence.

Some online translators appear to retain information submitted for translation to improve future translations, which creates uncertainty as to whether such information can be considered confidential.

### Potential Privilege Waiver from Disclosures to Online Translators

Attorney-client privilege protects confidential communications between a client and lawyer that were made for the purpose of obtaining legal advice. The Supreme Court has noted the importance of the privilege in facilitating “full and frank” discussions between attorneys and clients to ensure effective representation. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Voluntary disclosure of privileged documents to third parties generally destroys the privilege. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126–27 (9th Cir. 2012). There is an exception to the third-party waiver rule when a third party is employed to assist an attorney in providing legal advice. *Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002); see also *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (stating that communication with such third parties must be made in confidence and for the purpose of obtaining legal advice from the attorney). This exception is narrow, however, and applies only if the third party’s contributions are “nearly indispensable” or serve a specialized purpose in facilitating attorney-client communications to render legal advice. *Cavallaro*, 284 F.3d at 249 (citation omitted).

While maintaining confidentiality is a fundamental requirement for attorney-client privilege, it is unclear whether the use of online translators provided by third parties is consistent with that requirement. Popular online translators have Terms of Service stating that the service providers have rights to all of the information that users enter. Common provisions include the rights to use, copy, store, reproduce, modify, publish, publicly perform, publicly display, create derivative works of, and distribute translated content, as well as the right to sublicense such rights to suppliers and subcontractors.

While these Terms of Service state what service providers can do with disclosed information, not necessarily what they ordinarily do, there is still reason to be wary. For example,

in *In re Asia Global Crossing*, the U.S. Bankruptcy Court for the Southern District of New York indicated that privilege may be destroyed when a third party has the right to monitor electronic communications between attorney and client, even if the third party does not actively or consistently monitor them. *In re Asia Glob. Crossing, Ltd.*, 322 B.R. 247, 258–59 (Bankr. S.D.N.Y. 2005). At issue was whether emails were confidential and privileged when an employee used his employer’s email system to communicate with his personal attorney. *Id.* at 256. To assess that issue, the court considered four factors that generally measure an employee’s expectation of privacy: “(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee’s computer or e-mail, (3) do third parties have a right of access to the computer or emails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?” *Id.* at 257 (footnote omitted).

While courts have not yet addressed whether confidentiality and privilege are maintained upon the provision of privileged information to a third-party service provider for online translation, the *In re Asia Global Crossing* factors provide reason for concern. If the service provider’s Terms of Service clearly state that it has access and rights to translated information, and these terms are clear to users, a court could conclude that there has been a breach of confidentiality. If the confidential information was privileged, a court could find that privilege was waived.

### Other Potential Concerns Regarding Loss of Confidentiality

Concerns regarding potential breaches of confidentiality by the use of online translators extend beyond attorney-client privilege. For example, the Supreme Court has held that disclosure of a trade secret to others extinguishes a property right in the trade secret. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (stating that once an individual “discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished”); see also 18 U.S.C. § 1839(3)(A) (requiring “reasonable measures to keep such information secret” to maintain trade secret protection).

Courts could conclude that using an online translator for trade-secret information abrogates a property right in the trade secrets.

Additionally, courts and administrative bodies frequently enter protective orders requiring a party's lawyers to maintain the confidentiality of information produced by the opposing party. The submission of confidential information to a third-party online translator could be seen as a violation of the protective order's terms, potentially subjecting a party to sanctions.

### **Conclusion**

Until courts issue opinions holding that confidentiality and privilege are maintained for information disclosed to online translators, it would be prudent for lawyers to limit their use of online translators to nonconfidential information. For translations of confidential information, attorneys should exercise caution and consider using a professional translation service subject to a nondisclosure agreement.

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