

ALI-ABA Training Materials

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**BEST PRACTICES IN REPRESENTING ASYLUM-SEEKERS
A VIDEO RESOURCE FOR *PRO BONO* ATTORNEYS**

Immigration Court Hearing

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Viewer's Guide to the Immigration Court Hearing

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A Viewer's Guide to PRELIMINARY MATTERS AT THE MERITS HEARING

Preliminary Matters Cover Many Procedural Issues

- This is your opportunity to discuss procedural issues such as:
 - Criminal background checks of your client
 - The allegations and charges against your client (found on the Notice to Appear) with DHS counsel and the Immigration Judge (if not addressed during the Master Calendar Hearing)
 - Your own late submissions (if any)
 - The government's late submissions (if any)
 - The result of Freedom of Information Act (FOIA) requests
 - Motions you may have, such as motions for telephonic testimony by witnesses
- Introduce your client to the interpreter and DHS trial attorney.
- Have your client swear to her affidavit if she has not already done so.

The Preliminary Matters Section of the Hearing is Your Opportunity to Object to DHS' Evidence and DHS May Object to Your Evidence

- Know how to object and think about possible objections in advance.
- If DHS objects to any of your evidence, make sure to respond.
- Typical objections relate to the introduction of documents; remember:
 - Every judge reacts differently to documents
 - All documents in foreign languages must be accompanied by notarized translations.

The DHS Attorney is the 'Prosecutor' – Therefore May Get Confrontational

- If DHS counsel does become confrontational:
 - Make sure to maintain an even keel

- Never reciprocate DHS's aggressiveness
- *Never* become confrontational with the adjudicator either!

A Viewer's Guide to DIRECT EXAMINATION

Direct Examination of Your Client

- Your direct examination should be very thorough.
 - You should be prepared to skip less important information in favor of vital information if the adjudicator requests you to move more quickly.
 - There is no ideal amount of time that direct examination of your client should take, but this part of the merits hearing typically lasts between 1 and 1 ½ hours.
- Fully develop and explore each aspect of your client's case (including the elements of the legal theory and the facts that enhance your client's credibility) through testimony.
- Focus on the details of your client's case. These are essential in establishing your client's credibility. You should have practiced direct examination with your client (and any other witnesses) before – it is imperative that your client's and witnesses' testimony is credible with their affidavits.
- Make sure that your client explicitly discusses the persecution they experienced.
 - Bring tissues with you in case your client breaks down on the stand.
- Hearsay is not *per se* objectionable in immigration court.
- Leading questions, however, should be avoided.

Direct Examination of Other Witnesses

- Be prepared to have your witnesses testify at the hearing.
 - If your witnesses are unable to testify in person, file a motion for telephonic testimony.
- Make sure that your witnesses are prepared to elicit the information you have previously discussed with them.
 - This can be especially important where your client has memory loss or is non-responsive because of PTSD.

A Viewer's Guide to REDIRECT EXAMINATION

You May Want to Take a Break Between Cross-Examination and Redirect

- Remember that asylum applicants' credibility is the single most important element of an asylum claim.
 - Use redirect to enhance or restore your client's testimony.
- Tailor your redirect questions to specific aspects of your case that the DHS attorney focused on during his or her cross-examinations.
 - Use redirect to clear up inconsistencies elicited during cross-examination.
 - Attempt to rehabilitate your client or expert witness.
- Address any discrepancies DHS pointed out in your client's story.
- Think of redirect as a second opportunity to address specific aspects of your client's case that the DHS attorney or Immigration Judge focused on during your direct examination or during cross-examination. It is your opportunity to address these facts a second time and in a light most favorable to your client.

A Viewer's Guide to THE CLOSING ARGUMENT

Things to Consider When Preparing and Delivering Your Closing Argument

- Create a nexus between the facts in your client's case and the relevant law.
 - Make sure to cite to relevant case law, statutes and regulations.
- Your closing argument should be just that – an argument.
 - Be prepared to persuasively argue on behalf of your client.
- Cite to the record frequently – the record contains all of the facts in the case.
- A good strategy is to draft a closing argument that addresses each part of your client's claim and all potential weaknesses that DHS may bring up.
 - You may not end up using your entire argument, but at least you will be prepared to address the issues that seem to be most problematic at the hearing.
- Your closing argument should be responsive to the judge's questions, DHS's objections and concerns, and to your client's testimony.

A Viewer's Guide to THE JUDGE'S DECISION

THE HUMAN FACTOR

Regardless of the Outcome, Confer with Your Client About the Next Steps

- If the decision is favorable to your client:
 - Determine whether DHS plans to appeal the decision.
 - Stay to discuss when and where to meet and fill out important paperwork, such as Social Security card applications and applications for derivative asylum. Also make sure to discuss asylees' benefits with your client.
- If your client is detained:
 - Meet with DHS to discuss the possibility of release from detention.
 - Make arrangements to meet with DHS officials at the detention facility to ensure that your client is given form I-94 prior to leaving the facility and that the information on it is correct.
 - If you can, it is a rewarding experience to assist your client in finding somewhere to live after being released.
- If the decision is adverse to your client:
 - Make sure to discuss the option of appealing your client's case to the next level and whether you will be able to continue representation.
 - If your client wishes to appeal the case, you must do so within 30 days.
 - Immigration court decisions are appealed to the Bureau of Immigration Appeals (BIA).
- Ask about your client's feelings. Undoubtedly this was one of the most stressful days of your client's life.

LEGAL CONSIDERATIONS – LEGAL THEORY

Make Sure All of the Testimony Is on the Record

- There is no stenographer in immigration court. Instead, there is a tape recorder controlled by the judge.

- Should the decision be adverse to your client, it is imperative that the record be clear and complete. Therefore, make sure that all of your client's testimony and all of your witnesses' testimony is on the record.

The Decision

- Immigration Judges often rule from the bench.
- Because there is no stenographer and because it can take a long time for a hard copy of the transcript to be available, you need to take extremely precise notes throughout the proceeding and while the judge is reading her oral decision.
- Should you have to prepare an appeal, you will need detailed information about the errors you perceive in the court's reasoning and your notes will be your only guide in preparing it.

Preserving the Right to Appeal

- If you plan to appeal, you should state on the record that you wish to preserve your client's right to appeal the Immigration Judge's decision.
- Keep in mind that even if you do not wish to appeal the Immigration Judge's decision, the attorney from DHS may reserve the government's right to appeal.

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Some Common Objections

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Some Common Objections

1. Leading question

A leading question suggests the desired answer to the witness. To get around this objection, lawyers often use qualifiers such as “if anything.” Leading questions may be permissible if the witness is hostile, a child, or when proving a negative.

2. Question Calls for a Narrative

A long, narrative answer is objectionable because it allows the witness to inject inadmissible evidence into the trial without giving opposing counsel an opportunity to make an objection. By requiring the lawyer to ask a series of questions which call for succinct answers, opposing counsel will have an opportunity to object.

3. Lawyer is testifying

4. Question is irrelevant

Relevant evidence is evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would without the evidence.”

5. Question calls for a conclusion the witness is not qualified to make

Conclusion is a deduction drawn from a fact or series of facts. In general, witnesses should testify ONLY to facts (or inferences from facts).

6. Question has been asked and answered

The same question should not be repeated in the same form for at least two reasons. First, it wastes time. Second, it places undue emphasis on these questions and answers.

7. Compound Question

A question that asks two separate items within a single question. It is objectionable because any simple answer to the question will be unclear.

8. Question assumes facts not evidence

Usually occurs when the introductory part of the question assumes a fact not in evidence and the existence of which is in dispute.

9. Question is confusing or unclear

Question must be posed in a reasonably clear way so that the witness can reasonably know what information the examiner is eliciting.

10. Question calls for hearsay

Hearsay is a statement, other than made by the witness, that is offered to prove the truth of the matter asserted.

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Routine Steps for Introducing an Exhibit into Evidence

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Routine Steps For Introducing an Exhibit into Evidence

Asylum judges do not usually require lawyers to comply with all of the formal rules for admitting a document into evidence. Familiarity with the formal procedures, however, will ensure that you know what to do if your immigration judge is especially formal or if you find yourself admitting a document into court in the future.

(1). May I have this item marked for identification purposes as respondent's exhibit #1

Note: Many tribunals prefer to have all proposed exhibits marked for identification prior to opening the hearing. You should have submitted all of your documents at least 10 days in advance of hearing unless you secure a document just before the hearing.

(2). Let the record reflect that I am now showing a copy of respondent's exhibit #1 for identification to opposing counsel

Note: For documents, it is a courtesy to provide a copy opposing counsel. In fact, DHS must also be served with all proposed exhibits 10 days prior to the hearing. Keep a copy for yourself, too. Pause a moment to see if opposing counsel has anything to say about it at this time

(3) May I approach the witness?

Note: Some judges dispense with requiring this formality. An immigration judge is unlikely to require it, but it is good practice to proceed in this manner nonetheless.

(4) Witness X, I am now showing you the item that has been marked for identification purposes as respondent's exhibit #1.

Note: At this point, the item cannot be referred to as, say, a passport or a photograph. It is only "respondent's exhibit #1 for identification purposes" until the witness recognizes and describes it.

(5) Do you recognize this item?

Note: The answer should simply be "yes." Leading questions are permissible to lay a foundation

(6) How do you recognize it?

Note: The witness' answer should be very brief, perhaps "I have seen it before" or something similar.

(7) What is this item?

Note: Additional foundation questions may be required for special types of exhibits or if there is a dispute about the item's authenticity, chain of custody, etc. Consult Mauet for special situations.

(8) I move that respondent's exhibit #1 for identification purposes be accepted into evidence.

Note: This is when arguments over admissibility occur. If the item is admitted, it may receive a new number. Once admitted, the exhibit may be referred to as "the passport," or "the photograph," or as "respondent's exhibit #1" – without the tag of "for identification purposes." Be sure you get a clear ruling from the judge on admissibility before proceeding.

(9) Will you please read aloud paragraph 9 of respondent's exhibit #1?

Note: The exhibit cannot be used (e.g., quoted or shown to the judge or jury) until it is admitted into evidence, although it may be referred to or discussed earlier. After admission, the exhibit can be used extensively, and there may be many questions about its origin, purpose, effect, etc. It may be effective to read a portion of a document aloud, but in a bench trial the judge may say that he or she will read the document personally, so long quotations are unnecessary. After the witness is finished using the term, it may be passed around the jury or, in a bench trial, left with the judge. Removal hearings are always bench trials.

Note: Even if INS counsel consents to the admission of an exhibit, you may nevertheless want to go through the formalities to inform the judge about the circumstances surrounding the creation of the exhibit.

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**Post-Adjudication Issues to Consider such as Work Authorization, Reunification
with Spouse and Minor Children, Public Benefits, Travel Outside United States,
Notice to Appeal, and Appeals Process**

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POST-ADJUDICATION – ISSUES TO CONSIDER

I. Introduction:

Cases rarely end when judges make decisions. Clients usually need to be counseled about the results and there are several post-adjudication steps that lawyers need to assist their clients with completing. Lawyers may file (or resist) post-decision motions and appeals. They may also have to deal with ancillary matters, such as (in asylum cases) applications for benefits and for family members to join them in the United States. This chapter explains post-adjudication tasks in some detail.

II. Post-Adjudication Steps and Procedures:

The immigration judge will typically inform you and your client of the decision at the end of the hearing. There are several matters that you may want to discuss with your client if he or she is granted asylum. These should be explained in the letter you send to your client.

A. **Employment Authorization**

Clients who win asylum are automatically entitled to work in the United States. You will want to help them obtain a Form I-94 evidencing their asylee status if they do not already have one. The I-94 entitles them to a social security card that does not restrict in any way the asylees' authority to work in the United States, which they may use to secure employment. You should help your client and all derivatives apply for social security cards as soon as possible.

Your client is also entitled to a free employment authorization document (EAD).¹ The

¹ Under two conditions, your client (perhaps with your help) might already have filed for an employment authorization document, even before winning asylum: (1) applicants who filed for asylum before January 4, 1995, could obtain employment authorization while their claims were pending; and (2) an applicant for asylum who filed after January 4, 1995, could apply for asylum after his or her "employment authorization clock" had

one-page application for an EAD can be filed immediately after winning asylum, and this is something that you should also help your client with if he or she wants an EAD.² The I-765 form can be found on <http://uscis.gov/graphics/formsfee/forms/i-765.htm>.

Before preparing the application, make sure to read the instructions carefully. They explain that the application must be accompanied by:

- a copy of the I-94 departure record, if available;
- two new photographs conforming to the instructions. (Do not staple the photographs to the application, because staple holes will interfere with their use as the basis for a photo-ID card. Instead, place the photos in an envelope and staple the envelope to the application); and
- a copy of the decision or order granting asylum.

Work authorization is renewed by DHS on a yearly basis, but the fee is not waived for renewals. Asylees are not required to obtain an EAD or to renew an initial EAD. An asylee may not be terminated from his or her job so long as he or she has a proper social security card, obtained by presenting the Social Security office with an I-94 indicating asylee status.³

B. Adjustment of Status to Permanent Residency

You may advise your client that after one year of continuous residence in the United States he or she may apply for “adjustment of status,” which, if granted, would entitle your

run for 150 days, although employment authorization would not be issued unless the judge granted asylum or the clock ran for 180 days.

² Filing the form is so easy that most student representatives will have time to help their clients with it, even if asylum was granted in the last week of the semester.

³ See attached INS memorandum on “The Meaning of 8 CFR 274a.12(a) as it Relates to Refugee and Asylee Authorization for Employment.”

client to permanent residence (a “green card”) in the United States.⁴

C. Derivative Asylum for Family Members

If your client has a spouse or a child under 21 who has not already been granted asylum, that spouse or child may now apply for derivative asylum. You may want to help your client file for asylum for them. The application is made on an I-730 form. Copies are available on <http://www.immigration.gov/graphics/formsfee/forms/i-730.htm>. Read the instructions carefully. The I-730 requires a photograph of each beneficiary and proof of the relationship between the asylee (your client) and the beneficiary. These documents must be certified by people (attorneys among them) as being authentic.⁵ The certification has to be signed by a lawyer. This certification should be affixed to the photocopies:

“I, (attorney’s name), declare as follows: Copies of documents submitted are exact photocopies of unaltered original documents. I understand that I may be required to submit the original documents to an immigration or consular official at a later date. I declare under penalty of perjury that the foregoing is true and correct.” [Signature]

Then sign your name with an esquire notation to show that you fit under the attorney recognition rule. Notarizing this is not required, but is a wise precautionary step.

The form is misleading regarding the client’s signature. While it appears to require the client to sign the application in the presence of an immigration officer (who would notarize the form), notarization is not required.

⁴ Four years after adjusting to permanent resident status, he or she can apply for citizenship (“naturalization”). You should begin thinking about this process early in the semester so that your client can begin to gather the necessary documents. It can often take months to obtain a birth certificate or marriage certification from overseas.

⁵ You should begin thinking about this process early in the semester so that your client can begin to gather the necessary documents. It can often take months to obtain a birth certificate or marriage certification from overseas.

D. Benefits

Because your client has been granted asylum, he/she is now eligible for a variety of benefits from the U.S. Government. The benefits are processed through non-governmental agencies. There are many organizations that assist new refugees in getting settled in the United States. You can find a list of volunteer agencies at www.usdoj.gov/eoir/probono/states.htm. Additionally, you can call the Asylum Information and Referral Line at 1-800-354-0365. This hotline hosts asylum and referral information in many languages. Most agencies require that newly granted asylees apply for benefits within the first 30 days after a grant of asylum. So, it is important that you address this immediately after the hearing. Most times, asylees receive monthly allowance benefits (for 120 days after a grant of asylum) along with other benefits; job counseling to find and retain employment; and assistance with accessing social services.

E. Refugee Travel Documents

Because your client has won asylum, he or she may now obtain a refugee travel document (Form I-131) permitting travel outside of the United States.⁶ It is usually best for asylees to put off travel plans and try to remain in the United States until they adjust to permanent resident status. That way they avoid the risk of being stopped at the border and detained for lack of proper documents or because of some error. Moreover, a visit to his or her home country (or a neighboring country) could cause DHS to begin a proceeding to end asylum status on the ground that it was no longer dangerous for your client to return to his or her country of nationality. If your client is interested in traveling, you should consult him or her about the impact travel may have on his or her immigration status (for example, any time

⁶ Beginning September 1, 2004, USCIS will require that all photos included with newly filed applications be in passport style.

spent out of the country does not apply toward the residency requirement for a green card).

F. Criminal Record

If the client establishes a criminal record while an asylee or permanent resident (i.e., before the client has obtained citizenship), he or she may be in danger of removal. You should advise your client that if the client is arrested, he or she should contact you or an immigration attorney who knows criminal law. There are many public defenders and private criminal defense attorneys who do not understand immigration law and wrongly advise their asylee and permanent resident clients to plead guilty -- which may lead to removal, depending on the crime. Appeals based on lack of assistance of counsel are not likely to be viewed favorably.

G. Appeals

Notices of Appeal are due to the Board of Immigration Appeals (“BIA”) within 30 days of the issuance of the IJ’s decision. If the immigration judge (“IJ”) has granted asylum, DHS has 30 days to decide whether it wishes to appeal the IJ’s decision to the Board of Immigration Appeals (“BIA”). In this case, if your client is detained, you may wish to request that he or she be paroled while the appeal is pending. Requests should be made to your client’s deportation officer in the form of a letter. You will need to provide DHS with proof of your client’s identity, proof that someone can support your client financially (see immigration forms for the affidavit of support that must be provided) and assurances that your client is not a flight risk. After sending the letter and its supporting attachments, you should follow up with a phone call. If paroled, your client will also need work authorization. Accordingly, you may wish to submit an application for a work permit (“EAD”) with the parole request. If

asylum is denied, you will need to file the Notice to Appeal within 30 days. Parole of detained clients may still be possible.

H. Changes of Address

If the client changes his or her address, he or she should inform you and also inform the Court and DHS. Go to www.immigration.gov/graphics/formsfee/forms/ar-11.htm to obtain a copy of the Change of Address form. It is very important that the client keep their address current (especially with the court and DHS) so that they can always be reached. All address changes must be reported within ten days of the move.

IV. Closing after a Denial of Asylum

If the judge announces an adverse decision at the end of a removal hearing, you should both console your client and answer questions about further possible steps.⁷

Any notice of appeal must be received by the BIA within thirty calendar days after the judge's oral decision or within thirty calendar days after the date the judge's written decision was mailed if no oral decision was rendered.⁸

A. Copies of Hearing Tapes

⁷ Generally speaking, the client's alternatives are either to appeal or to leave the United States pursuant to the order of voluntary departure that judges usually enter when they deny asylum and restriction on removal (also called withholding of removal). In exceptional circumstances, (e.g., if a judge's decision obviously overlooked important evidence or legal theory), a motion for reconsideration (accompanied by a request to stay any removal order) may be filed. See 8 C.F.R. § 1003.23 (b). But in such a case, a client who wants to appeal should also file a notice of appeal because the filing of a motion for reconsideration does not postpone the deadline for filing a notice of appeal. Federal regulations affecting motions and appeals procedures impose time and number restrictions. There is a 90-day time limit on Motions to Reopen and a 30-day time limit on Motions to Reconsider. Generally, one Motion to Reopen and one Motion to Reconsider will be permitted.

⁸ Simply mailing the notice of appeal or having it post-marked within the time limit will not insure that the appeal is timely received by the Board. 8 C.F.R. § 1003.38. If a notice of appeal is received at the Board outside the time limit, it will be dismissed as untimely.

You can call the Immigration Court immediately after the hearing and before you file the notice of appeal and try to arrange to copy or obtain a copy of the tape of the hearing. If you cannot obtain a copy of the tape, you will need to rely on your notes from the hearing.

B. Posting a Voluntary Departure Bond

A client who is granted voluntary departure instead of asylum will have to post a departure bond of at least \$500. The bond must be posted within five days of the immigration judge's Order or the order will convert into an order of removal. The departure bond is posted with the deportation branch of the DHS district office and must be paid in the form of a postal money order or a cashier's check. Please note that the money order must come from the post office -- DHS will not accept money orders from other sources.

It is a good idea to accompany your client to the DHS office to assist with the paperwork for posting a bond. Many clients are nervous about going to DHS after they have just been denied asylum, but they must physically go to the office -- you cannot go for them. You do not need an appointment to pay the bond, but you will have to wait in line. You should call the deportation branch before you go to confirm the policies and procedures on posting these bonds. They do change from time to time without notice.

When you go to post the bond, you and your client will be called in for an interview with a removal officer. At the interview, the removal officer will explain that if your client fails to appear when requested, the bond will be forfeited. Your client will be asked to sign a form I-352 to acknowledge understanding of the terms of the bond. The removal officer may also require your client to come in for periodic interviews during the period of voluntary departure. This information will be set forth in a form I-340, which your client will also be asked to sign. Your client should also be given a form I-305 as a receipt for his or her bond.

Your client will need the original I-305 to recover the bond later and should be counseled to retain this document. These forms are prepared by the removal officer during the interview.

The voluntary departure interview is generally pro forma. However, you should listen carefully to what the deportation officer is saying and make sure that your client understands the terms and conditions of the bond, including any reporting requirements. If your client is going to appeal the judge's order, you should inform the deportation officer so the officer can take that into consideration in setting the reporting schedule. Frequently, the reporting requirement is not instituted until the appeals process has been exhausted.

Even though the interview is pro forma from a legal sense, it can be quite stressful for your client. We encourage you to counsel your client about the purpose of the interview and about what to expect during the course of the interview.