

WELL-FOUNDED FEAR


Thoughts From An Immigration Attorney

Well-Founded Fear Discussion Modules:

PRACTICING ASYLUM LAW



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Thoughts From An Immigration Attorney

From the filmmakers: We asked a good friend, a former practicing attorney who did hundreds of asylum cases and now teaches law, to look at the training modules and to react to the Asylum Officer's perspective also included here. His comments:

Translation Issues

The following is how I would sum up translation instructions, covering many of the points raised in the film and the comments. The following rules are worded to apply to all participants in the process - the applicant, the translator, the attorney and the Asylum Officer (AO). When everyone involved takes responsibility for these rules, a mutually reinforcing atmosphere will pervade the interview and facilitate clear communication.

1 Communicate the story and any questions in two sentence segments.

Everyone involved must insist that anything that must be translated is short. Applicants and volunteer translators must be trained from the moment they meet to do this. Translators must be trained to politely but firmly interrupt AOs who ask questions that are too long.

2 Insist that the applicant and the AO communicate directly to each other. Maintain eye contact between the applicant and the AO.

Such behavior is learned, not natural. As with insisting on short translations, practice makes perfect. As many applicants are uncomfortable (and even very fearful of) looking authority figures in the eye, practice and explanation are important to understanding how important such direct communication is for the applicant and the AO.

Again, translators, attorneys and applicants must politely direct AOs to look at the applicant, not others in the room.

3 Insist that translations be exact. Make timely corrections.

As a general rule, verb tense should be first person, not third person. (example: The applicant says, in her own language, "I went to the store." The wrong translation is to say in English, "She says she went to the store." The correct translation in English is, "I went to the store.") Avoiding personal pronouns like "they" as much as possible also makes for clearer communication.

Colloquial expressions are difficult to translate exactly. It is appropriate for translator to explain to the AO (or to the applicant) the meaning of "sayings" or slang, after giving an exact translation.

Profanity should be translated exactly. Acts of torture are obscene; verbal obscenity often accompanies such acts. All of it should be accurately communicated. If translators are uncomfortable doing so, they should practice saying the bad words in advance.

If a mistake is made and you notice it (whether "you" are the translator, the AO, the attorney or the applicant), bring it to the attention of the participants immediately.

Attorneys can literally time an applicant's or AO's comments, and then time how long it takes to translate the comments. If there is a serious difference, that should be raised immediately.

4 Avoid untranslated side conversations.

Side conversations between the applicant and the translator should be avoided. It is sometimes necessary to do so, and when that happens, the translator should inform the AO and the attorney what happened in the conversation.

At the same time, when the AO has a conversation with the translator in English, the translator should inform the applicant about that, too.

If possible, the translator should quietly translate conversations that go on between the AO and the attorney.

5 When possible, know the contents of the asylum application.

A translator should be given a copy of the application to review in advance. Applicants should converse with the translator in advance to clarify phrases and become comfortable.

Reviewing the application does not give the translator license to “correct” the applicant during an interview. “Helping” an applicant in an interview in that way can be disastrous. The application may be wrong, or the applicant may have an explanation for the discrepancy. It is not the job of the translator to make the story better, or to “fix things” during the interview.

6 Practice, practice, practice.

These rules should be followed from the moment a translator enters the picture. Whether you have two months to prepare, or only twenty minutes, start practicing right away.



About “Glimpses Inside The Asylum Office”

As a preface to my suggestions on the written material for this section, I must say that as hung up as the attorney in the video may be about the AO, the author of the commentary and the AO in the segment are equally hung up about attorneys.

When you throw in the comments of the AO author of the commentary (and interject me, a die-hard advocate) into the mix, you’ve got multiple layers of (sur)reality to peel away to get at some estimation of the truth. While the actual language of the AO in the introductory section is unobjectionable, his tone is patronizing. I am willing to guess that the officer is not an attorney, and came from another section of the INS, most likely adjudications, before becoming an AO.

He worries about losing control of interviews to attorneys, perhaps because they have been patronizing to him as well in the past. The attorney has likely encountered AOs she would categorize as being adversarial, and may well have history with this officer. Thin skin all around. What a marvelous scene! The applicant almost gets lost in this encounter.

It seem to me that some anger toward this attorney and others like her is barely below the surface in the accompanying AO’s commentary as well. From my perspective, the writer overstates the duties of the officer in controlling the interview. This is a non-adversarial interview, not a star chamber. In the comments, the writer states the following:

“An attorney may not interrupt an AO’s line of inquiry at any time during the interview... An AO is trained that, at the beginning of an interview where an attorney is present, the officer should take a few minutes out to explain to the attorney how they will be conducting the interview. This involves indicating to the attorney present that when the officer has completed all questioning they believe is required of the applicant, the officer will allow the attorney time to either make a brief statement about the case or to ask additional questions of the applicant. At no other time in the interview should the attorney be engaging the asylum officer.”

I’ve picked out these statements, because to me they represent an overstatement of the AO’s role in the interview. Again, a firm grip on the interview is different from an iron grip. What follows is how I would write the section. I use extensive verbatim transcriptions, as examining exact language is a useful technique to get at the true nature of this exchange.

1 General Principles For The Conduct Of The Interview

The rules indicate that the interview is to be non-adversarial [8 CFR 208.9(b)]. Some AOs take this to mean that because formal objections (like in court) are not allowed in interviews, that they are in absolute control of the interviews and attorneys or representatives are not allowed to speak at all until the end of the interview. A look at the AO training materials belies this mistaken assumption. The following are excerpts from the Interviewing I chapter of the IMMIGRATION OFFICER ACADEMY ASYLUM OFFICER BASIC TRAINING COURSE (Nov. 2002):

The representative and the AO are not adversaries. Therefore, some actions that may be appropriate for attorneys during adversarial settings (such as making objections) are not appropriate in the non-adversarial interview, where the AO and representative share a cooperative role in developing and clarifying the merits of the applicant’s claim.

In certain instances, it may be appropriate for the representative to comment during the course of the interview to avoid confusion or misunderstandings. Such comments may be helpful and should not be discouraged. At the same time, it is important that the AO retain control of the interview. If the representative repeatedly interrupts or otherwise disrupts the interview, the AO should ask the representative to refrain from interrupting the interview and explain that the representative will be given an opportunity at the end of the interview to ask questions and make comments...

The AO may at times need to remind the representative of the non-adversarial nature of the asylum interview. In doing so, the AO must conduct him/herself in a professional manner, even if provoked. (p. 18)

Perhaps it should go without saying that at times, the AO also may need to be reminded of the non-adversarial nature of the interviews as well. According to the same manual, “questioning must be done in a professional manner that is non-threatening and non-accusatory.” (p. 7).

Again, the manual states that the AO “must treat the applicant with respect, ... be non-judgmental and non-moralistic, ... create an atmosphere in which the applicant can freely express his or her claim, treat each applicant as an individual, ... set aside ‘personal baggage,’ ... probe into all material elements of the applicant’s claim, ... provide the applicant an opportunity to clarify inconsistencies, and ... maintain a neutral tone throughout the interview.” (p. 6-9). Attorneys should keep these elements in mind during an interview. An asylum officer is charged with ferreting out inconsistencies and protecting the system from fraud, but also must be fair and non-adversarial during the process.

Additionally, the manual goes on to state that “[t]he asylum officer must not: a. argue in opposition to the applicant’s claim; b. interrogate the applicant (i.e., must not question the applicant in a hostile manner); c. take sides in the applicant’s claim; d. attempt to be overly friendly with the applicant; e. allow the asylum officer’s ‘personal baggage’ to influence him or her during the interview, either in favor of or against the applicant.” (p. 9). If a client is being badgered or interrogated, an attorney should feel compelled to intervene.

2 A Confrontation Between An Asylum Officer And An Attorney

In the film we encounter an attorney with bad past experiences with AOs and an AO who makes a not too subtle effort to trap the applicant in an inconsistency, and is himself trapped when the attorney calls him on it. The attorney, however, handles the situation poorly by assuming at the outset that the AO will behave poorly, and makes a disparaging comment about AOs. The AO later grasps at control of the interview by talking down to and over the attorney while backtracking on his veiled accusations.

An AO viewing this scene might well view the attorney as overstepping her role, insulting AOs in general and impeding the flow of the interview. An attorney viewing the scene might

agree that the attorney was impolite, but also might see her as protecting the interests of her client from unfair questioning by the officer.

In the scene, the AO legitimately has concerns about the basis for the applicant’s claim to asylum. The applicant’s authorized period of stay in the US expired and then, a month later, a coup occurred in his home country. The coup is the basis for his asylum claim, and the officer is interested in why he didn’t just go home before the coup happened.

The interview unfolds in the following way:

Asylum Officer (AO): If it’s agreeable to you, I’d like to do it this way. I’d like to conduct the interview. At the end of the interview, I’ll give you, you know, five minutes or so to make a statement, ok? I would appreciate it if you didn’t interrupt the interview. Ok. And let me conduct the interview with him, ok?

Attorney (Att.): Ok. Um, sometimes I might hear that, sense that he is not understanding what you are asking.

AO: If, if he doesn’t understand, if he can’t understand me right now, then we can’t have the interview.

Att.: No, he can understand you, but sometimes... you know...

AO: Wait, wait ‘til the end...

Att.: ... sometimes between the English and the...

AO: ... If you want to clear it up, you can clear it up. Ok? I don’t want to interrupt the flow of the interview. Wait til the end. Right. Make yourself a note about something you felt he didn’t understand and we’ll readdress it. Ok, otherwise the interviews go on and on almost like it’s a courtroom. It’s not a courtroom.

Att.: Oh, I don’t try to make them go on and on, but it’s real hard for me to bite my tongue... when I hear you guys are going off in left field. But I’ll try my best to keep my mouth shut.

AO: Ok, I would appreciate that. I must get this done the way I have to do it. It's my responsibility as the hearing officer to control the hearing and that's what I'm going to do. I will give you the ample time at the end to address any issues you want to readdress, ok?

Att: I'll try.

Here, the AO has correctly stated that he is to control the interview. He has incorrectly stated that the attorney must keep quiet until the end of the interview. The rules indicate that the interview is to be non-adversarial. Some AOs take this to mean that because the setting is not a courtroom, that attorneys should not be allowed to comment at all during the interview. The materials used to train AOs actually communicate something a bit different, as pointed out in the segment from the training manual for AOs.

The attorney may be correct in her position that she should be able to correct misunderstandings, but her flip comment about "going off in left field" is a bit too strong. Rather than saying she will interrupt, it may be wiser simply to be prepared to do so, without notifying the officer in advance.

When the attorney interrupts later in the interview, she may well have had a valid point about the asylum officer assuming a discrepancy when one did not exist. Review of the transcript indicates how the officer asked the initial questions:

Asylum Officer (AO): Ok, um, and why is it that you haven't returned?

Applicant (A): Um, I haven't returned, um, because I intend to stay for three months in United States, right. And after that I stayed, I stayed for a while and the government changed in Sudan.

AO: When did the government in Sudan change?

A: Okay, uh, it changed in, um, June 30, 1989.

AO: Tell about that change, what you know of it?

A: I know that the group they've taken over the government, thrown over the democratic government.

AO: What group?

A: Uh, the group is the military, the military.

AO: Why did that event change your mind about going home?

A: Ur, because, um, it is a dictatorship actually. Dictatorship government. And I have been persecuted [prosecuted?] before from another, uh, dictatorship government, so I was afraid that if I go back I'm going to be persecuted [prosecuted?] again. I couldn't, I couldn't go back. I intend to stay three months.

AO: You could've went back on May 2. Government hadn't changed.

A: I told officer at the airport I going to stay three months.

AO: The officer gave you more time

Attorney (Att): [sigh]

AO: We'll get to it in a moment. We're going to clear this issue up to my satisfaction and then we're going to move on to addressing it.

A: I...

AO: He authorized you to stay...

A: Right.

AO: Right... until May. Your testimony was the reason you stayed beyond this date, your original testimony was, as I have verbatim in my notes, was you stayed because the government had changed. The government hadn't changed until June 1989.

A: No, I didn't say, I didn't say I stayed because the government had changed. I say because I intend to stay in United States for three months.

At this point, the attorney interrupts, believing the officer had misconstrued the testimony of the client. Indeed, the officer's "verbatim" notes are incorrect, if examined in light of the actual testimony given by the applicant. If the attorney believes that the officer is mistaken, or worse, is intentionally creating a conflict or discrepancy where one does not exist, the attorney should take steps to correct the misunderstanding immediately. This may be an uncomfortable step to take, but it needs to be done. To the AO's credit, he allows the interruption.

AO: ... Go ahead, Counselor.

Att: I have a problem with this...

AO: ... Go ahead.

Att: ... because his testimony was not that he stayed beyond May 2 because...

AO: No, no, that isn't why he stayed...

Att: ... You asked him why he did not go home. You didn't ask him...

AO: That's right...

Att: ... and, and what he said was that he did not go home because of the coup...

AO: ... Yes, I have that...

Att: ... But he didn't tell you that he did not go home on May 2 because of the coup...

AO: Yeah, and Counselor...

Att: ... he just said that he didn't go home...

AO: ... and we're addressing that issue now.

Att: ... because of the coup. There's a difference.

AO: Yeah, and we're addressing that issue now. That's what we're addressing.

Att: But you're saying there's a discrepancy from the beginning of his testimony, that he...

AO: I'm...

Att: ... did not go home on May 2.

AO: ... My first question to him was, "Why didn't you return to your country?"...

Att: ... Okay, and he told you.

AO: ... and he answered that. Ok. Now I'm asking him why, now I'm asking him an additional question of why he didn't receive, and the man is explaining it to me.

Att: Yeah...

AO: Yeah...

Att: ... and he said that he didn't go home on May 2 because he said he always intended...

AO: But let him, but let him...

Att: ... to stay for three months.

AO: ... let him tell me that. Let him tell me that. He's telling me that. What you're...

Att: Okay.

AO: ... saying right now, he's telling me now, so let him say it.

Here, the attorney takes the risk of being seen as obstructionist in order to protect her client from incorrect assumptions or conclusions. While the AO makes it sound towards the end of the encounter as if this misunderstanding would have been cleared up anyway if the attorney had just held her comments until the end, an equally plausible conclusion to draw is that the attorney's intervention headed off an AO conclusion that would be fatal to her client's claim.

Suggestions for Attorney Conduct

Attorneys should respect the fact that the AO is charged with conducting an interview in a short period of time. Asylum officers should never forget that such interviews should be conducted in a non-adversarial nature, and that techniques reserved for interrogations should not be used.

It is absolutely essential that attorneys take verbatim notes of all that occurs and is said at an interview. This includes noting not only the actual words said, but the tone of the interview. Was there tension in the air? What was the tone of voice of the officer?

Attorneys should be prepared to interrupt an interview when questioning becomes inappropriate, unfair, adversarial or abusive. Attorneys should prepare their clients that such moments may occur, and that the attorney will not interrupt immediately when the AO asks one or two inappropriate questions, but will wait until it becomes clear that the officer is behaving unprofessionally.

How do you know if or when to interrupt? As the interview is not to be adversarial, if an AO takes a tone or uses questions in the manner of an aggressive cross examination, that would be inappropriate. Questions that would be objected to in court may also be inappropriate in an asylum interview, even though the interview is not a court hearing. Compound questions can confuse. Argumentative questioning is also inappropriate. Questions that call for a narrative, however, may well be very appropriate in this setting.

Attorneys should assume that interviews will be conducted professionally. As such, it is not suggested that attorneys tell an officer in advance that they may interrupt. Rather, attorneys should be prepared to interrupt only if and when necessary. Doing so should be for serious (if subtle) departures from the charge AOs have to conduct non-adversarial interviews. Officers who are not offended by such interventions will receive them warmly. Those who do not take kindly to interruptions should not be given reason to be antagonized unless absolutely necessary.

After firm but professional interventions, AOs will likely refrain from further unprofessional behavior. Your verbatim notes should provide you with corroboration as to the tone, form and content of inappropriate questioning and behavior.

Attorneys should not be put off by an officer bringing his or her supervisor into a dispute over conduct of the interview. Wait for the officer to explain his position, then take the opportunity to lay out your detailed objections to the interview. Rescheduling the interviewing with another officer is within the authority of the supervisor, and you should not be afraid of that possibility.

If the interview continues poorly, you should be prepared to file a complaint with the AO's director immediately following the interview. Waiting until a decision is reached on the case (for fear of hurting your client) will not be taken as seriously, particularly if your client's case is referred. If you sense an AO is trying to deny your client asylum unjustly, waiting to file the complaint only hurts your client (and your own reputation as an advocate). If your sense is wrong and the AO intends to grant asylum, then your complaint should not alter the professionalism of that officer in doing his or her job.

Evaluating A Prep Session

A suggestion for introducing this section:

Here is an opportunity to test the lessons from the earlier segments, as well as consider how best to prepare an applicant for an asylum interview. As you view the video, grade all the participants, and think about how they have done things well, and also where they could improve.

How does the applicant do in the preparation session? In the final interview? Do you have a sense as to how reliving the past affects her and her ability to tell her story? Does she tell her story in short segments? Does she maintain eye contact with the AO? How does she do in explaining the potential discrepancies in her story and her application?

How does the attorney do in informing the client about what is to come? About how to answer questions? About how to work with translators? Does he follow his own instructions? Does he speak in short clear sentences at all times? Is he overly harsh towards the applicant? Does he make appropriate interventions during the interview? How does he do in the closing statement? Does he apply the law to the facts of the case in a clear and understandable way? How does he make use of exhibits?

How does the translator do in the prep session? At the official interview? Does she accurately translate in both situations? How does the AO do? Are her questions fair? Clear? Of proper length? How would you grade her treatment of the participants in the interview?

Our Advisors:

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Dr. Barsky is Professor of French and Italian, and Comparative Literature, at Vanderbilt University. He has previously been a *Professeur sans octroi* at the Ethnic Studies Department of the Institut National de la Recherche Scientifique in Montreal, with a specialization in migration and refugee issues, and the Canadian Bi-Centennial Visiting Professor at the Yale Center for International and Area Studies. He is the author of six books, including **Arguing and Justifying: Assessing the Convention Refugee Choice of Moment, Motive and Host Country** (2001) and **Noam Chomsky: A Life of Dissent** (1998, with 5 translations), as well as **Zellig Harris's America and The Chomsky Approach** (both forthcoming with MIT Press). He is on the editorial board of several journals, including his new journal called *AmeriQuests*, for which he is founding editor.

John "Wally" Bird

Mr. Bird joined the Asylum Division of the INS in November 1994, and is currently employed by the Refugee Operations branch of USCIS, DHS. Mr. Bird's immigration background extends back to the early 1980s, when he worked with Central American refugees in the United States through the Society of Friends while completing graduate coursework in 20th Century Latin American and Immigration History at the University of Florida. Prior to joining the INS, he worked for Congressman Peter W. Rodino II at the law firm of Rodino & Rodino, and then practiced immigration and entertainment law in his own firm.

R. Gerald Brown

Mr. Brown has more than 20 years of experience in refugee and immigrant work, including provision of direct services, national program management, overseas refugee processing and asylum adjudication. He was an Asylum Officer with the INS, and now works as Senior Consultant for the Institute for Social and Economic Development assisting agencies with organizational development, program design, case management and performance measurement. He began his career with refugees in Egypt and Taiwan and coordinated the provision of social services to Haitian and Cuban refugees at Guantanamo Bay. Mr. Brown holds a B.A. in psychology from the University of North Carolina at Chapel Hill.

Steve D. Heller

Mr. Heller has over 10 years of immigration law experience. He has represented asylum seekers as an attorney, and has adjudicated asylum claims as an Asylum Officer. He was also a Supervisory Asylum Officer in the Newark Asylum Office, and the Supervising Attorney with the New York Association for New Americans (NYANA), a non-profit immigration services organization. Currently, he is an Adjudications Officer in the Office of Programs and Regulation Development at USCIS, primarily responsible for matters relating to inter-country adoptions and special immigrant juveniles. Mr. Heller co-authored **U.S. Citizenship for Dummies**.

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Ms. Strizhak has over 30 years of experience in the migration and refugee field. Most recently, she was an Asylum Officer with the Newark Asylum Office of the INS, a position she held for almost 8 years. For over 15 years prior to that, she represented asylum applicants on behalf of voluntary agencies before the INS, through a credential obtained from the Board of Immigration Appeals (U.S. Department of Justice). As an advocate for refugees, Ms. Strizhak has also trained attorneys and staff of local community-based agencies in asylum law and procedure. She has designed and managed refugee resettlement and immigration programs in various parts of the United States, and written and/or edited three US Government publications on immigration law and procedure.

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This guide was written and edited with the assistance of Deborah Popowski and Jill Krauss.

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All footage in the videotape is original material filmed during production of the feature documentary film, *Well-Founded Fear*, produced and directed by Shari Robertson and Michael Camerini.

Well-Founded Fear is available for purchase at <http://www.wellfoundedfear.org>

In memory of **Arthur Helton**,
whose work for refugees and displaced persons
changed so many lives.

